No. 12-15634

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

GRAND CANYON SKYWALK DEVELOPMENT, LLC,
Plaintiff-Appellant,

v.

'SA' NYU WA; GRAND CANYON RESORT CORPORATION; RICHARD WALEMA, 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

Appeal from the United States District Court for the District of Arizona
District Court No. 3:12-cv-08030-DGC
The Hon. David G. Campbell, District Judge

APPELLEES' ANSWERING BRIEF

Glen Hallman (005888)
Jeffrey D. Gross (011510)
Paul K. Charlton (012449)
Christopher W. Thompson (026384)
GALLAGHER & KENNEDY, P.A.
2575 East Camelback Road
Phoenix, Arizona 85016-9225
(602) 530-8000

Attorneys for Defendants/Appellees

CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1, Appellees 'Sa' Nyu Wa and Grand Canyon Resort Corporation, through undersigned counsel, state that they are corporations chartered by the Hualapai Tribe, that they have no parent corporation but are wholly-owned by the Hualapai Tribe, and that no publicly held corporation owns 10 percent or more of their stock.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

INTRODUCTION

Appellant's ("GCSD") invective-laced rants against Appellees (collectively "Tribe") not only are completely unsupportable by the record or the facts, but also are beside the point. This appeal is not about whether the Tribe treated GCSD poorly (it did not) or whether the Tribe's condemnation of GCSD's property interest is valid (it is). The narrow appellate issue is which tribunal should initially decide GCSD's objections to the Tribe's condemnation action – the Federal District Court or the Hualapai Tribal Court.

The United States Supreme Court has developed clear rules, which this Court has followed faithfully, firmly establishing a preference for tribal courts, as judicial arms of sovereign nations, to determine their own jurisdiction and to resolve the merits of cases involving management of tribal land or tribal resources. The District Court correctly ruled that this is such a case. GCSD entered into an agreement with a tribally-chartered corporation for a license to build and operate tribally-owned facilities on tribal land, to employ tribal members, and to generate revenue for the Tribe. GCSD agreed to comply with tribal ordinances, and the agreement was governed by tribal and Arizona law. After GCSD refused to finish the facilities and ignored the Tribe's requests for financial information, the Tribe filed an action in Hualapai Tribal Court, lawfully exercising its sovereign power of eminent domain and rights under tribal law to condemn GCSD's contract interest

for a public use. The Tribal Court is now adjudicating GCSD's right to just compensation. Under these facts, the Tribal Court is the proper forum for GCSD's challenges to the Tribe's condemnation action.

STATEMENT OF ISSUES

1. Is GCSD collaterally estopped from raising issues that were litigated in *Grand Canyon Skywalk Development v. Vaughn, et al.*, CV11-8048-PCT-DGC?

2. May GCSD raise new arguments that were not considered by the District Court as to the Tribe's jurisdiction over GCSD's property interest?

3. Did the District Court properly deny GCSD's request for injunctive relief after determining that GCSD had to exhaust its tribal court remedies?

4. Did the District Court correctly rule that the "futility" exception to exhaustion does not apply because GCSD failed to establish that it would be futile to seek relief in the Tribal Court?

5. Did the District Court correctly determine that the "bad faith" assertion of jurisdiction exception to exhaustion does not apply because there was no evidence that the Tribal Court asserted jurisdiction in bad faith?

6. If GCSD could challenge the Tribe's jurisdiction over GCSD's property interest for the first time on appeal, does the Tribal Court have jurisdiction over GCSD's agreement with a wholly-owned tribal corporation, governed by tribal law, to operate a tribal-owned facilities on tribal land?

STATEMENT OF THE CASE

I. INTRODUCTION.

This appeal involves the second of two related cases. Both disputes involve the validity of an eminent domain ordinance ("Ordinance") adopted by the Tribe and the Tribe's authority to condemn GCSD's rights in its agreement with 'Sa' Nyu Wa, Inc. ("SNW"), a tribally-chartered corporation, giving GCSD a license to build and operate the Grand Canyon Skywalk (the "Skywalk"), which is owned by the Tribe and located on the Hualapai Reservation. The District Court never reached the merits in either case, instead finding that the Hualapai Tribal Court ("Tribal Court") should be given the first opportunity to rule on GCSD's objections to the condemnation.

II. *GCSD I.*

In 2003, GCSD entered into an agreement with SNW for a license to build and operate a glass bridge known as the Skywalk, which is suspended over the Grand Canyon on the Hualapai Reservation. [Vol. III, Appellant's Excerpts of Record ("EOR") 4-2]. On April 4, 2011, the Hualapai Tribal Council adopted the Ordinance, which provided a process for the exercise of the Tribe's sovereign power of eminent domain. [IV EOR 4-3]. On March 30, 2011, GCSD filed a Complaint and a Motion for Preliminary Injunction in Arizona District Court to enjoin the Tribal Council from using the yet-to-be-adopted Ordinance to condemn

GCSD's interest in the Skywalk. [Vol. II, Appellees' Supplemental Excerpts of Record ("Supp. EOR") 4-5 (Complaint, *Grand Canyon Skywalk Development v. Vaughn, et al.*, CV11-8048-PCT-DGC ("*GCSD I*")), Doc. 1].

On April 12, 2011, the Court denied GCSD's request for a temporary restraining order. [IV Supp. EOR at Supp. EOR000646 (Docket Entry 18, text minute entry)]. On April 27, 2011, the Tribe filed a Motion to Stay and Alternatively to Dismiss, arguing that GCSD was required to bring its challenge in Tribal Court. [IV Supp. EOR *GCSD I*-25 at SEOR000608-613]. GCSD responded by arguing that it was "plain" that the Tribal Court lacked jurisdiction. [IV Supp. EOR *GCSD I*-26 at SEOR000431].

On June 23, 2011, the District Court ruled that in light of this Court's decision in *Water Wheel Camp Recreational Area, Inc. v. LaRance*, 642 F.3d 802 (9th Cir. 2011), a tribal court has presumptive jurisdiction over non-Indians conducting business on tribal land. [III Supp. EOR *GCSD I*-33 at SEOR000424-426]. Noting that the construction and operation of the Skywalk occurred on tribal land, the District Court concluded that the Tribal Court's lack of jurisdiction over GCSD's claim was not "plain," but that jurisdiction appeared likely. [*Id.* at SEOR000425]. ("The Hualapai tribal court would appear to have jurisdiction over Plaintiff for activities conducted on tribal land, including the construction and operation of the skywalk [and] Plaintiff's legal challenge to an ordinance passed by

the Hualapai Tribal Council, on tribal land, to authorize condemnation of Plaintiff's interests in the construction and operation of the skywalk on tribal land"). The District Court thus held that GCSD must exhaust its remedies in Tribal Court. [*Id.* at SEOR000426]. ("Plaintiff's claim in this case challenges tribal authority to enact and enforce a tribal condemnation ordinance, a claim central to tribal self-government, and the tribal court must be given an opportunity to both decide whether it has jurisdiction and to interpret the ordinance"). Because the Tribe had not condemned GCSD's property, the Court dismissed rather than stayed the action. [*Id.* at SEOR000427]. Judgment was entered on June 23, 2011. [III Supp. EOR *GCSD I*-34].

On June 27, 2011, GCSD filed a Motion for Reconsideration arguing, *inter alia*, that the court misapplied *Water Wheel* because that case concerned a tribe's action against non-Indian trespassers, while GCSD's case concerned the Tribe's condemnation of a non-Indian's contract rights. [III Supp. EOR *GCSD I*-35 at SEOR000331-334]. After ordering additional briefing, the District Court affirmed its ruling and again rejected GCSD's argument that the Tribal Court lacked jurisdiction. [III Supp. EOR *GCSD I*-39]. GCSD did not appeal.

III. ***GCSD II.***

On February 7, 2012, the Tribe filed an eminent domain action in Tribal Court to condemn GCSD's interest in the 2003 Agreement, *i.e.* its license to

operate the Skywalk on the Hualapai Reservation. Rather than seek relief in Tribal Court, on February 16, 2012, GCSD filed a second Complaint and a Motion for Temporary Restraining Order ("TRO Motion") in the District Court to enjoin the Tribe, Tribal Council members and Tribal Court judges from continuing eminent domain proceedings. *Grand Canyon Skywalk Development, LLC v. 'Sa' Nyu Wa, et al.* ("*GCSD II*") [IV EOR 1 at EOR0693]. In its TRO Motion, GCSD again argued that the Tribal Court lacks jurisdiction. [III EOR at 0324-0330].

The Tribe noted in its opposition to the TRO Motion that the District Court had dismissed *GCSD I* on exhaustion grounds. [II Supp. EOR 18 at SEOR000204-205]. In its ruling dated February 28, 2012, the District Court acknowledged the similarity to *GCSD I* and only ruled on three of GCSD's arguments. [I EOR 32 at EOR0036-0037]. First, the District Court considered whether it was "plain" that the Tribe lacked jurisdiction over GCSD. [*Id.* at EOR0036-0038]. Since the court had addressed this issue at length in *GCSD I*, the court limited its analysis to whether *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982), made *Water Wheel* inapplicable. [*Id.* at EOR0037]. The court held that *Merrion* did not support GCSD's argument. *Id.*

Second, the District Court considered whether the "futility" exception to exhaustion applied. The court held that the exception only applied in cases where

a functioning tribal court does not exist or where the tribal court refused access. The court noted that such was not the case here. [*Id.* at EOR0038-0039].

Third, after ordering additional briefing, the District Court considered whether the "bad faith" exception to exhaustion applied. In an Order dated March 19, 2012, the court held that the bad faith exception is limited to cases involving bad faith assertion of jurisdiction by a tribal court, not bad faith by a tribe. [I EOR 54 at EOR0029]. Since GCSD had not alleged acts of bad faith in or by the Tribal Court, the District Court concluded that the bad faith exception did not apply, denied GCSD relief and stayed the case pending resolution in Tribal Court. [*Id.* at EOR0029-34].

GCSD filed a Notice of Appeal on March 22, 2012. Doc. 55.

