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)

REPLY BRIEF OF APPELLANT
GRAND CANYON SKYWALK DEVELOPMENT, LLC

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Dated this 2nd day of July 2012.

GREENBERG TRAURIG, LLP

/s_*Troy Eid*

ATTORNEYS FOR APPELLANT-GRAND CANYON SKYWALK DEVELOPMENT, LLC

Appellant Grand Canyon Skywalk Development, LLC ("GCSD"), a Nevada limited liability company, respectfully submits its Reply Brief. The question presented is straightforward: Did the District Court err by requiring exhaustion of tribal court remedies when the Hualapai Indian Tribe ("Tribe") lacks jurisdiction to take the intangible property rights of a non-Indian? The answer is yes. The Tribe's purported taking – by eminent domain power arising under Hualapai Tribal law – does not extend to GCSD's off-reservation, Nevada property rights.

ARGUMENT

I. APPELLEES' PROCEDURAL ARGUMENTS LACK MERIT.

Appellees contend that "GCSD cannot re-litigate issues decided in *GCSD I* or raise arguments for the first time on appeal." This is misplaced and contrary to hornbook law. Collateral estoppel is inapplicable where, as here, there is no identity of issues in both proceedings. The District Court already noted the very different nature of the issues. Moreover, all the arguments raised in this appeal were properly before the District Court. But even if they were not, issues of law may be presented for the first time on appeal because they do not depend on further development of the factual record.

A. Appellees' Reliance On The Doctrine Of Collateral Estoppel Is Misplaced.

Four elements must be met before the doctrine of collateral estoppel may apply: (1) the issue at stake was identical in both proceedings; (2) the issue was

actually litigated and decided in the prior proceedings; (3) there was a full and fair opportunity to litigate the issue; and (4) the issue was necessary to the merits. *Habig v. FDIC*, 2012 WL 193052, *4 (D. Ariz. May 29, 2012); *see also Clark v. Bear Stearns & Co., Inc*., 966 F.2d 1318, 1320 (9th Cir. 1992). The party seeking to assert collateral estoppel bears the burden "to prove each of the elements have been met." *Kendall v. Visa U.S.A., Inc*., 518 F.3d 1042, 1050-51 (9th Cir. 2008). "Collateral estoppel is inappropriate if there is any doubt as to whether an issue was actually litigated in a prior proceeding." *Eureka Fed. Sav. & Loan Ass'n v. American Cas. Co. of Reading, Pa*., 873 F.2d 229, 233 (9th Cir. 1989).

Here, Appellees' collateral estoppel argument collapses because *GCSD I* and the present action involved different circumstances altered by Appellees' own actions in passing the eminent domain ordinance ("Ordinance"), joining but later abandoning arbitration proceedings, and seizing GCSD's business. No identical issues were actually adjudicated between the two District Court cases. *GCSD I* involved GCSD's challenge to the passage of the Ordinance itself, in the absence of the Tribe's actual exercise of the power of eminent domain. Here, in contrast, the Tribe has already exercised eminent domain and shut down GCSD's business. Appellees downplay this altered landscape by representing that "[t]he fact that the Tribe had not attempted to use the Ordinance until after the decision in *GCSD I* does not change things [because] … [u]se of the Ordinance was not a controlling

fact that constituted a significant change relevant to [the] District Court's jurisdictional determination." (Answering Brief at 19-20). Pronouncements of the District Court itself, however, vitiate Appellees' entire argument.

During the TRO hearing in *GCSD I*, the District Court indicated it would indeed have jurisdiction over the controversy had the Tribe actually acted pursuant to the Ordinance, and that the issue was simply not ripe for review absent the Tribe's taking:

> Now I will say that *if a condemnation action is commenced ... against the GCSD in Tribal Court*, my understanding of the law is that a federal question, properly adjudicated in Federal Court at that point, will be whether the Tribal Court has jurisdiction over the non-Indian defendant, under the *Montana* line of cases. That gets litigated in Federal Court frequently, and it is a federal question that I think would be appropriately addressed at that point. And I think it's a proper exercise of Federal Court authority to decide that question. The Supreme Court has clearly said I have.
>
> So I wouldn't have the same concerns about comity and rightness and imposing federal procedure requirements in Tribal Court in that case as I have in this TRO procedure.

(Transcript of April 12, 2011 TRO hearing, 42:5-18, Supplemental Excerpts of Record 0001-0047, submitted contemporaneously herewith pursuant to Circuit Rule 30-1.8) (emphasis added).

Appellees cannot maintain that the issues at stake in the present action are on all fours with *GCSD I* such that the outcome of *GCSD I* should be accorded preclusive effect. GCSD had no opportunity to litigate the issues raised here in

GCSD I, and "the [Supreme] Court has repeatedly recognized … that the concept of collateral estoppel cannot apply when the party against whom the earlier decision is asserted did not have a full and fair opportunity to litigate [an] issue in the earlier case." *Maciel v. Commissioner of Internal Revenue*, 489 F.3d 1018, 1023 (9th Cir. 2007) (internal quotations omitted) (citing *Allen v. McCurry*, 449 U.S. 90, 95 (1980)). Other than identity of the parties, none of the prerequisites for the application of collateral estoppel is present here. *See Wolfson v. Bramer*, 616 F.3d 1045, 1064 (9th Cir. 2010) (collateral estoppel inapplicable where the underlying action was dismissed based on lack of ripeness).

