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)

Petition for Rehearing *En Banc*

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I. Statement of Issues as Required by Fed. R. App. P. 35(b)(1)

The panel decision requiring Grand Canyon Skywalk Development ("GCSD") to exhaust its tribal remedies before challenging the expropriation of its contractual rights warrants rehearing *en banc* because it: (i) presents issues of exceptional importance regarding the enforceability of contracts with tribal entities and the security of investments on Indian reservations from involuntary nationalization, and (ii) conflicts with binding Supreme Court precedent, namely the Court's doctrines regarding: (1) the existence and application of the bad faith exception to tribal court exhaustion provided by *National Farmers Union Insurance Companies v. Crow Tribe*, 471 U.S. 845 (1985); (2) the necessity of determining that there is at least a colorable claim that the assertion of jurisdiction falls under one of the two exceptions laid out in *Montana v. United States*, 450 U.S. 544, 565 (1981) when a tribe asserts jurisdiction over a non-Indian; and (3) the application of the "consent" exception to the *Montana* doctrine when the non-tribal entity enters into a contract with a tribal entity that explicitly provides that disputes be resolved through binding arbitration rather than tribal court.

The safeguards established by *National Farmers* and *Montana* and their progeny are a deeply entrenched and longstanding part of the jurisprudence of the Supreme Court and this Circuit, and play a vital role in the civic and economic life

of Indian tribes and nations. Their abandonment here is legally indefensible and will discourage private economic investment that is greatly needed by the citizens of the Hualapai Indian Tribe ("Tribe") and elsewhere in Indian Country. GCSD respectfully petitions this Court for a rehearing *en banc*.

II. Background

In 1996, David Jin conceived the idea of building a glass bridge extending out over the Grand Canyon, and, in 2003, chose to fully finance, develop, and operate the Skywalk in cooperation with the Tribe, with which he had a longstanding and successful relationship. The Tribe, through its Tribally-charted corporation, 'Sa' Nyu Wa, Inc. ("SNW"), entered into a contract with Jin, through GCSD, a Nevada limited liability company with its principal place of business in Las Vegas. Under this contract, GCSD would build and operate the Skywalk – with an initial $25 million investment – in exchange for a 50-year contract that entitled it to manage the Skywalk and share in the profits pursuant to a formula that would gradually decline as GCSD recouped its investment. The Tribe has always owned the Skywalk, situated on federal trust land. The Tribe exercised its power to exclude by conditioning GCSD's Reservation access via the contract with SNW. The terms of the contract between GCSD and SNW were generally straightforward

and included detailed provisions that binding arbitration was the exclusive dispute resolution mechanism between GCSD and SNW.

The Skywalk opened in 2008 and has been a financial success, yet to date, no revenue distributions have ever been made to GCSD. Instead, year after year, SNW refused to turn over even the most basic financial documents, failed to complete the obligatory annual audits, and resisted Jin's attempts to resolve differences through arbitration as provided by contract.

Long into the protracted fight, and only days before key financial documents were due to be produced the arbitrator assigned to adjudicate the GCSD-SNW dispute, the Tribal Council voted to "condemn" GCSD's intangible contract rights to manage the Skywalk. The Tribe brought an *ex parte* condemnation action in its Tribal Court, which ordered title to GCSD's contract interests in the Skywalk transferred to the Tribe without notice, a hearing, or posting of a bond. The Tribal Court issued two identical temporary restraining orders, prohibiting GCSD from damaging, destroying or removing from the Reservation its own personal property. These *ex parte* orders were signed by two permanent Tribal Court judges, both of whom then promptly recused themselves because they had blood relationships with Council members – impermissible conflicts of interests expressly prohibited by the Tribe's Constitution. Despite their recusal, the Tribal judges declined to withdraw

their orders. The Tribal Council, through armed Tribal officers, immediately seized control of the Skywalk and all GCSD property therein. GCSD then brought this action seeking to enjoin the Tribal Court's improper assertion of jurisdiction over a non-Indian and the Tribal Council's use of its purported eminent domain powers over intangible, off-reservation, out-of-state non-Indian contract rights.

