Pamela M. Overton (AZ Bar No. 009062)
Aaron C. Schepler(AZ Bar No. 019985)
GREENBERG TRAURIG, LLP
2375 E. Camelback Rd., Ste. 700
Phoenix, Arizona 85016
Telephone: (602) 445-8000
Facsimile: (602) 445-8100
E-mail: OvertonP@gtlaw.com; ScheplerA@gtlaw.com

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

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

Attorneys for Plaintiff

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

Grand Canyon Skywalk Development, LLC, Plaintiff, vs. Charles Vaughn, et al., Defendants.	No. 3:11-CV-08048-DGC **RESPONSE IN OPPOSITION TO DEFENDANTS' MOTION TO STAY AND ALTERNATIVELY TO DISMISS** **(Oral Argument Requested)** ***Expedited Hearing and Consideration Requested***

Defendants ask this Court to stay or dismiss this action "based upon considerations of comity between the United States and the Hualapai Nation." Doc. 25, Defendants' Motion to Stay and Alternatively to Dismiss (the "Motion"), at p. 1. This case presents no such "comity"

issues. Nor is tribal-court exhaustion required because, according to controlling U.S. Supreme Court precedent, the Hualapai Indian Tribe lacks any civil jurisdiction over Plaintiff. This Court should therefore deny Defendants' Motion.

Also, pursuant to Rule 16 of the Federal Rules of Civil Procedure and the Court's inherent authority to manage its docket, Plaintiff respectfully moves for expedited consideration of Defendants' Motion. Plaintiff also requests, as discussed below, that the Court issue a ruling on Plaintiff's Motion for Accelerated Discovery. *See* Doc. 4.

I. NO COMITY CONCERNS ARISE BECAUSE THE CASES INVOLVE DIFFERENT PARTIES AND DIFFERENT CLAIMS.

The doctrine of comity generally provides that one court should respect the legitimate decisions of another when the same parties are involved in a particular case or controversy. *See* BLACK'S LAW DICTIONARY (9th ed. 2009) ("comity: 1. A practice among political entities (as nations, states, or courts of different jurisdictions), involving esp. mutual recognition of legislative, executive, and judicial acts.") Comity concerns are not implicated where, as here, there are two totally different cases involving different parties and claims in two completely separate judicial fora. As this Court is aware, Plaintiff initiated a tribal court action against a tribal corporation, 'Sa' Nyu Wa ("SNW") with which it has a contractual relationship. *See* Doc. 1, Complaint, Exhibit 2. In that action, Grand Canyon Skywalk Development ("GCSD") seeks solely to compel SNW to arbitrate contract disputes between GCSD and SNW on the outstanding amounts due GCSD, and other issues as their contract expressly requires. *Id*.

The underlying merits of the tribal-court contract dispute/arbitration case have no bearing whatsoever on the matter before this Court – namely GCSD's declaratory-judgment claims against 11 individual tribal officials who purport to be able to seize any private, non-Indian citizen's contractual rights by exercise of so-called "eminent domain" powers. The terms of the contract do not apply to tribal officials' *ultra vires* "eminent domain" conduct, and no contract interpretation is required for adjudicating Plaintiff's declaratory-judgment action. Moreover, Defendants themselves admit that "this lawsuit … does not involve the contractual dispute

between Plaintiff and SNW." Motion, at p.3. Simply put, the tribal-court matter and this case are "apples and oranges." Accordingly, no comity concerns are presented here.

While it is true that comity concerns can exist even where there is no case pending in tribal court, (*see* Motion, at p. 5 (citing *Crawford v. Genuine Parts Co*., 947 F.2d 1405 (9th Cir. 1991)), it is not correct that the mere assertion of potential tribal court jurisdiction requires the Court to cede its authority over this case based on comity. This is because "mandatory deference does not follow automatically from an assertion of tribal court jurisdiction." *Crawford*, 947 F.2d at 1407.

II. NO EXHAUSTION OF TRIBAL COURT REMEDIES IS REQUIRED BECAUSE THE TRIBAL COURT LACKS CIVIL ADJUDICATIVE JURISDICTION OVER PLAINTIFF.