Appellees' argument also fails because it has not been raised before. Their Answering Brief marks the first time Appellees have argued that the issues raised in *GCSD I* must be accorded preclusive effect. Yet "collateral estoppel will not be considered for the first time on appeal." *Harbeson v. Parke Davis, Inc.*, 746 F.2d 517, 521 (9th Cir. 1984) (citing *Exxon Corp. v. Texas Motor Exch. of Houston, Inc.*, 628 F.2d 500, 507 n.3 (5th Cir. 1980)). *See also ABC Supply, Inc. v. Edwards*, 952 P.2d 286, 288 (Ariz. App. 1997) ("New arguments such as collateral estoppel and res judicata cannot be raised for the first time on appeal."); *People v.*

Schlimbach, 122 Cal. Rptr. 3d 804, 815 n.11 (Cal. App. 2011) (declining to entertain collateral estoppel argument that was raised for the first time on appeal).[1]

B. The Lack Of Tribal Jurisdiction Over GCSD's Intangible Property Is Properly Raised On Appeal.

GCSD explained in its Opening Brief why the Tribe lacks jurisdiction over GCSD's intangible property because no sovereign can condemn property beyond its territorial limits. A government's power of eminent domain is, by its very nature, exclusive of another sovereign's power to condemn the same property. As a result, only one state may condemn a particular piece of property. Because the situs of GCSD's intangible property is in Nevada, only Nevada has the power to condemn that property. Appellees urge the Court not to consider the issue at all because it was supposedly raised "for the first time on appeal."

This, too, is incorrect. Arguments intertwined with the validity of a claim cannot be claimed to have been waived below. *See Engquist v. Oregon Dep't of Agric.*, 478 F.3d 985, 996 n.5 (9th Cir. 2007). "When an issue or claim is properly before the court, the court is not limited to the particular legal theories advanced by

[1] The one case Appellees rely on to support their blanket assertion that collateral estoppel may be raised on appeal – *Clements v. Airport Authority of Washoe County*, 69 F.3d 321 (9th Cir. 1995) – involved circumstances where, unlike here, the issue at stake was "*actually* litigated and *necessarily* decided." *Id.* at 329 (emphasis in original). Moreover, *Clements* presented "[e]xtraordinary circumstances" absent here that justified the appellate court's *sua sponte* consideration of collateral estoppel as an exception to the general rule of waiver. *Rotec Indus., Inc. v. Mitsubishi Corp.*, 348 F.3d 1116, 1119 (9th Cir. 2003).

the parties, but rather retains the independent power to identify and apply the proper construction of governing law." *Kamen v. Kemper Fin. Servs., Inc*., 500 U.S. 90, 99 (1991). Because the Tribe's power of to assert eminent domain over GCSD's property is central to the validity of its assertion of jurisdiction over GCSD, this issue is properly raised here.

Moreover, the question whether the Tribal government can reach beyond its reservation borders and take the intangible personal property of a non-resident, non-Indian located in another state was already presented to the District Court at its hearing on February 24, 2012. [EOR II 0117-0200]. The subject was discussed both in the context of the taking of the contractual rights of GCSD by the Tribe and in the context of taking the ability of GCSD to pursue its chose in action, in the form of an arbitration. *Id*. Indeed, Appellees have cited the very same cases from that hearing in their Answering Brief. *Compare*, discussion of *City of Oakland v. Oakland Raiders*, 646 P.2d 835 (Cal. 1982) (hereinafter *Oakland*) and *Mayor and City and Council of Baltimore V. Baltimore Football Club*, 624 F. Supp. 278 (D. Md. 1986) (hereinafter *Baltimore*) in the February 24, 2012 transcript [EOR II 0117-0200, at pp. EOR II 0183:10-0184:21] with the Answering Brief at 51-54.

It is simply incorrect for Appellees to assert that the situs of the intangible property at issue was not raised as a jurisdictional issue below. As one of GCSD's attorneys stated at the hearing:

> MR. EID: And remember, in this case, sir, it's an intangible right. It's a license. It's not a piece of physical property. His interest is an intangible property right that Mr. Jin has through his company.
>
> And to be able to reach beyond the boundaries of the Hualapai Nation to Las Vegas, where we have our computer system, or other places off reservation where we're basing our buses and repairing our buses, all the things that we do to run this, they don't have authority, sir; and there is no place in the law that says they do. *Water Wheel* sure as heck doesn't say it.

[EOR II 0117-0200, at EOR II 0173:5-0173:15].