STATEMENT OF FACTS

I. THE 2003 AGREEMENT AND GCSD'S FAILURE TO PERFORM.

In 2003, GCSD entered into a Development and Management Agreement ("2003 Agreement") with SNW, a corporation chartered and wholly-owned by the Tribe and located on the Hualapai Reservation. [III EOR 4-2]. The Skywalk is on reservation land, and all improvements (including the glass bridge, buildings, furniture, equipment, supplies, inventory, and all other items of real, personal, or intangible property used in connection with the development and operation of the

Skywalk) belong exclusively to the Tribe.[1] GCSD acknowledged in the 2003 Agreement that SNW was an affiliate of the Tribe, that SNW and the Tribe were "related parties," and that the Tribe was SNW's sole shareholder. [III EOR0347-0350 at §§ 1.1 (definitions of "affiliate" and "related parties") and EOR0387 at 14.1(b).

The 2003 Agreement gave GCSD a license to build and operate the Skywalk project and a right to be paid a management fee. [III EOR0360-0367 at §§ 2.3, 2.9, Art. 3]. GCSD agreed to construct the Skywalk and other project improvements, such as a visitor's center, coffee shop, gift shop, amphitheater, restrooms, infrastructure and water and wastewater systems, on the Hualapai Reservation. [III EOR0351-0366 at Art. 2; III EOR0394 at Ex. B]. GCSD also was responsible for pricing tickets and tours (subject to SNW's approval), arranging for utility and other services, performing repairs and maintenance, purchasing inventory, installing furniture and equipment, collecting revenues at point of sale, and hiring and supervising employees. [III EOR0360, 0362 at §§ 2.3, 2.6]. GCSD agreed to perform other duties on the Hualapai Reservation, including shuttling employees

[1] *See* III EOR0347 at Recital A ("The Nation is the owner of the real property"); EOR0379 at § 10.2(d) (intangible property belongs to the Tribe); EOR0360 at § 2.2(s) (ownership of the "Project" shall remain in the Tribe throughout the contract); EOR0350 at Article 1.1 ("Project" means the Project Improvements, the site, all furniture and equipment, inventories, all other [property used in connection with the Project]").

and busing tourists to the Skywalk. [III EOR0383 at § 13.4].

The 2003 Agreement was governed by Hualapai and, with certain exceptions, Arizona law. [III EOR0388 at § 15.4(b)]. GCSD accepted its license responsibilities with the understanding that it was required to comply with the Tribe's laws, ordinances, rules, and regulations. *See* [III EOR0351 at § 2.1] ("[GCSD] agrees to develop, supervise, manage, and operate the Project . . . in accordance . . . and compliance with all . . . Nation . . . laws, ordinances, rules, and regulation . . . "). GCSD also agreed that the subject matter of the 2003 Agreement was subject to condemnation by "any competent authority," which would include the Tribe, and that its only recourse would be to seek compensation for loss of its rights. [III EOR0377 at § 9.2].

II. GCSD'S ATTEMPTS TO COMPEL SNW TO ARBITRATION.

In the 2003 Agreement, SNW consented to a limited waiver of its sovereign immunity for the sole purpose of arbitrating disputes under the terms of Section 15.4 of the 2003 Agreement. Section 15.4(d) specified that SNW's waiver of sovereign immunity and consent to arbitration was limited to an action "in a federal court of competent jurisdiction in Arizona," *i.e.* Arizona District Court, to compel arbitration or to enforce an arbitration decision. [III EOR0389].

Rather than seek an order in Arizona District Court, on February 25, 2011, GCSD filed a Complaint in the Tribal Court to compel SNW to arbitrate. [II Supp.

EOR 1-1]. SNW filed a Motion to Dismiss on the grounds that SNW had not waived its sovereign immunity for actions in the Tribal Court. [I Supp. EOR 37-5 at SEOR000044-50]. The Tribal Court granted SNW's Motion to Dismiss on sovereign immunity grounds and ruled that GCSD "may seek resolution in federal court pursuant to § 15.4 of the [2003] Agreement." [I Supp. EOR 37-5 at SEOR000043].

Yet GCSD still refused to seek resolution in federal court. On August 11, 2011, GCSD filed an Arbitration Complaint directly with the American Arbitration Association. SNW filed an Answer to the Arbitration Complaint under protest, and included a counterclaim for fraud, accounting and discharge of the parties' rights and duties under the 2003 Agreement, including discharge of any obligation for SNW to compensate GCSD. [I Supp. 35 at EOR000128-190].

III. THE TRIBE ADOPTS AN EMINENT DOMAIN ORDINANCE PATTERNED AFTER ARIZONA AND FEDERAL MODELS.

On April 4, 2011, the Tribal Council adopted the Ordinance to establish procedures and requirements for the exercise of the Tribe's inherent power of eminent domain. [IV EOR 4-3]. Under the Ordinance, a taking is initiated by filing a complaint for condemnation in Tribal Court. [IV EOR 4-3 at EOR0678, Ordinance § 2.16(F)(1)]. A declaration of taking may be filed with the court at or any time after filing the complaint. *Id.* at EOR0678, at §2.16(F)(2). The declaration must contain a statement of public use, a description of the property, a

statement that the estate or interest in the property is taken, and an estimate of just compensation. *Id.* at EOR0679, at §2.16(F)(3). The Tribe may, but is not required, to post a bond in the amount of the estimated just compensation. [*Id.* at EOR0679, at §2.16(F)(5)].

Defeasible title to the property vests in the Tribe when the declaration of taking is filed. *Id.* at §2.16(F)(4) If the property is an intangible such as a contract, the Tribe becomes the party "in full place and stead of the defendant, to the full extent as if the Tribe and not the defendant were the original signator or party thereto, and the defendant shall no longer be a party thereto." [*Id.* at §2.16(F)(4)(a)]. The defendant's right to just compensation vests upon filing the declaration of taking. [*Id.* at §2.16(F)(4)]. The defendant has ten days to file a motion to dismiss challenging the taking as not being for a public use. [*Id.* at EOR0679 at §2.16(F)(6)]. If the Tribal Court determines that the taking is for a public use, absolute title vests in the Tribe, subject to payment of just compensation. [*Id.* at §2.16(F)(6)(e)].

Just compensation is determined by the Tribal Court in accordance with the process outlined in § 2.16(L). [III EOR at EOR0682 at §2.16(L)]. If the Tribe fails to pay just compensation within 180 days after the date of the award, title reverts back to the owner. [III EOR at EOR0683 at § 2.16(N)]. The Tribe may be granted extensions to pay just compensation, but only "for good cause shown." *Id.*

IV. THE TRIBE CONDEMNS GCSD'S INTEREST IN THE 2003 AGREEMENT.

Even before adoption of the Ordinance, GCSD filed the Complaint in *GCSD I*, and the relationship between the parties continued to deteriorate. Completion of the facilities that GCSD was obligated to build remained in indefinite suspension, with no completion date in sight. [III EOR 4-6 at EOR0418; I Supp. EOR at SEOR000131-136]. Instead of approaching the Skywalk through a completed visitor's center, tourists walked around the empty building onto a temporary wooden walkway. Instead of buying coffee and snacks at the promised indoor coffee shop, visitors stood outside in the elements to eat food purchased at a trailer or a hastily-built, flimsy out-building. [IV Supp. EOR *GCSD I*-25 at SEOR000618-627]. Instead of using the contracted-for indoor restrooms, guests were forced to use outdoor port-a-pottys. [*Id.* at SEOR000627].

Despite the Tribe's vigorous attempts to negotiate a resolution, GCSD still refused to take steps toward completion of the Skywalk facilities and initiated unauthorized arbitration against SNW. In the meantime, GCSD continued to stonewall the Tribe's request for financial and accounting records, as it had done throughout the parties' relationship. [I Supp. EOR at SEOR000155-160].

For these and other reasons, on February 7, 2012, the Tribe's legislative branch, the Tribal Council, passed Resolution No. 15-2012 to condemn all of GCSD's interest in the 2003 Agreement, including the license to manage and

operate the Skywalk on tribal land. [III EOR 4-6 at EOR0418-0420]. The Tribal Council found that GCSD's actions and its failures to complete the Skywalk facilities and account for revenues had damaged unique and culturally significant tribal land, the reputation and goodwill of the Tribe and its people, and the Tribe's economic prospects with respect to its limited natural resources. [*Id.* at EOR0418-0419]. The Tribal Council further found the operation of the Skywalk and the protection of its land and resources to be a public use and acquisition of GCSD's interest in the 2003 Agreement to be necessary to carry out a public purpose. [*Id.* at EOR0420].

V. THE TRIBAL COURT EMINENT DOMAIN ACTION.

On February 8, 2012, the Tribe filed an action in the Tribal Court to effectuate the condemnation, to determine just compensation, and to afford GCSD due process. Also on February 8, 2012, the Tribe filed a Declaration of Taking in the Tribal Court to take possession of GCSD's interests in the 2003 Agreement. [III EOR 4-6 at EOR0431-0434]. GCSD did not file a motion to dismiss within 10 days challenging public use.

The legal and practical effects of the condemnation were that the Tribe stepped into GCSD's shoes under the 2003 Agreement, so the arbitration over the parties' compliance with the 2003 Agreement became moot. The Tribe also succeeded to GCSD's rights and obligations to manage and operate the Skywalk.

On February 8 and 9, 2012, the Tribal Court issued two temporary restraining orders ("TROs"), enjoining GCSD from removing or damaging any property that was located at the Skywalk and that was subject to the 2003 Agreement. [III EOR 4-6 at EOR0422-0427]. Since all property at the Skywalk that was subject to the 2003 Agreement is owned by the Tribe, the TROs only enjoined GCSD from removing the Tribe's property.

