UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

GRAND CANYON SKYWALK DEVELOPMENT, LLC, GCSD/Appellant, v. 'SA' NYU WA; GRAND CANYON RESORT CORPORATION; RICHARD WALLERMA, SR.; WYNONA SINYELLA; RUBY STEELE; CANDIDA HUNTER; BARNEY ROCKY IMUS; WAYLON HONGA; CHARLES VAUGHN, SR.; WANDA EASTER; JACI DUGAN; and HON. DUANE YELLOWHAWK, Defendants/Appellees.	Case No. 12-15634 D.C. No. 3:1208030-DGC (United States District Court for the District of Arizona)

OPENING BRIEF OF APPELLANT
GRAND CANYON SKYWALK DEVELOPMENT, LLC

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Dated this 4th day of May 2012.

GREENBERG TRAURIG, LLP

/s *Troy A. Eid*

ATTORNEYS FOR APPELLANT-GRAND CANYON SKYWALK DEVELOPMENT, LLC

CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1, Appellant Grand Canyon Skywalk Development, LLC, through its undersigned counsel, states that it is a privately held limited liability company, that it has no parent corporation, and that no publicly held corporation owns 10 percent or more of its stock.

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Appellant, Grand Canyon Skywalk Development, LLC ("GCSD"), a Nevada limited liability company, through its counsel of record, Greenberg Traurig, LLP, respectfully submits it Opening Brief on Appeal.

INTRODUCTION

It cannot possibly be that a non-Indian corporation whose intangible contract rights have been wrongfully seized by a handful of tribal officials, through their invocation of so-called "eminent domain" powers and their manipulation of the tribal court system – as an excuse to avoid an ongoing arbitration proceedings that was solemnly agreed to by the parties under a legal and binding contract – has absolutely no federal remedy at law or in equity, despite the ongoing destruction of its business and the loss of millions of dollars. This is, after all, the United States of America. Only in this country could a visionary entrepreneur and his company enter into a contract for services with a corporation chartered by an Indian tribe to design, build and operate the world-famous Grand Canyon Skywalk ("Skywalk"), a glass-bottomed viewing platform jutting 70 feet out from the rim of the Grand Canyon with the Colorado River 4,000 feet below. Yet GCSD now languishes in a legal morass over the Skywalk – with no judicial relief in sight – because the District Court demands GCSD first somehow "exhaust" its judicial remedies in a tribal court that lacks any civil jurisdiction over GCSD, a non-Indian corporation. This notwithstanding the shameless and unrelenting bad faith of tribal officials who have conspired to deny GCSD's basic civil rights under the United States Constitution and federal common law.

On two separate occasions over the past year, the District Court has declined to protect GCSD's rights as a non-Indian under federal law, instead elevating tribal court exhaustion – a principle of comity by which courts of separate sovereigns exercising *valid* jurisdiction defer to one another – into a jurisdictional

prerequisite. Now the unthinkable has happened: GCSD's business has been literally been "condemned" into legal oblivion by a tribal government using an ordinance that was concocted solely to "take" GCSD's property ***along with all its legal rights and remedies provided by a legal and binding contract***. That contract was entered into not with the Hualapai Indian Tribe, but with a corporation, 'SA' NYU WA ("SNW"), that the Tribe chose to create for the express purpose of enabling the very contractual rights and remedies that the Tribe would now eviscerate.

Faced with a dysfunctional tribal court system being manipulated by a handful of tribal governmental officials, and with GCSD's contractual right to arbitration purportedly "taken" by the Hualapai Tribal Council ("Council") majority's resolution to "condemn" GCSD's solemnized contract with SNW, along with all other associated remedies and causes of action, GCSD has literally no place left to go to vindicate its federal rights as a non-Indian than this honorable Court.

GCSD predicted this would happen more than a year ago – and told the District Court so – when the Council passed what may be the most draconian eminent-domain ordinance ("Ordinance") enacted in the United States, and after enduring a public relations smear campaign by the Tribe's media consultants.

The Tribe is the sole shareholder of SNW, the corporation established by the Tribe to enable the Skywalk project and with which GCSD contracted to build and manage the Skywalk. GCSD spent more than $25 million to construct the attraction and invested millions more in many Skywalk-related improvements. GCSD created the entire infrastructure, both on and off the Hualapai Indian Reservation, to support the management of what has proven to be an exceedingly

popular tourist attraction. In return for this substantial capital investment, borne *entirely* by GCSD, it was granted the right to manage the attraction and receive management fees, as well as price concessions. Critically important for this case, the Tribe itself owns the structure and all the hard assets of the Skywalk, which rests on federal trust land. GCSD's only asset and only avenue to recouping its multi-million-dollar investment is its ability to manage the Skywalk under a binding and valid contract between two corporations that the Tribe now purports to have seized and unilaterally rewritten.

Once the Skywalk opened, SNW sadly proved to be an unreliable business partner, failing to account properly for the earnings of the Skywalk, and to pay GCSD its fair share of revenues. When the Tribe chartered SNW, it expressly authorized SNW's waiver of sovereign immunity – again using the process that Congress provided under the Indian Reorganization Act of 1934, which enables tribal corporations to waive sovereign immunity that would otherwise apply in order to engage in business with non-Indian corporations. SNW agreed to resolve disputes through arbitration, and indeed, an arbitration proceeding between GCSD and SNW has been ongoing in Arizona since the fall of 2011.

The arbitration had not been going well for SNW. In fact, the arbitrator ordered SNW to produce certain financial documents, including sales summary sheets, no later than February 10, 2012, so as to permit the deposition of certain Tribal members regarding financial information on February 14 and 15. Four days before that deadline, the Council – which is also the board of directors of SNW – voted to "condemn" GCSD's rights under its contract with SNW, and seized, for the so-called "public use" of the Tribe, all of those contract rights. In reciting its various reasons purporting to justify the seizure, the Council *expressly* mentioned

the arbitration. Although no court, tribal or otherwise, has authorized the Tribe's seizure of GCSD's property, the Tribe has seized physical control of management of the Skywalk. It has posted no bond, and has paid no compensation.

Faced with this blatant and continuing injustice, the District Court plays Lady MacBeth: "Things without all remedy Should be without regard: what's done is done."[1]

After categorically disavowing any application of equity to this case, the District Court insisted that GCSD exhaust non-existent tribal court "remedies" in a non-functioning tribal court system, grossly manipulated by members of the Council, that lacks any credible judicial independence and is failing to provide basic due process protections to which all U.S. citizens are entitled, such as a right to be heard before a fair and impartial tribunal. As a direct result of the District Court's unwillingness to act, the Eminent Domain Ordinance ("Ordinance"), and corresponding Council resolution declaring a "taking" of GCSD's intangible contract rights and associated causes of action – including an active arbitration proceeding between the parties – have stripped the tribal court of its power to undertake any substantive review on the merits aside from whether the taking was for a public use.[2] Indeed, GCSD has yet to get a single hearing before a tribal court that has thus far issued only *ex parte* orders benefitting the Tribe, and whose

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[1] William Shakespeare, *MacBeth* (1606).

[2] [IV EOR 0674-0685 (Ordinance, Section 2.16(F)(5)(a))]. So draconian is the Ordinance that it takes effect immediately, without a hearing. [*See, e.g., id*. at Section 2.16(F)(4) ("on filing the declaration of taking: (a) title to the estate or interest specified in the declaration of taking shall vest in the Tribe[]")].

judges have refused to invalidate those orders – despite GCSD's pleas – in disregard of their own conflicts of interest under the Hualapai Constitution.

The District Court has also stretched *Water Wheel Camp Recreational Area, Inc. v. LaRance*, 642 F.3d 802 (9th Cir. 2011), beyond recognition, holding that it trumps controlling precedent in the *Montana*[3] line of cases even where no Indian tribe is a party to the contract, and where that agreement involved intangible rights – many if not most arising far from the Reservation – and deals with services, not land. The result is a federal judicial vacuum in which GCSD's only bargained-for contractual remedy, arbitration, has been sucked away through a combination of the District Court's misreading reading of *Montana* and the calculated exercise of eminent-domain powers by a handful of Tribal officials determined to "get" GCSD and its founder and owner, Mr. David Jin.