Later in the hearing, during discussion of the Tribe's claim that it can strip GCSD of its right to prosecute GCSD's chose in action in the form of an arbitration between GCSD and the Tribe's wholly-owned corporation, 'Sa' Nyu Wa ("SNW"), the issue of whether the Tribe could extend its jurisdiction beyond the reservation to seize the intangible property right of GCSD arose again:

> THE COURT: Okay. I hear what you're saying. I understand the argument that you're making. I'm having great difficulty with the idea that this cause of action is not a separate asset owned by the corporation, that it is really just part and parcel of their rights under the contract that can be seized by the tribe.
>
> MR. HALLMAN: Maybe I can phrase it this way: Their right to pursue any cause of action under the 2003 agreement is limited by the 2003 Agreement to pursue arbitration as compelled by a federal court of competent jurisdiction.
>
> THE COURT: Okay. Assuming that's true, it's still an asset. It's a piece of personal property that they own that is separate from the contract in terms of it doesn't require any performance under the contract, it doesn't require an operation on the land; it's just a right of action they've acquired through the breach, or the alleged breach, by

> SNW, and you're sweeping into your eminent domain power that asset of the Nevada corporation.
>
> MR. Hallman: Which, again, is inherent – it's – I believe it's separable from the 2003 agreement itself.
> THE COURT: Do you agree, Mr. Hallman, the tribe could send tribal police officers to Las Vegas and seize the servers in the offices of GCSD?
>
> Mr. Hallman: No. Again, we're condemning their contractual rights, not their property. The tangible property as opposed to the intangible –
>
> THE COURT: Well, but those computers have intangible information on them related to the Skywalk, right.
>
> MR. HALLMAN: Assuming they do, I don't believe the tribe has any right to do that.
>
> THE COURT: **But it can go to Las Vegas and seize their cause of action?**

[EOR II 0117-0200, at pp. EOR II 0189:20-0191:1] (emphasis added).

Even assuming, *arguendo*, that this issue was not raised below, the legal nature of the argument permits this Court to consider it.[2] The basis for the rule that issues not presented to the District Court generally cannot be raised on appeal is

[2] The purely legal nature of GCSD's argument regarding the condemnation of its intangible rights stands in stark contrast to the record-based nature of Appellees' collateral estoppel argument, which, as explained above, may not be raised for the first time on appeal. It is well-established that the applicability of collateral estoppel depends on the facts and circumstances of each case. *See Ashe v. Swenson*, 397 U.S. 436, 444 (1970). *See also Af-Cap Inc. v. Chevron Overseas (Congo) Ltd.*, 475 F.3d 1080, 1086 (9th Cir. 2007) (noting that issue preclusion is mainly applied to issues of fact). *Cf. In re Sprico, Inc.*, 221 B.R. 361, 368 (W.D. Pa. 1998); *United States v. Bevel*, 558 F.Supp. 95, 97 (N.D. Ga. 1983).

that "[i]t would be unfair to surprise litigants on appeal by final decision of an issue on which they had no opportunity to introduce evidence." *United States v. Hawkins*, 249 F.3d 867, 872 (9th Cir. 2001) (citation omitted). Thus, "[w]hen the issue conceded or neglected in the trial court is purely one of law and either does not affect or rely upon the factual record developed by the parties or the pertinent record has been fully developed, the court of appeals may consent to consider it." *United States v. Patrin*, 575 F.2d 708, 712 (9th Cir. 1978) (internal citations omitted). *See also United States v. Thornburg*, 82 F.3d 886, 890 (9th Cir. 1996). The issue regarding a sovereign's power to condemn property beyond its territorial limits thus presents a purely legal issue here, especially given that it does not depend on any sort of supplementation of the factual record. As explained in *Silveira v. Apfel*, 204 F.3d 1257, 1260 n.8 (9th Cir. 2000), where the Court considered an issue raised for the first time on appeal, "[t]his is not a case in which the claimant rests her arguments on additional *evidence* presented for the first time on appeal, thus depriving [the other side] of an opportunity to weigh and evaluate that evidence … This is a pure question of law."

Here, it is undisputed that Nevada is the situs of GCSD's intangible property. As such, this argument can be adjudicated on the basis of the existing factual record alone, and is therefore properly raised on appeal. *See Federal Ins. Co. v. Union Pac. R.R. Co.*, 651 F.3d 1175, 1178 (9th Cir. 2011) (issue raised for

first time on appeal was purely legal – and therefore considered by the Appeals Court – where the issue "turns on two issues we can resolve based on the undisputed facts."); *see also Ruiz v. Affinity Logistics Corp.*, 667 F.3d 1318, 1322 (9th Cir. 2012) (noting that an appellate court may consider issues of law not presented to the district court); *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 487, 128 S. Ct. 2605, 2618 (2008) (declining to adopt a rule that would limit federal appellate courts' discretion to consider issues of law not raised in at the district court level).