There is no requirement to exhaust tribal remedies when tribal-court jurisdiction is non-existent. *Nevada v. Hicks*, 533 U.S. 353, 369 (2001) (when it is "plain" that tribal court jurisdiction is lacking, exhaustion is unnecessary because the exhaustion requirement "would serve no purpose other than delay"). A tribal court is precluded from exercising civil adjudicatory jurisdiction over non-Indians or non-members where the tribe lacks corresponding civil regulatory or legislative jurisdiction. *Strate v. A-1 Contractors*, 520 U.S. 438, 453 (1997) ("As to nonmembers, we hold, a tribe's adjudicative jurisdiction does not exceed its legislative jurisdiction").

A. *Montana* precludes tribal court civil adjudicative jurisdiction over non-Indians except in two narrow circumstances.

For the past three decades, the U.S. Supreme Court has consistently ruled that Indian tribes lack civil jurisdiction over non-Indians except in two very narrow circumstances. This is the so-called *Montana* doctrine, first articulated in *Montana v. United States*, 450 U.S. 544 (1981), and it controls this case. Defendants lack the civil regulatory or legislative authority to expropriate Plaintiff's contractual rights because Defendants have absolutely no general civil regulatory or legislative authority over GCSD. Consequently, the tribal court has no general civil adjudicatory jurisdiction over GCSD. Although there are two exceptions to the *Montana* doctrine, neither of those exceptions applies here.

1. Plaintiff lacks "consensual relationships" with the Tribe.

The first *Montana* exception is limited to "consensual relationships" not present in this case: Plaintiff's contract is obviously with a tribally chartered corporation, SNW, and not with the Tribe itself. Moreover, the narrow and specific jurisdiction to which GCSD agreed in its 2003 contract with SNW – arbitration, with federal court enforcement – was not an unlimited agreement by GCSD to submit itself to any and all forms of tribal civil regulatory jurisdiction. *See Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316 (2008) ("[W]hen it comes to tribal regulatory authority, it is not 'in for a penny, in for a Pound.'") (quoting *Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 656 (2001)). Under the plain language of the contract, Plaintiff is "in" only for litigation proceedings in federal court; GSCD's contractual relationship with SNW expressly provides that federal court is the proper forum for the litigation of contract matters. Specifically, the agreement provides that "[t]he venue and jurisdiction for (x) any litigation under this Agreement and (y) all other civil matters arising out of this Agreement shall be the federal courts sitting in the State of Arizona. . . ." *See* Agreement, § 15.4(b) (Exhibit A to the Declaration of David Jin, filed with the Injunction Motion [Doc. 3]).

That Plaintiff has sought to enforce the contract's arbitration clause in tribal court does not submit GCSD to the Tribe's civil jurisdiction. By asserting otherwise, Defendants are, in effect, confusing general with specific jurisdiction. While GCSD has brought an action to compel arbitration in tribal court, that action in no way advances any agreement to the general jurisdiction of the tribal court. This result is basic hornbook litigation principles. *See, e.g., Core-Vent Corp. v. Nobel Industries AB*, 11 F.3d 1482, 1490 (9th Cir. 1993) (litigant's agreement to submit to California's jurisdiction in unrelated settlement agreement had no bearing on propriety of jurisdiction for other claims); *Virtuality LLC v. Bata Ltd.*, 138 F. Supp.2d 677, 685 (D. Md. 2001) (filing of an alternative dispute resolution case in Maryland could not open up litigant to the exercise of general jurisdiction in Maryland with respect to common law and statutory claims).

