

GRAND CANYON SKYWALK: VIEWS OF LAW AND ETHICS

By

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I. INTRODUCTION

With ethics education being essential for business students, the intersection of law and ethics provides students with a view of how people are expected to conduct themselves legally and how that conduct also must meet ethical standards.¹ The story of the development and operation of the Grand Canyon Skywalk (“Skywalk”) is one that is perfectly suited to the task. It is a tale of dreams, schemes, law and the legal system, but, most importantly, it is a tale of how people behave and how that behavior raises questions of ethics regardless of the legal outcomes.

This teaching case also provides the opportunity for students to engage in active learning, to interact with their classmates and to learn the importance of gathering information before making decisions, about law, about ethical conduct or about any proposed action.² It provides students the chance to look at the story of the Skywalk from different perspectives and to learn that perspective plays an important role in determining the ethical nature of human conduct. Moreover, the case provides ample opportunity for critical thinking and analysis, discussion and writing, skills which are crucial to the ethical decision making process. Finally, the tale of the Skywalk is a story of how legal and ethical behavior may or may not be synonymous.³ From contract law to eminent domain, from defamation to trademark infringement, the story of the Skywalk has it all.

II. THE CASE STUDY

A. Skywalk

Officially opened in March 2007, amid festivities, tribal prayers and sage burning,⁴ the Grand Canyon Skywalk is perched on a point at the far western edge of the Grand Canyon.⁵ Situated one hundred-twenty miles from Las Vegas, the glass bottomed Skywalk is a unique tourist attraction. Jutting seventy feet from the West Rim of the Canyon on the lands of the Hualapai Tribe, the Skywalk provides a bird’s eye view of the Canyon and the Colorado River rushing through the gorge four thousand feet below. The testament to its appeal is evidenced by the opening May 1, 2014 of the *Glacier Skywalk* in Jasper National Park in Canada.⁶

Developed as a joint venture between Grand Canyon Skywalk Development, LLC (“GCSD”), a business entity established by Developer David Jin, and Sa Nyu Wa (“SNW”), a tribally-chartered corporation formed and owned by the Hualapai (WALL-uh-pie) Tribe just for this purpose, the Skywalk is a two million pound engineering marvel,⁷ which is not without some

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spiritual conflict. Some members of Hualapai Tribe believe that the Skywalk is a blight on their ancestral lands and only serves to “desecrates the very place the Hualapai hold so dear.”⁸ Others claim that the structure serves to “tarnish the pristine canyon.”⁹

Hundreds of thousands of daring visitors each year *walk the sky* on the glass cantilevered horseshoe.¹⁰ Steel anchors are sunk deep into the canyon cliffs to hold the structure in place.¹¹ Contractors began the massive construction project in 2005,¹² and with one million pounds of steel, it is strong enough to hold seventy-one fully loaded 747 airplanes,¹³ and able to withstand an 8.0 earthquake.¹⁴ The massive structure grew in a remote location of “snakes, rocks, dirt and wind.”¹⁵ Its steel underpinning was fabricated in Salt Lake City and moved to the site; once welded, it was rolled out over the canyon cliffs into position.¹⁶ While dry desert air blows across the canyon, the Skywalk remains steady and can withstand winds up to one hundred miles per hour.¹⁷ Nine hundred pounds of glass deck,¹⁸ two inches thick and ten feet wide,¹⁹ along with five foot tall glass panels behind the handrails,²⁰ protect visitors from falls as groups of one-hundred-twenty visitors at a time, all in shoe coverings to protect the glass, traverse the attraction.²¹ An estimated 370,000 visitors annually,²² pay the current ticket price of \$80.94 per person, including impact fee and fuel surcharge.²³ A financial report created for the Sa Nyu Wa in 2013 indicated that revenues generated by this attraction doubled from \$7.9 million its first year of operation to \$18.2 million in 2012.²⁴ As a visitor to the Skywalk remarked, “It’s breathtaking really, it’s unbelievable.”²⁵

B. The Deal and the Divide

Las Vegas business man David Jin approached the Hualapai Tribe with the idea for the Skywalk in 1996.²⁶ Jin already had a thriving Las Vegas tourist business which catered to Chinese tourists and transported bussed visitors from Las Vegas to the West Rim of the Grand Canyon on the Hualapai reservation.²⁷ The West Rim of the Grand Canyon had difficulty competing with its more famous cousin, the south rim. To increase marketability, Jin proposed the Skywalk and Visitor Center, and negotiated with the Tribe for several years before an agreement was reached. In 2003 a contract was executed between Grand Canyon Skywalk Development, LLC (“GCSD”), a business entity formed by Jin (“Developer”) and ‘Sa’ Nyu Wa, Inc. (“SNW”), a tribally-chartered and owned corporation.²⁸ The basic terms of the deal were that Jin would fund the building of the Skywalk and visitor center; upon completion, GCSD would operate the attraction, SNW would handle the accounts, and the parties would split the profits for a period of twenty-five years, allowing GCSD to recoup the capital contribution and turn a profit.

After the official dedication ceremony on March 20, 2007, when former astronaut Edwin “Buzz” Aldrin joined by Native American astronaut John Herrington took the first steps on it,²⁹ things began to fall apart rather quickly. The initial visitor response was overwhelming and the SNW had difficulty managing the accounts. Jin was asked to take over that task, agreed to do so, and hired an accounting firm. However, questions about embezzlement, mishandling of funds, and the failure to supply receipts and financial information became a common theme.³⁰ Of course, the parties share different perspectives on the issues and who did or did not do what, but by 2011 matters came to a head and GCSD started arbitration proceedings in an attempt to settle the matters in dispute.³¹

Other tensions were brewing at the same time. Disputes regarding the trademark of *Grand Canyon West* developed between the Tribe and its neighbor, Nigel Turner, owner of a

ranch resort close to the reservation. To complicate the relationship further, the unpaved road to the Skywalk, called the Diamond Bar Road, traverses property owned by Turner.³² Operating his resort, the Grand Canyon Ranch, Turner had concerns over the amount of traffic that traveled across his property. While the previous owner allowed free access in exchange for annual grading, Turner revoked the privilege and started a dispute that continued for many years. Eventually, conflict between Turner and the Tribe over the usage of the road came to a head and the Bureau of Indian Affairs had to intervene to resolve that issue.³³ While his story is a backdrop to the larger conflict, it too illustrates the sometimes juxtaposition of law and business ethics. Let the players tell the story.

