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10 **IN THE UNITED STATES DISTRICT COURT**  
11  
12 **FOR THE DISTRICT OF ARIZONA**

13 GRAND CANYON SKYWALK  
14 DEVELOPMENT, LLC,

15 Plaintiff,

16 vs.

17 CHARLES VAUGHN, ET. AL.,

18 Defendants.  
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No. 3:11-CV-08048-DGC

**DEFENDANTS’ REPLY TO  
PLAINTIFF’S RESPONSE IN  
OPPOSITION TO DEFENDANTS’  
MOTION TO STAY AND  
ALTERNATIVELY TO DISMISS**

21 The Tribal Council hereby respectfully submits its Reply to GCSD’s Response to  
22 Defendants’ Motion to Stay and Alternatively to Dismiss (the “Motion”). Based upon  
23 GCSD’s Response, it appears that GCSD misunderstands the legal issues GCSD itself  
24 placed at issue in its pre-emptive lawsuit.  
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1           **I. PRECEDENT & COMITY REQUIRE A STAY OF PROCEEDINGS**

2           GCSD argues that Defendants are asserting that the matter presently pending  
3 before the Hualapai Tribal Court provides the basis for GCSD’s Motion. As is self  
4 evident on pg. 6, ln. 6-19 of the Motion, Defendants’ comity argument is instead  
5 premised upon allowing the Tribal Court, in the first instance, to address the existence,  
6 constitutionality, and scope of the Hualapai’s inherent sovereign power of eminent  
7 domain – the issues raised by this lawsuit. To deny the Tribal Court the opportunity to  
8 address such important questions, touching upon the heart of the Hualapai’s sovereignty,  
9 would contravene clearly established federal policies designed to support and foster tribal  
10 self-government. Simply put, the pendency of the current Tribal Court lawsuit is not the  
11 basis for Defendants’ Motion.

12                           1. A Consensual Relationship Exists

13           GCSD’s response fails to address why any of the controlling precedent the Tribal  
14 Council cited in the Motion does not apply to this case. Moreover, GCSD’s argument  
15 evidences a misunderstanding of that controlling precedent. GCSD appears to believe  
16 that it must do business with the Tribe itself, as opposed to SNW, a tribally-chartered  
17 corporation, for a consensual relationship to exist with the Tribe. Such a belief is dead  
18 wrong, and is self-evident from the precedent cited in the Tribal Council’s Motion:  
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20                           “*See Montana*, 450 U.S. at 565, 101 S.Ct. 1245 (holding that tribal courts  
21 have presumptive civil subject matter jurisdiction over non-members who  
22 enter into commercial dealings on tribal lands with the tribe *or its*  
23 *members*)”  
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1 See Defendants' Motion to Stay, pg. 8, ln. 5-16.

2           Indeed, the 9th Circuit's *Stock West Inc.* and *Lanphere* opinions make clear that  
3 commercial dealings on reservation lands, whether with the Tribe, tribal members, or  
4 non-members, is sufficient to raise a colorable claim of civil subject matter jurisdiction  
5 under *Montana* such that exhaustion is required. Moreover, in the present case, the 2003  
6 Agreement is the "commercial dealing" that both supports the existence of a consensual  
7 relationship and is the subject matter concerning the Tribe's preemptively challenged use  
8 of its legislative power to exercise eminent domain. Looked at another way, a consensual  
9 relationship must exist because the purpose and effect of a potential condemnation of the  
10 2003 Agreement would be to end GCSD's commercial dealings with SNW and the Tribe  
11 on tribal trust land and thereby end the GCSD's consensual/contractual relationship with  
12 SNW, the Tribe, its members, and non-members on tribal trust lands.

