

1 Pamela M. Overton (AZ Bar No. 009062)
Tracy L. Weiss (AZ Bar No. 027289)
2 **GREENBERG TRAUIG, LLP**
2375 E. Camelback Rd., Ste. 700
3 Phoenix, Arizona 85016
Telephone: (602) 445-8000
4 Facsimile: (602) 445-8100
5 E-mail: OvertonP@gtlaw.com; WeissT@gtlaw.com

6 Mark Tratos (NV Bar No. 1086) (*Pro Hac Vice* App. Pending)
GREENBERG TRAUIG, LLP
7 3773 Howard Hughes Parkway
Ste. 400 North
8 Las Vegas, Nevada 89169
Telephone: (702) 792-3773
9 Facsimile: (702) 792-9002
10 Email: TratosM@gtlaw.com

11 Troy A. Eid (CO Bar No. 21164) (*Pro Hac Vice* App. Pending)
GREENBERG TRAUIG, LLP
12 1200 17th St., Ste. 2400
Denver, Colorado 80202
13 Telephone: (303) 572-6500
Facsimile: (303) 572-6540
14 Email: EidT@gtlaw.com

15 Attorneys for Plaintiff

16 IN THE UNITED STATES DISTRICT COURT
17 FOR THE DISTRICT OF ARIZONA

18 GRAND CANYON SKYWALK
19 DEVELOPMENT, LLC,

20 Plaintiff,

21 vs.

22 CHARLES VAUGHN, ET AL. ,

23 Defendants.
24

No. 3:11-CV-08048-DGC

**REPLY IN SUPPORT OF GCSD'S
MOTION FOR RECONSIDERATION
AND REQUEST FOR STAY**

(Oral Argument Requested)

**Expedited Hearing and Consideration
Requested**

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27 For the reasons detailed in Grand Canyon Skywalk Development, LLC's ("GCSD")
28 Motion for Reconsideration ("Motion," Dkt. 35) and herein, GCSD has satisfied LRCiv 7.2(g)

1 and reconsideration of this Court's June 23, 2011 Order dismissing this action ("Order," Dkt.
2 33) is warranted. Defendants' Response In Opposition to Plaintiffs' Motion for Reconsideration
3 ("Response," Dkt. 37) raises no viable arguments to counter GCSD's demonstration that: (i)
4 significant new facts and developments have arisen about which this Court was unaware when it
5 issued its Order; and (ii) the Court erred in its application of *Water Wheel*¹ because this case
6 does not implicate the sort of tribal right to exclude at issue in *Water Wheel*. Accordingly,
7 GCSD's Motion should be granted.

8 **A. There Are New Facts. They Illuminate And Support GCSD's Request For**
9 **Injunctive Relief And Weigh Against Dismissal Of The Action.**

10 Without citation, Defendants assert that: "There are no 'new facts.'" Response at 2:2.
11 But Defendants refute none of the facts outlined in GCSD's Motion, Supplemental Status
12 Report (Ex. 1 to GCSD's Motion), or supporting declaration or numerous attached documents.
13 Nor do they address the motion to dismiss made in Hualapai Tribal Court by 'Sa' Nyu Wa, Inc.
14 ("SNW") or the ultimate result sought by the collaborative actions of SNW in Tribal Court and
15 Defendants here: that GCSD be left with nowhere to go to enforce its contract rights and
16 nowhere to challenge an allegedly regulatory taking of those rights. The plot has become even
17 clearer in the additional new facts GCSD presents.²

18 GCSD does not misunderstand Section 2.16 of the Hualapai Tribe Law and Order Code
19 ("Ordinance")³ or "condemnation law in general." Resp. at 2:5-6. GCSD clearly understands
20 the legal bootstrapping Defendants wish to accomplish. According to Defendants, GCSD may
21 not file a suit in *any* court to challenge the legality of the Ordinance, irrespective of its nature
22 and effect on non-Indian, intangible contract rights. Resp. at n.3 (if GCSD's contract rights are
23 condemned "the Tribe would be immune from suit by GCSD in *any* court" (emphasis in
24 original); *see also* Ex. A, ¶¶ 5-7. Defendants assert that GCSD must wait for the Tribe to
25 initiate a Tribal Court action pursuant to the Ordinance and then GCSD may avail itself of
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28 ¹ *Water Wheel Camp Recreational Area Inc. v. Larance*, --- F.3d ---, 2011 WL 2279188 (9th Cir. June 10, 2011).