The District Court's deference to comity and the Tribal Court system does not excuse its failure to act when a party's federal due process rights continue to be violated on a daily basis. GCSD's hands are tied: it has no remedy in Tribal Court, and, per the District Court, no remedy in the federal court system either. Ironically, the District Court's ruling undermines the purpose of the exhaustion requirement, which is to strengthen the authority of tribal courts, so long as such

[3] *Montana v. United States*, 450 U.S. 544, 564 (1981) (where "the Supreme Court stated that the 'exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation'").

bolstering does not compromise a party's ability to obtain immediate redress for an alleged deprivation of individual rights.[4]

Finally, pursuant to a mandatory arbitration provision contained in the Agreement between GCSD and SNW, the parties had been arbitrating their dispute before the American Arbitration Association. Yet as soon as the arbitrator ordered SNW to produce financial "hot-button" documents that could have incriminated the Tribe, the Tribe purported to condemn GCSD's contract rights under the Agreement, including its right to arbitration, and purported to terminate the arbitration proceedings. As a result, GCSD is left with absolutely no forum in which to seek a remedy. No interpretation of the exhaustion requirement or of *Water Wheel* – no matter how distorted – supports this result.

Justice delayed is justice denied. It is incumbent on this Court to stop this sorry charade and provide immediate relief to restore GCSD's rights as guaranteed by federal law.

JURISDICTIONAL STATEMENT

A. The Basis for the District Court's Subject-Matter Jurisdiction

The District Court had subject-matter jurisdiction over this action pursuant to 28 U.S.C. § 1331 because this action arises under the Constitution and laws of the United States. *See also Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, (2008) (the determination of a tribe's civil authority over nonmembers [of a federally recognized Indian tribe] is a federal question.").

[4] *Cobell v. Cobell*, 503 F.2d 790, 793 (9th Cir. 1974).

B. The Basis for the Court of Appeals' Jurisdiction

The Court of Appeals has jurisdiction over this appeal under 28 U.S.C. § 1292(a)(1), which permits the Court to hear appeals from interlocutory orders of the District Court which grant, continue, modify, refuse, or dissolve injunctive relief.

C. The Filing Dates Establishing the Timeliness of the Appeal

GCSD appeals from two orders: the District Court's February 28, 2012 Order [Doc. 32] denying GCSD's motion for temporary restraining order, and the District Court's March 19, 2012 Order [Doc. 54], as amended on March 28, 2012 [Doc. 58], denying GCSD's supplemental motion in support of the motion for temporary restraining order. GCSD filed its Notice of Appeal on March 22, 2012, and an amended notice on April 18, 2012. As such, this appeal is timely under Fed. R. App. P. 4(a)(1)(A).

D. Additional Grounds Establishing this Court's Jurisdiction

The denial of a TRO is appealable where, as here, the circumstances render the denial "tantamount to the denial of a preliminary injunction." *Religious Tech. Ctr., Church of Scientology Int'l, Inc. v. Scott*, 869 F.2d 1306, 1308 (9th Cir. 1989) (citing *Environmental Def. Fund v. Andrus*, 625 F.2d 861, 862 (9th Cir. 1980)). "Where a district court holds an adversary hearing and the basis for the court's order was strongly challenged, classification as a TRO is unlikely." *Service Employees Int'l Union v. National Union of Healthcare Workers*, 598 F.3d 1061, 1067 (9th Cir. 2010) (noting propriety of appeal from denial of TRO where the parties had "filed written memoranda regarding the propriety of the TRO" and the court held an evidentiary hearing on the matter). Here, the District Court held two adversary hearings on the requested TRO (although, contrary to Appellant's

request, the Court declined to hear proffered testimony from available witnesses, but instead, merely permitted a proffer of evidence). Additionally, the parties engaged in two rounds of briefing, with the supplementary brief ordered by the District Court.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

I. THE DISTRICT COURT ERRED BY EXPANDING THE APPLICATION OF *WATER WHEEL* TO A DISPUTE BETWEEN A NON-INDIAN CORPORATION AND A TRIBAL CORPORATION INVOLVING THE TRIBAL GOVERNMENT'S ATTEMPT TO 'TAKE' AND EVISCERATE THE NON-INDIAN'S PRIVATE OFF-RESERVATION CONTRACTUAL RIGHTS.

II. THE DISTRICT COURT ERRED BY REQUIRING EXHAUSTION OF TRIBAL REMEDIES WHEN THE TRIBE HAS NO COLORABLE CLAIM OF JURISDICTION OVER GCSD'S INTANGIBLE PROPERTY.

III. THE DISTRICT COURT ERRED IN REQUIRING EXHAUSTION OF TRIBAL COURT REMEDIES, WHEN EXHAUSTION WOULD BE FUTILE.

IV. THE DISTRICT COURT ERRED BY REQUIRING EXHAUSTION OF TRIBAL REMEDIES DESPITE CLEAR EVIDENCE THAT THE INVOCATION OF TRIBAL AUTHORITY WAS MOTIVATED BY BAD FAITH AND HARASSMENT.

STATEMENT OF THE CASE

GCSD filed a declaratory judgment action in the United States District Court for the District of Arizona, seeking a declaration that the Tribe has no right of eminent domain over GCSD's intangible contract rights relating to a 2003 Agreement with an Indian corporation. The named defendants consist of the members of the Council, plus two corporations, both of which the Tribe is the sole shareholder, with whom GCSD has certain contractual agreements (hereafter, collectively, "Appellees"). [II EOR 0201-0264] GCSD also filed a Motion for Temporary Restraining Order with Notice, requesting that the Appellees be

prevented from enforcing the purported condemnation of GCSD's contract interests. [III EOR 0306-0346]

Following a hearing, the District Court issued an initial Order denying relief pending exhaustion of Tribal Court remedies, but also ordering additional briefing on the issue of the bad faith exception to the exhaustion requirement. [I EOR 0035-0040] Following a second hearing, where GCSD proffered additional evidence, the District Court entered an Order, with a subsequent non-substantive amendment, denying GCSD's request for a temporary restraining order on the grounds that GCSD was required to exhaust its jurisdictional arguments in Tribal Court. [I EOR 0001-0015 and 0020-0034].

STATEMENT OF FACTS

Simply, the Tribe is "stepping into the shoes" of GCSD for all matters relating to the agreement.

Glen Hallman, Counsel for Appellees, [III EOR 0422-0424]

This appeal addresses an extraordinary situation: the Tribe has purported to seize the entirety of GCSD's intangible contractual rights with another corporation, even though such intangible rights are necessarily located in the state where GCSD is headquartered and legally incorporated. Thus, the Tribe is attempting to "take" property that, as a matter of law, has its *situs* in Nevada. With the stroke of a pen, a handful of Council officials have claimed the power to cross out GCSD's name on its contract with SNW, and to have replaced it with the name of the Tribe, as if GCSD never existed. This bizarre situation is as unprecedented as the Tribe's

purported legal power to "take" and eviscerate a non-Indian corporation's contractual rights.

GCSD enters into an Agreement for the Construction and Management of the Skywalk

GCSD is a Nevada limited liability company with its principal place of business in Las Vegas, Nevada. [II EOR 0201-0264]. The principal of GCSD, David Jin, has many years of experience in the travel industry, with a particular emphasis on arranging travel from certain Asian countries to the American Southwest. Having conceived and developed the idea of constructing the Skywalk, and related facilities extending over the edge of the Grand Canyon, he entered into discussions with the Tribe, whose Reservation borders the Colorado River. In 2003, an agreement was reached whereby GCSD, formed by Mr. Jin and other investors for this purpose, agreed to finance, construct and operate the Grand Canyon Skywalk Project ("Project") as part of a revenue-sharing and operating agreement ("2003 Agreement") with SNW. [II EOR 0114-0116; II EOR 0265-0266; II EOR 0267 and III EOR 0347-395].