13           Based on the foregoing, and incorporating by reference the prior arguments made  
14 in Defendants' Motion, this Court should stay this proceeding until GCSD has exhausted  
15 tribal remedies.<sup>1</sup>

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23 <sup>1</sup> Defendants did not contend in the Motion to Stay that the second *Montana* exception  
24 applied, because the argument is unnecessary where there is a consensual relationship, as  
25 patently exists between GCSD and the Tribe and its members. However, Defendants  
26 note that because the Skywalk is an essential element to the Tribe's economic success,  
GCSD's continued mismanagement and refusal to complete the project could lead to  
catastrophe if visitors attendance drops due to visitors' unfavorable reaction to the  
unfinished nature of the project.

1           **II.     GCS D Has Not Alleged a Violation of Federal Law.**

2           Defendants' assertion that GCS D has not alleged any violation of federal law is  
3 neither "incredible" nor based on "strained" reasoning. In its Complaint, GCS D alleged  
4 that the violation of federal law they wished this court to enjoin was the potential use of  
5 the Tribe's eminent domain power over GCS D's interest in the 2003 Development and  
6 Management Agreement. GCS D argued that any potential taking of their property  
7 interest in the 2003 Agreement would violate federal law because *Montana* limits the  
8 Tribe's subject matter jurisdiction to regulate and/or adjudicate the conduct and activities  
9 of non-members, unless one of two *Montana* exceptions applies. The Tribal Council  
10 argued in its Motion that the subject matter rule laid down by *Montana* and its progeny  
11 was limited to restricting the exercise of a tribe's power over non-members' *activities*  
12 *and conduct*, and does not apply where a tribe does not attempt to regulate or adjudicate  
13 with regard to non-member *conduct or activity*. Since an eminent domain action is a  
14 proceeding *in rem*, and *in rem* proceedings are concerned exclusively with the treatment  
15 of property (not the conduct or activities of people), then *Montana* does not apply. Ergo,  
16 GCS D has pled no violation of federal law under *Montana*, or at all.

17           GCS D, rather than address the argument and supporting case law cited in the  
18 Tribal Council's Motion, confuses the dispositive *Montana* issues.

19           First, GCS D suggests that the Tribe cannot condemn the contract interest because  
20 it could not condemn the underlying land upon which the skywalk is built. This is true,  
21 but irrelevant. The Tribe's power to condemn may not "travel up," such that it could take  
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1 from the U.S. land held by the U.S. in trust for the Tribe and thereby recharacterize it as  
2 purely sovereign tribal land. But the power to condemn does “travel down.” No one  
3 would question Tribe’s use of eminent domain to retake land that the Tribe previously  
4 alienated for private use by a member or non-member. And, simply, any exercise of  
5 eminent domain by the Tribe would not be against any real property owned by Plaintiff –  
6 only Plaintiff’s contract interest in the management of Tribal property.  
7

8           Second, GCSD confuses subject matter jurisdiction with personal jurisdiction,  
9 claiming that *in rem* proceedings cannot be used as an end run around *in personam*  
10 jurisdiction. But *Montana* has nothing to do with personal jurisdiction, *in personam* or *in*  
11 *rem*. *Montana* only restricts the subject-matter upon which a tribe may regulate or  
12 adjudicate. Moreover, an *in rem* proceeding is not an end run around *in personam*  
13 jurisdiction because *in personam* jurisdiction is irrelevant and unnecessary to proceed  
14 against property. An eminent domain action, as an *in rem* action, by its very nature and  
15 purpose needs no authority over the owner of the property interest. *See Shaffer v.*  
16 *Heitner*, 433 U.S. 186, 199, 97 S.Ct. 2569, 53 L.Ed.2d 683 (1997)( “[t]he effect of a  
17 judgment in [an *in rem* proceeding] is limited to the property that supports jurisdiction  
18 and does not impose a personal liability on the property owner, *since he is not before the*  
19 *court.*” (emphasis added).  
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23           Based on GCSD’s misunderstanding of the law, a person who never set foot in  
24 Arizona, but came into ownership of real property in Arizona by inheritance, could defeat  
25 an *in rem* eminent domain proceeding against his real property by simply demonstrating  
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1 that the state had no personal jurisdiction over him. This cannot be so. In the present  
2 case, as in all eminent domain cases, personal jurisdiction over the owner is irrelevant.<sup>2</sup>