GCSD argued before both the District Court and the panel that it did not need to exhaust Tribal Court remedies because the Tribal Council had improperly tied the hands of the Tribal judiciary and Tribal law provides no mechanism for the Tribal Court to restore GCSD's access its property or the Skywalk. GCSD asked the District Court to provide equitable relief that the Tribal Court cannot provide. The District Court improperly demurred its equitable powers and on April 26, 2013 the panel affirmed. The panel found that the bad faith exception was narrowly limited to the conduct of the Tribal Court itself, even though here the Tribe lacks an independent judiciary, the Tribal judges refused to withdraw their original illegal *ex parte* orders, and the evidence of bad faith on the part of the Tribal Council was overwhelming. The panel then found that it could reject the argument that the combined actions of the Tribal Court and Council were not "patently violative of express jurisdictional prohibitions," *id*., without even *reaching* the *Montana* factors. To reach their conclusions, both the District Court and the panel

relied on *Water Wheel Camp Recreational Area v. LaRance*, 642 F.3d 802 (9th Cir. 2011). In doing so, they have created an impermissible parallel universe where, in this Circuit alone, virtually any tribal activity may be deemed incidental to the power to exclude, and thus within the scope of *Water Wheel* and excused from consideration under the *Montana* analysis. Finally, the panel found in the alternative that the Tribal Court might conclude that this dispute falls under the "consent" prong of the *Montana* standard, even though the consensual relationship was with a tribal corporation, rather than the Tribe itself, and was governed by documents that clearly provided that disputes would be resolved either through binding arbitration or in federal district court, not Tribal Court.

III. Discussion

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

A. The panel decision essentially reads the *National Farmers* bad faith exception out of the law.

This Court should reconsider the panel's decision because it interprets the bad faith exception, announced in *National Farmers*, so narrowly that virtually no act of deliberate injustice, however unambiguous and clearly supported by the

record, could ever be rectified without first going through a judicial system controlled by the governing tribal council. *Nat'l Farmers,* 471 U.S. at 857 n. 21.

If the bad faith exception to the exhaustion doctrine does not apply to this situation, then it does not exist. The bad faith motives and actions of the Tribal Council itself are clearly demonstrated by the uncontested record. [EOR 0272]; [EOR 0279-0285]; [EOR 0287-0289]; GCSD Motion to Supplement Record on Appeal, Exhibit C at 33-39, taken into consideration by the panel. The Council's plan depended entirely, and explicitly, on the Tribal Council majority's confidence that its judiciary act as instructed. The Council specified in its eminent domain ordinance that the only ground for a legal challenge to its actions was the amount of the valuation, not the validity of the taking itself; that the Tribal Court was expressly forbidden to appoint a judge *pro tempore* in eminent domain cases; that the Tribe would immediately take "title" to any condemned intangible property prior to any judicial process; and that the Tribe was not required to post any type of bond against the eventual payment of compensation.

When, as here, the Tribal Council has restricted the issues the Tribal Court may consider and the relief it may grant, the bad faith exception cannot, as the panel held, be limited solely to the conduct of the judges themselves, because to do so disregards the intertwining of the Tribe's branches of government. The bad

faith exception is not so narrow. *See Atwood v. Fort Peck Tribal Court Assiniboine*, 513 F.3d 943 (9th Cir. 2008); *A & A Concrete, Inc. v. White Mountain Apache Tribe*, 781 F.2d 1411 (9th Cir. 1986) (holding that the bad faith exception requires that "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") (emphasis added).