II. THE TRIBE HAS NO POWER TO TAKE PROPERTY LOCATED BEYOND ITS TERRITORIAL BOUNDARIES, AND GCSD'S INTANGIBLE PROPERTY IS LOCATED IN NEVADA AS A MATTER OF LAW. THEREFORE, ONLY NEVADA, AND NOT TRIBE, COULD EVER CONDEMN GCSD'S INTANGIBLE PROPERTY.

A sovereign's power to condemn property extends only as far as its borders, and property to be taken by a sovereign must be taken within its jurisdictional boundaries. *Mayor & City Council of Baltimore v. Baltimore Football Club Inc*., 624 F. Supp. 278, 284 (D. Md. 1985); Nichols on Eminent Domain (3d ed. 1980), §§ 2.07, 2.12 . GCSD is and always has been located in Nevada. [III EOR 0437-0443]. Its offices are Nevada, its headquarters are in Nevada, its principal place of business is in Nevada, and its owners are domiciled in Nevada. Under the long-established maxim that the location of intangible personal property follows the owner (*mobilia sequuntur personam*, hereinafter the "mobilia doctrine"), GCSD's

intangible contract rights and its AAA arbitration claims lie in Nevada, beyond the reach of any Tribal eminent domain power. *See Blodgett v. Silberman*, 277 U.S. 1, 9-10 (1928); *Texas v. New Jersey*, 379 U.S. 674, 681-82, n.10 (1965).

In their Answering Brief, Appellees contend that the Tribe has the power to condemn GCSD's intangible contract rights because the mobilia doctrine has somehow been rejected and replaced by a form of minimum contacts analysis, or a "common sense approach." *See generally*, Appellees' Answering Brief at 51-56. Thus, Appellees maintain that because GCSD performed business operations on the Hualapai Reservation, the Tribe has the ability to take GCSD's intangible property. *See generally, id.* This argument has been expressly rejected by the Supreme Court in *Texas v. New Jersey*, where the Court disavowed the minimum contacts test, explaining that, while a party may have substantial contacts in more than one state, the same property cannot be taken by escheat in more than one state. *Texas*, 379 U.S. at 678-79. In so doing, the Court adopted a mobilia doctrine test, using the last known address of the owner to determine which state had the right to take the owner's property in escheat.

Further, the three cases Appellees cite in ostensible support of their "minimum contacts" argument – *Curry*, 307 U.S. 357 (1939); *City of Oakland*, 646 P.2d 835 (Cal. 1982); and *Baltimore*, 624 F. Supp. 278 (D. Md. 1986) – in fact reject the minimum contacts analysis and embrace the mobilia doctrine.

1. *Curry v. McCanless*

By no means does *Curry* relieve the Tribe of the rule that it can only take property located within its territorial boundaries, or that the location of intangibles is other than the location of its owner. In *Curry*, the issue was whether Alabama and Tennessee could each constitutionally impose taxes upon the transfer intangibles, the life estate of which was held by the decedent beneficiary, with the remaining interests held in trust by a trustee. *Curry*, 307 U.S. at 360.

The Court determined that it had previously recognized separate ownership interests held by both beneficiaries and trustees for tax purposes, and it examined the Fourteenth Amendment to determine whether there was a constitutional ban precluding the taxation of intangible property in more than one state. *Id*. at 363. The Court concluded there was no such prohibition. *Id*. The Court did not reject the principle that intangibles are located at the domicile of their owner, but in fact confirmed it as a basis for taxation by a state. *See id.* at 372-73. The Court concluded that when there were multiple separate interests one could not always use the mobilia doctrine to establish a single location for those interests, but rather one had to look at the domicile of the title holder of each interest to determine the location of their respective intangible assets. *See id*.

2. *City of Oakland v. Oakland Raiders*

In *Oakland*, the Raider's sought summary judgment on the City of Oakland's eminent domain claim contending that because the city was statutorily barred from condemning property not located within its territorial limits, the city could not acquire the Raider's intangible partnership rights. *Oakland*, 646 P.2d at 844. The California Supreme Court suggested several possible non-exclusive factors to determine where the intangible property at issue was located, including the principal place of business test, the location of the Raider's home games, and the location of the Raider's tangible property, under which it concluded that the location of the intangibles appeared to have been met on the record before them. There is nothing in the decision to indicate that there was any evidence before the *Oakland* court that the Franchise's owners were domiciled anywhere other than in Oakland. Although it returned the case to the lower court to resolve outstanding issues of fact, the court's analysis appears to adopt the mobilia doctrine by examining evidence relating to where the club was located.

3. *Mayor & City of Baltimore v. Baltimore Football Club*

It is incomprehensible that Appellees rely on *Baltimore* to refute the use of the mobilia doctrine. In *Baltimore*, the United States District Court for the District of Maryland directly adopted the rule that a sovereign cannot take property located

beyond its borders. *Baltimore*, 624 F.Supp. at 284 (citing Nichols on Eminent Domain, (3d ed. 1980), § 2.12). The *Baltimore* court resoundingly rejected the minimum contacts analysis, stating:

> The adoption of the City's "minimum contacts" analysis would lead to an untenable precedent. Any state whose courts could assert jurisdiction over the parties could condemn the property in question . . . The Court finds the City's legal theory totally unacceptable and inapplicable. Such a rule 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.