As relevant here, the 2003 Agreement, with subsequent amendments, provided that GCSD would :

- finance and construct all facilities related to the Project [III EOR 0351-0360 at § 2.1, 2.2];
- purchase all inventory, services and merchandise necessary to operate the Skywalk [III EOR 0360-0362 at § 2.3];
- institute and defend lawsuits arising from operation of the Skywalk [*Id*.].;

- establish and maintain advertising, public relations, and promotional policies for the Skywalk [*Id.*].;
- obtain and maintain all required licenses for operation of the Skywalk [*Id.* at § 2.4];
- direct and supervise employees for the Skywalk, all of whom were to be employees of GCSD, regardless of location; the 2003 Agreements expressly contemplated that there would be employees off-Reservation, as it provided that GCSD would not be reimbursed for travel expenses of "employees who do not perform all of their services at the Project" [*Id.*; III EOR 0372 at § 5.7];
- be entitled to perform its duties through a subsidiary [III EOR 0365-0366 at §2.10];
- be, when operating as a Tour Operator, entitled to a discount on the usage fees of the Skywalk [III EOR 0366 at § 2.11];
- be entitled to a management fee in the amount of 50 percent of net revenues for the first five years of operation of the Skywalk; the fee was to be reduced in subsequent years, although such reductions were not to be made until GCSD received fees at least equal to its investment in the Project [*Id.* at § 3.1];
- purchase real property off Reservation, from which a staging area for tours to the Skywalk could be accommodated [III EOR 0383-0384 at § 13.4(c)];
- initially, if SNW exercised a right to terminate without cause within the first five years after the Skywalk opened as a tourist attraction, be entitled to payment of $50 million; through an amendment, SNW's

right to terminate was deleted in deference to GCSD's commission to expand the size of the Project at the request of SNW [III EOR 03578 at § 10.1(c) -& amendment];

- be entitled to have recognized affiliates who benefit from the agreement [III EOR 0347 at Art. 1, Def. "Affiliate"];

It is undisputed that many, if not most, of these rights and obligations, such as the ownership of the shuttle vehicles and the staging area, the management of employees, obtaining licensing and permitting for the Skywalk activities, and purchasing inventory related to activities off the Reservation, were necessarily performed outside the Reservation, and required GCSD to enter into contracts and other relationships with third parties in multiple states, and indeed, in various foreign countries.

Moreover, both parties expressly agreed to resolve disputes by off-Reservation arbitration under the auspices of the American Arbitration Association, with SNW specifically waiving sovereign immunity to that extent. [III EOR 0388-0389 at § 15.4]

In all, GCSD invested approximately $25 million in the planning and construction of the Skywalk project in order to meet its obligations to SNW under the 2003 Agreement, and substantial additional sums for its successful operation. [III EOR 0437-0443] The initial results were very promising. When the Skywalk opened to the public in March 2007, revenues from tourist visits far exceeded expectations. [III EOR 0437-0443]

Disagreement between GCSD and SNW

The 2003 Agreement gave SNW certain accounting responsibilities relating to revenues once the Skywalk opened to the public. [III EOR 0347-0395].

However, discrepancies quickly arose; GCSD did not receive its 50 percent share of revenues after operating expenses, although SNW received funds. [III EOR 0437-0443, ¶ 13]. Additionally, SNW made payments to third parties, something not authorized by the 2003 Agreement. [*Id.*]. In fact, GCSD received *no* management fees whatsoever from 2008 to 2011. There was also turmoil within SNW, as its entire Board of Directors was replaced by the members of the Council. [III EOR 0317]. As a result of the financial irregularities, GCSD and SNW entered into a Trust Agreement with Wells Fargo Bank (a non-tribal entity), whereby a trust account was created to provide greater financial control over the profits generated by the Skywalk. [III EOR 0455-0566]. Although the amounts in the Trust now exceed $11 million, SNW has refused to agree to any distribution to GCSD. [III EOR 0437-0443].

GCSD attempted to renegotiate the 2003 Agreement, but SNW balked at efforts to retain GCSD's entitlement to recover its investment. Thereafter, GCSD instituted the arbitration proceeding, as required by the 2003 Agreement. [III EOR 0347-0393 at § 15.4 and III EOR 0396-0417]. While SNW resisted, the arbitration eventually proceeded. SNW was ordered to produce financial documents no later than February 10, 2012, with depositions of tribe members regarding such documents to occur the following week. [II EOR 0290-0291].

Seizure of the Skywalk

Rather than comply with the arbitrator's order, on February 6, 2012, the Tribal Council voted to "condemn" GCSD's intangible contract interest to operate and manage the Skywalk as originally contemplated in the 2003 Agreement; a formal resolution authorizing its legal counsel and other Tribal representatives to "take" GCSD's interest, passed the next day. [III EOR 0418-0421]. The

resolution specifically cited purported disagreements regarding GCSD's performance under the 2003 Agreement, and the arbitration, as among the justifications for the taking. *Id.* The Tribe then initiated "condemnation" proceeding against GCSD in the Tribal Court. [III EOR 0431-0434 and III EOR 0435-0436]. The Tribal Court immediately issued two identical Temporary Restraining Orders, prohibiting GCSD from damaged, destroying, or removing from the Reservation its own personal property, each signed by one of the two permanent Tribal Court judges. [III EOR 0425-0427 and III EOR 0428-0430].

The Tribal Court did *not*, however, authorize the Tribe to seize GCSD's property. Indeed, the only substantive orders issued by the Tribal Court in the condemnation proceeding were 1) the identical TROs mentioned above; 2) an order recusing both of the judges who signed the TRO's as having conflicts of interest; and 3) an order that a judge pro tem shall be appointed by the Chief Judge to hear the condemnation proceedings. [II EOR 0292-0293]. No appointment of a pro tem judge to hear the matter was made.

Despite the complete absence of any Tribal Court authority purporting to authorize their actions, on February 10, 2012, Tribal officials seized control of the Skywalk by informing all of the Skywalk employees that the Tribe had taken over ownership and operation of GCSD's interests in the 2003 Agreement and that the employees were no longer employees of GCSD but were, instead, employees of a Tribal corporation, Grand Canyon Resort Corporation ("GCRC"). Employees were intimidated through implied threat of job loss and physical harm to grant access to GCSD's property, including demands that those employees provide access to secured areas of GCSD's operation and open the locked safe that was kept on the property by GCSD. Tribal representatives and persons working in

association with them changed the locks on the doors, replaced the combination mechanism in the safe, cut cables to the Skywalk security cameras, and interrupted the web-cam image of the Skywalk broadcast on the internet. [III EOR 0444-454, ¶ 21-24].

The Tribal representatives also began running electrical cabling and power lines to the computers at the Skywalk and informed the employees that the Tribe would be taking over control of ticket sales using their own point of sale system. [III EOR 0449-0451 at ¶¶ 27-29]. In other areas, stand alone cash registers were installed, disabling the integrated sales recording systems. [*Id*.]. In further detriment and harm to GCSD, the Appellees, in their new capacity as Skywalk operators and manager, have also forced all individuals who possessed previously printed Skywalk tickets to redeem those tickets for tickets dispensed by GCRC and SNW, have at times failed to offer any food to visitors, and have declined to offer the specialized food promised to Asian visitors that GCSD had prepared off-Reservation and transported to the Skywalk. [*Id*.].

Additionally, on February 9, 2012, SNW's counsel in the arbitration informed the arbitrator that:

> Hualapai Tribe's initiation of eminent domain proceedings against GCSD's contractual interests in the agreement includes all such interests, including GCSD's limited rights to request or initiate any arbitration against SWN. Simply, the Tribe is "stepping into the shoes" of GCSD for all matters relating to the agreement.

[III EOR 0422-0424]. SNW's counsel informed the arbitrator that "[o]bviously, it makes no sense for the Hualapai Tribe to be litigating" against a Tribal corporation. *Id.* SNW's counsel stated they had "been instructed to terminate SNW's voluntary participation in this proceeding." *Id.*

The District Court Proceedings

In response, GCSD filed its action in the United States District Court for the District of Arizona seeking a declaration that the Tribe has no authority to condemn GCSD's private contract rights in the Skywalk Agreement. GCSD requested a Temporary Restraining Order to prevent the Appellees from taking any steps to enforce the Tribe's purported condemnation of GCSD's contract interests in the operation of the Skywalk. [II EOR 0201-0264 and III 0306-0346]. The first of two hearings was held February 24, 2012. [II EOR 0117-0200].

At the first hearing, GCSD offered to present the testimony of witnesses on the issue of the bad faith and misconduct of the Appellees. Indeed, among the witnesses proffered was the Chair of the Council, the Honorable Louise Benson,[5] who was willing to testify in support of GCSD's position that the Tribal government was acting in bad faith:

> [Mr. Tratos]: . . . that, in fact, unlike every other ordinance that has been passed at the Hualapai where it is put out in the publication, where there is discussion amongst the tribal members, where the tribe gets to make comment and have a constant discussion, this particular ordinance was passed in secret executive session without having the ability to have comment from the tribe. It was literally thrust on the tribe as a surprise.
>
> It was done specifically and exclusively for one person. It was to take this property, the Skywalk management agreement. . . . This ordinance was expressly tailored to prevent Mr. Jin's company, GCSD, from being able to protect itself and so that they could literally steal the property. . .
>
> [S]he will testify that at the time that the PR campaign was launched against Mr. Jin to discredit him for not completing the building, to discredit him for not

[5] Ms. Benson was initially a defendant in this action, but GCSD dismissed the allegations against her, which dismissal was included in the Court's order. [I EOR 0020-0034, p. 15].