² *See* Declaration of Troy A. Eid, Ex. A, ¶¶ 5-9 (detailing statements in recent filings, hearings and correspondence).

³ Exhibit B hereto.

1 Tribal Court remedies that may be available, *if any*. But in fact there is no remedy available to
2 GCSD under the Ordinance. Hence, GCSD’s instant challenge to the Ordinance as *ultra vires*.

3 As GCSD alleged in its Complaint (Dkt. 1), Motion for Preliminary Injunction (Dkt. 3)
4 and Motion for Temporary Restraining Order (Dkt. 15), if GCSD were required to await the
5 seizure of its contract rights, the damage would be irreparable and instantaneous. If this Court
6 will not at least retain jurisdiction, stay this matter and allow GCSD to come back to the Court
7 when Defendants attempt to enforce their eminent domain ordinance, GCSD will be left with
8 only the amorphous and hollow procedures set forth in the Ordinance.

9 Thereunder, Defendants may seize “All property interests, tangible or intangible, for any
10 use of the Tribe, or any other use authorized by the Tribal Council.”⁴ Ex. B, ¶ B(3). Having
11 declared such a taking, the Tribe must file a complaint in Hualapai Tribal Court. *Id.*, ¶ F(2).
12 However, in its sole discretion, the Tribe may file with the Tribal Court a declaration of taking,
13 providing some details about the taking. *Id.* As a matter of gratuity, the Tribe may post a bond.
14 *Id.*, ¶ F(5). The party whose rights are seized by such an action may only file a motion to
15 dismiss if a declaration of taking is filed and then may challenge only a single matter: whether
16 or not the taking is for a public use. *Id.*, ¶ F(6). If the Tribe files a declaration and a party
17 lodges a challenge per Paragraph F(6) of the Ordinance, the purported seizure is nonetheless
18 immediately self-executing: “The Tribe shall have the full right and authority to possess and use
19 the property, including acting as the party to the contract or other intangible property, described
20 in the declaration of taking.” *Id.*, ¶ F(6)(d). Once the Tribe declares a taking, there can be no
21 meaningful review: “The Tribe’s right and authority to possess and use the property, including
22 acting as the party to the contract or other intangible property, described in the declaration of
23 taking shall not be delayed or prevented through any court action,” *id.*; and “No subsequent
24 proceedings shall affect the title acquired by the Tribe to the property, or its status as a party to
25 the contract or other intangible property.” *Id.*, ¶ F(6)(f); ¶ O(3).

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28 ⁴ On its face, this supposedly unlimited power would also include a right to seize “tangible or intangible” property or rights
for personal (non Tribal use) as long as the Tribal Council deemed it appropriate.

1 If the Tribe elects not to file a declaration of taking, it need only file a complaint
2 describing the property taken and citing its purported public use. Ex. B, ¶ G(1-5). However,
3 “[t]he Tribe is not required to, and need not, plead or prove any other matter, including that the
4 public use is ‘necessary.’” *Id.*, ¶ G(6). The amount of compensation is sole issue subject to
5 adjudication under the Ordinance and only by a local, full-time judge of the Tribal Court (no
6 judge pro tem may hear the case), *id.*, ¶ K(1). No other relief whatsoever is available. *Id.*, ¶¶ L,
7 M. Even after a court determination of the property value, the Tribe may pay or not, at its
8 leisure or could change its mind and return the seized property, perhaps damaged, after six
9 months or more of non-payment *Id.*, ¶ N.

10 Under Defendants’ scheme, they have uncontestable power to initiate a self-executing
11 declaration of eminent domain over GCSD’s intangible contract rights and to insert themselves
12 into the contract shoes of a private, non-Indian party at any time with total impunity. Those
13 facts have been made clear in the recent combination of filings by Defendants in this Court and
14 SNW in Tribal Court that SNW maintains GCSD has no contractual remedies and GCSD has no
15 right to challenge the Ordinance. *See* Ex. B, ¶¶ 5-7. Defendants’ statement that “GCSD will
16 have a forum in Tribal Court to challenge the civil subject matter, along with all other applicable
17 defenses and challenges to the legality of the Tribe’s exercise of its sovereign powers” is thus
18 simply disingenuous. Resp. at 2:11-13.