On February 17, 2012, GCSD filed an Opposition to Plaintiff's Application for Temporary Restraining Order and Declaration of Taking ("Opposition") in Tribal Court, challenging the Tribe's jurisdiction over GCSD and the validity of the Ordinance and requesting disqualification of Tribal Court judges. [Opposition, attached as Exhibit A to Appellees' Motion to Take Judicial Notice of Hualapai Tribal Court Record ("Motion to Take Judicial Notice"), Doc. 16 at 6]. On February 17, 2012, the Tribal Court held a hearing on the TROs, attended by GCSD's counsel. The Tribal Court continued the TROs in effect, and recused the Chief Judge and Associate Judge (the only two sitting judges) "to preserve the independence and integrity of the judiciary." [II EOR 37-5 at EOR0292-0293]. The Tribal Court also invalidated § 2.16(K) of the Ordinance prohibiting a judge *pro tem* from hearing condemnation cases and stated that a judge *pro tem* would be appointed. *Id.*

On April 2, 2012, after receiving an extension from the Tribal Court to file a response until the District Court ruled on whether the Tribal Court had jurisdiction, the Tribe filed its response to the Opposition. [Hualapai Nation's Response to Respondent's Opposition to Application for Taking, attached as Exhibit 1 to Appellees' Supplemental Motion to Take Judicial Notice of Hualapai Tribal Court Record]. On May 1, 2012, Judge Pro Tem Lawrence King scheduled a hearing on GCSD's Opposition and other matters for May 4, 2012, but the hearing was postponed several times at the parties' requests. [Minute Entry and Order, attached as Exhibit B to Motion to Take Judicial Notice]. The Tribal Court held a hearing on June 1, 2012, and took GCSD's Opposition and other matters under advisement. [Minute Entry and Order, attached as Exhibit H to Motion to Take Judicial Notice].

SUMMARY OF ARGUMENT

The single, dispositive issue in this appeal is whether GCSD must exhaust its challenges to the Tribe's condemnation in the pending Tribal Court eminent domain action. After a straightforward application of this Court's decision in *Water Wheel*, which recognized the strong federal policy allowing tribal courts to determine their own jurisdiction, the District Court ruled on multiple occasions in two cases that GCSD had to exhaust its Tribal Court remedies and that GCSD failed to prove any of the narrow exceptions to the exhaustion requirement applied.

Although GCSD protests that it has been treated unfairly by the Tribe, which the Tribe strongly denies and the record does not support, the merits of GCSD's claims are not before this Court. The only issue raised by this appeal is whether the District Court's rulings that the Tribal Court is the proper forum for GCSD to raise those arguments were legally correct. The District Court's multiple rulings should be upheld, and GCSD should be required to continue to litigate the merits of the Tribe's eminent domain action in the Tribal Court.

ARGUMENT

I. STANDARD OF REVIEW.

This Court applies the same abuse-of-discretion standard to grants or denials of temporary restraining orders as it does to grants or denials of preliminary injunctions. *See, e.g., Johnson v. Couturier*, 572 F.3d 1067, 1078 (9th Cir. 2009). "This review is 'limited and deferential,' and it does not extend to the underlying merits of the case." *Id.* (*quoting Lands Council v. Martin*, 479 F.3d 636, 639 (9th Cir. 2007). "[R]eview is generally limited to whether the district court [1] employed the proper preliminary injunction [or temporary restraining order] standard and [2] whether the court correctly apprehended the underlying legal issues in the case." *Earth Island Inst. v. U.S. Forest Serv.*, 351 F.3d 1291, 1298 (9th Cir. 2003). "As long as the district court got the law right, it will not be reversed simply because the appellate court would have arrived at a different result

if it had applied the law to the facts of the case." *Id.* If "the district court is alleged to have relied on an erroneous legal premise, [the Ninth Circuit] review[s] the underlying issues of law de novo." *Id.*

II. GCSD CANNOT RE-LITIGATE ISSUES DECIDED IN *GCSD I* OR RAISE ARGUMENTS FOR THE FIRST TIME ON APPEAL.

A. GCSD Is Collaterally Estopped From Appealing Issues That Were Litigated In *GCSD I*, Including Application Of *Water Wheel* And The Exhaustion Exception For "Plain" Lack Of Jurisdiction.

Collateral estoppel bars re-litigation of issues adjudicated in an earlier proceeding if: (1) the issue decided in the prior proceeding is identical to the one which is sought to be re-litigated; (2) the first proceeding ended with a final judgment; and (3) the party against whom collateral estoppel is asserted was a party or in privity with a party in the first proceeding. *Offshore Sportswear, Inc. v. Vuarnet Int'l, B.V.*, 114 F.3d 848, 850 (9th Cir. 1997). GCSD was a party in *GCSD I*. Thus, collateral estoppel will apply if requirements one and two are met.

Although this Court has not directly ruled on whether dismissal without prejudice on jurisdictional grounds may be accorded preclusive effect, most circuits recognize that dismissal without prejudice for lack of jurisdiction is preclusive on the jurisdictional issue even if it does not reach the merits of the underlying claim. *See, e.g.*, 18A Wright & Miller, Federal Practice and Procedure § 4436 (2d ed. updated 2012); *Shaw v. Merritt-Chapman & Scott Corp.*, 554 F.2d 786 (6th Cir. 1997); *Hill v. Potter*, 352 F.3d 1142, 1146-47 (7th Cir. 2003). The

Ninth Circuit has accorded preclusive effect to dismissals without prejudice on other procedural grounds. As this Court recognized in *Deutsch v. Flannery*, 823 F.2d 1361 (9th Cir. 1987): "It matters not that the prior action resulted in a dismissal without prejudice so long as the determination being accorded preclusive effect was essential to the dismissal." *Id.* at 1364 (Rule 9(b) dismissal without prejudice precluded plaintiff from re-litigating whether a nearly identical complaint satisfied that rule); *Offshore*, 114 F.3d at 850-51 (dismissal without prejudice arising from adjudication of a forum selection clause had preclusive effect).

The core jurisdictional questions decided in *GCSD I* were identical and essential to jurisdictional issues GCSD raised in *GCSD II*:

- The argument regarding the applicability of *Water Wheel* was the same (*Compare* Motion for Reconsideration in *GCSD I* [III Supp. EOR *GCSD I*-35 at SEOR000331-334] *with* TRO Motion in *GCSD II* [III EOR 4 at EOR0328-0330]); and
- GCSD's "plain" lack of jurisdiction argument with respect to *Montana v. U.S.*, 450 U.S. 544 (1981) (was the same (*Compare* Prelim. Inj. Motion in *GCSD I* [IV, Supp. EOR *GCSD I*-3 at SEOR000633-635] *with* TRO Motion in *GCSD II* [III EOR 4 at EOR0325-328]).

Both arguments were fully considered and rejected by the District Court in *GCSD I*.[2] Consequently, although *GCSD I* was dismissed without prejudice and not on the merits of the underlying claims, the issues that led to the dismissal on exhaustion grounds were adjudicated on their merits.

The June 23, 2011 Judgment in *GCSD I* was final and appealable. When a district court denies preliminary injunctive relief and dismisses an action without prejudice, the court of appeals has jurisdiction to hear an appeal regarding the propriety of the ruling. 28 U.S.C. § 1292(a)(1); *United States v. Orr Water Ditch Co.*, 914 F.2d 1302, 1306-07 (9th Cir. 1990). And dismissal without prejudice becomes final when it is left unappealed. *Offshore*, 114 F.3d at 851; *Shaw*, 554 F.2d at 789. Because the District Court dismissed *GCSD I* in conjunction with denial of GCSD's requested preliminary injunction, the Judgment was final and appealable. Therefore, the requirements for collateral estoppel have been met. *See Offshore*, 114 F.3d at 851; *Shaw*, 554 F.2d at 789.

The fact that the Tribe had not attempted to use the Ordinance until after the decision in *GCSD I* does not change things. Application of collateral estoppel is only precluded when "*controlling* facts or legal principles have changed

---

[2] It is immaterial that GCSD raised arguments in its motion for reconsideration. The "post-judgment denial of reconsideration is an 'integral part' of the final judgment on the merits, even though not entered concurrently with that judgment." *Smith v. Pac. Props. and Dev. Corp.*, 358 F.3d 1097, 1100 (9th Cir. 2004).

significantly since the prior judgment . . . ." *See Richey v. I.R.S.*, 9 F.3d 1407, 1410 (9th Cir. 1993) (emphasis added). Use of the Ordinance was not a controlling fact that constituted a significant change relevant to District Court's jurisdictional determination. The central issue in both cases was the jurisdiction of the Tribal Court over GCSD's challenges to validity of the Ordinance, whether the Tribe had yet used it to condemn GCSD's property or not. Indeed, GCSD argued in *GCSD I* that condemnation was a foregone conclusion. Actual enforcement of the Ordinance by the Tribe had nothing to do with whether GCSD must exhaust Tribal Court remedies.

A court of appeals may consider collateral estoppel for the first time on appeal, particularly when the litigation below concerned only a request for a temporary restraining order. *See Clements v. Airport Auth. of Washoe Cnty.*, 69 F.3d 321, 329-31 (9th Cir. 1995). Unlike claim preclusion, which can apply to claims that are not actually litigated, issue preclusion can only be based on issues actually litigated. *Id.* at 330. Therefore, applying issue preclusion does not prejudice GCSD by depriving it of the opportunity to litigate an issue. *Id.*

GCSD had a full and fair opportunity to litigate the issues in *GCSD I* and to appeal the final adjudication in that case. Moreover, issue preclusion will advance the public interest in conserving judicial resources by limiting appeal to the new issues raised in *GCSD II*, encouraging immediate appeals instead of horizontal

appeals through the re-filing of lawsuits, and promoting the finality of unappealed decisions. Indeed, the only party prejudiced would be the Tribe, as it would be forced to re-argue issues that were conclusively decided over a year ago. Therefore, GCSD should be precluded from re-litigating the applicability of *Water Wheel* and the "plain" lack of jurisdiction exhaustion exception in this appeal.