> bringing utilities and power, that that was a deliberate bad faith act because it was never Mr. Jin's obligation to bring utilities to Eagle Point. That was always the obligation of the tribe.
>
> And, in fact, it was the tribe itself, through an issuance of a stop-work order and refusal to authorize him to complete the building, because there was an internal dispute as to the size of the building, that, in fact, there has been a media campaign mounted by the tribe's PR firm to discredit Mr. Jin in order to justify the condemnation based upon the false assertion he has breached his contract.
>
> [Chairwoman Benson would also testify] that those obligations were never his and that, in fact, the tribe has engaged a PR firm to specifically discredit him.

[II EOR 0117-0200 at 59:24-61:8]. However, the District Court did not permit any testimony to be taken at either of the two hearings. [*Id*. at 80:13-22].

The District Court also made clear at the first hearing that it was required to consider the civil legislative jurisdiction of the Tribe:

> The Court: . . . I need to address the question of whether the tribe has jurisdiction to do what it's doing from a regulatory standpoint in terms of the condemnation and from an adjudicative standpoint in terms of the just compensation proceeding if we go forward.

[*Id*. at 6:6-10].

Subsequently, the Court issued an order asserting that two of three exceptions to the requirement for exhaustion of remedies had not been established, but ordering that the record be supplemented with respect to the issue of bad faith. [I EOR 0035-0040].

GCSD filed a motion entitled "Emergency Motion Requesting Evidentiary Hearing on Newly Developing Evidence Related to Defendants' Ongoing Bad Faith Conduct." The motion requested an evidentiary hearing to permit the presentation of evidence relating to Appellees' bad faith.

This second hearing was held on March 14, 2012. Additionally, GCSD supplemented its briefing, producing additional documentary evidence. [II EOR 0294-0305]. New evidence also accompanied this supplement and showed that the Tribe's adoption of the Ordinance was specifically directed at GCSD, as well as evidence of a media plan to address the Tribe's "planned litigation against" GCSD. [II EOR 0268-0286 and II EOR 0287-0289].

GCSD explained that, since the first hearing, the Council had rescinded the Ordinance, but immediately thereafter, two members of the Council were "suspended" from the Council – in apparent violation of Hualapai law – and that, immediately following their suspension, the Ordinance was reinstated by the remaining Council majority. [I EOR 0041-0112 at 37:11-40:1]. GCSD told the District Court that it was prepared to call witnesses given that the Court had convened an evidentiary hearing. However, the District Court declined to hear any testimony, instead requesting a proffer of what the testimony would include. [*Id*. at 14:6-10; 18]. GCSD had asked to provide testimony at the second hearing that certain Council members had admitted, in a public meeting, that the exercise of the power of eminent domain was motivated by a fear of a loss in the arbitration, as well as other testimony in support of the allegations of misconduct by Appellees. [*Id*. at 8:23-9:1]. Additionally, GCSD proffered testimony from Joseph Myers, the longtime executive director of the National Indian Justice Center. Importantly, Mr. Myers had recently conducted a study of the Tribal Court, was prepared to testify that the Tribal Court lacks any credible judicial independence, and "is not capable of functioning without control by the Tribal Council." [*Id*. at 17:4-12].

GCSD also advised the District Court as to ongoing damages, including the loss of GCSD's employees, 115 of whom had been laid off by Tribal officials. [*Id*. at 51:4-9].

The District Court thereafter entered an Order, with a subsequent non-substantive amendment, denying GCSD's request for a temporary restraining order on the grounds that GCSD was required to exhaust its jurisdictional arguments in Tribal Court.

SUMMARY OF THE ARGUMENT

The District Court's requirement that GCSD exhaust its tribal remedies was in error and should be reversed. First, the District Court's error rests on an extreme misinterpretation of *Water Wheel*, creating in this Circuit a line of authority wholly inconsistent with the United States Supreme Court's recent requirements regarding the exceedingly narrow scope of tribal authority over non-Indians. *Water Wheel*, a land-lease dispute between a tribal government and a non-Indian, does not apply to intangible property rights held by a non-Indian corporation whose *situs* is off-reservation in another state, and therefore does not implicate the Tribe's exclusionary powers. Moreover, that contract is with a *corporation*, not the Tribe. The Tribal government exercised its sovereignty when it availed itself of the power to create SNW, for the express purpose of contracting with GCSD on the Skywalk Project. The Tribe cannot have it both ways. It cannot take advantage of the ability to shield the Tribe from liabilities by using a corporate form, so that SNW may benefit from legally enforceable rights and remedies, such as arbitration in the event of a dispute with GCSD, and then "condemn" GCSD's contract when arbitration does not go the Tribe's way. The Tribe had a sovereign choice, and it exercised that choice when it chartered SNW and waived its sovereign immunity.

According to controlling Supreme Court precedent, the Tribe surrendered any power it previously had to exclude GCSD from its lands when it deliberately created SNW, and entered into an agreement with GCSD that conditioned GCSD's rights to enter Hualapai trust lands in order to perform the contract and arbitrate with SNW in the event of dispute.

Second, the law of this Circuit does not require GCSD to prove that bad faith was limited to the actions of the Tribal Court in order to satisfy the bad faith exception to the tribal exhaustion rule. Where the Tribe's judiciary lacks independence and is completely controlled by the Council, the legal distinctions between the two branches are a nullity. Moreover, even assuming that the Tribal Court itself did not act in bad faith, the Ordinance itself prohibits any substantive judicial review – rendering any good faith on the part of the Tribe's judges to be a complete nullity. The purpose and effect of the Council's deliberate, shameless and unrelenting conduct is to deprive GCSD of its fundamental rights under the U.S. Constitution and federal common law at the hands of a self-executing Ordinance, targeted solely at GCSD. That denies GCSD its most basic due process rights, including the right to be heard on the merits. Restricting this Circuit's bad-faith exception analysis where no meaningful Tribal separation of powers exists, as the District Court has done, amounts to judicial formalism. There is no tribal jurisdiction here – and no need for GCSD to exhaust tribal court "remedies" where plainly none exists.

Ordinarily, when addressing an issue of tribal jurisdiction over a non-Indian, "considerations of comity direct that tribal remedies be exhausted before the question is addressed by the District Court," *Iowa Mut. Ins. Co. v. LaPlante,* 480 U.S. 9, 15, (1987). However, those principles of comity do not override all other

considerations. Accordingly, there are exceptions to the requirement. As relevant here, these exceptions include situations where 1) it is plain that no federal grant provides for tribal governance of nonmembers' conduct on and covered by *Montana*'s main rule; 2) exhaustion would be futile because of the lack of adequate opportunity to challenge the court's jurisdiction; and 3) the assertion of tribal jurisdiction is motivated by a desire to harass or is conducted in bad faith. *Burlington N. R.R. Co. v. Red Wolf*, 196 F.3d 1059, 1065 (9th Cir. 1999).

Here, the fact that the Tribe seeks to exercise the power of eminent domain over GCSD's intangible property requires a conclusion that there is no colorable claim that the Tribe has jurisdiction; the Tribe has no legislative authority over off-reservation property belonging to non-Indians, and accordingly, cannot have adjudicative authority over such property.

Similarly, the primary focus of any inquiry regarding futility must be directed at the legislation that purports to create the right. Here, the Tribe compounded its extraterritorial overreaching by deliberately placing obstacles in front of any attempt to obtain judicial review of its actions. Those obstacles, coupled with the sheer impracticality of judicial review in light of the absence of a presiding judicial officer, indicate that attempting to exhaust Tribal remedies would be futile.

Finally, the overwhelming evidence available to show that the Tribe's adoption and exercise of the Ordinance was expressly intended to avoid a review of the SNW's performance under the contract, coupled with the many efforts made to interfere with judicial review, compels a conclusion that the evocation of Tribal jurisdiction was motivated by bad faith and a desire to harass GCSD. This too

relieves GCSD of any obligation to exhaust Tribal remedies. As a result, the District Court erred in requiring that GCSD exhaust.

STANDARD OF REVIEW

The determination of jurisdiction is a legal question and is therefore subject to *de novo* review. Whether the exhaustion of tribal court remedies is required is also reviewed *de novo*. *Philip Morris USA, Inc. v. King Mountain Tobacco Co., Inc*., 569 F.3d 932, 938 n.1 (9th Cir. 2009).

ARGUMENT

I. THE DISTRICT COURT COMMITTED REVERSIBLE ERROR BY EXPANDING THE APPLICATION OF *WATER WHEEL* TO COVER CONTRACTS FOR SERVICES BETWEEN A NON-INDIAN CORPORATION AND A TRIBAL CORPORATION.