C. The Players

The following narratives, for the purpose of the teaching case, are first person accounts. While the tone and dialogue are fictionalized, the events and information recounted by these narratives are documented.

1. The Developer, David Jin

Don't get me wrong, despite all I have gone through, I still have respect for the Hualapai people but they have been misled by some leaders wanting to follow their own agendas. That can happen anywhere, but the Tribe has wronged me and my faith in the courts has been undermined. But don't just take my word for it; let me tell you what happened and you can decide.

I am a dreamer. I came to the United States from Shanghai in 1988,³⁴ with a vision of creating a good life for my family, and seizing the opportunities that this great country provides, even for Chinese immigrants, to live the American dream. Sometimes I think Americans do not appreciate what wonderful opportunities are laid at their feet, but I saw those opportunities and I was going to grab them. As a little boy, I remember my parents taking me to an American cowboy movie. Not a common occurrence in China; it was the most special of occasions. I sat entranced by the horses, the cowboys, the Indians and wide open spaces of the West. Those images stayed with me all my life and although 5000 miles away, the West became part of me. Immigrating to America and actually living and thriving in the West was a more than just a dream come true, it was a spiritual event for me, as if I had found where I was meant to be. There was nothing that was going to stop me from making my life, and the lives of my wife and children, part of the West that I dreamed about.

Las Vegas was a perfect fit for me. It is a city of life, excitement, color: a vibrancy that mirrors the images of the rough and tumble West I imagined as a child. The desert, the canyons, the sky filled with sunlight and stars, all were mesmerizing to me. And the Grand Canyon! What a magnificent sight! On my first visit I immediately knew that this beautiful place needed to be shared be shared with others, especially with my native people of China.³⁵ I wanted others to see what I saw, to feel the magic of the West that I felt, to be humbled by the majestic Canyon that made me remember what a small role I played in the universe. It was a natural fit, then, to think about bringing others to the sights and sounds of Vegas and the Canyon, and that is what I set out to do. There were several businesses, and like all ventures there were some false starts, but my plans finally worked. Tourists from around the world were coming to Vegas, and I was giving them a taste of the American West with tours of the Grand Canyon.

Don't let me leave you with the impression that money was not a motivator. I am a

businessman, and making money is what business is about. But to be able to make money where and how I wanted was an opportunity this great country gave me. When most people hear the name *Grand Canyon* the image that comes to mind is the part of the massive Canyon referred to as the South Rim. That area, needless to say, is very much developed for the tourist trade and harder for a new comer to break into. But there are other areas of that great canyon that can appeal to tourists. Those areas were where I focused my attention, and that is when the Tribe came into the picture.

Part of the tribal lands includes what is called the West Rim of the Canyon. Undeveloped and much less visited by tourists, I saw this beautiful area as an opportunity calling to me: one that would help me and the Hualapai people. So that's really how it all started; that was around 1995 I would say.³⁶ My efforts were successful and tourism increased, with the accompanying revenues, for my business and for the Tribe. Oriental Tours, Inc. and Y Travel, both headquartered in Las Vegas, drove tourists two and a half hours from the City of Lights to the majestic west rim of the Grand Canyon.³⁷ My companies grew quickly into the most successful tourist brokers for my native Chinese peoples.³⁸

But how could we improve those numbers and open up the West Rim to more visitors? There was no question but that the South Rim still held the greatest allure for visitors with its more breathtaking panoramic vistas. What could I do to enhance the West Rim experience? That question played in my mind, with the answer simmering and finally maturing into a grand plan. A glass bottomed walkway over the Canyon! What an incredible experience for visitors! "When an eagle flies, it gathers power, takes off and then glides far above the ground."³⁹ That's what walking on the walkway would be like! In a quiet way a person could "fly like an eagle."⁴⁰ Guests seemingly could walk on the air, even those with disabilities, and get a view which no other place could provide of the natural majesty of the Canyon and the Colorado River four thousand feet below. That would be really something!⁴¹ The notion was simple, but fantastical.

By 1996, this greatest of dreams began to take shape when I approached the Hualapai Tribe about my plan. The West Rim is within the Hualapai reservation, and I had an idea as to how both the Tribe and I could make our marks, financially and historically. This venture would be "an economic development tool and jobs for the Hualapai Tribe."⁴² The Hualapai could benefit from the project, securing needed revenues to the people of the reservation. Their dependence on tourism already was established; it was just a matter of creating an environment that would provide a unique, once in a lifetime experience for the tourists. I knew the Tribe would not be in a financial position to get the project off the ground; but I was willing to make the contribution needed to get the project up and running. The Skywalk would be my contribution to the beautiful Canyon, one that would bring more sightseers to the Canyon's West Rim, and one that would leave a legacy for decades to come. Not all that legacy was positive, but I don't want to jump ahead of the story.