Id. at 284-85.

The court in *Baltimore* ultimately used the mobilia doctrine in determining that whether one followed the Oakland factors for determining the situs of a franchise, the U.S. Supreme Court escheat precedents, or any other factors within the decision, that the situs of the franchise was not in Maryland where the Club operated its football franchise for years, but rather at the location of the franchise owner outside of Maryland. Therefore, the City of Baltimore could not condemn the football club's intangible property. *Id*. at 287.

Intangibles are located where their owners are located, and a sovereign cannot take property outside its territorial boundaries. GCSD is located in Nevada by any applicable test. The Tribe simply does not have the power to take GCSD's intangible property, which, by law, is not located on the Hualapai Reservation.

III. APPELLEES FAIL TO JUSTIFY THE WHOLESALE EXPANSION OF *WATER WHEEL* THEY SEEK TO ELEVATE.

The District Court's conclusion that the Tribal Court could exercise jurisdiction over GCSD was based exclusively on the District Court's misinterpretation of the scope of the *Water Wheel*[3] decision. Specifically, the District Court concluded that *Water Wheel* – which held that a tribe's power to exclude conferred jurisdiction over a non-Indian over-staying its lease on tribal land – vitiates *Montana*'s main rule because the Skywalk is located on federal trust land, which implicates the Tribe's power physically to exclude non-Indians from that land. As GCSD explained at length in its Opening Brief, the *Water Wheel* decision cannot be expanded to apply to this action for two fundamental reasons: (1) the backbone of the *Water Wheel* decision is based solely on issues concerning contracts that encumber land; and (2) the reasoning of the *Water Wheel* decision is limited to contracts between non-Indians and Tribes themselves, and not to contracts between corporate entities. Both of these differences are critical to understanding the District Court's flawed construction of *Water Wheel* because they each implicate the power to exclude in a manner that is simply inapplicable to the present circumstances.

[3] *Water Wheel Camp Recreational Area, Inc. v. LaRance*, 642 F.3d 802 (9th Cir. 2011).

Appellees offer no colorable grounds justifying the District Court's expansion of *Water Wheel* to a contract that does not encumber land entered into between corporate entities. Instead, Appellees attempt to fit this action into the *Water Wheel* paradigm by mischaracterizing the 2003 Agreement as one that burdens land, thereby conceding the inapplicability of *Water Wheel* to agreements governing intangible rights. Appellees similarly argue that *Water Wheel* controls this action because the Tribe did not exercise its power to exclude upon forming SNW, and, therefore, the Tribe's retained power to exclude GCSD from its land conferred subject-matter jurisdiction on the Tribal Court. As set forth below, this argument also fails because the formation of SNW "conditioned entry" to the Tribe's land, thereby surrendering the Tribe's sovereign immunity per the terms of the Agreement. Thus, although *Water Wheel* may be controlling in cases addressing contracts encumbering reservation land and where a tribe has retained its power to exclude, its holding cannot be enlarged in the manner urged by the District Court and Appellees.

A. Appellees' Rhetoric Does Not Alter That The 2003 Agreement Is A Contract For Management Services.

With a wide brush, Appellees make the sweeping assertion that *Water Wheel* "provides the correct test to apply in cases involving a tribe's civil jurisdiction over a non-Indian's conduct, activities and property interests on reservation land." (Answering Brief at 23-24). In support of this argument, Appellees attempt to

downplay the fact that the 2003 Agreement – as a contract for management services – does not fall within the purview of *Water Wheel*, on the grounds that the exercise of eminent domain is a function of the Tribe's power to "manage its land," which is "no different than the parties in *Water Wheel*."

Ironically, however, Appellees' eminent domain argument confirms that a contract must encumber land to fit within *Water Wheel*'s parameters, and characterizes – as it must – the 2003 Agreement as one burdening Reservation land. In this regard, Appellees argue that GCSD's alleged breach of the Agreement interferes with the Tribe's management of its land, in an unsuccessful attempt to draw parallels between this action and the physical trespass at issue in *Water Wheel*. Appellees' efforts to portray the Agreement as one impacting the Tribe's ability to manage its land are telling, as they betray an awareness that contracts for services do not implicate a Tribe's power to exclude non-Indians from Indian territory, which was the linchpin of the *Water Wheel* decision.

Appellees' efforts notwithstanding, the 2003 Agreement is a management services contract governing GCSD's intangible right to build and operate the Skywalk and to share in its profits. The service-based nature of the Agreement is confirmed by the fact that, unlike the site lease at issue in *Water Wheel*, the 2003 Agreement did not require approval of the Department of Indian Affairs. Indeed, the Tribe's "condemnation" consists of a purported taking of GCSD's *contractual*

rights, and cannot be likened to a Tribe's right to exclude a non-Indian over-staying its lease and physically trespassing on Indian territory. The Tribe's status as landowner, therefore, is not "enough to support regulatory jurisdiction without considering *Montana*." *Water Wheel*, 642 F.3d at 814.