Montana v. United States, 450 U.S 544 (1981) governs the determination of whether a tribal court may exercise civil jurisdiction over non-Indians. Apart from treaties, there are only two potential sources of tribal jurisdiction: a tribe's inherent sovereignty and Congressional statutory grant. *Philip Morris*, 569 F.3d at 937. In general, "the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe." *Montana*, 450 U.S. at 565. The *Montana* framework is applicable to tribal adjudicative jurisdiction, which extends no further than the *Montana* exceptions. *Phillip Morris*, 569 F.3d at 939.

While the doctrine of comity is ordinarily intended to allow tribal courts to define their own jurisdiction in the first instance, such deference is *never* a judicial prerequisite and is not required in four instances: where (1) an assertion of tribal jurisdiction is motivated by a desire to harass or is conducted in bad faith; (2) the action is patently violative of express jurisdictional prohibitions; (3) exhaustion

would be futile because of the lack of adequate opportunity to challenge the court's jurisdiction; or (4) it is plain that no federal grant provides for tribal governance of nonmembers' conduct on and covered by *Montana*'s main rule. *Burlington N. R.R.*, 196 F.3d at 1065. GCSD need not exhaust here because it has satisfied the first, third and fourth exceptions.

The District Court held, after its first hearing, that *Water Wheel* vitiates *Montana's* main rule because the Skywalk structure is located on federal trust land, implicating the Tribe's power to exclude non-Indians from that land and thereby forcing GCSD to exhaust its tribal court remedies. The District Court's overruling of the Supreme Court's fourth exception to the tribal court exhaustion requirement, based on an overly expansive interpretation of *Water Wheel* that is at odds with the critically important facts of this case, amounts to reversible legal error. The reasoning of *Water Wheel* was and is limited to issues particular to contracts encumbering land. The contract at issue in this case involves services and the *situs* of the property is, by definition, located off-Reservation. Moreover, *Water Wheel* involved a contract to which a tribe was a direct party, as opposed to a corporation that the Tribe chartered in order to (i) shield the Tribe from potential corporate liabilities, (ii) condition GCSD's rights of entry as a non-Indian to Tribal lands, and (iii) agree to specific legal rights and remedies governed by a private contractual relationship – including arbitration enforceable in federal court.

Although orders on injunctive relief are generally reviewed for abuse of discretion (*Sierra Forest Legacy v. Sherman*, 646 F.3d 1161, 1177 (9th Cir. 2011)), the question of the applicability of *Water Wheel* is a legal issue, and therefore subject to *de novo* review. *See Ting v. AT&T*, 319 F.3d 1126, 1134-35 (9th Cir. 2003) (reviewing *de novo* questions of law determined by the District Court in

determining propriety of injunction, noting that "[w]e review any determination underlying the grant of an injunction by the standard that applies to that determination."); *Serv. Employees Int'l Union*, 598 F.3d at 1069 (although ordinarily a grant or denial of injunctive relief is reviewed for abuse of discretion, where the issue is jurisdiction, review is also *de novo)*.

A. *Water Wheel* Has No Bearing on This Action Because Its Reasoning Is Limited to Issues Concerning Contracts Encumbering Land.

The District Court ruled that the fourth exception to exhaustion – that exhaustion is not required where it is plain that no federal grant provides for tribal governance of nonmembers' conduct on land covered by *Montana*'s main rule – did not excuse the exhaustion requirement in this instance, on the grounds that it was not "plain" that the Tribal Court lacked jurisdiction over GCSD. In reaching this conclusion, the District Court held that *Water Wheel* trumps the *Montana* line of cases because the Skywalk structure is located on federal land held in trust for the Tribe. This is legally incorrect and, if taken seriously, would enable Indian tribal governments throughout the Ninth Circuit to have it both ways: create companies for arms-length contracting with non-Indians, then "condemn" non-Indians' property – along with all associated legal rights and remedies, on and off reservation – whenever disputes arise between the original parties to that contract.

Water Wheel by no means requires this absurd result. In *Water Wheel*, a non-Indian corporation and a non-Indian individual entered into a tribal surface lease agreement directly with the Colorado River Indian Tribes ("CRIT"), pursuant to which the non-Indian rented tribal land to operate a recreational resort. After numerous disputes, the non-Indian refused to vacate the property upon the

expiration of the lease and challenged the tribe's regulatory and adjudicatory jurisdiction in a trespass enforcement action involving the land that had been leased. On appeal, the Ninth Circuit held that the tribe's inherent power to exclude the non-Indian from the land, under the specific factual circumstances of the case, provided a basis for civil jurisdiction over the non-Indians not addressed directly by the *Montana* doctrine.

Water Wheel is inapposite to the present dispute because the contract at issue in that case was a site lease for property. As a contract encumbering land, it required review and approval by the Secretary of the Interior pursuant to 25 U.S.C § 81. *Water Wheel*, 642 F.3d at 805. As such, *Water Wheel* based its holding on the fact that the activity in question in that case – overstaying a lease of tribal *lands* – had interfered directly with the tribe's inherent powers to exclude non-Indians from its territory and to manage its own lands. In this regard, the tribe's status as landowner was dispositive of its right to physically exclude the trespassing company and sufficed to remove the circumstances from the application of *Montana*:

> In this instance, where the non-Indian activity in question occurred on tribal land, the activity interfered directly with the tribe's inherent powers to exclude and manage its own lands, and there are no competing state interests at play, the tribe's status as landowner is enough to support regulatory jurisdiction without considering *Montana*. Finding otherwise would contradict Supreme Court precedent establishing that land ownership may sometimes be dispositive and would improperly limit tribal sovereignty without clear direction from Congress.

Water Wheel, 642 F.3d at 814. The Court therefore concluded that "the CRIT has regulatory jurisdiction over Water Wheel and Johnson for claims arising from their activities on tribal land, independent of *Montana*." *Id*.

Here, in contrast, the 2003 Agreement is not a contract that burdens land, it is a contract for *services*, bestowing on GCSD the intangible right to build and operate the Skywalk and to share in the profits generated. Unlike the contract at issue in *Water Wheel*, the 2003 Agreement did not require Secretary approval. This is a crucial legal distinction. A tribe's inherent power to exclude, the backbone of the *Water Wheel* decision, is not implicated in the 2003 Agreement, because a tribe's power to exclude pertains to the exclusion of a non-Indian from Indian territory, and not to the exclusion of a non-Indian's intangible rights. *See Plains Commerce Bank*, 554 U.S. at 335 (power to exclude gives tribes "the power to set conditions on entry to [tribal] land"). The disposition of GCSD's non-Indian contract rights has no bearing whatsoever on Tribal land. The Tribe never imposed conditions on the entry to Tribal land; rather, GCSD's contract – with SNW – governs all aspects of the relationship between the two corporations.

B. *Water Wheel* Is Also Inapplicable Because Its Reasoning Is Limited to Contracts Between Non-Indians and Tribes Themselves, and Does Not Apply to Contracts Between Corporations.

Unlike the contract in *Water Wheel*, the contract for services between GCSD and SNW is between a non-Indian corporation and a Tribal corporation. This distinction is again dispositive. In contrast to *Water Wheel*, the services at issue here are exclusively defined by, and arise solely from, a private contract that exists only because the Tribe itself chartered a corporation under Tribal law, thereby

exercising its inherent sovereign rights – including its power to exclude – at the moment when SNW voluntarily entered into that contract and "conditioned entry" with a non-Indian. By choosing to incorporate and delegating its authority to SNW, the Hualapai Tribe had already finally and fully exercised its power to exclude non-Indians from Reservation lands, thereby surrendering its sovereign immunity and other powers so long as GCSD obeyed the Tribe's laws and honored its contractual obligations. If GCSD failed to do the latter, SNW's remedy was clear: seek federally-enforceable arbitration as provided by the contract. As a result, the power to exclude – on which the entirety of the *Water Wheel* decision is premised – has already been exercised. The Tribe lacks jurisdiction here under *Montana* and tribal-court exhaustion is not required under the Supreme Court's fourth exception to the exhaustion rule.

The District Court summarily rejected GCSD's interpretation of *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982), finding instead that *Merrion* "stands for the proposition that a tribe does not surrender its sovereign powers by entering into commercial agreements with non-Indians." [I EOR 0035-0040 at 3]. The District Court concluded that, "[i]f a tribe does not surrender its sovereign power by directly entering into a contract with a non-Indian, *a fortiori* it does not surrender that power by forming a corporation that enters into a contract with a non-Indian." [*Id*. at 4].