The Tribe did agree, although not without some concerns and a long period of discussion. After all, the Canyon land is sacred to them.⁴³ And the road to the reservation was in bad shape; could it handle the thousands of tourists the buses would bring to the reservation?⁴⁴ What would the Skywalk look like? How could we make sure it was safe? What facilities were needed at the Skywalk location to address the needs of the guests? But we overcame those challenges, and early in the new millennium the Tribe and Grand Canyon Development had negotiated a contract. The Tribe also formed a corporation to handle the Tribe's obligations under the contract, 'Sa' Nyu Wa. In December 2003, the deal was signed and delivered: Grand Canyon Skywalk Development would oversee operations and many years later, the 'Sa' Nyu Wa

Corporation eventually would take over Skywalk.⁴⁵

Here are the basics of our agreement. On my part, I agreed to build the Skywalk and the Visitors Center and to handle landscaping of the area. I agreed to pay for it all! The Tribe agreed to handle the supply of utilities to the area for the Visitors Center and accompanying structures, and to coordinate operations once the project was concluded. Once completed, the Tribe and I agreed to share profits from ticket sales 50/50 for twenty-five years after its opening. GCSD would handle operations for twenty-five years after opening, and the Tribe would handle accounting and records.⁴⁶ I did what I agreed to do and more. Once completed, the Skywalk was wider and jutted out over the Canyon even more than originally envisioned.⁴⁷ The Visitors Center was completed, at least my end of the deal, with almost five times more square feet than originally planned. The Tribe was happy and approved those modifications. We knew future visitors would expect a top notch experience, and we wanted to make sure they got it.⁴⁸ It was a proud time for me.⁴⁹ In fact, patrons of my tourism companies constituted about one-third of all visitors to the Skywalk.⁵⁰

But it did not take long after the Skywalk opened in 2007 for my troubles to start. GCSD completed all of the Visitors Center that could be completed, but the Tribe did not get utilities to the building as it had promised.⁵¹ It sat, and sits still, an empty shell ready for completion. I could get no cooperation from the Tribe to get the utilities so I could complete the building. They stalled and then demanded that our original agreement be modified. I wouldn't sign it-- why should I? When I tried to get the Tribe to sit down and talk, the members refused.⁵² How was I to know that things were only going to get worse? The immediate success of the Skywalk was such that the Tribe could not handle the record-keeping, and asked me to take over that job.⁵³ There were many financial discrepancies and unaccounted funds.⁵⁴ I suspected some ticket sale monies were being taken.⁵⁵ Despite deep frustration, I agreed to do what I could to get the books sorted out; at this point I could not let the project go down the hill. We were just about there. The Tribe agreed to turn over all receipts, financial records and monies associated with the Skywalk, and I hired an accounting firm to sort it all.

The Tribe was refusing to cooperate; they were not living up to their contractual obligations, not wanting to go through with the deal. There were still no utilities to the Center to allow me to finish that project, and then the Tribe stopped turning over receipts and money to the accountant. Without those records and funds, I could not get the fees and profits to which I was entitled under the contract. Each year I would ask for my fees from the SNW, and each time the response was "no."⁵⁶ I received fees only once, in 2007, and even then without a proper accounting.⁵⁷ Despite repeated requests and demands, no money was turned over as required by the contract for management fees.⁵⁸ We are talking about millions and millions of dollars being generated by the Skywalk, and I had nothing to show for it. Some financial reports put the first year revenue at \$7.9 million and the 2012 revenues at \$18.2 million.⁵⁹ What was going on? My \$30,000,000 investment in the Skywalk resulted in the most unique glass structure in the world, but a world full of conflict with the Tribe. I was shocked, but most of all I was saddened. We were partners, in spirit at least, and my partner turned his back on me and betrayed me. What could I do?

For years I kept trying to work out the issues with the Tribe. I tried reasoning, negotiating anything to settle differences, but all efforts were for nothing. Finally, I had to do something, so I followed the contract. We had an arbitration clause. So I requested arbitration through the American Arbitration Association in 2011, as we had agreed to resolve disputes in that way.⁶⁰ At first, when the Tribe participated, I thought, now we can work it out. I was still confused and

upset, but felt optimistic that through arbitration our differences would be put aside. How wrong I was! While the Tribe initially participated in the arbitration process, before long they pulled out. The Tribe refused to respond to arbitrator subpoenas for information and financial records; they refused to appear at the hearings. No word, no response to inquiries, participation just stopped.⁶¹

Turns out the Tribe had passed an eminent domain law and was planning to take my interests in the Skywalk contract.⁶² I was stunned. By February of the next year, the Tribe condemned my property rights in the contract and took everything away from me. They literally came to Skywalk office, seized all the equipment and supplies and kicked GCSD people out!⁶³ And what would be my just compensation for the taking: Eighteen million dollars. Just eighteen million dollars?⁶⁴ I had over thirty million dollars invested and should have received millions more in fees and profits. What did I get myself into? I had to fight for my rights and for my family's future. So I sued the Tribe in federal court to stop the taking of my property.

But did I get justice? No. Again, the Tribe twisted everything. It was my fault they had to take my contract rights. It was my fault the financials were in such bad shape. It was my fault the Visitors Center was not completed. It was all entirely my fault. How could the Tribe say that? The contract clearly stated that the Tribe was to be in charge of the acquisition of all utilities.⁶⁵ I know for a fact the Tribe received millions of dollars from the feds to pave the access road to the Skywalk, the Diamond Bar Road, so that visitors could travel to the Skywalk more comfortably.⁶⁶ Does that sound like I am responsible for the infrastructure?