Before the District Court, GCSD produced a report prepared by Joseph Myers, the longtime executive director of the National Indian Justice Center, who had conducted a recent study of the Hualapai Tribal Court. In his report, Myers concluded that the Hualapai judiciary "is not capable of functioning without control by the Tribal Council." [EOR III 0567-0673]. Myers was available to testify, but the District Court instead requested a proffer of the evidence in lieu of testimony. [II EOR 0054 at 14]. In response to this request GCSD, proffered that Myers "does tribal court evaluations all over the country" and had performed an evaluation of the Hualapai court system within the previous year. [II EOR 0057 at 17]. "He evaluated this court and conclude[d] there is no independent judiciary, that the judiciary is not capable of functioning without control by the tribal council." *Id*.

The District Court, and later the panel, rejected the argument that the Tribal Court lacked independence on the grounds that the factual evidence presented was insufficiently detailed, incorrectly concluding that the findings of the Myer's Report were "broad generalizations or guiding principles." Slip op. at 11.

B. *Water Wheel* did not, and cannot, create a new exception to the *Montana* doctrine so broad that it encompasses any cause of action related to tribal lands.

In addition to improperly narrowing the bad faith exception, the panel also adopted an approach to the other principle exception – for situations "where the action is patently violative of express jurisdictional prohibitions,"[1] that conflicts with controlling precedent. The panel decision warrants rehearing because it expands the narrow exception to the *Montana* doctrine created by *Water Wheel* – an exception unique to this Circuit – into a new doctrine that reverses the longstanding presumption that tribal courts lack jurisdiction over non-Indians.

"Indian tribes' regulatory authority over nonmembers is governed by the principles set forth in *Montana v. United States*, 450 U.S. 544 (1981), which [the Supreme Court has] called the 'pathmarking case' on the subject, *Strate v. A-1 Contractors*, 520 U.S. 438, 445." *Nevada v. Hicks*, 533 U.S. 353, 358 (2001). "Our analysis of the tribal court's jurisdiction starts with the Supreme Court's

[1] *Nat'l Farmers*, 471 U.S. at 856.

decision in *Montana*." *Smith v. Salish Kootenai Coll.*, 434 F.3d 1127, 1130 (9th Cir. 2006). When finding that "[t]he tribal court does not plainly lack jurisdiction," however, the panel decided that it was not necessary to conduct the *Montana* analysis at all: "[T]he district court correctly relied upon *Water Wheel*, which provides for tribal jurisdiction without ever reaching the application of *Montana*." Slip op. at 15. The panel conceded that this approach evades the implications of "the pathmarking case concerning tribal civil authority over nonmembers," slip op. at 15, but explained that *Montana* is not applicable because: "With the exception of *Nevada v. Hicks*, 533 U.S. 353 (2001), the Supreme Court has applied *Montana* 'almost exclusively to questions of jurisdiction arising on non-Indian land or its equivalent,'" slip op. at 18, quoting *Water Wheel*, 642 F.3d at 809. In this sentence, the panel (and the *Water Wheel per curiam* opinion) leave little doubt that they conflict with controlling precedent. The panel says "[w]ith the exception of *Nevada v. Hicks*," but *Hicks*, of course, is one of the Supreme Court's most recent decisions on tribal court jurisdiction and is good law both in this Circuit and beyond. The statement that the Supreme Court has "almost exclusively" applied *Montana* to non-Indian law is also tantamount to an admission that the Court has sometimes applied *Montana* on Indian land. This is indefensible.

Hicks squarely addressed the question of whether *Montana* applies to causes of action arising on tribal trust lands, and found that it does. In *Hicks*, the respondent tribal member and tribal court, and the federal government as *amicus curiae*, argued that *Montana* was not applicable because "since Hicks's home and yard are on tribe-owned land within the reservation, the Tribe may make its exercise of regulatory authority over nonmembers a condition of nonmembers' entry." 533 U.S. at 359. The Court rejected this argument, holding that "the existence of tribal ownership is not alone enough to support regulatory jurisdiction over nonmembers." *Id*.