The District Court's interpretation of *Merrion* was incorrect and ignored more recent Supreme Court cases – directly on point – which demonstrate that *Merrion* bars the Tribe from using its exclusionary power to assert civil jurisdiction over GCSD in this case. As Justice Scalia observed on behalf of a unanimous Supreme Court in *Nevada v. Hicks*, 533 U.S. 353 (2001):

> Tribal assertion of regulatory authority over nonmembers must be connected to that right of the Indians to make their own laws and be governed by them. *See* [*Merrion*, 455 U.S. at 137, 142] ("The power to tax is an essential attribute of Indian sovereignty because it is a necessary instrument of self-government," at least as to "tribal lands" on which the tribe "has… authority over a nonmember.").
>
> …
>
> [A] tribe's power to tax derived from two distinct sources: the tribe's power of self-government and the tribe's power to exclude. *Id*. at 137, 149. Recognizing that tribes are "unique aggregations possessing attributes of sovereignty," however, we further explained that the power to tax was "subject to constraints not imposed on other governmental entities" in that the Federal Government could take away that power. *Id*. at 140-41.

Hicks, 533 U.S. at 361, 389. Justice Scalia further characterized the Court's holding in *Merrion* as determining that the tribe's inherent power to tax extended only to transactions occurring on trust lands and significantly involving a tribe or its members. *Id*. at 391.

Put another way, the power of self-government held by Indian tribes "arises from their original tribal sovereignty over their members rather than from any constitutional source." *Montana v. Gilham*, 133 F.3d 1133, 1137 (9th Cir. 1998) (as amended). Thus, the regulatory and adjudicatory authority of tribes does not derive from the Constitution of the United States, but from "the vestiges of their once absolute authority over their internal affairs." *Id*. at 1136. Tribes therefore enjoy complete sovereign power so long as they remain in their pre-Constitutional bubble. Once a tribe reaches outside of its bubble to grab a bundle of rights created by Congress, the tribe automatically loses its inherent sovereignty, and can never regain it.

One manner in which tribes lose their absolute right to exclude, and therefore abdicate their inherent authority, is through choosing to form a corporation. Tribes wishing to engage in economic activity with non-members may do so directly, or by forming a corporate entity under federal, state or tribal law. Tribes have a choice: they can enter into a contract as a government and retain their inherent sovereignty, or they can surrender their sovereign immunity by taking advantage of a corporate form and vesting that corporation with the power to execute waivers of sovereignty. Hualapai law permits the Tribe to engage in business dealings directly – as the Colorado River Indian Tribes did in *Water Wheel* – or alternatively and as here, to create companies that can enter into enforceable agreements with non-Indian entities. It is elementary that if a Tribal corporation enters into a contract with a non-Indian company, it must resolve any disagreements with the non-Indian through the dispute-resolution mechanism in the contract. The Tribe cannot use eminent domain to go back in time and condemn the non-Indian out of its bargained-for ability to resolve disputes claiming such a power is predicated on the Tribe's right to exclude. The Tribe's right to exclude was exercised, and voluntarily limited, by SNW.

The power to exclude takes place upon a tribe's original delegation of its power, which cannot be undone through some sort of after-the-fact "eminent domain" process by a tribal government that purports to take intangible contract rights and remedies created voluntarily between two corporations. Here, the Tribe exercised its power to exclude when it made the sovereign decision to delegate its powers through the creation of the SNW corporation. As explained in *Merrion*, "[w]hen a tribe grants a non-Indian the right to be on Indian land, the tribe agrees not to exercise its *ultimate* power to oust the non-Indian as long as the non-Indian

complies with the initial conditions of entry." 455 U.S. at 144 (emphasis in original). That *ultimate* power has already been exercised here, and the tribe's power to exclude cannot, therefore, be used as a rationale to forego a *Montana* analysis.

The District Court not only erred in its analysis of how and why *Merrion* controls this case, but also wrongfully omitted consideration of Supreme Court authority that reinforces why a tribal government cannot invoke its power to exclude to scuttle a voluntary private contract between corporations. For instance, in *Strate v. A–1 Contractors,* 520 U.S. 438, 459 n.14 (1997), a nonmember sued another nonmember in tribal court over an accident that occurred on a state highway through the reservation. 520 U.S. 438. **The Supreme Court held that, in exercising its right to exclude, and inverse right to include, by authorizing the right-of-way for the highway, the tribe "expressly reserved no right to exercise dominion or control over the right-of-way;" and instead, "retained no gatekeeping right."** *Id*. at 455-456. As a result, the *Strate* Court found that, by authorizing conditioned access for the right-of-way, the tribe had given up its inherent right to exclude nonmembers from the encumbered lands. *Id*. at 456. By ceding the right to exclude, the tribe in *Strate* had also given up the lesser right to exercise governmental authority over the nonmembers on the highway unless the tribe could demonstrate either nonmember consent to tribal jurisdiction or nonmember impacts on tribal health, safety, economic integrity, or political security. *Id*. In *Strate*, the Supreme Court determined that neither consent nor sufficient impacts on the tribe were present, and thus that the tort action could not be heard in tribal court. *Id*. at 456-459.

This case is *Strate* revisited. The Tribe exercised its right to exclude, and inverse right to include, by authorizing the incorporation of SNW and the development of the Skywalk. By ceding the right to exclude in so doing, the Tribe has lost the lesser right to exercise governmental authority over a non-member with the scope of the exercise of the Tribe's original exercise of its exclusion powers.

In sum, the District Court improperly rejected the *Merrion-Strate* line of authority, which make clear that this case falls squarely within the *Montana* doctrine. *Water Wheel* did not and could not reject this controlling precedent of the U.S. Supreme Court. Requiring exhaustion here violates *Montana*.

II. THE DISTRICT COURT ERRED BY REQUIRING EXHAUSTION WHERE THERE WAS CLEAR EVIDENCE THAT THE INVOCATION OF TRIBAL AUTHORITY WAS MOTIVATED BY BAD FAITH AND HARASSMENT.

GCSD has no obligation to exhaust tribal remedies because the Tribe's assertion of its jurisdiction, i.e., its exercise of the power of eminent domain, was motivated by a desire to "harass" and was conducted in bad faith. *See Nat'l Farmers Union Ins. Co. v. Crow Tribe of Indians*, 471 U.S. 845, 857, n.21 (1985) (noting that exhaustion would not be required where an assertion of tribal jurisdiction "is motivated by a desire to harass or is conducted in bad faith"). In this case, the Council majority engineered the unlawful seizure of GCSD's property by targeting GCSD with the Ordinance, "condemning" its intangible property along with all associated legal rights and remedies, walking out of a contractually required arbitration proceeding, and hiding behind a Tribal Court

controlled by the Council itself. Even the express language of the Ordinance prohibits any substantive judicial challenge.

GCSD cannot get a fair hearing – or indeed, any hearing at all, according to the Ordinance – given the manifest bad faith displayed by the Tribal government. This is because the Council majority, according to the communications plan that accompanied its passage of the Ordinance, was directed specifically at "forcing the sale" of GCSD's contractual rights, even though the parties to that contract had mutually agreed to remove any buyout provisions. [6] [II EOR 0268-0286].

By any reasonable standard, this amounts to textbook bad faith by the Tribe's government, and it plainly falls within the exception to tribal court exhaustion required by *National Farmers Union*. Incredibly, the District Court reads the bad-faith exception so narrowly as to require that GCSD prove that the Tribal Court itself exhibited bad faith. When GCSD sought to do so in open court, by presenting uncontested evidence that the two permanent Tribal Court judges who had issued ex parte orders against GCSD were legally disqualified to do so under the Hualapai Constitution, the District Court concluded that this evidence as to the Tribal Court's bad faith was insufficient.[7]

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[6] Appellees challenged this evidence as improperly submitted, due to its purportedly confidential nature. However, the document was widely distributed among Tribe members without any imposition of confidentiality; an employee of GCSD, who is a member of the Tribe, received it, as indicated by his declaration. [EOR] Appellees motion to strike the exhibit was denied as moot].