3  
4 Third, GCSD contends that “Defendants’ characterization of contract rights as a  
5 ‘thing’ subject to seizure is dubious at best.” Indubitably, eminent domain extends to any  
6 intangible property, including contracts. *See, e.g., City of Cincinnati v. Lousiville & N.R.*  
7 *Co.*, 223 U.S. 390, 400, 32 S.Ct. 267, 268 (1912) (“[Ohio’s power of eminent domain]  
8 extends to tangibles and intangibles alike. A chose in action, a charter, ***or any kind of***  
9 ***contract***, are, along with land and moveables, within the sweep of this sovereign  
10 authority.”)(emphasis added).

11  
12 Fourth, GCSD’s newly minted allegation that the recent passage of the  
13 condemnation ordinance by the Tribal Council is an *ultra vires* act is meritless, and  
14 demonstrates a fundamental misunderstanding of a sovereign’s eminent domain power.  
15 Assuming *arguendo* that the Court found the passage or existence of the condemnation  
16 ordinance was an *ultra vires* act, it would accomplish nothing. The ordinance is not a  
17 grant of power; the ordinance is a restriction of the Tribe’s power to exercise eminent  
18 domain – a power that already existed, and exists because the Tribe is a sovereign entity.<sup>3</sup>  
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20 Therefore, the ordinance’s existence and its provisions are immaterial to the specific  
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23 <sup>2</sup> Even if personal jurisdiction were necessary, GCSD has minimum contacts necessary  
24 under the standard set forth in *International Shoe* to support personal jurisdiction.

25 <sup>3</sup> “The right of eminent domain . . . requires no constitutional recognition; ***it is an***  
26 ***attribute of sovereignty.***” *Mississippi & Rum River Boom Co. v. Patterson*, 98 U.S. 403,  
406, 25 L. Ed. 206 (1878)(emphasis added).

1 issue raised by GCSD's Complaint (i.e., whether the Tribe may condemn a non-  
2 member's property). The ordinance simply insures due process is provided in any  
3 eminent domain proceeding.  
4

5 Fifth,<sup>4</sup> GCSD asserts that "Plaintiff has alleged that Defendants, in their  
6 ***threatened enforcement***<sup>5</sup> of the eminent domain ordinance have purported to act "***under***  
7 ***authority not validly conferred*** . . . because, as a matter of law, the Tribe ***may not confer***  
8 ***or bestow any such regulatory authority upon its agents and officials***, including these  
9 Defendants." Response at pg. 8, ln. 15-18. As was explained in the Motion and above,  
10 the condemnation ordinance does not grant or bestow the power of eminent domain to the  
11 Tribal Council. Eminent domain power exists, and has always existed, because the Tribe  
12 is a sovereign entity. *Mississippi & Rum River Boom Co. v. Patterson*, 98 U.S. 403, 406,  
13 25 L. Ed. 206 (1878). The Tribal Council is embodied with full legislative power under  
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17 <sup>4</sup> As a house keeping matter, GCSD's continued *Ex Parte Young* analysis misunderstands  
18 the primary argument of the Tribal Council's Motion. The Tribal Council does not  
19 contest that *Ex Parte Young* strips immunity where a plaintiff alleges that an official has  
20 violated federal law. Rather, the Tribal Council argues that immunity issues and *Ex*  
21 *Parte Young* are irrelevant because GCSD has failed to state a colorable claim that the  
Tribal Council is or will violate federal law by taking a non-member's property under the  
specific facts presented in this case.