B. GCSD Cannot Raise A New Argument On Appeal.

GCSD argues for the first time on appeal that the Tribe cannot exercise jurisdiction over the 2003 Agreement because the situs of the property is in Nevada. [Opening Brief at 39-41]. GCSD never made this argument in the District Court; therefore, this Court should not address it. *Rothman v. Hosp. Serv. of S. Cal.*, 510 F.2d 956, 960 (9th Cir. 1975) (constitutional issue waived when not raised prior to district court's judgment); *Eason v. Dickson*, 390 F.2d 585, 589 (9th Cir. 1968) ("we decline to consider a contention not urged in the court below").

In sum, the only issues properly before the Court in this appeal are whether the District Court correctly found that the "futility" or "bad faith" assertion of jurisdiction exceptions to the exhaustion requirement do not apply.

III. THE TRIAL COURT CORRECTLY REFUSED TO ENJOIN THE CONDEMNATION PROCEEDING AND REQUIRED GCSD TO EXHAUST ITS REMEDIES IN TRIBAL COURT.

A. Injunction Standards.

Alliance for the Wild Rockies v. Cottrell, 632 F.3d 1127, 1135 (9th Cir.

2011) governs the standards for issuance of injunctive relief. In addition to "serious questions going to the merits," GCSD must also show a "likelihood" of irreparable harm, that the balance of equities tips "sharply" in its favor and that an injunction would be "in the public interest." *Id.* at 1135. Although a court considers these factors on a "sliding scale," GCSD must demonstrate that all four fall in its favor. *Id.* at 1134-35. GCSD failed to meet its burden below, and there is no reason for this Court to find that the District Court abused its discretion.

First, GCSD failed to establish a likelihood of success on the merits that the Tribal Court's lack of jurisdiction is "plain" or that any other exception to Tribal Court exhaustion applies. Second, GCSD has not even attempted to argue that it would be irreparably injured by having to exhaust Tribal Court remedies or that the public interest weighs in its favor. Therefore, the District Court did not err in denying GCSD injunctive relief.

B. GCSD Is Not Likely To Succeed On The Merits Of Its Claim That Exhaustion In Tribal Court Is Unnecessary.

1. The District Court Correctly Ruled That The Tribal Court Likely Has Jurisdiction Under *Water Wheel*.[3]

As Congress has recognized and as the Supreme Court has stressed, "furthering tribal self-government encompasses far more than encouraging tribal

[3] As explained in Section II.A above, GCSD is collaterally estopped from re-litigating the applicability of *Water Wheel*.

management of disputes between members, but includes . . . as a necessary implication . . . that tribes have the power to manage the use of its territory and resources by both members and nonmembers, to undertake and regulate economic activity within the reservation, and to defray the cost of governmental services by levying taxes." *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 335-36 (1983). To encourage tribal self-government, the Court has espoused a firm policy directing federal courts to stay their hand to allow tribal courts to determine their own jurisdiction. *Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9, 15-16 (1987). This is particularly true when the litigation involves the validity of a tribal ordinance concerning the exercise of an inherently vital sovereign power such as eminent domain. Such litigation goes to the heart of sovereign self-governance, which demands that a tribe be allowed to interpret its own laws. *See Burlington N. R.R. Co. v. Crow Tribal Council*, 940 F.2d 1239, 1246 (9th Cir. 1991). In fact, civil jurisdiction over activities of non-Indians on reservation land presumptively lies in tribal court unless affirmatively limited by treaty or statute. *Iowa Mutual*, 480 U.S. at 18.

In light of these interests, *Water Wheel Camp Recreational Area, Inc. v. LaRance*, 642 F.3d 802 (9th Cir. 2011), 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. The *Water Wheel* test was based, in part, on two closely related powers. First, furthering Congress' broad commitment to tribal self-government requires that "tribes have the power to manage the use of [their] territory and resources by both member and non-members, [and] to undertake and regulate economic activity within the reservation . . . ." *Id*. at 813-14 (quoting *Mescalero Apache Tribe*, 462 U.S. at 335-36). Second, a tribe has jurisdiction over non-members' activities on tribal land arising out of its power to exclude. *Id.* at 811-14. The court in *Water Wheel* held that the power to exclude generally includes the power to regulate non-Indians on tribal land. *Id*. at 812. Both powers are implicated here.

a. The Tribe has jurisdiction over GCSD as an incident of management and use of its tribal land.

In *Water Wheel*, non-Indian lessees of tribal land refused to comply with the tribe's request that they surrender control and management of the Water Wheel Resort back to the tribe. *Id*. at 805-06. The dispositive factor in this Court's determination that the tribe had authority to regulate the non-Indian defendants was the location of the Water Wheel Resort on reservation land. *Id*. at 814. As the tribal appellate court noted, such activity "interfered with the tribe's ability to manage and use its own land." *Id*. at 807. This Court agreed. *Id*. at 814 ("[interfering] directly with the tribe's inherent powers to . . . manage its own lands . . . is enough to support regulatory jurisdiction without considering *Montana*").

The Tribe's position vis-à-vis GCSD with respect to management of its tribal land is no different than the parties in *Water Wheel*. GCSD received a license to build and operate the Skywalk on the Hualapai Reservation and accepted responsibilities for maintenance, employee supervision, ticket sales and transportation, which entitled it to receive a management fee for fulfilling its contractual obligations. [III EOR 4-2 at EOR0365 (§2.9); EOR0360 (§2.5; EOR0362 (§2.6(b)); EOR0366 (§3.1)]. Seven years after the original deadline, GCSD has failed to complete any improvement other than the glass bridge. [III EOR 4-6 at EOR0418-0419 (Tribe's Resolution Authorizing Condemnation)]. In addition to its construction failures, GCSD's management of the uncompleted Skywalk has been conducted in secrecy to keep the Tribe and SNW in the dark about Skywalk operations. *Id.*

GCSD's continuing failure to meet the obligations of its license has interfered with the Tribe's management of its land and a primary driver of its economy – tourism at the Grand Canyon and the Skywalk project. *Id.* The Tribe spent several years attempting to persuade GCSD to honor its construction and management obligations. *Id.* GCSD rebuffed these attempts and continued to refuse to comply with the Tribe's requests and the terms of the 2003 Agreement. Instead, GCSD instituted unauthorized arbitration with SNW. *Id.* Faced with hostile litigation and with no prospect that the Skywalk project would ever be

completed, the Tribe determined that the only way its tribal property could be developed and managed properly was to remove GCSD from control of the Tribe's most valuable asset. *Id.* Therefore, in the exercise of its sovereign power to take property for public use, the Tribe condemned GCSD's rights. [*Id.* at EOR0420].

No power is more central to management and self-governance of tribal land that the use of eminent domain to take property for a public use. As in *Water Wheel*, the Tribe has jurisdiction over GCSD's performance of its agreement to manage and control tribal property. Consequently, adjudicative jurisdiction to decide issues arising out of the condemnation of GCSD's contractual license falls squarely in the Tribal Court.

b. The Tribe has jurisdiction over GCSD arising out of its power to exclude.

i. The Tribe has the power to exclude GCSD by condemning its license to be on tribal land.

Implicit in GCSD's license to build, manage and operate the Skywalk and related facilities on tribal land license was the right to enter upon the Hualapai Reservation to perform its contractual obligations. There is no dispute that the Tribe has the power to exclude GCSD from tribal land. The Tribe chose to use its inherent sovereign power of eminent domain to condemn GCSD's contractual interest, which would have the effect of excluding GCSD from private operation of the tribal assets on tribal land while affording GCSD just compensation for the

taking for a public use. This power to exclude is not subject to *Montana*. *Water Wheel*, 642 F.3d at 810.

The power to exclude non-Indians from tribal land includes the power to regulate them. Since the Tribe has regulatory jurisdiction over GCSD, the important sovereign interests at stake in taking management and control of tribal land through exercise of the sovereign power of eminent domain are sufficient to give the Tribe adjudicative jurisdiction as well. *Id.* at 814-16.

ii. The Tribe did not waive its sovereign powers by forming SNW to contract with GCSD.

GCSD argues that *Water Wheel* does not apply because the 2003 Agreement is a private contract between GCSD and SNW, a tribal corporation, not the Tribe. From this fact, GCSD maintains that the Tribe lost its right to exclude, waived its sovereign immunity and relinquished *all* sovereign powers over GCSD simply by forming SNW to be a party to the contract to develop the Skywalk. GCSD clearly is wrong on the law – the Tribe did not cede its sovereign powers by forming a corporation to engage in commercial endeavors. *See, e.g., Cook v. AVI Casino Enters., Inc.*, 548 F.3d 718, 726 (9th Cir. 2008) (tribal corporation functioned as an arm of tribe and was protected by sovereign immunity); *Breakthrough Mgmt. Grp., Inc. v. Chukchansi Gold Casino & Resort*, 629 F.3d 1173, 1191, 1196 (10th Cir. 2010) (tribal economic development authority and casino shared tribe's sovereign immunity).

For its novel proposition to the contrary, GCSD cites *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982) and *Strate v. A-1 Contractors*, 520 U.S. 438 (1997), both of which support the Tribe's position and the District Court's rulings.

In *Merrion*, the tribe had entered into leases with oil and gas producers and later adopted a severance tax on oil and gas produced on tribal land. *See* 455 U.S. at 135-36. The producers sued to enjoin the tax, alleging that the tribe lacked authority to impose it. *Id.* at 136. The producers' theory was that the tribe's authority to tax stemmed exclusively from its power to exclude, and that because the tribe had not conditioned the leases upon payment of the tax, the tribe lost its authority to subsequently enact such a tax. *Id.* at 136-37.

The Court held that the tribe's authority to tax did not arise solely from the power to exclude, but as "an essential attribute of Indian sovereignty because it is a necessary instrument of self-government and territorial management." *Id.* at 137. The Court then concluded that the tribe did not waive its sovereign power by failing to include an enabling provision in the leases for the tax:

> A nonmember who enters the jurisdiction of the tribe remains subject to the risk that the tribe will later exercise its sovereign power. The fact that the tribe chooses not to exercise its power to tax when it initially grants a non-Indian entry onto the reservation does not permanently divest the tribe of its authority to impose such a tax.

Id. at 145.