[7] The District Court accurately summarized GCSD's position, then applied the incorrect legal standard under *National Farmers Union* for when tribal court exhaustion is required:

> The Court: What the plaintiff is arguing is bad faith in this case is that the tribe, through a wholly owned corporation, entered into an

The District Court's legal error occurred, however, when it excluded – as a matter of law under the *National Farmers Union* analysis – the extensive and entirely undisputed evidence of bad faith by the Council majority *in controlling the Tribal Court itself.*

> agreement with the plaintiff to build and operate the Skywalk that expressly included a provision as to how disputes would be resolved. Disputes arose. There's fingerpointing both ways as to who caused them. But there was a provision for that to be addressed, and that was through arbitration.
>
> Through some pretty significant effort, plaintiff finally got the tribe, tribal corporation, into arbitration. Invitations didn't work, demands didn't work, an action in tribal court didn't work. They finally initiated an arbitration and the arbitrator said, yeah, you've got to be here.
>
> So they get it started. So when the tribal corporation is finally in the location where these disputes were going to be resolved by the agreement of the parties, the tribe acts to shut down the arbitration, to take all of the plaintiff's interest in the contract, to not terminate the contract and invoke a $50 million payment obligation, does so pursuant to an ordinance that says this can only be heard in tribal court by somebody who is a member of the tribe, ensuring that a pro tem won't be sitting on it.
>
> And then, over the course of implementing this, implements it, revokes it, reinstates it, revokes it, reinstates it, and in the process suspends members of the tribal council who would result in a vote that thwarted the condemnation action.
>
> I think the plaintiff's argument is this can be viewed as a very calculated effort by the tribe to get out of its obligation in the contract to, first, do business with the plaintiff and, second, to arbitrate any disagreements with the plaintiff, and, third, if it really broke down and they terminated it, to get out from a $50 million payment obligation that was in the contract.

[I EOR 0041-0113, 64:6-65:13].

A. The District Court Erred by Interpreting the Bad-Faith Exception to Apply Only to the Bad Faith of the Tribal Court, and Not to the Bad Faith of the Parties or of Council Members in Control of the Tribal Court.

Despite the ample evidence of the desire to harass and bad faith offered by GCSD, the District Court concluded that the bad faith exception did not apply, because it "is meant to apply primarily to actions of the Tribal Court, not the actions of litigants or other branches of tribal government." However, this analysis both ignores 1) the plain language of the exceptions, and 2) the nature of the assertion of jurisdiction here. As the Counsel for Appellee noted, " ***we're talking about a challenge to the tribe's ability, power to exercise its sovereign authority of eminent domain."*** [II EOR 0200 at 36:6-9]. Thus, the "assertion of jurisdiction" here occurred, *not* through the actions of the Tribal Court, but through the action of the Tribe in purporting to take, via the power of eminent domain, the extra-territorial intangible property belonging to GCSD. Accordingly, that is the conduct that, according to the plain language of exceptions set forth in *National Farmers*, must be reviewed. Here, there can be no doubt that the Tribe's *assertion* of jurisdiction was motivated by a desire to harass and conducted in bad faith.

Furthermore, this Court has repeatedly indicated its awareness that the appropriate inquiry is directed to the motivation for and conduct of the assertion of Tribal *jurisdiction*, rather than the exercise of that jurisdiction by the tribal judiciary. *See, e.g., Atwood v. Fort Peck Tribal Court Assiniboine*, 513 F.3d 943, 948 (9th Cir. 2008) (noting that "[t]here has been no showing that *Defendant Hanson* asserted tribal jurisdiction in bad faith *or that she acted to harass* GCSD") (emphasis added); *A & A Concrete, Inc. v. White Mountain Apache Tribe*, 781 F.2d 1411, 1417 (9th Cir. 1986) (analyzing bad faith as applicable to the "enforcement

of the statutory scheme"); *Russ v. Dry Creek Rancheria Band of Pomo*, 2006 WL 2619356 (N.D. Cal. Sept. 12, 2006) (discussing the bad faith exception as it applied to "the *Tribe's* conduct") (emphasis added).

Nor is this Court alone in such recognition. For example, in *Superior Oil Co. v. United States*, 798 F.2d 1324, 1331 (10th Cir. 1986), the Tenth Circuit reversed a dismissal of an action against tribal officers, and remanded the cause to the District Court to :

> undertake such further proceedings deemed necessary to determine whether the actions of the Navajo Tribe of Indians and the named individual Navajo defendants in withholding consent to assignments of leases and requests for seismic permits were taken in bad faith or motivated by a desire to harass such as to render exhaustion of Navajo Tribal Court remedies futile.

Id. at 1331. The defendants in Superior Oil included tribal officials outside the judiciary because, as here, there was evidence that they must have been involved in the alleged bad-faith scheme by tribal government.

Similarly, in *Armstrong v. Mille Lacs County Sheriffs Dep't*, 112 F.Supp.2d 840, 849 (D. Minn. 2000), the court noted that bad faith on behalf of the *defendants* intending to delay the proceedings and to increase the costs of litigation could, if proven, "properly stave a resort to the Tribal Court" under the bad-faith exception. *See also Tamiami Partners, Ltd. v. Miccosukee Tribe of Indians of Fla.*, 63 F.3d 1030, 1045 (11th Cir. 1995) (plaintiff was not required to exhaust his tribal remedies because he had alleged bad faith on the part of the *individual defendants*); *Gaming World Int'l, Ltd. v. White Earth Band of Chippewa Indians*, 317 F.3d 840, 851 (8th Cir. 2003) (looking at alleged bad faith of *defendants* in evaluating bad faith exception).

The District Court's insistence that GCSD demonstrate bad faith by Tribal judges is not only inconsistent with this precedent, but also misses the most important point: that non-Indians with federal civil remedies need not "exhaust" remedies when Tribal government officials are engaged in bad faith or harassment.

B. The District Court's Reasoning Regarding Bad Faith Was Impaired By Its Refusal To Hear The Proffered Testimony On The Influence Wielded Over The Tribal Court By The Council.

Even if the District Court's focus on the conduct of the judiciary were proper, the evidence here supported a conclusion that the Council controls the outcome here – directly, through the Ordinance that denies GCSD a hearing on the merits, and indirectly by manipulating the Tribal judicial system. At a minimum, the District Court's refusal to hear proffered testimony expressly related to the lack of impartiality of the Hualapai Tribal Court system contributed materially to the Court's erroneous conclusions regarding whether exhaustion could be foregone due to bad faith. A district court's decision regarding whether to conduct an evidentiary hearing is reviewed for abuse of discretion. *See United States v. Sarno*, 73 F.3d 1470, 1502 (9th Cir. 1995).

Here, the District Court abused its discretion by declining to hear the proffered testimony of Joseph Myers, a nationally-recognized expert on tribal court judicial independence who has just evaluated the Tribal Court and concluded it was controlled by the Council. At the second evidentiary hearing, at which the District Court declined to consider any evidence from GCSD witnesses present in the courtroom for this purpose, GCSD asked to offer the testimony of Mr. Myers, the longtime executive director of the National Indian Justice Center who had conducted a recent study of the Hualapai Tribal Court, and who was prepared to

testify that there was no independent judiciary in the Hualapai Tribal Court, and specifically that "the judiciary is not capable of functioning without control by the Tribal Council." [I EOR 0041-0113 at 17:9-12]. By refusing to permit the testimony, even though the hearing had been requested and set specifically to address the allegations of bad faith, the District Court not only prevented GCSD from presenting vital evidence, but also hampered its own ability to properly consider the report by the National Indian Justice Center authored by Mr. Myers. Indeed, even in the report issued regarding the Hualapai Tribal Court, Recommendation A-1 was that the Tribe should "Clarify and Integrate the Policy of Separation of Powers between the Council and the Judiciary." [IV EOR 0567-0673 at 15]. The report noted that even if the Council were to adopt such an express statement, it could take "several generations for a community to understand and appreciate" such a policy. [*Id.*]. In other words, even if the Hualapai court system began to adhere to principles of separation of powers at once, its judiciary would likely not be independent for generations. Indeed, another recommendation was the judicial code of ethics should be *established*; i.e., the Hualapai Tribal Court has none. [*Id.* at 20]. Finally, the Report noted that the interviewees in the judiciary had "varying and diverse interpretations of tribal code and principles of Indian law." [*Id.* at 26].

GCSD offered evidence to show the lack of independence of the judiciary. This lack of independence, coupled with the overwhelming evidence of bad faith by the Tribal Council, excuses GCSD from any conceivable obligation to exhaust its remedies in the Tribal Court. Yet the evidence itself would have informed the District Court's determination regarding the scope of the bad faith exception because the evidence would have demonstrated that the Tribal Court was acting

under the influence of the Tribal Council, and would further have demonstrated the bad faith permeating the Tribal Court's and Council's actions throughout the litigation. As such, the District Court's refusal to consider GCSD's evidence of bad faith constitutes reversible error. *See U.S. Philips Corp v. KBC Bank N.V.*, 2012 WL 112264, *2 (9th Cir. Jan. 13, 2012).