The federal judge, however, could not see through the smokescreen and ordered me to go to the Tribal Court first to "exhaust" the Tribal remedies for dispute resolution.⁶⁷ Was he kidding? I would get no justice from the Tribe! Wasn't it clear that I was being cheated? That the contract was being ignored? Even the United States Supreme Court did not provide me any respite; the justices refused to hear my case.⁶⁸

If everything was my fault and I did not do as I agreed to do under the contract, why would the arbitrator have found in my favor? In 2012, the arbitrator awarded me \$28.5 million as compensation for the Tribe's wrongful acts.⁶⁹ Finally, I was moving forward and would get at least a small portion of the monies due me. But there was one more wound to be inflicted in this sad story. My lawyer started efforts to collect the arbitration award, and within days, he received notice that the SNW corporation filed for bankruptcy, blocking all our attempts to get the monies to which I was entitled! They claimed the corporation only had fifteen million dollars in assets.⁷⁰ How could that be? Then I found out that all SNW assets were transferred to another hastily formed corporation. Once again, the Tribe was refusing to honor not only our deal, but also the legal proceedings to rectify the many wrongs I endured.⁷¹

Not only had I been cheated of my rightful earnings, \$405 million dollars,⁷² but also I was slandered in the process. I am not a man who does not honor his business commitments. They called me the "Bernie Madoff of Arizona."⁷³ They said that my actions showed a "blatant disregard of decency," and that I was hurting tourists and the Tribe.⁷⁴ Wasn't it enough to take my investment and my earnings? Now the Tribe tarnished my good name? My lawyer told me that he could prove that "[t]his was a completely made-up fabrication to ruin his name for one thing, so that the public would not feel bad when the tribe took [Skywalk] away."⁷⁵ So I followed his advice sued for defamation.

How this will end, I do not know. Am I bitter? Not bitter. Mostly just saddened at the turn of events. I trusted the Tribe members I worked with and honestly wanted to do something extraordinary for my family and for the Tribe. Instead, I was betrayed and demeaned.

2. The Hualapai Tribe, Spokesperson

For thousand years the *People of the Tall Pines*, the Hualapai, have lived on this land; it is in our bones.⁷⁶ We are a proud and ancient tribe, and our ties to the land of our ancestors are strong. Many generations ago we hunted and travelled across lands reaching from the Grand Canyon, beyond the Black Mountains and to the San Francisco peaks.⁷⁷ Our society and beliefs are connected to the land, to the canyon, to the river.⁷⁸ The river that runs through these canyons is the giver of life, and without the river, we cannot survive--these millions of acres are the home of our ancestors.⁷⁹ The walls of these cliffs depict our history in petroglyphs that tell the story of a land of water and the creation of our people--these places are sacred to us.⁸⁰ From our original five million acres that spanned across canyon, river, mountain and desert, the lands from which we garner all our needs, we now have only a small parcel.⁸¹ But we will continue to defend our remaining land against those persons who would abuse and exploit us.

In 1883, the European settlers of this country allowed us this land for the Hualapai people.⁸² Without the great expanses, our needs could not be met by guided hunts and timber harvests.⁸³ Our people are poor, and over time it became as clear as the river water that we had no alternative but to turn to tourism as a means of supplying jobs and income for our 2300 tribal members. At first we started a hotel, restaurant and shop at our tribal headquarters, Peach Springs,⁸⁴ but it was not enough to furnish our needs and to eradicate the poverty of our people.⁸⁵ "With so much poverty and unemployment we had to do something..."⁸⁶ In 1995 we turned to running a casino, but how could we compete with the City of Lights for money?⁸⁷ That was a venture doomed to fail, and while a path many other tribes have chosen, it was not to be our path.⁸⁸ But we had to persevere. Surely, with 4,000,000 visitors to the Grand Canyon each year,⁸⁹ tourism was the only true option. We would have to face that fact head on, and make our own way. The survival of our people depended on it.

We were willing to do what it took to make tourism work for our Tribe. We tried heli-tours with a business man from Great Britain, thinking that would be a suitable way to bring visitors to our great West Rim.⁹⁰ It proved unacceptable to us and disruptive to our ancestors; the noise violated the sanctity of sacred places. It became clear that we must be cautious about those with whom we enter into agreements; the business man did not respect our ways and the limitations placed on his helicopters. He built helicopter pads and steps on the river without our consent and approval.⁹¹ We had to stop that endeavor, although the financial loss was significant, because it went beyond what our people could tolerate. It is a difficult balance.

Another business man, who would later work with us as a Developer, brought tourists to our West Rim over the years, and we had experienced no difficulties with him. His operations were based in Las Vegas, and he would bus his guests to our reservation. This enterprise was beneficial to him and to the Tribe; it was a business relationship we believed to be honest and respectful of our people and our guests.⁹²

You can understand, then, that when the Developer approached us about the Skywalk, we were both curious and cautious. So far our dealings with Developer were satisfactory but would this be the right project for our people? Would this man be one who could be trusted to do, not just what paper said, but what he said? That must have been around 1996, and we debated the issue in council meetings for many years. The area of the proposed glass bridge, the west rim, is a sacred place to us.⁹³ We kept reminding ourselves that we already had a relationship with Developer and with his tourist trade. We kept reminding ourselves that the tourist trade was the only way our people could survive on our lands; we had to be imaginative and if needed, make

concessions. The tourists from Las Vegas had only the view for entertainment, and it did not seem to be enough. Surely the Developer was right when he said that the drive along the unpaved Diamond Bar Road and the lack of amenities were holding us back from the tourist revenues we needed. With these visiting tourists, though, there was no harm done to the land, no marks that could not be erased by the wind. A Grand Canyon Skywalk, though, would stand out for all generations to come as a mark of our need to move into the future for our people, and to do so by compromising our sacred places. It is not an easy choice, spiritually or financially.