Nor is Plaintiff's compliance with tribal regulations, or its access to governmental services provided by the Tribe to its members on the reservation, legally sufficient to establish

such consensual relationships within the meaning of *Montana.* In *Atkinson Trading Co. v. Shirley*, 532 U.S. 645 (2001), the Court rejected the argument that the Navajo Nation had satisfied *Montana's* "consensual relationship" exception by providing numerous governmental services, including frequently used emergency-response services, to the petitioner hotel and its guests, which the Navajo Nation wished to tax. The *Atkinson Trading* Court held that "the generalized availability of tribal services patently insufficient to sustain the Tribe's civil authority over nonmembers[.]" *Id*. at 655. *Atkinson Trading* likewise held that petitioner's compliance with a general licensing regime was insufficient to establish a consensual relationship: "A nonmember's consensual relationship in one area thus does not trigger tribal civil authority in another – it is not 'in for a penny, in for a Pound.'" 532 U.S. at 656. The same situation applies here. Simply because Plaintiff operates a business on the reservation, and may have access to various tribal services, is legally insufficient under *Atkinson Trading* to establish the Tribe's civil regulatory or legislative adjudication over Plaintiff as a non-Indian.

2. Plaintiff's conduct is not "catastrophic" to tribal government.

The second *Montana* exception is likewise exceedingly narrow, and also does not apply here. That exception applies only when non-Indians' conduct is "catastrophic" to tribal government" and "menaces the 'political integrity, the economic security, or the health or welfare of the tribe." *Plains Commerce Bank*, 128 U.S. at 2726 (citing *Montana*, 450 U.S. at 566). "The conduct," the Court emphasized, "must do more than injure the tribe, it must 'imperil the subsistence' of the tribal community." *Id.*; *see also Atkinson Trading Co.*, 532 U.S. at 657-58 n.12 (tribe lacks civil jurisdiction over non-Indians "unless the drain of the nonmember's conduct upon tribal services and resources is so severe that it actually 'imperil[s]' the political integrity of the Indian tribe, there can be no assertion of civil authority beyond tribal lands" (quoting *Montana*, 450 U.S. at 566)). There is obviously nothing "catastrophic" to the Tribe about the Skywalk or its management and operations. This world-famous attraction generates millions of dollars in revenue, which provide substantial benefits to the Hualapai

Tribe.[1] Indeed, Plaintiff seeks to keep a profitable operation in place for the benefit of both the Tribe and GCSD.

In sum, Defendants' assertion that Plaintiff must exhaust tribal court remedies, when that court lacks civil jurisdiction over GCSD as required by *Montana*, is patently meritless. Defendants' actions are *ultra vires*, the Tribe has no general civil regulatory authority over GCSD, and the tribal court would lack any coordinate general civil adjudicatory authority. There is no "comity" concern presented when Plaintiff is not challenging tribal-court jurisdiction in tribal court. The comity/exhaustion rule applies to questions of civil adjudicatory jurisdiction, not to questions of civil *regulatory* jurisdiction (such as the ordinance and purported eminent-domain powers Plaintiff challenges in this case).

As set forth more fully below, *ultra vires* act by tribal officials may *always* be challenged in federal court without first exhausting trial remedies.

III. PLAINTIFF HAS ALLEGED VIOLATIONS OF FEDERAL LAW.

Incredibly, Defendants argue that Plaintiff has not alleged a violation of federal law because Plaintiff's allegation that the Tribe lacks civil regulatory authority over GCSD is irrelevant. Defendants' strained reasoning can be summarized as follows: eminent domain is an "*in rem*" proceeding but applies to intangible property, including contract rights, and the fact that the property managed under GCSD's contract with SNW is tribal-trust property somehow magically attaches some "tribal property" character to any non-Indian contract rights, subjecting them to seizure by a government before which non-Indians are not represented. Motion, at pp. 9-11. Defendants' argument is meritless. Plaintiff has stated a violation of federal law. Defendants are subject to this Court's jurisdiction challenging their *ultra vires* acts.

---

[1] The fact that the Skywalk is located on trust land, rather than fee land, is also legally insufficient to establish the Tribe's civil jurisdiction over Plaintiff under either Montana exception. In *Nevada v. Hicks*, the Supreme Court declared that even tribal beneficial ownership of land – the area where tribal power was previously perceived to be at its zenith – is merely "one factor to consider" in judicially determining whether an exercise of tribal governing authority over nonmembers "is 'necessary to protect tribal self-government or to control internal relations.'" 533 U.S. at 360.