B. The Power To Exclude Upon Which *Water Wheel* Is Based Does Not Create Tribal Jurisdiction Because The Tribe Exercised That Power Upon the Formation of SNW.

Appellees likewise argue that the Tribe's formation of SNW to enter into the 2003 Agreement with GCSD did not implicate its power to exclude. In support of this proposition, Appellees argue that the Tribe's power of eminent domain can never be conclusively exercised, by forming a corporation to engage in business relations with non-Indians or otherwise, because it is a necessary attribute of tribal sovereignty. If accepted, this position would render illusory any contract entered into between a non-Indian and a tribally-chartered corporation, and disregards controlling Supreme Court precedent. Appellees' argument is a dangerous one indeed, as it would support any tribal corporation's exercise of eminent domain to "take" the rights of a non-Indian with whom it is contracting, including the non-Indian's right to enforce the contract's dispute-resolution provision, a result with staggering implications to the future of commerce in Indian Country.

By choosing to form the SNW, the Tribe exercised its power to exclude and condition entry upon its lands. This power is not, as Appellees argue, ongoing and

subject to tribal whim. "When 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 so long as the non-Indian complies with the initial conditions of entry." *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 144 (1982) (emphasis in original). Tribes that have already exercised their right to exclude, and inverse right to include, by conditioning access through a corporate entity "retain[] no gatekeeping right." *Strate v. A-1 Contractors*, 520 U.S. 438, 455-56 (1997). Appellees' efforts to denigrate the *Strate/Merrion* line of authority threaten the viability of all contracts entered into between tribal corporations and non-Indians.

The Tribe could have entered into the 2003 Agreement with GCSD itself. It made the calculated decision not to. By instead delegating its authority to SNW to conduct business with GCSD, the Tribe ceded its right to exclude GCSD and surrendered its sovereign immunity so long as GCSD obeyed the Tribe's laws and honored its obligations under the Agreement. Appellees' statement that "[a]ccording to GCSD, the Tribe would lose all sovereign powers over non-Indians that are engaged in activity on tribal land for all time and all purposes simply by forming a corporation to do business with them" misses the point entirely. Instead, GCSD maintains – rightfully – that a tribe conditions entry upon its initial decision to delegate its power to a corporation, and that, so long as the non-Indian party to the contract honors its contractual obligations, the Tribal government cannot undo

the corporation's original terms of entry through a retroactive exercise of eminent domain.

IV. THE *MONTANA* EXCEPTIONS CANNOT BE DISTORTED TO CREATE TRIBAL COURT JURISDICTION HERE.

In furtherance of their attempt to keep this matter out of court, Appellees assert that narrow exceptions permitting tribal jurisdiction over non-Indians articulated in *Montana v. United States*, 450 U.S. 544 (1981) should be expanded to create tribal jurisdiction here. This ignores controlling Supreme Court precedent curtailing the applicability of those exceptions and disregards the presumption against tribal jurisdiction over non-members.

It is presumed that tribal courts lack jurisdiction over non-Indians. *Rolling Frito-Lay Sales LP v. Stover*, 2012 U.S. Dist. LEXIS 9555, *9 (D. Ariz. Jan. 26, 2012). Indeed, tribal efforts to regulate nonmembers are "presumptively invalid." *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 330 (2008) (quoting *Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 659 (2001)). This is so because while tribes have authority to exercise civil jurisdiction over their own members, "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." *Montana*, 450 U.S. at 564 (citations omitted). Generally, therefore, "the inherent sovereign powers of an Indian tribe do not extend to the activities of

nonmembers of the tribe." *Id*. at 565. Indeed, to this day the Supreme Court has "never held that a tribal court had jurisdiction over a non-member defendant." *Nevada v. Hicks*, 533 U.S. 353, 358 n.2 (2001).

Montana sets forth two narrowly-circumscribed exceptions to the general rule against tribal jurisdiction. 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 dealings, contracts, leases, or other arrangements." Second, "[a] tribe may … exercise civil authority over the 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." *Montana*, 450 U.S. at 565-66. Neither of these exceptions can be stretched to confer tribal jurisdiction over GCSD's intangible, Nevada-based property rights.

A. The 2003 Agreement Between GCSD and SNW Is Insufficient to Satisfy *Montana*'s "Consensual Relationship" Exception.

Montana's first exception permits an Indian tribe to exercise civil jurisdiction over a non-Indian only where the non-Indian has a consensual relationship with the tribe under which the non-Indian should reasonably expect to be subject to the tribe's jurisdiction. *See Plains Commerce Bank*, 554 U.S. at 338. Two fundamental obstacles preclude the application of this exception. First, GCSD has never been in an expressly consensual relationship with the Tribe.

