MODRALL SPERLING LAWYERS

Native American Law Watch

Summer 2013

The Grand Canyon Sky Walk, Continued: Bad Faith, Jurisdiction, and Who's On (the Bench) First

The Case: In the latest round of the multi-pronged litigation, *Grand Canyon Skywalk Development, LLC v. 'Sa' Nyu Wa, Inc.*, (*GCSD I*),[1] the Ninth Circuit Court of Appeals entered a significant decision on April 26, 2013, addressing whether federal or tribal court should first address a dispute arising in economic development in Indian country.[2] The GCSD litigations are instructive because they address remedies available—or unavailable—to a contracting party when a tribe and tribal entity work hand in glove at point of dispute to divest a developer of contract rights.

After a dispute arose between the tourist attraction developer, Grand Canyon Skywalk Development, LLC ("GCSD"), and a corporation wholly owned by the Hualapai Tribe, 'Sa' Nyu Wa ("SNW"), while litigation stormed between GCSD and SNW, the Tribe sought to use eminent domain to condemn the developer's interest under the development agreement, and the developer demanded arbitration, claiming damages for the value of the agreement. After several tribal and federal court decisions led to an arbitration, as our Spring 2013 Watch reported, *GCSD I* confirmed the arbitrator's award of $28 million for GCSD, reflecting important principles supporting the enforceability of arbitration awards when a dispute arises in economic development in Indian country (NSW responded to the district court's order by filing a notice of appeal followed quickly by a voluntary bankruptcy petition, listing the arbitration award as its only substantial debt).

The Ninth Circuit's *GCSD II* decision does not directly address the arbitration award. It reviews an earlier federal district court decision that dismissed GCSD's challenge to the Tribe's condemnation order, requiring the developer to first exhaust tribal court remedies. GCSD appealed that order, and the Court of Appeals agreed with the district court that the developer should first present its challenge to tribal court jurisdiction to the Tribal Court. On May 10, 2013, GCSD filed a petition for rehearing or for rehearing *en banc*, asking the Ninth Circuit to reconsider its decision.

The Ninth Circuit's Recent Ruling: *GCSD II* is the Ninth Circuit's most recent decision on both the doctrine of exhaustion of tribal remedies and tribal jurisdiction over nonmembers under *Montana v. United States*, 450 U.S. 544 (1981) ("*Montana*"). The U.S. Supreme Court requires a party challenging tribal court jurisdiction to first present the challenge to the tribal court, unless one of four "exceptions" to the "exhaustion rule" apply.[3] *GCSD II* addressed the first and fourth exhaustion exceptions.

The first exhaustion exception allows immediate federal court review when an assertion of tribal jurisdiction is "motivated by a desire to harass or is conducted in bad faith." GCSD contended the bad faith exception applied because the Tribe adopted the condemnation ordinance specifically to take the developer's interest, the ordinance precluded effective Tribal Court review of a taking, and the Tribal Court is not independent from the Tribal Council. The Ninth Circuit's decision potentially is significant because it requires the "bad faith" to be on the part of the tribal court officials only, not that of the tribe or a party invoking tribal court jurisdiction. Given that limited scope of inquiry, the court found the evidence "does not conclusively support" bad faith by court personnel. The Ninth Circuit also rejected GCSD's contention that *Montana*'s second exception, futility, applied because the Tribe's ordinance foreclosed any effective relief.

1 No. CV-12-08183-PCT-DGC (D. Az. Feb. 11, 2013).

2 No. 12-15634 (9th Cir. 2013)

3 *See National Farmers Mutual Ins. Co. v. Crow Tribe of Indians*, 471 U.S. 854, 856-57 (1985); *Burlington N.R.R. Co. v. Red Wolf*, 196 F3d 1059, 1065 (9th Cir. 1999).

The Ninth Circuit next considered the fourth *Montana* exception, where a federal court need not require exhaustion of tribal court remedies if it is "plain" that the tribal court lacks jurisdiction over the nonmember.[4] The Ninth Circuit rejected GCSD's contention that, because the ordinance condemned only off-reservation-based contract rights and the parties stipulated to arbitration and federal court dispute resolution, the Tribal Court lacked jurisdiction over the dispute. The Ninth Circuit's based its affirmance of Tribal Court jurisdiction on a broad reading of an earlier *per curiam* decision in *Water Wheel Camp Recreation Area, Inc. v. LaRance*, 642 F.3d 802 (9th Cir. 2011). The Ninth Circuit held, first, the *Montana* analysis is unnecessary at all, because a tribe always has regulatory jurisdiction over tribal lands, and, although the condemned property rights were off-reservation-based, they related to a project on tribal lands. But, it also held that, even if *Montana* applies, *Montana*'s first exception is satisfied because the case pertains to an agreement between GCSD and SNW, a tribally-owned corporation, establishing a "consensual relationship, and, in any event, since it agreed the project would be developed in compliance with "all applicable federal, [Hualapai] Nation, state, and local laws," GCSD had consented to tribal law and enforcement of tribal law in tribal court.

The Take Away: *GCSD II* threatens to subject numerous agreements stipulating to off-reservation dispute resolution to required exhaustion of tribal court jurisdiction, even when the developer is plainly the subject of tribal efforts to usurp its contract rights. It underscores the critical importance of a clear and unambiguous waiver of immunity, a clear choice of exclusive acceptable forum(s), and clear remedial provisions in a development agreement with a tribe or tribal entity. In drafting such provisions, parties should recognize that, unless *GCSD II* is reversed on the pending petitions for rehearing or on a later review by the Supreme Court, an agreement that recognizes tribal law and does not expressly negate exhaustion of tribal remedies engenders a risk that, notwithstanding stipulated arbitration remedies, even onerous exercise of tribal power may be subject to federal court-mandated review in tribal court. It further highlights the potential need for an agreement to address whether the applicable tribe may exercise eminent domain authority over the project—a provision that may require a separate agreement by the tribe having potential jurisdiction over the project and carefully crafted remedial provisions.

For more information, please contact Lynn H. Slade at Lynn.Slade@modrall.com.

'Sa' Nyu Wa Eagle Point

4 *See Strate v. A-1 Contractors*, 520 U.S. 438 (2001).