So after long talks, we finally agreed. The Developer made us a tempting offer: he would find the funding and we would both benefit from the visitors it would bring to the reservation. The tribe had no funds, “[w]e’re land rich and dirt poor.”⁹⁴ The revenues from the proposed project were needed and could be used for education, health care, senior and child care, all serious needs on our reservation.⁹⁵ We thought we had included provisions to protect us, to require an approval process for the project to cause the least disruption to the land. We had the right to review all plans and veto any aspect that was unacceptable to us. Our 2003 agreement placed the costs of building the Skywalk and the Visitor Center on Developer’s corporation-- that corporation would operate the facility, and our corporation, SNW, would handle the financials and split profits with GCSO equally for a period of twenty-five years.⁹⁶

Despite some continuing tribal concerns, a spirit of optimism and hope spread through the Tribe.⁹⁷ The Developer seemed so sincere and eager to get the project off the ground. But troubles began so quickly; we were stunned by the turn of events and optimism turned to concern and hesitation.⁹⁸ Yes, the initial investment by the Developer was steep, tens of millions of dollars to build the glass bridge and make it comfortable for visiting tourists, but it was more than fair because we agreed to share profits from ticket sales 50/50 for twenty-five years from opening. How were we to know that soon there would be talk of embezzlement on the part of Tribal employees and that Developer would demand to take over receipts of ticket sales?⁹⁹ The Tribe failed to see that action for what it was, an omen that matters would just go from bad to much, much worse.

There were many, many issues with the contract and with the Developer’s failure to honor its terms: the Developer failed to provide us the plans and specifications of any improvements to the building of the Skywalk. While the Skywalk was being built, the Developer failed to complete all the other improvements that were part of the contract, specifically the Visitor’s Center, and also made statements indicating that he had no intention of finishing the project. GCSO failed to account to the Tribe regarding the monies received under the operation of the glass bridge.¹⁰⁰

The problems with the Developer threatened the Tribe and our financial dependence on tourists, on another front as well. Our neighboring Rancher, owner of the land through which the Diamond Bar Road runs to the Skywalk, suddenly decided not to let tourist busses freely pass along the road to the reservation.¹⁰¹ We had problems with that rancher before, when he tried to stop the use of our trademark *Grand Canyon West* only a few years before.¹⁰² But the road issue could not be tolerated. For years, we, and all who travel in Mohave County, passed freely along that portion of the road. In exchange, the road was graded by the County, an exchange that satisfied the property owner. But then one day, without warning, our busses were stopped by masked men with guns, tourists forced to pay a twenty-dollar fee to cross the road and our tribal employees were threatened.¹⁰³ Such conduct cannot be tolerated. Of course the owner had to be reported to the sheriff, who chose to arrest him and hold him in jail.¹⁰⁴ The next day Rancher had the audacity to erect blockades across the road. Intolerable! Our bulldozer made quick work

of that, and the Bureau of Indian Affairs soon stepped in to handle the matter.¹⁰⁵

Of course, the Tribe had problems with Rancher before, over his helicopter tours violating sacred places on the reservation, dumping oil, building a helicopter pad without authorization,¹⁰⁶ and his attempt to sabotage our trademark.¹⁰⁷ It was not a surprise to us that he would act as he did.¹⁰⁸ We feel sure that Developer had some part in trying to harm our Tribe by putting the Rancher up to his intolerable conduct.¹⁰⁹ Clearly, he wanted to annoy us and injure our reputation because we stopped his violations of our lands, and these actions were his revenge.¹¹⁰ But little did we realize the extent to which “[t]here’s always going to be something.”¹¹¹

Despite all these harmful incidents and malicious activities, the Tribe continued to review ways “...to bring this painful and unavoidable matter to a resolution.”¹¹² We did not take any action lightly. “The Hualapai have begged Mr. Jin to keeps his promises and complete the work.”¹¹³ But all our pleas went unheeded. “The Tribe did not ask for this dispute...”¹¹⁴

So when the Developer tried to force us into arbitration, we participated in the hopes that the issues between us could be resolved.¹¹⁵ Our hopes were dashed when it became clear that no viable resolution would come from the proceedings, and we had to pull out. Why should we participate? The arbitration is not our law and has no bearing on us; the Hualapai is a sovereign nation, free of the laws of Arizona and the United States.¹¹⁶ There was no court order compelling us to arbitrate, as provided in the contract, so the award is invalid.¹¹⁷ Ultimately, disputes with the Hualapai Tribe must be heard in our tribal courts, even your United States appeals court agrees with that principle.¹¹⁸

The Developer’s response? He accused us of not honoring our commitments. How could he turn the table to make us the wrongdoers? Yet, this hateful attitude is well reflected in his statement that our tribal leaders were “a lawless and archaic government.”¹¹⁹ Does he think so poorly of us as to slander and insult us? “No professional organization, Indian or otherwise, should endure such egregious misconduct without taking legal action to protect its interests.”¹²⁰

Of course, it was inevitable that the situation would continue to turn from bad to worse, and that drastic action was needed. We had no choice but to protect and preserve our “unique, priceless, and unalienable lands and natural resources,”¹²¹ and our people from the devastating impacts of these failures, the loss of revenues, and the unsightly partially constructed visitor center, which is “an eyesore, and a blemish,”¹²² that continues to create safety and health issues.¹²³ Protecting our people and our land is essential to our spiritual beliefs; we had no choice.¹²⁴ We turned to an option of which all governments can avail themselves, eminent domain. The Hualapai government is no different.¹²⁵ Our Tribal Council met and considered our course of action, realizing that this was a serious move, but that there were no other options.¹²⁶ After much deliberation, we passed a resolution to enact a tribal law permitting the Tribe to take property rights, and identifying the circumstances under which such action can occur.¹²⁷ Later, the Tribe condemned the Developer’s contractual rights; it was a tough decision but one that had to be made to protect our land, people and reputation.¹²⁸ Developer was offered just compensation, eighteen million dollars, as our law requires, but even now he is pursuing more legal action in an attempt to increase that amount.¹²⁹ We are entwined in a harmful situation, for which there seems to be no end.