The panel's decision here goes well beyond the actual facts of *Water Wheel*. The panel found that *Water Wheel* applied because the "valuable centerpiece" of the "controversy" is "the impressive beauty of the tribal land's location." Slip op. at 16. The question of whether a "controversy" centers on a particular piece of tribal land is far more nebulous than the question of whether the tribe's right to exclude trespassers confers some adjudicative jurisdiction. After all, the "valuable centerpiece" of a "controversy" over, say the copyright to a painting or photograph of the Grand Canyon, could be also be centered on "the impressive beauty of the tribal land's location," wherever that image happened to be located. Indeed, the vast majority of GCSD's management responsibilities actually took place off the

Hualapai Reservation, such as the ownership of the shuttle vehicles and the staging area, the management of employees, obtaining licensing and permitting for the Skywalk activities, and purchasing inventory related to activities off-reservation, and, most importantly, advertising the Skywalk on an international scale and drawing in millions of mostly foreign visitors. The question of whether a "controversy" centers on tribal land is much too vague to create such a large exception to a longstanding and entrenched jurisdictional doctrine.

The exception to *Montana* created by *Water Wheel* is less expansive and may be narrow enough to avoid a conflict with governing precedent. The cases can still be harmonized without requiring *Water Wheel's* reversal. The *Water Wheel* plaintiff was illegally trespassing on tribal trust property and refused to vacate the premises encompassed by an expired tribal surface lease. 642 F. 3d at 805-807. The Court upheld tribal jurisdiction over the trespasser by recognizing the tribe's rights to exclude trespassing non-members, and the tribe's ability to control tribal lands.

In contrast, no Indian lands or real property interests are implicated here. Rather, the question presented is whether the defendants may seize intangible contract rights. The case does not implicate the Tribe's rights as a landowner. Instead the Tribal Council was attempting to assist its wholly-owned corporation in

defaulting on its contract obligations and trying to avoid the arbitration clause that came with those obligations – an arbitration clause and waiver of sovereign immunity that had originally been authorized by the Tribe. Stated differently, the power to control non-Indian contract rights is not a stick in whatever remaining bundle of exclusionary rights the Tribe had after it conditioned GCSD's Reservation access in the SNW contract, and therefore cannot confer tribal jurisdiction under *Water Wheel*.

C. The "consensual relations" exception to *Montana* does not apply when that "consent" was a contract with a tribal entity that clearly provided for binding arbitration, even when the tribe characterizes its activity as an exercise of "eminent domain."

After deciding that it was not necessary to consider *Montana* to find that the Tribal Court's actions were not "patently violative of express jurisdictional prohibitions," *Nat'l Farmers*, 471 U.S. at 856, the District Court and panel went on to consider *Montana* anyway, and, in the course of finding that there might be jurisdiction, developed a legal interpretation of this doctrine that makes it effectively impossible for any party to have dealings with a tribe or tribal entity without implicitly consenting to tribal jurisdiction, up to and including the nationalization of its contract rights. This misinterpretation of the "consensual relations" exception to the *Montana* doctrine not only ignores binding precedent limiting the application of this exception, but also gives already reluctant parties

another reason to be wary of entering into commercial relationships with tribal businesses. This Court should grant reconsideration to clarify that a party entering into a contract with a tribal entity may limit its exposure to tribal jurisdiction with express contract terms just as GCSD did here.

"[T]he inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe." *Montana*, 450 U.S. at 565. Normally, therefore, neither a tribe's eminent domain powers nor its court jurisdiction extend beyond the reach of its own tribal members. There is an exception for "the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements." *Id*. This exception does not, however, subject any party which has commercial dealing with a tribal enterprise to the unlimited authority of the tribe. *Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 655 (2001).

The panel opens its discussion by pointing out that "GCSD voluntarily entered into a contract with SNW by signing an agreement to develop and manage the Skywalk and both parties were represented by counsel." Slip. Op. at 19. From this fact, the court argues that "[g]iven the consensual nature of the relationship between the parties and the potential economic impact of the agreement, the tribal court could conclude it has jurisdiction over SNW's dispute with GCSD under

either of *Montana*'s exceptions." *Id*. GCSD could not reasonably have contemplated that entering into the contract with a Tribally-chartered corporation would give the Tribe carte blanche to exercise jurisdiction over GCSD, especially when the contract says just the opposite.