The Court also stressed that the tribe's exercise of its sovereign power was not dependent on its prior conduct as a contracting party:

> Most important, petitioners and the dissent confuse the Tribe's role as commercial partner with its role as sovereign. This confusion relegates the powers of sovereignty to the bargaining process undertaken in each of the sovereign's commercial agreements. It is one thing to find that the Tribe has agreed to sell the right to use the land and take from it valuable minerals; it is quite another to find that the Tribe has abandoned its sovereign powers simply because it has not expressly reserved them through a contract . . . Confusing these two results denigrates Indian sovereignty.

Id. at 145-46. The Court held, "sovereign power, even when unexercised, is an enduring presence that governs all contracts subject to the sovereign's jurisdiction, and will remain intact unless surrendered in unmistakable terms." *Id.* at 148.

In arguing that the Tribe lost its power to exclude when it formed SNW to enter into the 2003 Agreement, GCSD makes the same mistake as the oil and gas producers in *Merrion* by conflating the Tribe's sovereign powers and its commercial remedies. Like the authority to tax, eminent domain is a necessary instrument of self-government and territorial management. The Tribe did not cede its essential sovereign powers by forming SNW to enter into the 2003 Agreement with GCSD, by agreeing to arbitrate disputes or by granting GCSD a license to enter onto the Hualapai Reservation to fulfill its contractual duties. According to the Court in *Merrion*, no such waiver may be implied, and there was no abandonment of sovereign power in unmistakable terms. To the contrary, the 2003

Agreement *expressly* referenced the possibility of eminent domain and contained only a limited waiver of SNW's sovereign immunity, with no waiver of the Tribe's sovereign immunity. As a matter of law and contract, GCSD remained subject to the risk that the Tribe would later exercise its sovereign power of eminent domain.

A state or federal government does not cede the sovereign power of eminent domain by entering into a contract with a private entity involving property that later is sought to be condemned. In fact, a sovereign entity "may not contract away 'an essential attribute of its sovereignty.'" *United States v. Winstar Corp.*, 518 U.S. 839, 888 (1996) (quoting *U.S. Trust Co. of N.Y. v. New Jersey*, 431 U.S. 1, 23 (1977). A sovereign's power of eminent domain has long been considered an "essential attribute of its sovereignty," and even "the Contract Clause does not require a State to adhere to a contract that surrenders an essential attribute of its sovereignty." *U.S. Trust*, 431 U.S. at 23-24 (1977); *State v. City of Chattanooga*, 264 U.S. 472, 480 (1924) ("The taking of private property for public use upon just compensation is so often necessary for the proper performance of governmental functions that the power is deemed to be essential to the life of the state. It cannot be surrendered, and, if attempted to be contracted away, it may be resumed at will."); *Contributors to Pa. Hosp. v. City of Phila.*, 245 U.S. 20, 23 (1917) ("states cannot by virtue of the contract clause be held to have divested themselves by contract of the right to exert their governmental authority" of eminent domain).

The Tribe, as a nation with its own constitutional power of eminent domain, cannot be treated any differently than its state or federal counterparts without denigrating its sovereignty, a result expressly prohibited in *Merrion*. *See* 455 U.S. at 148 ("To presume that a sovereign forever waives the right to exercise one of its sovereign powers unless it expressly reserves the right to exercise that power in a commercial agreement turns the concept of sovereignty on its head….").

According 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. Not only is this result directly contrary to controlling precedent, it makes no sense. GCSD offers no legal or logical reason why the Tribe would lose its authority or a non-Indian to enforce environmental laws, impose taxes, apply land use regulations, assess civil penalties or exercise other lawful powers just because it chartered a tribal corporation to contract with the non-Indian. Sovereign powers are not disposable, to be consumed after a single use, and the 2003 Agreement does not trump the Tribe's eminent domain power.

Nor is this case "*Strate* revisited," as GCSD suggests. In *Strate*, two non-Indians were injured in a car accident on federally-granted right-of-way maintained by the state of North Dakota over reservation land. 520 U.S. at 442-43. The Supreme Court concluded that tribal court jurisdiction did not exist over litigation

arising out of the accident. The Court concluded that the federal grant converted the road easement into non-tribal land, "expressly reserved no right to exercise dominion or control over the right-of-way" by the tribe. *Id*. at 454-455. In other words, unlike *Water Wheel*, *Strate* did not involve activities on tribal land affecting management and use of the tribe's land, or tribal land at all. Indeed, the Court in *Strate* specifically declined to speculate on the outcome had the accident occurred on tribal land. *Id*. ("We express no view on the governing law or proper forum when an accident occurs on a tribal road within a reservation"). Thus, *Strate* has no bearing upon the *Water Wheel* analysis.

iii. The Tribe did not relinquish its sovereign powers by reaching outside of a "pre-Constitutional bubble."

Citing no authority, GCSD argues that the Tribe "automatically loses its inherent sovereignty and can never regain it" when it "reaches outside of its [pre-Constitutional] bubble to grab a bundle of rights created by Congress." [Opening Brief at 28]. By forming SNW, GCSD's argument goes, the Tribe "grabbed" one of these rights and therefore abdicated its inherent sovereign authority. This proposition, like GCSD's entire argument, finds no support in the law.

GCSD improperly assumes that chartering a tribal corporation amounts to "grabbing" a bundle of rights created by Congress. SNW is not a federally-chartered corporation formed under Section 17 of the Indian Reorganization Act,

25 U.S.C. § 477. SNW was formed under the authority of the Hualapai Constitution. *See* II Supp. EOR 4-4 at SEOR000295 (SNW is a "Hualapai tribally-chartered corporation"). By electing *not* to charter SNW under federal law, it can hardly be said that the Tribe "reached outside of its pre-Constitutional bubble to grab a bundle of rights created by Congress."

Even if the Tribe elected to incorporate SNW under federal law, the result is the same. The Supreme Court has held that the Indian Reorganization Act did not create rights; it merely regulated rights already possessed by tribes. *United States v. Wheeler*, 435 U.S. 313, 328 (1978) (The IRA did not "*create*[] the Indians' power to govern themselves . . . . That Congress has in certain ways regulated the manner and extent of the tribal power of self-government does not mean that Congress is the source of that power"). Under any theory, the Tribe did not reach outside any "pre-Constitutional bubble" when it chartered SNW, regardless of whether it was formed under federal law or tribal law.

c. *Water Wheel* is not limited to contracts encumbering land.

GCSD also argues that *Water Wheel* does not apply because its relationship with the Tribe arises out of a contract for services rather than an interest in land

such as a lease; therefore, the right to exclude is not at issue.[4] GCSD goes so far as to claim that "disposition of GCSD's non-Indian contract rights has no bearing whatsoever on Tribal land." [Opening Brief at 26]. GCSD is wrong on two counts. First, GCSD did not have a mere contract for services, but a license to be on the Hualapai Reservation to operate and manage a tribal asset. Second, disposition of contract rights wholly devoted to building, managing and operating tribal facilities on tribal land for a tribal enterprise directly impacts tribal land. GCSD's contractual license intrinsically arises out of the Tribe's sovereign power over management and control of its land and economic resources, not to mention the power to exclude GCSD – the underlying rationales of *Water Wheel*.

2. The Action Also Satisfies The *Montana* Exceptions.

The Court in *Montana* articulated two exceptions allowing tribal civil jurisdiction over non-members "even on non-Indian fee lands." *Montana*, 450 U.S. at 565. First, "[a] tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements." *Id.* Second, a tribe may regulate "conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect

[4] This issue was resolved in *GCSD I*. [III Supp. EOR *GCSD I*-39 at SEOR000321]. Therefore, GCSD is collaterally estopped from raising it.

on the political integrity, the economic security, or the health or welfare of the tribe." *Id*. at 566. These exceptions are founded on Indian tribes' inherent power "to protect tribal self-government or to control internal relations." *Id*. at 564.

a. GCSD's consensual relationship with the Tribe.

Under *Montana*, consent to civil jurisdiction may be established "expressly *or* by the [nonmember's] actions." *Water Wheel*, 642 F.3d at 818 (emphasis added) (quoting *Plains Commerce Bank v. Long Family Land and Cattle*, 554 U.S. 316, 337 (2008)). GCSD expressly consented to jurisdiction by voluntarily entering into an agreement with an affiliate of the Tribe for a license to develop and manage a tribal asset on tribal land. GCSD agreed to build a project that would be owned entirely by the Tribe (including all intangible rights), generate revenues for the Tribe and be located on reservation land. In this capacity, GCSD built the Skywalk and began building associated facilities, employed tribal members, operated a shuttle service within the Hualapai Reservation and brought tourists onto the reservation. GCSD agreed to comply with the Tribe's laws, ordinances, rules, and regulations and to allow the 2003 Agreement to be governed by Hualapai law. GCSD also agreed that the subject matter of the agreement was subject to condemnation by "any competent authority," including the Tribe. In sum, the GCSD's consensual contractual relationship with SNW and the Tribe provides more than an adequate basis for *Montana* jurisdiction. *See Stock W. Inc*.

v. Confederated Tribes of the Colville Reservation, 873 F.2d 1221, 1228 (9th Cir. 1989) (management agreement to build and manage tribe's sawmill, entered into between non-member and tribally-chartered corporation is sufficient activity by non-member to require exhaustion of tribal court remedies); *Lanphere v. Wright*, 387 F. Appx. 766, 767 (9th Cir. 2010) (sale of cigarettes on tribal land creates a colorable claim of jurisdiction requiring federal court abstention).

Even without express consent, GCSD reasonably could have anticipated that its actions might trigger tribal authority. *Water Wheel*, 642 F.3d at 818. Like the non-Indian members in *Water Wheel*, GCSD was operating on reservation land for many years. GCSD understood from the 2003 Agreement that the land and project it was to develop and manage were completely owned by the Tribe. By purposefully entering the Hualapai Reservation to perform its obligations to develop and manage a significant tribal economic resource, GCSD subjected itself to tribal jurisdiction.