19 **B. *Water Wheel* Is Distinguishable From The Instant Case.**

20 It simply cannot be that the Ninth Circuit’s decision in *Water Wheel* affords Defendants a
21 clear path to swallow the contract rights of a non-Indian with absolutely no forum for judicial
22 challenge to their purported regulatory powers. As demonstrated above, the Ordinance’s regime
23 provides that the Tribal Council need only declare a taking to make it instantly so. If this Court
24 dismisses this action, GCSD’s contract rights are lost. GCSD respectfully submits that the
25 *Water Wheel* comes no where close to countenancing such an injustice.

26 Defendants advance three intertwined arguments that the application of *Water Wheel* is
27 appropriate. First, Defendants argue that GCSD’s “2003 Agreement”⁵ with SNW is

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⁵ Because Defendants have raised interpretation of the 2003 Agreement as an issue, GCSD attaches it hereto as Ex. C.

1 “appurtenant to the Skywalk” because some of the activities required by the 2003 Agreement
2 occur on tribal land. Response, pp. 2, 3. Next, Defendants urge that the Tribe’s right to exclude
3 and its ability to condemn contract rights are synonymous. *Id.*, 3:6-7; n2. Third, Defendants
4 argue that *Water Wheel* is that it is not a narrow case about tribal power to exclude non-Indians
5 from tribal property, but rather, a much broader case about tribal power to regulate non-Indian
6 activity if that activity has some connection to tribal lands. Resp., pp. 3-5. As explained below,
7 each of these arguments is infirm.

8 Defendants argue that the 2003 Agreement “appurtenant to tribal land” encumbers tribal
9 land and restricts the Tribe’s right to exclude. Resp., pp. 3-5.⁶ Defendants assert that the 2003
10 Agreement between SNW and GCSO “directly bears upon the Tribe’s ability to exclude and
11 manage its lands” and “bears directly upon the Tribe’s territorial management of its land, and its
12 tourism industry.” *Id.* at 4:20-25. Defendants are mistaken. This case plainly involves a
13 contract for services and has *never* been about tribal land. Had the 2003 Agreement involved an
14 interest that was appurtenant to tribal land, the Tribe would have duly submitted it to the
15 Secretary of the Interior for approval as required by federal law. 25 U.S.C. § 81. The Tribe did
16 not, and for good reason: a contract for services does not “encumber” tribal lands for a period of
17 seven years or more as required by Section 81.⁷ The 2000 Amendments to Section 81 made it
18 emphatically clear, and the Tribe plainly understood at the time, that Secretarial approval was no
19 longer required for contracts “relative to Indian lands,” but rather applies only where there is a
20 “loss of tribal proprietary control” over tribal lands. S. Rep. 106-150, at 9 (1999). By
21 definition, this case cannot turn on the Tribe’s power to exclude where there has been no
22 relinquishment of proprietary control over tribal land.⁸

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24 ⁶ GCSO asserts that the 2003 Agreement is not “appurtenant” the lands upon which the Skywalk is situated. “Appurtenance”
is defined in Black’s Law Dictionary as: “Something that belongs or is attached to something else.” Black’s Law Dictionary,
Pocket Edition, 1996.

25 ⁷ Note that the 2003 Agreement has an “Operating Term” of 25 years (Ex. C, p. 4), but bears no Bureau of Indian Affairs
26 contract identification number and there is no correspondence in the record indicating the 2003 Agreement was ever
submitted for review to the Department of the Interior. GCSO submits this is because the parties recognized that the 2003
Agreement simply did not encumber tribal lands, as Defendants now suggest.