First, the Tribe has no *in rem* authority even as to the real property upon which the Skywalk is situated; only the United States has such power. The land upon which the Skywalk is located is trust land held by the United States for the benefit of the Tribe. The Tribe and its officials lack the power to condemn federal property. *See*, *e.g.*, 25 U.S.C. §§ 177-202 (Non-Intercourse Act, providing Indian lands not subject to alienation absent approval of the United States); 1A-2 NICHOLS ON EMINENT DOMAIN § 2.20 (discussing how Indian tribes have always been subject to the sovereignty of the United States and likewise subject to the power of federal eminent domain). To the extent Defendants' argument is that the Tribe has power of eminent domain over contract rights associated in some manner with real property within the boundaries of the Reservation, such a power cannot more extensive that the Tribe's eminent-domain power with respect to the real property. Here, the Tribe has no such power with respect to the real property upon which the Skywalk sits and, consequently, no power of eminent domain with respect to contract rights for management of commercial facilities located on that real property.

Second, *in rem* jurisdiction does not equate to an end-run around *in personam* jurisdiction, as Defendants argue. The Tribe simply does not have some territorial super power for *in rem* actions over any and all property or contract rights of persons within its borders. 1A-2 NICHOLS ON EMINENT DOMAIN § 2.07 (sovereign's powers of eminent domain "however vast in their character and searching in their extent, are inherently limited to subjects within the [sovereign's] jurisdiction"). Rather, the sovereignty of the tribe is limited as defined in federal law, either by Congress or the courts. It is clear that the tribe does not retain some broad "*in rem*" territorial sovereignty by which it can side-step the U.S. Supreme Court authorities that detail the general rule that Indian tribes lack jurisdiction over non-Indians by claiming to have eminent domain authority over all non-Indian property within the exterior boundaries of a reservation, even if the tribe does not have jurisdiction over the individual non-Indian owner of same. *See generally, Montana, Strate, Hicks*. With that argument, the Defendants assume they would have jurisdiction to seize non-Indian fee lands within the Reservation, federal lands within the Reservation, and much more. Defendants' characterization of contract rights as a "thing" subject to seizure is dubious at best.

The Defendants' assertion of their ability to take GCSD's contract rights in stunningly broad. Under Defendants' theory, the Tribe could seize lands held by the United States, lands held by non-Indians, or contract rights of any person passing through the Reservation. Taken to its logical extreme, the eminent-domain ordinance would countenance a non-Indian cell-phone user driving through a state highway on the Reservation having his cell-phone contract expropriated for tribal public use because he was appurtenant to land within the Tribe's territorial boundaries, even though the Tribe did not own or control the land. It simply cannot be, under the U.S. Supreme Court's precedents, that a tribe can take any non-Indian property found within its borders at any time without redress to federal court. The eminent-domain ordinance that purports to establish such a power for the Hualapai Tribe is *ultra vire*s. Federal courts are open to challenge such an overreaching and unfair law without regard to the doctrines of sovereign immunity or tribal-court exhaustion because the conduct with respect to which relief is sought is beyond the officers' powers and is, therefore, not the conduct of the sovereign. *See Larson v. Domestic & Foreign Commerce Corp*., 337 U.S. 682, 689-691 (1949).[2]

Plaintiff has alleged that Defendants, in their threatened enforcement of the eminent-domain ordinance have purported to act "under an authority not validly conferred," *Larson*, 237 U.S. at 691, because, as a matter of law, the Tribe may not confer or bestow any such regulatory authority upon its agents and officials, including these Defendants. Sovereign immunity does not extend to *members* of the tribe just because of their status as members, *see Puyallup Tribe v. Dep't of Game*, 433 U.S. 165, 172-173 (1977), or to tribal officials alleged to have acted outside the bounds of their lawful authority. *See*, *e.g*., *Tenneco Oil Co. v. Sac & Fox Tribe*, 725 F.2d 572, 574-575 (10th Cir. 1984). Rather, federal courts have extended the doctrine of *Ex parte*

[2] As the Court observed in *Larson*, where an official acts outside of his or her authority, that person's acts are not those of the sovereign: "There may be, of course, suits for specific relief against officers of the sovereign which are not suits against the sovereign. *** [For example,] where the officer's powers are limited by statute, his actions beyond those limitations are considered individual and not sovereign actions. The officer is not doing the business which the sovereign has empowered him to do or he is doing it in a way which the sovereign has forbidden. His actions are ultra vires his authority and therefore may be made the object of specific relief." 337 U.S. at 689.