Significantly, GCSD entered into the 2003 Agreement with SNW – a Tribally-chartered corporation – and not with the Tribe itself. Though Appellees cite to *Stock West, Inc. v. Confederated Tribes of the Colville Reservation*, 873 F.2d 1221 (9th Cir. 1989) as support for the proposition that a contract between a non-member and a Tribally-chartered corporation will satisfy the consensual relationship requirement, that case did not involve *Montana* or the consensual relationship exception and is inapposite to this analysis. There is simply no "consensual relationship" with the Tribe itself or with its members.[4]

GCSD never consented to the Tribe's civil jurisdiction in entering into a contract with a tribally-chartered corporation whose sole remedy was AAA

[4] Appellees' reliance on *Smith v.Salish Kootenai College*, 434 F.3d 1127 (9th Cir. 2006) is also unavailing. Appellees rely on *Salish* to argue that, here, GCSD entered into a consensual relationship with SNW by moving to compel arbitration in Tribal Court. But in *Salish*, consent to tribal court jurisdiction was found because the plaintiff filed suit in the tribal court seeking adjudication on the merits of his claims against a tribally-chartered college. In contrast, GCSD brought an action in the Tribal Court not to adjudicate the claims at issue, but instead to compel arbitration of those claims in a different forum entirely, the American Arbitration Association ("AAA"). Seeking to compel the Tribe to arbitrate the merits of its dispute with GCSD before AAA hardly reflects the requisite "consent" at issue in *Salish*. Indeed, as recognized in *Lanphere v. Wright*, 2010 WL 2790929, *1 (9th Cir. July 13, 2010), *Salish* applies where a party has filed "the[] same claims" in tribal court, and not where the claim filed in tribal court is limited to seeking adjudication of the parties' dispute in a separate, non-Indian forum.

arbitration enforceable in federal court.[5] GCSD could not reasonably have contemplated that entering into the 2003 Agreement would give the Tribe *carte blanche* to exercise jurisdiction over GCSD, especially when the 2003 Agreement says just the opposite. "[I]t is not in for a penny, in for a pound." *Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 656 (2001) (quoting E. Ravenscroft, *The Canterbury Guests; Or A Bargain Broken*, act v, sc. 1)).

B. The Second *Montana* Exception Is Also Inapplicable.

The second *Montana* exception – permitting the exercise of tribal civil jurisdiction over non-Indians where the non-Indian's "conduct" jeopardizes the "political integrity, the economic security, or the health or welfare of the tribe" – is also inapplicable here. *Montana*, 450 U.S. at 566. To be subject to tribal court jurisdiction under this exception, the non-Indian conduct must be sufficiently egregious to "imperil the subsistence" of the tribal community (*Plains Commerce Bank*, 554 U.S. at 341) such that the assertion of tribal jurisdiction would be "necessary to avert catastrophic consequences." *Rolling Frito-Lay*, 2012 U.S. Dist.

[5] Nowhere does the 2003 Agreement indicate that GCSD, as a non-Indian with a non-Indian interest in the 2003 Agreement, could be subject to the regulatory or adjudicatory jurisdiction of the Tribe or the Tribal Court. To the contrary, the parties specifically agreed that "[a]ny controversy, claim or dispute arising out of or related to this Agreement shall be resolved by binding arbitration," and that "[t]he venue and jurisdiction for (x) any litigation under this Agreement and (y) all other civil matters arising out of this Agreement shall be the Federal courts sitting in the State of Arizona."

LEXIS 9555 at *13 (quoting *Plains*, 554 U.S. at 341). Such extreme circumstances are absent here, which Appellees all but concede by characterizing their argument under this exception as merely "colorable."

V. APPELLEES CANNOT EVADE THE BAD FAITH AND FUTILITY EXCEPTIONS TO TRIBAL COURT JURISDICTION.

A. Bad Faith Prompted the Invocation of Tribal Court Jurisdiction.

The Tribe's unlawful seizure of GCSD's property based upon false claims of contractual breaches amounts to textbook bad faith. Appellees attempt to evade this very real evidence of bad faith on the basis that the bad faith exception is limited to bad faith by a tribal court, and not by those in control of the court. Appellees would have the Court adopt a constrained interpretation of the bad faith exception that elevates form over substance, and myopically focuses on one branch of tribal government in isolation, even where that branch is inextricably intertwined with another branch that was unquestionably motivated by bad faith. Although the bad faith exception may be "narrow," it is not blind.

These are extreme circumstances. A communications plan accompanying the passage of the Ordinance confirms that the Council Members enacted the Ordinance with one goal in mind: to "force[] the sale" of GCSD's contractual rights. The Council then orchestrated the seizure of GCSD's property under the Ordinance, and condemned its intangible property and contractual rights and remedies. Such brash tactics would never have been undertaken had the Council

not been confident that it controlled the Tribal Court as well. GCSD agrees with Appellees that, generally, "[a]n allegation that a party acted in bad faith, or even that a party filed a tribal court action in bad faith, does not fatally infect a tribal court's dispensation of justice." But it does here, because there is no separation between the Tribal Court and the Tribal Council.