27 ⁸ Here, the 2003 Agreement expressly provides that the Tribe retains ownership of the site and beneficial ownership of the
28 land. Ex. B, §§ 2.2, 2.9 (2003 Agreement “not intended (and shall not be construed) to create or grant a leasehold or any
other real property interest in favor of Manager”). GCSO has no proprietary control over tribal land. 25 C.F.R. § 84.002;
GasPlus, LLC v. U.S. Dep’t of the Interior, 510 F.Supp.2d 18, 36-37 (D. D.C. 2007).

1 Likewise, Defendants' reliance upon *Johnson v Gila River Community*, 174 F.3d 1032
2 (9th Cir. 1999), *cert. denied*, 120 S.Ct. 182 (1999) as supportive of their opaque second
3 argument on inverse condemnation is misplaced. Defendants appear to assert that *Johnson*
4 stands for the proposition that an Indian tribe can bring an inverse condemnation case and that it
5 would be perverse for a tribal to be able to challenge condemnation of tribal lands by another
6 government, but not to also be to itself condemn property. Resp. at n.2. *Johnson* does not so
7 hold, or even address inverse condemnation at all. In any event, it is clear on the face the
8 Ordinance that GCSD could not bring an inverse condemnation against Defendants in any court
9 or even challenge the Ordinance in a Tribal Court action originated by the Tribe. Ex. B, ¶¶
10 E(4), F(6)(f), J(2), U. Additionally, *Johnson* does not indicate that there is any right of action
11 for a tribe to challenge condemnation of intangible contracts rights or indicate that some legal
12 imbalance would arise from tribal inability to condemn a non-Indian's intangible contract rights.
13 Thus, Defendants' second argument lacks merit.

14 Moreover, Defendants concede that “[a]ny potential condemnation of the Skywalk
15 Agreement would be against contract rights only.” Resp. at 2:22-23. But Defendants'
16 following conclusory declaration that those “property interests are on non-fee, tribal land and
17 the Skywalk” is inaccurate. Resp. at 5:8-10. While some of the services outlined in the 2003
18 Agreement are provided on tribal lands, many others are performed off the Reservation in Las
19 Vegas, Nevada. Ex. D, ¶¶ 4-17. But even if Defendants' characterization of the location for
20 contract performance were fair (which it is not), the fact remains that the intangible contract
21 interests Defendants would seize are non-Indian interests that should trigger analysis the Court's
22 analysis under *Montana v. United States*, 450 U.S. 544 (1981).

23 Stated more directly, Defendants' third argument is that because the Skywalk is situated
24 on trust lands owned by the United States and the 2003 Agreement provides for some services to
25 take place on those lands, the ownership of the underlying lands and not the ownership of the
26 intangible rights Defendants seek to condemn is dispositive of whether or not the Hualapai Tribe
27 has civil regulatory and adjudicatory authority over non-Indian contract rights and therefore
28 *Water Wheel* applies and *Montana* does not. That proposition is baseless.

1 In all the U.S. Supreme Court's seminal cases on the absence of tribal civil and
2 regulatory jurisdiction, the tribes' ability to exclude had been lost or burdened.⁹ Here, the
3 Hualapai Tribe has already exercised its right to exclude (and reciprocal right to include) by
4 delegating authority to SNW to contract with GCSD and grant GCSD the right to recover
5 monies from the operations of the Skywalk business on trust lands. To the extent the Tribe's
6 right to exclude is burdened by the construction and operation of the Skywalk, it has been
7 burdened by the sovereign actions of the Tribe.¹⁰ Such a burden on the Tribe's right to exclude
8 puts this case squarely within the framework of *Montana*, *Strate*, *Bourland* and *Plains*
9 *Commerce*. Defendants are without power to "regulate" their way out of a contract by seizing a
10 non-Indian's contract rights and claiming that no court can review that action.¹¹

11 It is clear that neither of the *Montana* exceptions applies here. 450 U.S. at 565-566.
12 GCSD has a contract with SNW. In no way could entering into a tribal corporation give rise to
13 some reasonable expectation that the parent tribe could, at its unreviewable whim, declare itself
14 to be the party to the contract in the stead of a non-Indian party and effect a taking, with
15 complete impunity, as a "regulatory" act within the meaning of the first *Montana* exception.
16 See *Atkinson Trading Co. v. Shirley*, 532 U.S. 645 (2001) ("*Montana's* consensual relationship
17 exception requires that the tax or regulation imposed by the Indian tribe have a nexus to the
18 consensual relationship itself"). Likewise, contracts for tourism management services do not
19 implicate the second *Montana* exception as it has been narrowly understood by the Supreme
20 Court. *Plains Commerce*, 128 S.Ct. at 2726 ("The conduct must do more than injure the tribe, it
21 must "imperil the subsistence" of the tribal community").