22 <sup>5</sup> Defendants have not "threatened enforcement" of eminent domain against GCSD.  
23 However, Defendants are aware that GCSD and its attorneys have obtained confidential  
24 and privileged documents, and then used those documents to bring the present action.  
25 Furthermore, GCSD has not explained how it came into possession of such confidential  
26 and privileged information, and why it believed use and disclosure of such material was  
appropriate without first contacting Defendants' attorney to confirm the confidential  
nature of the materials.

1 the Hualapai Constitution, and the Constitution was approved by the United States  
2 Secretary of the Interior. The Tribal Council, as the legislative body of the Hualapai, is  
3 not using a eminent domain “under an authority not validly conferred.” The power exists  
4 because the Tribe exists. Because use of eminent domain is a legislative action, it is an  
5 inherent power whose sole privilege of use belongs to the Tribal Council, not by  
6 delegation, but by right. Therefore, exercise of the authority to condemn is not an *ultra*  
7  
8 *vires* act in and of itself.

9  
10 Finally, GCSD’s Response reiterates its original basis for filing this suit: “the  
11 Council Defendants, by taking steps to condemn the contractual rights of a non-Indian,  
12 are acting beyond the scope of their legal authority.” GCSD fails to cite any authority for  
13 this proposition. It cannot be the case that GCSD can just insist there is a violation of  
14 federal law without presenting some colorable explanation of how and why the  
15 challenged action is violative of federal law. In its Complaint GCSD cites *Montana* as its  
16 sole basis for the alleged violation of federal law. In its Response, GCSD refuses to  
17 address the argument that *Montana* does not apply because eminent domain is not an  
18 attempt to regulate or adjudicate upon the activity and conduct of non-members, and  
19 instead cites inapposite case law. Each of the cases cited by GCSD concern actions by  
20 Tribal officials that sought to regulate by taxation the conduct and activities of non-  
21 members or adjudicate upon the conduct and activities of non-members. Here, GCSD  
22 has alleged no violation of federal law that would pass a 12(b)(6) test, let alone satisfy *Ex*  
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26 *Parte Young*.

1           Based on the above, GCSD has failed to allege any violation of federal law. No  
2 federal law restricts a tribe's civil subject matter jurisdiction over property on tribal trust  
3 land. Therefore, this Court should stay this proceeding until the Tribal Court can  
4 determine the legality and jurisdictional matters at issue in GCSD's Complaint, if the  
5 Tribal Council does in fact pass a resolution to condemn the 2003 Agreement in whole or  
6 in part and initiates an eminent domain proceeding in Tribal Court.  
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8           **III. EXPEDITED CONSIDERATION OF THE MOTION**  
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10           The Tribal Council does not oppose GCSD's request for expedited consideration  
11 of the Motion, but does not believe any of the unfounded allegations raised in support of  
12 the motion are germane to the dispute at hand. The Tribal Council does believe that  
13 GCSD's accusations of bad-faith are unwarranted and particularly ironic given GCSD's  
14 continued use of confidential and privilege information.  
15

16           **IV. EXPEDITED DISCOVERY**  
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18           Expedited discovery is unnecessary. GCSD simply wishes to use this lawsuit as a  
19 discovery vehicle for its lawsuit in Tribal Court. Moreover, there is no discovery that  
20 could take place that would not be protected from disclosure by the attorney client  
21 privilege, work-product doctrine, and executive session privilege. All discussion  
22 regarding any and all potential legal options pertaining to the Tribe's interest in the  
23 Skywalk were conducted for the purposes of obtaining legal advice and during the Tribal  
24 Council's executive session meetings with legal counsel present.  
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**V. CONCLUSION**

For all of the foregoing reasons, the Tribal Council respectfully requests this Court to stay all proceedings until tribal remedies have been exhausted.

Respectfully submitted this 19th day of May, 2011.

**GALLAGHER & KENNEDY, P.A.**

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**CERTIFICATE OF SERVICE**

I hereby certify that on May 19, 2011, I electronically transmitted the attached document to the Clerk's Office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to the following CM/ECF registrants:

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