Moreover, GCSD availed itself of Tribal Court jurisdiction to declare its rights under the 2003 Agreement by moving to compel arbitration. "A nonmember who knowingly enters tribal courts for the purpose of filing suit against a tribal member has, by the act of filing his claims, entered into a 'consensual relationship' with the tribe within the meaning of *Montana*." *Smith v. Salish Kootenai Coll.*, 434 F.3d 1127, 1140 (9th Cir. 2006).

To the extent that tribal jurisdiction depends on a "nexus" between the assertion of sovereignty and the consensual relationship, the existence is absolute in this case. As evidenced by its name, ***G***rand ***C***anyon ***S***kywalk ***D***evelopment's reason for being is to construct and manage the Skywalk – a tribal asset located on tribal land. The Tribe is condemning GCSD's contractual interest in its license to develop and manage tribal property because GCSD is interfering with the Tribe's control and management of its land and economic resources, a primary source of the Tribe's revenue. Given these facts, and particularly GCSD's consent to the condemnation provision in the 2003 Agreement, GCSD cannot argue that it was unreasonable to anticipate that the Tribe could exercise its eminent domain authority. *See City of Cincinnati v. Louisville & Nashville R.R. Co.*, 223 U.S. 390, 400 (1912) ("There enters into every engagement the unwritten condition that it is subordinate to the right of appropriation to a public use").

b. GCSD's threat to the Tribe's economic security.

GCSD was obligated to perform under the 2003 Agreement and has not done so. GCSD's failure to develop and manage tribal property deprived the Tribe of its power to govern and regulate its own land, and its ability to manage and control one of its most valuable tribal assets. Resolution No. 15-2012 speaks for itself with regard to the importance to the Tribe of a completed Skywalk project and development of its reservation land abutting the edge of the Grand Canyon.

[III EOR 4-6 at EOR0418-0421]. Tourism and reservation land, which coalesce in the Skywalk, are the Tribe's most vital economic resources.

In short, there is at least a colorable claim that the construction, operation and management of the Skywalk is such a vital economic component of the Tribe's well-being that the *Montana* second exception is met. *Water Wheel*, 642 F.3d at 817, 818-19 (threat to significant tribal economic interest satisfied second *Montana* exception). Therefore, the District Court correctly ruled that the Tribal Court's lack of jurisdiction is not "plain," and that the Tribal Court should decide its own jurisdiction. *See Allstate Indem. Co. v. Stump*, 191 F.3d 1071, 1073, 1076 (9th Cir. 1999) ("colorable" jurisdiction requires litigant to exhaust tribal remedies).

3. GCSD Cannot Satisfy The "Futility" Exception.

a. The narrow futility exception.

A party is excused from exhausting its claims in tribal court when "exhaustion would be futile because of the lack of adequate opportunity to challenge the court's jurisdiction." *Burlington N. R.R. Co. v. Red Wolf*, 196 F.3d 1059, 1065 (9th Cir. 1999). The futility exception is narrow, generally applying "only when the tribe does not have a functioning court system." Cohen, *Handbook of Federal Indian Law* 632 (2005 ed.). Cases from this circuit and others have found futility only where it was doubtful that a functioning tribal court existed or where the tribal court refused access to the litigant. *See Johnson v. Gila River*

Indian Cmty., 174 F.3d 1032, 1036 (9th Cir. 1999) (futility where lack of judicial process for an "abnormally extensive period" create doubt that a functioning appellate court exists); *Krempel v. Prairie Island Indian Cmty.*, 125 F.3d 621, 622 (8th Cir. 1997) (exhaustion not required where no functioning court existed); *Dry Creek Lodge, Inc. v. Arapahoe and Shoshone Tribes*, 623 F.2d 682, 684 (10th Cir. 1980) (futility found where tribal court refused access).

b. There is a functioning Tribal Court.

There is no evidence supporting GCSD's outrageous mischaracterization of the Tribal Court as dysfunctional or incompetent. There is nothing suspect about the timing or substance of the Tribal Court proceedings. The Tribe filed the eminent domain action on February 8, 2012. [III EOR 4-6 at EOR0431-0434]. The same day, the Tribal Court issued a TRO preventing GCSD from removing tribal property. [III EOR 4-6 at EOR0425-0427]. The Tribal Court later held a hearing at which GCSD was represented by counsel and disqualified two judges, invalidated the section of the Ordinance barring a pro tem judge from condemnation cases and stated that it would appoint a judge *pro tem*. [IV EOR 37-5 at EOR 0292-0293].

GCSD filed its Opposition to the Declaration of Taking on February 17,

2012.[5] On March 14, 2012, the Tribal Court granted the Tribe's request for an extension to file its response to the Opposition until 10 days after the District Court ruled on whether the Tribal Court had jurisdiction. On April 2, 2012, the Tribe filed a response to the Opposition in Tribal Court. On May 1, 2012, Judge Pro Tem Lawrence King set a hearing on all pending matters for May 4, 2012, which after postponements requested by both parties was held on June 1, 2012. In all respects, the Tribal Court has acted timely and impartially.

In addition, GCSD of its own accord sought relief in the Tribal Court to determine the parties' rights and remedies under the 2003 Agreement with respect to arbitration. [II Supp. EOR 1-1 at SEOR000288-294] After full judicial process, the Tribal Court dismissed GCSD's action on subject matter jurisdiction grounds in a ruling that turned on an interpretation of the 2003 Agreement. [I Supp. EOR 37-5 at SEOR000041-43] GCSD's prior recourse to a functioning Tribal Court to address issues arising out of the 2003 Agreement belies its current claims to the contrary.

[5] GCSD claims the Tribal Court failed to rule on its objections within 60 days. However, GCSD did not object to the condemnation as not being for a "public use," which would have required a ruling within 60 days from the filing of the Declaration of Taking. [III EOR at EOR0680 (Ordinance § 2.16(F)(6))]. Instead, GCSD only objected to the Tribe's exercise of eminent domain as unconstitutional and without jurisdiction. As a result, GCSD waived an argument that the condemnation was not for a public use, and its broader objections were not required to be decided within 60 days. *Id.*

c. GCSD's legal challenges to the Ordinance and jurisdiction have been raised in Tribal Court.

GCSD contends that two "roadblocks" prevent it from obtaining relief in Tribal Court. First, GCSD speculates that a decision by Pro Tem Judge King "will be challenged on the basis of the jurist's authority to preside," since the Ordinance precludes a judge *pro tem* from hearing condemnation cases. [Opening Brief at 38] However, the Tribal Court exercised its independent judicial authority by invalidating that provision and appointing a judge *pro tem*. [II EOR 37-5 at EOR0292-293]. The Tribe has not challenged, and has no intention of challenging, Judge King's authority to hear the condemnation case as a judge *pro tem* or the Tribal Court's ability to appoint him.

Second, GCSD suggests that § 2.16(F)(6) of the Ordinance, which limits a motion to dismiss to the issue of whether the taking is for a public use, precludes it from bringing a challenge in Tribal Court as to the validity of the Ordinance or the court's jurisdiction. Section 2.16(F)(6) does not prevent GCSD from litigating any issue, it only imposes accelerated time limits for deciding whether the taking is for a "public use." [IV EOR 4-3 at EOR0679]. In any case, GCSD has had a meaningful opportunity in Tribal Court to challenge the validity of the Ordinance and its application to GCSD's property interest to raise its jurisdictional objections. Judge King is considering GCSD's objections, and if he rejects them the parties will proceed to the merits of GCSD's right to just compensation. If GCSD is

dissatisfied, it has the right to appeal to the Hualapai Court of Appeals. Therefore, exhaustion of remedies in Tribal Court has not been, and will not be, futile.

4. The District Court Correctly Applied The Narrow "Bad Faith" Assertion Of Jurisdiction Exception.

a. The narrow bad faith exception.

In *National Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 856 (1985), the Supreme Court established a generally applicable requirement that a non-Indian litigant must exhaust tribal court remedies before seeking relief in federal court. *Id.* at 856 (adopting a rule to "provide the forum whose jurisdiction is being challenged the first opportunity to evaluate the factual and legal bases for the challenge"). The Court, however, noted an exception to the exhaustion requirement when "assertion of tribal jurisdiction 'is motivated by a desire to harass or is conducted in bad faith.'" *Id.* at 857 n.21 (quoting *Juidice v. Vail*, 430 U.S. 327, 338 (1977)).

As later courts have held, this exception is narrow. *See A & A Concrete, Inc. v. White Mountain Apache Tribe*, 781 F.2d 1411, 1416 (9th Cir. 1986) (referring to bad faith as "narrow exception to the exhaustion requirement"); *Ninigret Dev. Corp. v. Narragansett Indian Wetuomuck Hous. Auth.*, 207 F.3d 21, 34 (1st Cir. 2000) ("Although claims of futility, bias, bad faith, and the like roll easily off the tongue, they are difficult to sustain"). The exception actually is *very* narrow, since

neither the parties nor the District Court could find a case excusing exhaustion based on a bad faith assertion of jurisdiction.

b. The Tribal Court has not asserted jurisdiction over GCSD in bad faith.

GCSD's claim of bad faith appears to be that the Tribal Council "engineered" the taking of GCSD's property rights, contested the validity of the arbitration and somehow manipulated the Tribal Court. In an exhaustively researched and well-reasoned decision, the District Court concluded that the *National Farmers* "bad faith" exception is limited to bad faith assertion of jurisdiction in or by a tribal court.[6] *Melby v. Grand Portage Band of Chippewa*, 1998 WL 1769706 (D. Minn. Aug. 13, 1998), cited by the District Court, illustrates this point. In *Melby*, a non-Indian landowner within a reservation sought a county permit to develop his property. *Id.* at *1. Shortly thereafter, the tribe adopted a zoning ordinance that required him to obtain a tribal permit. *Id.* at *2. When plaintiff refused to obtain a permit or to stop development, the tribe created a court system and cited him. *Id.* Plaintiff filed an action in federal court to enjoin the

[6] *Juidice*, the case the Court in *National Farmers* cited in support of the exception, held that *Younger v. Harris*, 401 U.S. 37 (1971) abstention does not apply where "the state [court] <u>*proceeding*</u> is motivated by a desire to harass or is conducted in bad faith, or where the challenged statute is 'flagrantly and patently violative of express constitutional prohibitions in every clause, sentence and paragraph, and in whatever manner and against whomever an effort might be made to apply it.'" 430 U.S. at 338 (citation omitted, emphasis added). This language is further indication that the bad faith must be manifest in a judicial proceeding.

tribal court case and argued that exhaustion did not apply due to the tribe's bad faith, as evidenced by the history of discord between the parties and the creation of the court to target him. *Id.* The court in *Melby* disagreed:

> An allegation that a tribal court claim is brought in bad faith does not mean that an assertion of subject matter jurisdiction by the tribal court over that claim would be in bad faith. If the tribal court action was indeed commenced by the Band and its Land Use Administrator in bad faith, that issue should be addressed in the first instance by the tribal court.