Developer uses the courts to push and intimidate us. The arbitrator’s award, made under the laws that do not bind us, is now being examined by United States courts. Will we be forced to try to pay the \$28 million an arbitrator awarded Developer in a proceeding that did not support the Hualapai or its laws?¹³⁰ That is far more money that our corporation, the SNW, can raise and

the amount cannot be paid. We are overwhelmed with demands for money; Developer is not the only person to make claims against us. Our creditors also have claims that must be paid, it could be over fifty million dollars, more than the SNW's assets.¹³¹ No money can be paid if there is no money to pay. Sadly, this continuing fight with a man who does not keep his word and fulfill his obligations continues to harm the Tribe and forces us into paths we do not wish to travel. There is nothing to be done but to file for bankruptcy so that the court can decide how SNW assets will be distributed among the claimants.¹³² We did the best we could, transferring the management of the Skywalk to another corporation and bankrupting SNW.¹³³ The Skywalk is still our only hope for financial security for our people; no effort by Developer or the laws of another country will stop us from trying to protect our financial future.

Yet Developer still continues to use law against us. Now he has sued for defamation claiming we have slandered his good name. His good name? How can he in good conscious continue this way? There is no merit in this claim; we have only spoken the truth, we will stand by the truth and we will continue to speak the truth. Developer will not succeed in his effort to "chill the basic right of freedom of speech ... and affront the sovereignty of the Hualapai Tribe."¹³⁴ We do not want to fight. But we have no choice; our livelihoods, our beliefs, our future, even our ancestors demand it.

3. The Rancher, Nigel Turner

I may just be a minor player in all this hoopla over that Skywalk, but I have my rights too, don't I? That's what makes this country great, even the small guy has rights. People may call me dude and think it's a laugh, but I am proud to be a dude and proud to run a dude ranch. I can laugh right back because I am living the dream, doing what I want, the way I want. Not many folks can say that, but me, I am a dude and it's true. I don't wear alligator boots and a ten gallon hat for the visitors, you know, I wear them for me.¹³⁵ I know that Developer chap, and about the feuding between him and the Hualapai Tribe. Well, I had some dealings with the Tribe that didn't sit too well, either. Heck, I am getting ahead of myself; let me start at the beginning.

My obsession with the American west started as a childhood fixation; I am from England originally, although I say I was just born there. The dream of the West, it always stuck in my head.¹³⁶ This place, this sky and this desert, are where I am from. Even as a little boy the American West called to me. Once I was grown, it didn't take any prodding for me to pick up and head out, and I have been here ever since. 1985 I guess, or around abouts, and started in California.¹³⁷ A helicopter pilot, yes sir, back in the day I flew for the British Army Aircorp. Got my training there and don't regret those days one bit. Got me over here in a way, no I didn't fly, but I did when I got to California. Started flying tourists out to the *Hollywood* sign in my helicopter over Los Angeles and to the Hollywood Hills. Pretty good view from a helicopter. Boy, did those folks just eat that up. But for me, well, the earthquakes got me unsettled, and after a while I longed for the American West I dreamed of, deserts and canyons, tumbleweeds and coyote. Yes, sir, that was where I was heading.

When I moved further west and stopped in Las Vegas, that helicopter business continued to help me. Wasn't too long until I hooked a deal with an Indian tribe on the West Rim of the Grand Canyon, Hualapai they are called. Now I was flying tourists in my helicopter over the Grand Canyon. That Tribe sure did need the tourist business and I did, too. It's hard on a helicopter pilot around the Grand Canyon. Rest of the Canyon is a National Park, and gosh if those boys aren't strict about flying over that end of the Canyon! But the Hualapai portion of the

Grand Canyon isn't part of the National Park, so we were good to go.

It was around that time I met that Developer who was bringing tourists from Las Vegas.¹³⁸ Gosh, but between us we were bringing them in! Developer by bus and me by heli, and the tribe seemed grateful for the trade. There wasn't much on the reservation then, but tourists still wanted to see the Canyon. And flying over it, well, that is something special. Lots of people appreciated it, and were willing to pay for the luxury. For quite a while it was good business, but then the Tribe got touchy about it. Not sure what set it off but I do have my suspicions. The Hualapai claimed that I flew in sacred areas where I had been told to avoid. I wouldn't do that. Why would I want to jeopardize a good trade? No, I don't think that is the real story.

I think it was all about some steps.¹³⁹ Steps you say? How could they bring the business to an end? Well, let me tell you what we did. We had permission to take the tourists down to the river. Now that was a thrilling ride, descending down in to the canyon to the river, landing between those canyon walls! Anyway, those rocks around the river are slick. When the folks would get in the water and then make their way along the river rocks there would be a lot of slipping and sliding when they climbed out of the water. Dangerous, for sure. The logical thing to do was to make the area safer for the guests, and that we did. We built some steps coming up from the water, nothing major mind you, and just for safety, but the Tribe nixed that real fast and I was out of a job.¹⁴⁰ That didn't set too well, but it was their land and they could make the decisions. Hurt my pocketbook sure, but it hurt my pride more. I am not a man to cause trouble and not respect others.

Fortunately, I had been lucky find a ranch for sale not too far from the reservation. Over the years I got to know the area pretty well, so I jumped on the chance to buy that ranch when it became available. A ranch in the desert, big skies, canyons, it was a dream come true! This ranch is now my home and business. So I was not dealing with the Hualapai anymore. That was alright though, just gave me time to focus on the ranch. I can live the life of a dude and give visitors the chance to experience the West they dreamed about, just like me. I was flying visitors in from Vegas and housing them at the Ranch.¹⁴¹ Yes, sir, Grand Canyon Ranch makes a fine attraction for the tourists. I get close to 450 people a day flying to the Ranch.¹⁴² I can generate eighteen million dollars a year, more than they can out at the West Rim.¹⁴³ But that darn road was ruining it for me and for my visitors. I had to make a stand on the Diamond Bar Road. But there were other aggravations still in store for me.