III. GCSD NEED NOT EXHAUST TRIBAL REMEDIES BECAUSE TO DO SO WOULD BE FUTILE.

A party need not exhaust tribal remedies where such exhaustion would be futile because of the lack of a meaningful opportunity to challenge the court's jurisdiction. *National Farmers Union,* 471 U.S. at 857 n.21. Exhaustion is also futile where the tribal court would provide no meaningful remedy to a litigant. *See Cobell v. Cobell,* 503 F.2d 790, 793-94 (9th Cir. 1974) (lack of a meaningful remedy in tribal court excuses exhaustion); *Krempel v. Prairie Island Indian Cmty.*, 125 F.3d 621 622 (8th Cir. 1997) (excusing party from exhausting tribal remedies where no functioning court existed at the time the original complaint was filed in district court).

Here, the Ordinance itself provides two substantive roadblocks to relief in Tribal Court. First, it expressly provides that a judge pro tem may not sit on cases considering it. [IV EOR 0674-0685 at § 2.16(F)(6)]. While, prior to recusing himself, a tribal judge ruled that this provision must be stricken, the existence of the preclusions creates a considerable risk that any decision by a judge pro tem, assuming one is ever appointed, will be challenged on the basis of the jurist's authority to preside.

Additionally, § 2.16(F)(6) of the Ordinance expressly precludes the Tribal Court from considering any challenge to the condemnation other than whether

property was taken for a "public use." [*Id.*]. In other words, *the Ordinance itself prohibits the Tribal Court from hearing a challenge to its jurisdiction*. Because the plain language of the Ordinance prohibits the Tribal Court from deciding either its jurisdiction over the matter, or even the validity of the ordinance, one need look no further than the Ordinance itself to find a textbook example of futility of exhaustion. *See National Farmers Union*, 471 U.S. at 857 n. 21.

Where there are exigent circumstances, such as continuing in increasing harm, delay can satisfy the futility requirement. *See Boozer v. Wilder,* 381 F.3d 931, 936 (9th Cir. 2004) (noting that delay may suffice to demonstrate futility, but declining to apply futility exception for other reasons); *Brown v. Rice,* 760 F.Supp. 1459, 1462 (D. Kan. 1991) (futility was satisfied where the petitioner had been "hampered for some months by the delay in receiving a written order from the tribal court and the delay in receiving a copy of the tribal code from tribal authorities," while a serious issue was pending). Here, GCSD has been subjected to continuing and irreparable harm, with no meaningful forum in which to seek relief. A hypothetical hope of future relief does not obviate futility.

IV. THE TRIBE HAS NO COLORABLE CLAIM OF JURISDICTION OVER GCSD'S INTANGIBLE PROPERTY BECAUSE A SOVEREIGN HAS NO POWER TO CONDEMN PROPERTY BEYOND ITS TERRITORIAL LIMITS.

Jurisdiction over the *owner* of property is not sufficient to establish jurisdiction over the property itself. A sovereign's power to condemn property extends only as far as its borders, and thus, the property to be taken must be within the state's jurisdictional boundaries. *Nichols on Eminent Domain* (3d ed. 1980), § 2.12. Moreover, a sovereign's "power of eminent domain is, by its very nature,

exclusive of another sovereign's power to condemn the same property." *Id.* Thus, in "order to avoid conflicting judgments with respect to the same property, only one state may condemn a particular piece of property, whether tangible or intangible." *Mayor & City Council of Baltimore v. Baltimore Football Club Inc.*, 624 F. Supp. 278, 284 (D. Md. 1985) (holding that Baltimore did not have jurisdiction over intangible property of over what had become the Indianapolis Colts).

Accordingly, jurisdiction over property cannot be gained through the owner's contacts with the forum, because a single entity might establish sufficient contacts with multiple forums so as to allow any to assert personal jurisdiction over it. If contacts could result in jurisdiction over property, then each such forum could claim a right to condemn the same property. A contrary view would "eviscerate the established rule that only one sovereign may properly condemn property, and would lead to the exercise by a foreign state of extraordinary powers over property located in another state." *Mayor and City Council of Baltimore*, 624 at 285.

Longstanding authority has determined that the ownership of intangible property is determined by the doctrine of *mobilia sequuntur personam* ("moveables follow the person"). *Blodgett v. Silberman*, 277 U.S. 1, 10 (1928) ("intangible personalty has such a situs at the domicile of its owner that its transfer on his death may be taxed there."). Significantly, the Supreme court reaffirmed the application of this doctrine in *Texas v. New Jersey,* 379 U.S. 674, 682 (1965), when it determined that the power to escheat property lies only with the forum of the owner's last known address. Like the power of eminent domain, the power to escheat involves a sovereign's right to seize property, and further, may be

exercised only by one sovereign. *Id*. Accordingly, the domicile of the owner of the intangible property determines the sovereign entitled to take the property by eminent domain. *Nichols on Eminent Domain, supra*, § 2.2.

While published decisions involving condemnation of intangible property are rare, those few cases available support finding that Nevada is the situs of GCSD's intangible property, and therefore, the sovereign that could exercise a right of eminent domain over such property. In *City of Oakland v. Oakland Raiders,* 32 Cal.3d 60, 183 Cal.Rptr. 673, 646 P.2d 835 (1982), the court determined that the City of Oakland was the situs of the team's intangible property, noting that "Oakland is the principal place of business of the [the owner of the team]. . . . It is the primary locale of the team's tangible personalty." *Id.* Similarly, in *Mayor and City Council of Baltimore, supra*, the Court determined that Baltimore could not exercise the power of eminent domain over the Colts, because at the time of the commencement of condemnation proceeding, the team no longer had its domicile in Maryland.

Applying this rule here requires a finding that GCSD's intangible property must be deemed located in Nevada, and therefore, outside the jurisdictional reach of the Tribe.

CONCLUSION

According to the reported cases argued by the parties and provided to the District Court, no Indian tribe has ever attempted to take a non-Indian corporation's contract rights using tribal eminent domain. At very minimum, this extraordinary exercise of governmental power against a private U.S. citizen demands stringent procedural protections consistent with the U.S. Constitution and

federal common law, including the opportunity to be heard in a fair and impartial tribunal free and the right not to be harassed by governmental officials acting in bad faith. That the government exercising such extraordinary power is a Native American tribal government provides no exception to this rule. The District Court's decision to punt this case to the Tribal Court, which lacks judicial independence and is being shamelessly manipulated in this case – both by the Ordinance, which expressly precludes substantive judicial review or even a hearing, and by the continuing bad-faith machinations of a majority of the governing Tribal Council – are precisely what the Supreme Court contemplated in *National Farmers Union* when it crafted exceptions to the exhaustion rule for bad faith and harassment, and where exhaustion would be futile. This Court's decision in *Water Wheel* cannot reasonably dictate a federal judicial vacuum in such instances. Nor does *Water Wheel* apply when the Tribe – through an understandable exercise of its sovereign powers – chose to create a company for the express purpose of entering into an arms-length contract with GCSD in order to pursue a joint venture intended for mutual benefit. The Tribe could have, but did not, contract directly with GCSD or demand a land-lease as in *Water Wheel*. Instead, the Tribe chartered a corporation under its own laws, which in turn negotiated a services contract – involving purely intangible property and not encumbering land – with a Nevada company to pursue a tourist venture that stretches beyond the Reservation, or even Arizona or Nevada, to the distant corners of the world.

Contrary to the District Court's holding, the Supreme Court has spoken to this very situation by insisting, in *Merrion* and *Strate*, that Indian tribes cannot have it both ways. They cannot rely on their exclusionary powers over land to

engage in commerce according to a valid contract, through a tribally-chartered corporation, and subsequently eviscerate that same contract at a whim through some far-flung "condemnation" action that seizes a non-Indian company's property and all associated legal rights and remedies, including contractually-required arbitration. It is up to this honorable Court to clarify that *Water Wheel* properly concerns land contracts involving tangible property rights, and cannot be misinterpreted or misapplied to read *Montana's* main rule out of the law. GCSD therefore respectfully requests that this Court REVERSE the District Court's denials of GCSD's Motion for Temporary Restraining Order and Supplemental Motion Regarding Temporary Restraining Order, and to enter an Order confirming the District Court's jurisdiction over this matter.

Respectfully submitted this 4th day of May 2012.

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CERTIFICATE OF SERVICE

This is to certify that on May 4, 2012, a true and correct copy of the foregoing Opening Brief, in the appeal from D.C. No. 3:12-08030-DGC, was served by United States Mail, first class, on counsel of record for all parties to the action below in this matter, as follows:

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