Glen Hallman (SBN 005888)
Paul K. Charlton (SBN 012449)
Benjamin C. Runkle (SBN 026358)
Christopher W. Thompson (SBN 026384)
GALLAGHER & KENNEDY, P.A.
2575 East Camelback Road
Phoenix, Arizona 85016-9225
Telephone: (602) 530-8000
Facsimile: (602) 530-8500
Email: gh@gknet.com
Email: paul.charlton@gknet.com
Email: benjamin.runkle@gknet.com
Email: chris.thompson@gknet.com
Attorneys for Defendants

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 **DEFENDANTS' RESPONSE IN OPPOSITION TO PLAINTIFF'S MOTION FOR RECONSIDERATION**

Tribal Council Defendants hereby file their Response in Opposition to Plaintiff's Motion for Reconsideration. There are no significant new facts and the Court correctly applied *Water Wheel* to the case *sub judice*. The requirements of Arizona LRCiv 7.2(g)(1) are not satisfied and reconsideration is not warranted.

I. No New Facts Alter The Conclusion That Comity Requires Exhaustion.

There are no "new facts." SNW's motion in Hualapai Tribal Court regarding SNW's sovereign immunity presents no "new facts." GCSD misunderstands the Tribal ordinance and condemnation law in general. Under the condemnation ordinance, the Tribe must initiate a lawsuit in which the Tribe is the plaintiff/party in the Hualapai Tribal Court to determine the legality and just compensation of any exercise of eminent domain. Since the Tribe must initiate any lawsuit in the Tribal Court, there would be no sovereign immunity defense.

If the Tribal Council condemns any GCSD property interests, GCSD will have a forum in Tribal Court to challenge the civil subject matter, along with all other applicable defenses and challenges to the legality of the Tribe's exercise of its sovereign powers. Therefore, the issue of SNW or the Tribe's sovereign immunity regarding immunity to compelled arbitration in the Tribal Court is irrelevant. Quite simply, there are no new facts which require this court to re-visit its ruling.

II. *Water Wheel* Is Indistinguishable & Jurisdiction Is Not Plainly Lacking.

First, the Hualapai Tribal Council reiterates that *Montana* and its progeny do not apply where the Tribe does not seek to regulate the activity or conduct of a non-Indian. Any potential condemnation of the Skywalk Agreement would be against contracts rights only. The rights existing under the Skywalk Agreement are appurtenant to the Skywalk, which is built on tribal land and, therefore, well within the jurisdiction of the Tribe.

GCSD's attempt to construe these management contract rights as having a situs

anywhere other than on tribal land is misgiven. The contract rights in the Agreement are rights to, *inter alia*, build and manage the Skywalk – activities which affect and must take place on Tribal land. The contract requires the application of Hualapai law and specifically provides provisions dealing with any potential condemnation actions.[1]

Additionally, under *Montana* and its progeny, the Tribe's power to condemn is inextricably intertwined with its inherent sovereign power to exclude.[2] There is no doubt that the Tribe has the power to exclude GCSD from tribal land. To do so would result in an inverse condemnation, since GCSD could neither perform as required by the Agreement, nor could GCSD recoup monies from its management and tourist activities under any relevant agreements because it could not run its business on tribal land.[3]

In any event, the Court's analysis and application of *Water Wheel* is correct. GCSD's narrow interpretation of the case directly contravenes the express language of the opinion. The 9th Circuit did not uphold the CRIT's authority to regulate and

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[1] *See*, § 9.2 of Skywalk Agreement**.** Indeed, it seems inconsistent to assert the non-existence of a power and the illegality of an event that the parties specifically foresaw and made provision for at the time the contract was signed.

[2] Arguably, the power to exclude and the power to condemn are two sides of the same coin and coterminous in their extent. It would be odd that a tribe could create an inverse condemnation such as in *Johnson v. Gila River Community*, 174 F.3d 1032 (9th Cir. 1999), *cert. denied*, 120 S.Ct. 182, 528 U.S. 875, 145 L.Ed.2d 153)(1999), but not be able to affirmatively condemn the same property interests that were inversely condemned.