It started with an argument with the tribe over the *Grand Canyon West* trademark. It was part of the name I gave the ranch and a nice ring to it too, *Grand Canyon West Ranch*. The Tribe wanted to use that name for its operations and claimed that *Grand Canyon West* was theirs and I had better not be using it for the ranch. You know, after a time, it gets tiring to keep jabbing at each other, but I don't like being pushed. No sir, I don't. So when the Tribe filed for trademark protection of *Grand Canyon West* I hired a lawyer and filed in opposition.¹⁴⁴ The Tribe knew that was my business name and I could not just let them walk over me; my ranching business is just as important to me just as their Skywalk business is to them. So there was a hearing with the trademark people and it was not good news for the Tribe. The hearing officer said that the Tribe had been involved with some deception and that it would keep them from using the name. Appealing it now, but I don't really care. I'll just change my name and let them have it.

But that was not the end of their feuding. Let me tell you why the Tribe has made the Diamond Bar Road a source of aggravation for me. In a nutshell, that road is the most direct way to the Skywalk and it crosses over my land. Before that Developer and the Tribe signed on for

the Skywalk, the road wasn't crowded--just the Developer bringing in his tours from Vegas. But once that Skywalk agreement was signed, Developer and the Tribe started to fret over the road; there would be a good bit more traffic once that glass bridge was built and the unpaved road was a hard road to travel. Sure the previous owner had let them use the road for free; well that was his choice wasn't it? A character he was too, an old rodeo man. Well, he was happy to let anyone use the road so that he could get it graded for free by the county. Well good for him, I say, but that's not what I wanted to do. I could decide not to give permission if I wanted to; it's my land after all. Anyway, too much travel on that road could impact my ranch in a bad way, with cars and busses running the road all day and night.

So I had to sue, what choice did I have? The Tribe could not use the road without me and they did not want to deal with me. What would happen to all the trees and natural beauty? Well, it ended up with the Bureau of Indian Affairs ("BIA") doing an impact statement, one of those environmental things, you know, and they said that all those trees could be moved and replanted. I couldn't help but wonder if that promise would be honored.¹⁴⁵ Could I let them destroy all the Joshua trees, and then put up with all the noise and aggravation? No sir. So we went to court, but you can't fight the government can you? We worked out a deal, me and the BIA and yes, they had to pay me for a permanent easement, \$750,000, but that's just a pittance to me. What really mattered is that the BIA was to build underpasses for my livestock, move the Joshua trees, plant trees along the front of the ranch to block the road, and put up fencing and cattle guards.¹⁴⁶ That's only fair. And they had to pave it; I gave them until 2011, a full four years, to get it done. I just wanted to make the point that you can walk over someone land rights without consequence.

But they didn't follow the plan. No sir, it was much later before the paving started and the agreement to move trees, build underpasses, well, all of that was not done. Back to court I went to force the BIA to do what it said it would do. Problem is the wheels of justice are slow and I had to act fast to protect my land. I don't have to let them use my land for free do I? Twenty dollars a head is a fair toll for the tourists heading to the Skywalk. Even the Developer thought it was fair; it was his idea and I appreciated his help in trying to figure out how to deal with trespassers.¹⁴⁷ "There were people stopping by, photographing buffalo, leaving trash. This is my private road."¹⁴⁸

I had to have some guards to back it up, and some said they had guns, but this is the West.¹⁴⁹ We all have guns, but I was not carrying one,¹⁵⁰ and besides I was on my own land, private land.¹⁵¹ Then the Tribe just twisted it all and had me arrested for threatening construction workers, employees, and, well that was just too much. "It was a set up" by the Tribe as sure as the sun shines.¹⁵² Believe me now, folks, you don't ever want to have to spend a night in the Mohave County jail. So when I got out, I just shut down that road then and there. I had the right. It is my land, my road and I was not going to be abused. What choice did I have when the Tribe just bulldozed right past my blockade and hired a contractor to pave the road, even the portion that crosses my land? No concern about my rights, under the agreement no concern over the hundreds of Joshua trees that have been mowed down, no concern for the history buried in this land.¹⁵³

We had an agreement. But rather than to live up to that agreement and the court order, the BIA just gave the Tribe another right of way to avoid the ranch and the toll.¹⁵⁴ For the BIA to just bypass my land and opt to give a permit to open another road¹⁵⁵ was proof that the government trying to strong-arm me. And there is no concern for the new construction and the trees being destroyed by that bypass; it's just a shame.¹⁵⁶ Kind of funny that it wasn't too many years ago the Tribe was getting on me about not respecting their land; but doesn't seem like

turnabout is fair play. It's nothing personal against the Hualapai people, mind you, but there are some bad decisions being made. Never mind, I keep telling myself, I have my ranch and business is going good. That's all that matters. I am living the dream and I want to enjoy it.

III. Teaching Note

To generate interest in the topic initially, instructors may show students pictures from the website of the Hualapai Nation.¹⁵⁷ Videos of the marvel are also available on YouTube.¹⁵⁸ Additionally, National Geographic has a video of walking on the Skywalk on its website.¹⁵⁹

A. Ethics

Jurisprudential schools of thought are instructive in evaluating the ethical positions of the players. The Natural Law school of thought advocates conforming behavior to the moral imperative and doing what is morally right.¹⁶⁰ Natural law is considered to be a higher law of nature which fundamentally commands that good is to be done and evil avoided.¹⁶¹ As Cicero observed, "True law is right reason, harmonious with nature, diffused among all, constant, eternal; a law which calls to duty by its commands and restrains from evil by its prohibitions. It is a sacred obligation not to attempt to legislate in contradiction to this law; nor may it be derogated from nor abrogated. . . . Nor is it one law at Rome and another at Athens; one now and another at a later time; but one eternal and unchangeable law binding all nations through all time."¹⁶² Natural law is grounded on intrinsic truth rather than the power of a sovereign, and exists even if it is inconsistent with laws passed by governments.¹⁶³

If the law of the sovereign is not synced with natural law principles, then civil disobedience may occur, justified by the moral compulsion to comply with a higher law. Indeed, the Declaration of Independence, which launched the American Revolution, recognized that people possessed certain inalienable rights, that governments derived power from the governed and that when government became destructive of natural rights, it lost legitimacy,¹⁶⁴ and commensurately, the requirement for the governed to obey.