Young, 209 U.S. 123 (1908), to allow suits against tribal officials, at least for declaratory or injunctive relief. *Tenneco Oil*, 725 F.2d at 574-575. Indeed, in *Santa Clara Pueblo v. Martinez*, the Supreme Court squarely addressed this issue, and specifically stated that tribal officials are not protected by tribal immunity when acting beyond the scope of their authority. 436 U.S. 49, 59 (1978); *see also Okla. Tax Comm'n v. Citizen Band of Potawatomi Indian Tribe*, 498 U.S. 505, 514 (1991) ("We have never held that individual agents or officers of a tribe are not liable for damages in actions brought by the State.").

Here, the validity of the Council Defendants' actions has been expressly challenged. GCSD alleges in its complaint that the Council Defendants, by taking steps to condemn the contractual rights of a non-Indian, are acting beyond the scope of their legal authority. *See*, *e.g.*, Complaint ¶¶ 1, 16, 81 & 83. As a result, no sovereign immunity attaches. *See Burlington N. R. Co. v. Blackfeet Tribe*, 924 F.2d 899, 901-902 (9th Cir. 1991), *overruled on other grounds by Big Horn County Elec. Coop., Inc. v. Adams*, 219 F.3d 944, 953 (9th Cir. 2000). This rule could not be clearer in the Ninth Circuit:

> In determining whether *Ex Parte Young* is applicable to overcome the tribal officials' claim of immunity, the relevant inquiry is only whether BNSF has *alleged* an ongoing violation of federal law and seeks prospective relief. *See Verizon Md., Inc.*, 535 U.S. at 645-46. Clearly it has done so. BNSF's complaint states that "Defendants have acted, have threatened to act, or may act under the purported authority of the Tribe, to the injury of BNSF and in violation of federal law and in excess of federal limitations placed on the power of the Defendants" by seeking to enforce an unauthorized tax against BNSF that the Tribe lacks the jurisdiction to impose. Compl. P 5. BNSF seeks a declaration that the tax is invalid as applied to its right-of-way and a permanent injunction prohibiting the tribal officials from enforcing the tax against it. Compl. P 1. This is clearly the type of suit that is permissible under the doctrine of *Ex Parte Young*.

Burlington N. & Santa Fe R. Co. v. Vaughn, 509 F.3d 1085, 1092 (9th Cir. 2007); *see also BNSF Railway Co. v. Ray*, 297 Fed. Appx. 675, 677-78 (9th Cir. 2008) (upholding this Court's injunction preventing Hualapai tribal-court officials from taking any action over tort claims, *even to dismiss them*, where tribal officials' actions were alleged to be *ultra vires*, and ruling that no tribal-court exhaustion was required because the Tribe plainly lacked jurisdiction).

Lastly, Defendants' assertion that it is "beyond dispute" that a government can oust a party to a private contract and insert itself at whatever price it determines (because contract rights are "intangible property") is also wrong. Motion, at p. 10. Such a statement ignores *Montana* and , no known Ninth Circuit, Arizona, or Hualapai Indian Tribe authorities allow for the exercise of eminent domain with respect to contract rights such the government can put itself in the shoes of the contracting party.[3] Governmental authority to unilaterally substitute itself in place of a private party to a contract would eviscerate the fundamental concept of meeting of the minds. The outlier cases Defendants cite (allowing public seizure of major sports franchises to prevent relocation) are not at all equivalent to what the Tribe purports to be able to do here – to rewrite the contract of private parties and declare itself the substituted party to the contract. Accordingly, Plaintiff adequately alleged violations of federal law. Therefore, jurisdiction before this Court is proper.