Id. at *5. *Davis v. Mille Lacs Band of Chippewa Indians*, 193 F.3d 990, 992 (8th Cir. 1999) (bad faith exception inapplicable where there was "no support for Davis's claim of bias or bad faith on the part of the tribal court system"); *Legg v. Seneca Nation of Indians*, 518 F. Supp. 2d 274 (D.D.C. 2007); *Landmark Golf L.P. v. Las Vegas Paiute Tribe*, 49 F. Supp. 2d 1169, 1176 (Nev. 1999) (no showing that "the tribal court's assertion of jurisdiction over this case would be made in bad faith"); *Calumet Gaming Group-Kansas, Inc. v. The Kickapoo Tribe of Kan.*, 987 F. Supp. 1321, 1327 (D. Kan. 1997); *Espil v. Sells*, 847 F. Supp. 752, 757 (D. Ariz. 1994) (the bad faith exception "relates to actions of courts and not the parties").

It is true that this Court at times has loosely phrased the nature of the bad faith exception. *E.g., Atwood v. Fort Peck Tribal Court Assiniboine*, 513 F.3d 943, 948 (9th Cir. 2008); *A & A Concrete, Inc. v. White Mountain Apache Tribe*, 781 F.2d 1411, 1417 (9th Cir. 1986). However, as the District Court aptly noted, the parties in the Ninth Circuit cases did not address the distinction GCSD seeks to

make between *tribal* bad faith and *tribal court* bad faith, and the cases contained no analysis of the scope of the bad faith exception.

Atwood arose out of a tribal court child custody award to a grandmother. The child's non-Indian father filed an action in federal court challenging the tribal court's custody order on due process grounds. This Court held that the father was required to exhaust his tribal court remedies, and in *dicta* rejected the "bad faith" exception, citing the lack of evidence that the grandmother "asserted tribal jurisdiction in bad faith or that she acted to harass Plaintiff." 513 F.3d at 948. There is no indication that the parties had addressed bad faith, much less articulated the type of bad faith necessary to meet the exception. However, although the Court did not clearly distinguish between the grandmother's conduct and the assertion of tribal court jurisdiction, the subject act was entry of the tribal court order, not the grandmother's out-of-court bad faith.

In *A & A Concrete*, a contractor filed a federal court action against a tribe for civil rights violations. In the federal lawsuit, he alleged that the tribe had sued him for breach of contract in tribal court and, after entry of default judgment, executed on equipment in retaliation for the contractor's threat to testify against a tribal representative in a criminal action. This Court noted that the bad faith exception did not apply "unless it is alleged and proved that enforcement of the statutory scheme was the product of bad faith conduct or was perpetuated with a motive to

harass." 781 F.2d at 1417. Again, the scope of the bad faith was not at issue, but since enforcement occurred in a tribal court action, the assertion of jurisdiction would have been in connection with the litigation, not the tribe's conduct in general.

GCSD also cites *Superior Oil Co. v. United States*, 798 F.2d 1324 (10th Cir. 1986). The court in *Superior Oil* also did not directly address the issue presented here and remanded the case to the district court, which had not addressed the bad faith claim. The Tenth Circuit has since retreated from *Superior Oil*, noting that the case was decided before *Iowa Mutual*, in which the Supreme Court reiterated the policy favoring tribal self-governance and required a non-Indian litigant to litigate issues of judicial bias and incompetence in tribal court. *Bank of Oklahoma v. Muscogee (Creek) Nation*, 972 F.2d 1166, 1171 (10th Cir. 1992) (citing *Iowa Mutual*, 480 U.S. at 19).

The broader bad faith exception urged by GCSD is illogical and inconsistent with the intent of *National Farmers*. An 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. As the District Court recognized, tribal courts are capable of addressing and adjudicating allegations of bad faith of the parties before them. [I EOR 58 at EOR0009]. Removing a tribal court's jurisdiction because of alleged bad faith by a litigant would denigrate the tribal court's

authority, which is exactly contrary to the respect the Court in *National Farmers* and *Iowa Mutual* directed be extended to tribal courts.

Further, centering the bad faith inquiry on actions of the Tribal Council would necessarily draw judicial focus to the motives of the legislators and legislative body. The exercise of the power of eminent domain is a legislative function and presumptively valid. *See Arizona v. California*, 283 U.S. 423, 455 (1931) (court may not inquire into the motives of members of Congress as long as power was properly exercised). The Resolution condemning GCSD's property interest was duly adopted by the Tribal Council and contained factual justifications for the initiation of the action, reciting GCSD's various failures to meet its contractual obligations and the public purpose of the acquisition. [III EOR 4-6 at EOR0418-421]. GCSD may disagree with the findings, but a court may not inquire into the motives of a legislative decision to condemn. *See Green St. Ass'n v. Daley*, 373 F.2d 1, 6 (7th Cir. 1967) ("Given a public purpose or use, the motives that underlie the exercise of that [condemnation] power may not be questioned").

For these reasons, the District Court correctly ruled that the only appropriate inquiry is on bad faith assertion of jurisdiction by the Tribal Court. GCSD has not alleged that any such conduct occurred.

c. The eminent domain action was not filed in bad faith.

Even if the conduct of the Tribal Council could excuse exhaustion of Tribal Court remedies, nothing suggests that the Tribe acted in bad faith in asserting its sovereign and constitutional eminent domain rights in Tribal Court. In *GCSD I*, the District Court upheld the Tribal Court's jurisdiction over GCSD's challenges to the Tribe's exercise of eminent domain. [III Supp. EOR 33 at SEOR000425]. The Tribe did not act in bad faith by relying on that ruling in later filing the eminent domain action in Tribal Court and asserting that the Tribal Court has jurisdiction over GCSD.

In fact, GCSD has known that condemnation has always been an option for the Tribe. The Hualapai Constitution, which was approved by the federal government, authorizes the taking of property subject to payment of just compensation, and the Tribe never relinquished that power. [II Supp. EOR 4-4 at SEOR000309]. The 2003 Agreement also contained detailed provisions in the event of condemnation by "any competent authority." [III EOR 4-2 at EOR0377]. Although GCSD may not have foreseen if, how or when condemnation may occur, the Tribe's exercise of an act that the parties contractually contemplated was not in bad faith.

The 2003 Agreement also preserved the Tribe's sovereign immunity and provided for a limited consent to federal court jurisdiction over SNW. [*Id.* at EOR

0389 (§ 15.4(d))]. The Court cannot infer bad faith from the Tribe's assertion of Tribal Court jurisdiction when GCSD contractually agreed that the Tribe did not waive its immunity from suit in federal court. *See GNS, Inc. v. Winnebago Tribe of Nebraska*, 866 F. Supp. 1185, 1190 (N.D. Iowa 1994) ("Having so clearly structured this relationship to maintain sovereign immunity and to avoid assertion of federal court jurisdiction, the court simply cannot find that the assertion of tribal jurisdiction, as opposed to other actions against the Managers, is indicative of bad faith or a desire to harass").

GCSD speculates that the Tribe's initiation of the eminent domain action was in bad faith to avoid turning over "smoking guns" and to avert a damages award in the arbitration action. GCSD confuses cause and effect. The unauthorized arbitration filed by GCSD was a symptom of a larger problem involving GCSD's failure to perform its obligations and its misuse of tribal assets. In February 2012, the Tribal Council decided important tribal interests required it to condemn GCSD's contract rights and take over operation of the Skywalk as a public use. The Tribe stepped into GCSD's shoes, and GCSD lost its rights in the 2003 Agreement, including the right to arbitrate, rendering the arbitration moot.

In addition, GCSD has failed to mention that SNW asserted numerous counterclaims against GCSD for its conduct, including discharge, breach of contract, fraud, breaches of fiduciary duties, and civil conspiracy to misappropriate

funds. As a result, GCSD faced the possibility of paying substantial damages to SNW. Alternatively, SNW's claims for discharge of the 2003 Agreement, if successful, would have undone the contract, leaving GCSD with no rights or interest at all. And even if GCSD could have prevailed in arbitration, its remedy was limited to assets of SNW because GCSD agreed not to seek recourse against the Tribe. [III EOR 4-2 at EOR 0389 (2003 Agreement § 15.4(d)]. In short, rather than the condemnation being an attempt to *avoid* paying GCSD, the Tribe's eminent domain action *guarantees* that the Tribe will pay GCSD just compensation despite GCSD's material breaches and the limitations of the 2003 Agreement.

d. There is no evidence that the Tribal Council improperly controls the Tribal Court.