24 ⁹ See *Montana*, 450 U.S. 544 (tribe could not regulate hunting and fishing by non-Indians on non-Indian-owned fee land);
25 *Strate v. A-I Contractors*, 520 U.S. 438, 453 (1997) (extending that principle to state highway rights-of-way; tribe lacked
26 civil adjudicatory jurisdiction over an on-reservation vehicle accident); *South Dakota v. Bourland*, 508 U.S. 679 (1993)
(tribal regulation preempted as to land condemned for dam and reservoir project that had been broadly opened to the public);
Plains Commerce Bank v. Long Family Land & Cattle Co., 128 S.Ct. 2709 (2008) (no tribal power to regulate sale of
reservation fee land by non-Indian owner).

27 ¹⁰ And the Tribe is limited to the contractual remedies to which SNW is bound by the 2003 Agreement.

28 ¹¹ See *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 144-45 (1982) ("When a tribe grants a non-Indian the right to be on
Indian land, the tribe agrees not to exercise its *ultimate* power to oust the non-Indian as long as the non-Indian complies with
the initial conditions of entry." (emphasis in original)).

1 There is no requirement to exhaust tribal remedies when tribal court jurisdiction is non-
 2 existent. *Nevada v. Hicks*, 533 U.S. 353, 369, (2001). Here, the Tribe lacks regulatory
 3 adjudicatory authority over GCSD, thus the Tribal Court lacks authority over GCSD as well as
 4 any *in rem* authority over GCSD’s intangible non-Indian contract rights. There is no predicate
 5 for tribal jurisdiction in this instance, but even if there were, Defendants have so tied the hands
 6 of the Tribal Court in their overreaching Ordinance than no meaningful proceedings could occur
 7 in Tribal Court.¹² The wholly illusory nature of Tribal Court proceedings available under the
 8 Ordinance makes any Tribal Court challenge futile and jurisdiction in this Court proper.
 9 Finally, nothing in *Water Wheel* indicates that the ability to rewrite contracts of private parties is
 10 somehow incident to inherent tribal authority to exclude.

11 **CONCLUSION**

12 Pursuant to LRCiv 7.2(g), GCSD asks this Court, at a minimum, to stay this action to
 13 ensure the preservation of GCSD’s right to have its day in some court in the event Defendants
 14 attempt to exercise their supposed right to rewrite themselves as the party/parties to the 2003
 15 Agreement with SNW.

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28 ¹² E.g., GCSD could not challenge the Ordinance and the Tribal Court could only award compensation, which the Tribe, in turn, could pay or not. Ex. B, ¶¶ L, M, N.

1 Respectfully submitted this 15th day of July 2011.
2

3 **GREENBERG TRAURIG, LLP**
4

5 By: /s/ Pamela M. Overton

6 Pamela M. Overton
7 Tracy L. Weiss
8 2375 East Camelback Road, Suite 700
9 Phoenix, AZ 85016

10 **GREENBERG TRAURIG, LLP**

11 By: /s/ Mark Tratos

12 Mark Tratos
13 3773 Howard Hughes Parkway, Suite 400
14 North
15 Las Vegas, NV 89169

16 **GREENBERG TRAURIG, LLP**

17 By: /s/ Troy A. Eid

18 Troy A. Eid
19 1200 17th Street, Suite 2400
20 Denver, CO 80202

21 *Attorneys for Plaintiff*
22
23
24
25
26
27
28

CERTIFICATE OF SERVICE

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I hereby certify that on July 15, 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 registrant.

Glen Hallman
Paul K. Charlton
Benjamin C. Runkle
Christopher W. Thompson
GALLAGHER & KENNEDY, P.A.
2575 East Camelback Road
Phoenix, AZ 85016-9225

/s/Barrie Peagler