IV. PLAINTIFF'S MOTION FOR EXPEDITED CONSIDERATION OF DEFENDANTS MOTION TO STAY OR ALTERNATIVELY TO DISMISS AND MOTION FOR ORAL ARGUMENT.

Pursuant to Rule 16 of the Federal Rules of Civil Procedure and the Court's inherent authority to manage its docket, Plaintiff respectfully moves for expedited consideration of Defendants' Motion.

The filing of Defendants' facially non-meritorious Motion, and certain other actions they have taken, are simply an effort to avoid discovery; indeed, Plaintiff believes that the Tribe is stalling for time in the hope that its valuation expert can somehow arrive at the pre-determined figure that the Tribe has already announced that it is willing to pay for GCSD's contract rights. For example, as the Court is aware, Defendants' counsel improperly refused service of this suit on grounds of sovereign immunity and it took significant effort to get counsel to accept service – even following this Court's observation at the April 12 TRO hearing that sovereign immunity was not a defense to service. Further, Defendants' counsel has resisted any expedited discovery

[3] Indeed, for example, Arizona law is generally much more restrictive as to eminent domain. *See generally*, A.R.S. §§ 12-1131 through 1138 (further clarifying the definition of "public use").

per Plaintiff's Motion for Expedited Discovery (Doc. 4). *See* **Exhibit A**, Declaration of Mark Tratos, ¶ 7. Defendants and their counsel are plainly stalling, hoping to find support for its argument that GCSD's contract rights are worth substantially less than the just compensation claimed by GCSD.

Additionally, Defendants have taken various actions since the April 12 hearing on Plaintiff's TRO motion, which are clearly intended to "squeeze" Plaintiff into conceding its claims. For example, Defendants are still refusing to allow the buses that transport key employees to the Skywalk to enter the Reservation on the ground that the vendor – an affiliate of GCSD – does not have a "permit" to do so. *See* **Exhibit B**, Declaration of David Jin ("Jin Decl."), ¶¶ 34-36. Even though GCSD's affiliate has formally requested a permit, the Tribe has intentionally refused to process the application. *Id*., ¶ 35. It is critical for GCSD to be able to transport these employees to work each day. These employees are virtually irreplaceable because they speak fluent Mandarin and Cantonese, the native language of more than one third of the Skywalk's visitors. *Id*. Further, Defendants, through SNW, are now refusing to pay for temporary-housing costs for these same employees. *Id*., ¶¶ 37-41. Clearly, Defendants are ratcheting up their efforts to make running the Skywalk as difficult as possible for GCSD. Unless this case moves forward quickly, Defendants' bad-faith efforts will likely only escalate. Therefore, Plaintiff respectfully requests a hearing on the Motion at the Court's soonest opportunity.

V. PLAINTIFF'S RENEWED MOTION FOR EXPEDITED DISCOVERY

Because of the urgent need to protect its contract rights from seizure under the Tribe's broad eminent-domain ordinance, Plaintiff renews its motion for accelerated discovery. Doc. 4. Plaintiff believes the only way to thwart Defendants' gamesmanship is to get all the facts out before this Court. Plaintiff proposes targeted discovery that will assist the Court in adjudication of its declaratory-judgment action. Plaintiff requests a hearing on its Motion at the Court's soonest opportunity.

DATED this 9th day of May 2011.

GREENBERG TRAURIG, LLP

By: /s/ Pamela M. Overton
Pamela M. Overton
Aaron C. Schepler

GREENBERG TRAURIG, LLP

By: /s/ Mark Tratos
Mark Tratos

GREENBERG TRAURIG, LLP

By: /s/ Troy A. Eid
Troy A. Eid

Attorneys for Plaintiff

CERTIFICATE OF SERVICE

☒ I hereby certify that on May 9, 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:

Glen Hallman
GALLAGHER & KENNEDY, P.A.
2575 E. Camelback Road
Suite 1100
Phoenix, Arizona 85016
Attorneys for Defendants
Attorneys for Plaintiff

☐ I hereby certify that on _____, I served the attached document by United States Mail, postage prepaid, on the following, who are not registered participants of the CM/ECF System:

/s Aaron C. Schepler