GCSD claims to have had evidence to present to the District Court that the Tribal Court was being manipulated by the Tribal Council. However, the only "evidence" GCSD can posture is based on a 2010 National Indian Justice Center report authored by Joseph Myers, which GCSD completely mischaracterizes. The report, commissioned by the Tribal Council, *never* portrayed the Tribal Court as a dysfunctional judicial body controlled by the Tribal Council. [IV EOR 37-1 at EOR0567]. To the contrary, the report acknowledged that "the Hualapai Tribal Council understands that it is crucial that its members minimize involvement in cases pending before the tribal court." [*Id.* at EOR0585]. The report also concluded that "The Hualapai Tribal Court is a functional, established system with

court procedures, and developing relationships with tribal and state agencies," although the court facilities needed improvement. *Id.* And the report recognized that the chief judge "possesses fundamental judicial skills and working knowledge of the law," and "extensive experience on the bench." *Id.*

To be sure, the report noted weaknesses in tribal policies for documenting the separation of powers doctrine and recommended clarifying the Hualapai Constitution accordingly. *Id.* at EOR0586-588, EOR 0617-618. However, the report found no evidence that the Tribal Council had co-opted the Tribal Court. [*Id.* at EOR0590 ("no interviewee stated that there was any direct interference in court matters by tribal council members")]. In all respects, the report directly contradicts GCSD's barren rhetoric about the Tribal Court's supposed lack of independence. Consequently, the District Court appropriately ruled that the report failed to "show that the assertion of jurisdiction by the Tribal Court has been made in bad faith." [I EOR 58 at EOR0014].

For all of these reasons, the District Court did not err in finding that the narrow exception to the robust policy favoring exhaustion of tribal court remedies for bad faith assertion of jurisdiction does not apply.

C. The Tribe May Condemn GCSD's Contract Rights To Manage A Tribal Asset Located On Tribal Land.

Although GCSD would like to bypass the jurisdictional issues and jump to the merits, GCSD's argument about the Tribe's jurisdiction to condemn the 2003

Agreement is premature and misplaced.[7] The point of this entire appeal is that the proper forum to raise any argument about the Tribe's condemnation authority is in the Tribal Court.

In any case, GCSD is wrong. GCSD attempts to invoke the doctrine of *mobilia sequuntur personam* ("moveables follow the person") to argue that the Tribe lacks jurisdiction over GCSD's interest in the 2003 Agreement because GCSD chose to domicile in Nevada. Contrary to GCSD's assertion, the Supreme Court has rejected a blanket application of the *mobilia* maxim in cases involving intangible property, refusing to "substitute a rule for a reason." *Curry v. McCanless*, 307 U.S. 357, 367 (1939). In *Curry*, the Supreme Court rejected the blind use of the *mobilia* doctrine that would have prevented a state from taxing activities related to intangible property, even where the owner is domiciled elsewhere. *Id.* Jurisdiction was proper, the Court reasoned, because the non-resident "extend[ed] his activities with respect to his intangibles, so as to avail himself of the protection and benefit of the laws of another state . . . ." *Id.*

The other cases cited by GCSD do not support its argument that the inflexible *mobilia* doctrine governs condemnation of intangibles. Rather, GCSD's cases embrace the intent of *Curry* for evaluating the locus of the condemnation in

[7] As explained in Section II.B above, GCSD improperly raises this argument for the first time on appeal.

relation to the intangible property rights the sovereign is seeking to condemn. In *City of Oakland v. Oakland Raiders*, 646 P.2d 835 (Cal. 1982), the California Supreme Court upheld Oakland's condemnation of the Raiders franchise, even though the Raiders' owner was domiciled elsewhere. The court held that "[t]he location assigned to [intangible property] depends on what action is to be taken with reference to it." *Id.* at 844 (citation omitted). The court then considered several non-exclusive factors pertaining to the use of the property, such as the franchise's principal place of business, the site of the team's home games, and the primary location of the franchise's tangible property, and found Oakland to have jurisdiction. *Id.*

Likewise, in *Mayor & City Council of Balt. v. Balt. Football Club*, 624 F. Supp. 278 (D. Md. 1986), the court found that *Texas v. New Jersey*, 379 U.S. 674 (1965) – relied upon by GCSD – was not controlling in condemnation cases. The court refused to apply the "mechanical rule" of *mobilia sequuntur personam* to determine the situs of the Baltimore Colts franchise. *Id.* at 287. In the spirit of *Curry*, the district court considered many of the same *Oakland Raiders* factors, evaluating jurisdiction in relation to the property to be condemned. *Id.* Condemnation in Maryland was improper, the court ruled, because the Colts franchise had ceased operating in the state and had moved all of its operations and tangible property to Indiana before the condemnation action was filed. *Id.*

Under the common sense approach of *Baltimore* and *Raiders*, the locus of the condemnation action must be evaluated in relation to the type and location of the property to be condemned. In this case, there is a direct connection between the Tribe's jurisdiction and GCSD's license to build and operate a tribal asset on tribal land pursuant to an agreement with a wholly-owned affiliate of the Tribe, which was governed by Hualapai law and that required GCSD to comply with Hualapai codes and ordinances. Substantially all performance GCSD agreed to undertake, including operation of the Skywalk, maintenance of the facilities, supervision of employees, sale of food and merchandise, collection of receipts, and transportation of visitors, could take place nowhere else but within the boundaries of the Hualapai Reservation. In fact, GCSD admitted in the Tribal Court that its activity occurred on Hualapai land: "Defendant [GCSD] manages and operates the Skywalk, employs several Tribal members at the Skywalk as provided for in the 2003 Agreement, and transports the Tribal member employees to and from the Skywalk daily. Perhaps most importantly, Defendant also transports roughly one-third of all Skywalk patrons to the Tribe's reservation." [Opposition, attached as Exhibit A to Appellees' Motion to Take Judicial Notice, at 6[8]]. While GCSD may have chosen to perform bookkeeping tasks in Las Vegas, at the time of

[8] The Opposition is not page-numbered, so we have calculated the page number starting with the page with the "Introduction" heading as page 1.

condemnation its day-to-day operation and management of the Skywalk occurred on tribal land.[9]

GCSD plainly has "extend[ed] [its] activities with respect to [its] intangibles, so as to avail [itself] of the protection and benefit of the laws" of the Tribe. *Curry*, 307 U.S. at 367. Given the crucial economic interest the Tribe has in the Skywalk and the unfinished nature of the project, the Tribe has ample reasons "to support the constitutional power" of eminent domain to retake control of a tribally-owned facility for a valid public purpose. *See id.* Therefore, the Tribe has jurisdiction to condemn GCSD's contractual rights in the 2003 Agreement in Tribal Court.

If GCSD were correct, only the State of Nevada could condemn an interest in the 2003 Agreement, even though it is a contract with a tribal entity to build a tribal asset, governed by tribal laws, the performance of which must occur on land located entirely outside of Nevada and within the territory of a federally recognized sovereign Indian Nation. Furthermore, GCSD could arbitrarily and unilaterally change the forum to any jurisdiction of its choosing – or attempt to ensure that no such forum would exist – just by changing domiciles to a different state or another country, even while it continued to manage and operate the

[9] Unlike *Baltimore*, GCSD had not ended activity within the forum prior to the filing of the condemnation action, since GCSD remained in control of the Skywalk and facilities on the Hualapai Reservation when the action was filed.

Skywalk on the Hualapai Reservation. GCSD's single-factor rule, which may make sense in escheat cases, is absurd when applied in a condemnation context.

D. GCSD Failed To Establish That Continuation Of The Eminent Domain Action In Tribal Court Will Cause It Irreparable Harm.

GCSD has not even attempted to argue that the District Court erred in failing to find a likelihood of irreparable harm. In fact, GCSD will not be harmed if the case continues in Tribal Court. GCSD has been given the opportunity to challenge the taking in Tribal Court, the condemnation action is proceeding, and there undoubtedly will be a spirited battle over just compensation. But GCSD has been deprived of no ability to raise any argument or claim in Tribal Court that it is legally entitled to raise.

E. The Equities And Public Interest Favor The Tribe.

The United States Supreme Court and this Court repeatedly have held that tribal self-governance and self-determination are essential public policies to be advanced by federal court deference to tribal court jurisdiction. *Iowa Mutual*, 480 U.S. at 16; *Crawford v. Genuine Parts Co.*, 947 F.2d 1405, 1407 (9th Cir. 1991) ("The requirement of exhaustion of tribal remedies is not discretionary; it is mandatory." (citation omitted)). Enjoining the Tribe's legislative and judicial processes will subjugate the Tribe's power of self-governance without the requisite showing that Tribal Court plainly lacks jurisdiction.

Furthermore, if the Court enjoins the Tribe's legislature and judiciary from

proceeding with the exercise of the Tribe's power of eminent domain, the Tribe will continue to be deprived of the benefits of the 2003 Agreement due to GCSD's unabated failure to perform. In contrast, GCSD will receive due process and just compensation in an appropriate forum, with potential relief in federal court after exhausting its remedies in Tribal Court. And it is not unfair to require GCSD, which knowingly entered into an agreement governed by tribal law with a wholly-owned tribal corporation to build, manage and operate a tribally-owned asset on tribal land for the benefit of the Tribe, and which contemplated eminent domain, to litigate the Tribe's condemnation of GCSD's interest in that agreement in Tribal Court. The equities and public interest on the sliding *Cottrell* scale favor the Tribe.

IV. CONCLUSION.

Appellees respectfully request that this Court affirm the District Court's denial of GCSD's request for temporary restraining order.

RESPECTFULLY submitted this 18th day of June, 2012.

GALLAGHER & KENNEDY, P.A.

By: s/ Jeffrey D. Gross

Glen Hallman
Jeffrey D. Gross
Paul Charlton
Christopher W. Thompson
2575 East Camelback Road
Phoenix, AZ 85016-9225
(602) 530-8000
Attorneys for Defendants/Appellees

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 13,716 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2003 and in 14-point font in the Times New Roman style.

Dated this 18th day of June, 2012.

GALLAGHER & KENNEDY, P.A.

By: s/ Jeffrey D. Gross

Jeffrey D. Gross
2575 East Camelback Road
Phoenix, AZ 85016-9225
(602) 530-8000
Attorneys for Defendants/Appellees

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed this document with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on June 18, 2012.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

DATED this 18th day of June, 2012.

GALLAGHER & KENNEDY, P.A.

By: s/ Jeffrey D. Gross

Glen Hallman
Jeffrey D. Gross
Paul Charlton
Christopher W. Thompson
2575 East Camelback Road
Phoenix, AZ 85016-9225
(602) 530-8000
Attorneys for Defendants/Appellees