When, as here, the Tribal Council members control the Tribal court, the bad faith exception cannot, as Appellees contend, artificially focus only on the conduct of the judges themselves, and disregard the intertwining of the Tribal branches of government. Such an interpretation would strip the bad faith exception of any meaningful application given the recognized inter-relation of some Tribal governments. In this regard, Appellees' reliance on *Melby v. Grand Portage Band of Chippewa*, 1998 WL 1769706 (D. Minn. Aug. 13, 1998) and a handful of other cases to support the assertion that the bad faith exception looks no further than the actions of the tribal judiciary is inapposite because none of those cases involved or addressed circumstances where the Tribal Court was acting under the influence of another governmental branch.

Appellees contend that "[t]here is no evidence that the Tribal Council improperly controls the Tribal Court." This statement denigrates the findings of the Myers Report regarding the lack of impartiality of the Hualapai Tribal Court system, and, indeed, mischaracterizes the Report as a whole. The Myers Report

unequivocally concluded that the Hualapai Tribal Council controls the Hualapai Court system. Specifically, *the Hualapai judiciary "is not capable of functioning without control by the Tribal Council."* [EOR III 0567-0673]. In an attempt to trivialize the significance of Joseph Myers' findings, Appellees focus on alleged positives in the Report – such as the chief judge's judicial skills and the Tribal Court's development of relationships and procedures – none of which have any bearing on the Tribal Court's recognized lack of independence. Indeed, Appellees' reliance on one alleged positive – that "the Hualapai Tribal Council understands that it is crucial that its members minimize involvement in cases pending before the tribal court" – acknowledges that the Council members were in fact involved in Tribal Court proceedings, and needed to curtail that involvement. The Myers' Report recommended that the Hualapai integrate the policy of separation of powers between the Tribal Council and judiciary. To date, this has not been done, nor could it be, as the Report concluded that it would take "several generations" before such a policy could successfully separate the Council from the judiciary. The Myers Report also recommended that the Hualapai judiciary adopt a judicial code of ethics. Again, this has not been done. The evidence of the bad faith of the Tribal Council in enacting the Ordinance and seizing GCSD's property, and evidence that the Hualapai judiciary "is not capable of functioning without control by the Tribal Council," require that exhaustion be excused on grounds of bad faith.

B. The Futility Exception Excuses The Exhaustion Requirement Because GCSD Has No Meaningful Avenue To Challenge The Unlawful Assertion of Jurisdiction.

Appellees fare no better in trying to distinguish the present circumstances from those demonstrating futility of exhaustion. It is well established that the lack of a meaningful opportunity to challenge a tribal court's jurisdiction excuses the exhaustion requirement. *Krempel v. Prairie Island Indian Community*, 125 F.3d 621, 622 (8th Cir. 1997); *see also Cobell v. Cobell*, 503 F.2d 790, 793-94 (9th Cir. 1974). As GCSD explained in its Opening Brief, futility is a given here because the Ordinance itself prohibits the Tribal Court from hearing a challenge to its jurisdiction, and the Ordinance unequivocally precludes a judge pro tem from considering cases challenging the Ordinance. Appellees counter that these circumstances do not warrant a finding of futility because the exception is "narrow," because there is a "functioning Tribal Court," and because – in violation of the express language of the Ordinance – a judge pro tem has been appointed in the Tribal Court action. None of these arguments saves these circumstances from the futility exception.

First, Appellees' arguments based on the "narrowness" of the futility exception, and in support of the existence of a "functioning Tribal Court" ascribe a literal meaning to the phrases "access to the Tribal Court" and "functioning Tribal Court." That a Tribal Court physically exists, that GCSD has not been prevented

from entering the building, and that the Tribal Court has held hearings do not obviate a finding of futility because the Ordinance does not permit the Tribal Court to provide relief – meaningful or otherwise – to a party challenging the Tribal Court's jurisdiction.

On a related note, Appellees' argument that the Tribal Court has provided meaningful relief to GCSD because it has appointed a judge pro tem and GCSD has challenged the Tribal Court's jurisdiction in that forum is again unavailing in light of the express dictates of the Ordinance. Significantly, Appellees do not dispute that the Ordinance forbids the very proceedings taking place in Tribal Court, and that any decision rendered by the judge pro tem will be by its very nature *ultra vires*. For this reason, there exists a significant risk that decisions issued by the judge pro tem will be invalidated based on the judge's lack of authority to preside. "That remedies are available in theory, but not in fact, is not synonymous with failure to exhaust remedies." *Cobell*, 503 F.2d at 794. Certainly there can be no more clear-cut evidence of futility than a tribal ordinance expressly preventing the Tribal Court from hearing a challenge to its jurisdiction.

CONCLUSION

For the foregoing reasons, the decision of the District Court should be reversed.

Respectfully submitted this 2nd day of July 2012,

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CERTIFICATE OF SERVICE

This is to certify that on July 2, 2012, a true and correct copy of the foregoing Reply Brief of Appellant Grand Canyon Skywalk Development, LLC, was filed and served using the appellate CM/ECF system.

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