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. *Plains Commerce Bank v. Long Family Land & Cattle Co., Inc*., 554 U.S. 316, 338 (2008). In *Plains Commerce Bank*, for example, the non-Indian's contractual dealings with individual tribal members never gave the non-Indian reason to anticipate that the tribe would attempt to regulate the non-Indian's sale of non-Indian property. *Id*. The same is true here. GCSD could not have reasonably anticipated that merely entering into the contract would give the Tribe the authority to regulate the disposition of GCSD's out-of-state contract rights. On the contrary, the contract expressly states that all "litigation" and all "civil matters" must be brought in federal district court in Arizona. The forced sale or disposition of a non-Indian interest has been explicitly rejected as an "activity" that tribes may regulate. *Plains Commerce*, 554 U.S. at 332-34. Yet, that is exactly what the Tribe is attempting to do. Defendants purport

to compel the liquidation of non-Indian off-reservation intangible property rights. Such a forced liquidation is analogous to the situation in *Plains Commerce*, and the Supreme Court has already held that as a firm rule, Indian tribes do not, and cannot, have the civil authority to regulate, let alone force, the sale of non-Indian property interests by non-Indian owners. *Id*.

The panel's reliance on general contract language about compliance with applicable law, slip op. at 20, as grounds to find that "GCSD should have reasonably anticipated being subjected to the Tribe's jurisdiction" is particularly troubling. It is objectively unreasonable for a business person to expect that, simply because an Indian tribe or nation is involved, his or her carefully negotiated contractual remedies *with a corporation*, not the tribe itself, can be stripped by governmental fiat and their assets taken. The assumption behind the panel's ruling – that GCSD somehow should have known better because it was doing business with a tribal corporation – seriously undermines the thousands of contractual relationships throughout Indian Country between such tribal enterprises, on the one hand, and non-Indian investors on the other.

IV. Conclusion

For the reasons stated above, Petitioner GCSD respectfully requests that this Court grant its petition for rehearing *en banc*.

Respectfully submitted this 10th day of May 2013.

GREENBERG TRAURIG, LLP

By: *s/ Troy A. Eid*
Troy A. Eid
Jennifer H. Weddle
1200 17th Street, Suite 2400
Denver, CO 80202

GREENBERG TRAURIG, LLP
Mark Tratos
Tami D. Cowden
3773 Howard Hughes Parkway, Suite 400 North
Las Vegas, NV 89169

GREENBERG TRAURIG, LLP
Pamela M. Overton
2375 East Camelback Road, Suite 700
Phoenix, AZ 85016

Attorneys for Appellant/GCSD Grand Canyon Skywalk Development, LLC

CERTIFICATE OF SERVICE

This is to certify that on May 10, 2013, a true and correct copy of the foregoing **Petition for Rehearing *En Banc*** was filed and served using the appellate CM/ECF system.

Glen Hallman
Gallagher & Kennedy, P.A.
2575 East Camelback Road
Phoenix, Arizona 85016-9225
(602) 530-8000
gh@gknet.com

Paul K. Charlton
Gallagher & Kennedy, P.A.
2575 East Camelback Road
Phoenix, Arizona 85016-9225
(602) 530-8000
Paul.charlton@gknet.com

Jeffrey D. Gross
Gallagher & Kennedy, P.A.
2575 East Camelback Road
Phoenix, Arizona 85016-9225
(602) 530-8000
Jeff.gross@gknet.com

Christopher W. Thompson
Gallagher & Kennedy, P.A.
2575 East Camelback Road
Phoenix, Arizona 85016-9225
(602) 530-8000
Chris.thompson@gknet.com

s/ Jennifer H. Weddle