[3] Notably, if the Tribe excluded GCSD from tribal land for its misfeasance in handling its construction and management of the Skywalk, then GCSD would suffer an inverse condemnation against its contract rights and the Tribe would be immune from suit by GCSD in *any* court. *Id.*

adjudicate non-Indian activity occurring on tribal land because it concerned a "real property interest." Rather, as this Court noted, regulatory/adjudicative authority over a non-Indian existed without considering *Montana* because the ***activity*** was on tribal land.

Indeed, GCSD's unsupported "real property interest" limitation is puzzling since this Court directly quoted the rule that *Water Wheel* recognized as stemming from *Montana* - "Where the non-Indian ***activity in question occurred on tribal land***, the activity interfered directly with the tribe's inherent powers to exclude and manage its own lands . . . the tribe's status as landowner is enough to support regulatory jurisdiction without considering *Montana*." June 23 Order at 4:24-27 (*emphasis added*); *See also Merrion v. Jicarillia Apache Tribe*, 455 U.S. 130, 141 (1982)("Tribe's authority to tax non-Indians who conduct business on [tribal land] does not simply derive from the Tribe's power to exclude, but is an inherent power necessary for tribal self-government and ***territorial management***.").

Contrary to GCSD's assertion that these "contract rights ha[ve] no bearing whatsoever on tribal land ownership or control," it is a fact that disposition of the Skywalk Agreement directly bears upon the Tribe's ability to exclude and manage its lands – GCSD owns contractual rights putting it in control of the building and management of one of the Tribe's greatest sources of revenue – Skywalk tourism. The contract directly bears upon the Tribe's territorial management of its land, and its tourism industry. Therefore, this Court's Ruling was correct because the Tribe has colorable

claim of jurisdiction over both GCSD and property interests in the Skywalk.[4]

For the first time, in its Motion for Reconsideration GCSD presents the novel argument that *Montana's* Indian/Non-Indian land status distinction should apply to property interests owned by non-Indians, despite failing to muster a single citation in support of such an expansion. If true, it would not change the analysis or outcome of this Court's Ruling. Quite simply, jurisdiction over property interests would be analyzed just as Indian/non-Indians are analyzed. Since the property interests are on non-fee, tribal land, there is no need to even consider those exceptions. Under *Water Wheel*, because the property interests are appurtenant to tribal land and affect management of tribal land and the Skywalk, the Tribe may regulate those property interests.[5]

As this Court noted in its Ruling, at this stage the only relevant question is whether tribal jurisdiction is plainly lacking – it is not. At minimum, *Water Wheel* supports a colorable claim of jurisdiction in this case where the controlling issues are the authority of the Tribe to regulate contract rights allowing a non-Indian to conduct and manage commercial activities occurring on tribal land in connection with the Tribe's most important tourism site.

Based on the above, there are no new facts and this Court did not error in its

[4] Even if GCSD were right, all previous authority cited to this Court supports that jurisdiction is not plainly lacking under the *Montana* exceptions.

[5] Indeed, GCSD's concern about *Water Wheel* swallowing *Montana* is unfounded. Water *Wheel* does not expand upon or create a rule previously non-existent. The Supreme Court explained the greater authority over non-Indians under *Montana* in *Merrion* when it upheld a Tribe's ability to tax non-Indians' activity conducted on tribal land.

application of controlling precedent. Therefore, the Motion for Reconsideration does not satisfy the requirements of Rule Arizona LRCiv 7.2(g)(1) and should be denied.

Respectfully submitted this 7th day of July, 2011.

GALLAGHER & KENNEDY, P.A.

By: /s/ Glen Hallman
Glen Hallman
Paul K. Charlton
Benjamin C. Runkle
Christopher W. Thompson
2575 East Camelback Road
Phoenix, Arizona 85016-9225
Attorneys for Defendants

CERTIFICATE OF SERVICE

I hereby certify that on July 7th, 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:

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

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

Troy A. Eid
GREENBERG TRAURIG, LLP
1200 17th Street, Suite 2400
Denver, CO 80202
Attorneys for Plaintiff

By: /s/ Kim Penny
2794843 / 14434-15