The *Positivist* school of thought, in contrast, defines what behavior is moral and ethical as that which conforms to *positive* or legitimately enacted laws.¹⁶⁵ Positive law is defined as any law enacted by the sovereign and necessary to maintain an ordered society and to protect people from their primitive state; defined as such, the law commands obedience. It is enacted by governmental authority, such as legislatures, courts, and administrative agencies, as distinguished from natural law, which emanates from a higher moral authority. Under the Positivist theory, individuals are free to act as they choose, unless their conduct is specifically prohibited or circumscribed by reasonable positive law. This framework permits persons to violate ethical and moral standards, and yet not be answerable unless the behavior involved has been prohibited or circumscribed by positive law.

The contrast between these two jurisprudential views can be stark in situations where what is viewed to be legal is not considered to be moral and when what is considered moral may not be required by the law. Individuals, societies, religions and cultures have differing views about what is moral; however, the law imposes a legal standard, whether or not individuals or groups in society consider it to be just or proper. In the context of this case, students should consider the morality of eminent domain, along with the circumstances which could justify the breach of an enforceable contract. They should consider how the law permits the ownership of

private property in conjunction with how individuals may enforce those ownership rights by excluding others. In their opinion, is the law synced with what is moral in this case?

Finally, Utilitarianism focuses the power and role of the law to produce the greatest good for the greatest number of individuals,¹⁶⁶ using an “end-justifies-the-means” approach instead of a moral code to formulate what should be the law. Utilitarianism, thus, is outcome oriented, focusing on the consequences of an action rather than the nature of the action itself or on moral values or religious beliefs. Utilitarian theorists seek to determine: 1) alternate actions available in a given situation, 2) the effect on persons and society by these actions, 3) the negative and positive effects of the alternative actions using a cost-benefit analysis, and 4) a choice among the alternatives of the action will produce the maximum societal utility.¹⁶⁷ Eminent domain, or a taking by the government, can sometimes be justified under utilitarian theory.¹⁶⁸ Students should debate if its exercise in this case produced the greatest good. There are other theories that address the role of law in society, many of which involve ethical choices, and choosing between self-interest and perceived ethical obligations.

1. Skywalk and Ethics Generally

At its most simplistic level, ethics is about conceptualizing what is right and what is wrong; however, in reality, ethical conduct is demonstrated not through words but by deeds. That point is particularly pertinent to the Skywalk case, especially when ethical considerations are viewed with the application of law to the facts presented by the case. Having students to discuss ethics, as well as to examine the process that takes place when one is making decisions, facilitates their understanding of ethics in real life situations and the impact that decisions will have in the long run.¹⁶⁹ The Skywalk case also demonstrates some of the ambiguity that can characterize ethical issues when the parties involved have different values.¹⁷⁰

The teaching suggestions allow students to engage in an experience from their individual points of view, and then to discuss and reflect on those individual experiences. That process will aid students as they continue on their journeys in character development.¹⁷¹ While ethics discussions for a business law class may revolve around concepts of deontological and teleological philosophies, for discussions of the Skywalk case, virtue ethics is especially applicable. The foundation of virtue ethics looks not at rules that must be followed, rules that exist either because one is duty bound to follow a rule or because one follows a rule to produce a greater good. Rather, virtue ethics reflects on a person’s character and what traits a person possesses that will lead her to make ethical decisions.

Since the case involves characters providing first person accounts of the events surrounding the Skywalk controversies, a consideration of virtue ethics and the identification of virtues that ethical people possess will be meaningful to students. The characters portrayed in the Skywalk case have virtues, and vices, and students can identify those traits and how subsequent actions by the characters reflect individual virtues and vices. Students also can reflect on how perspective and point of view impact the ability to judge individual actions, supporting the inevitability that students are bound to be confronted with persons of diverse beliefs and points of view throughout their lives. Hopefully, the Skywalk case will provide meaningful lessons to aid students in making decisions to embrace virtuous behavior not only in their business dealings, but also in their personal lives.

2. Distinguishing Virtue Ethics

A short discussion of deontological and teleological philosophies will aid in distinguishing the theories that comprise the philosophy of virtue ethics. Deontology focuses on the acts of individuals and whether or not those acts are ethical. Immanuel Kant is associated with this philosophy, so for the purpose of this case, a discussion of deontology from a Kantian perspective will suffice.¹⁷² Kant defined his views of obligations and duties as imperatives, and espoused that in making decisions persons must look at the act, not the consequence, and judge it from a moral perspective.¹⁷³

The principles that must be followed when making decisions to act under deontology stem from external sources, such as religious beliefs or relationships with family or friends, deemed “special relationships,” and from the internal reasoning of a rational moral person.¹⁷⁴ These principles are considered constraints on behavior that mandate certain courses of action regardless of, and without consideration of, the consequences that will result from the act.¹⁷⁵ To aid the person who is considering the ethical implications of actions, Kant developed the concept of categorical imperatives.¹⁷⁶ These imperatives provide a framework in which actions can be considered and the ethicality of the action determined. Perhaps the most commonly referred to categorical imperative provides that one should act in such a way that the maxim of your action will become a universal law.¹⁷⁷ The focus, to state it simply, is on the act and whether the act is ethically right or wrong.

Teleology is a philosophy of ethics that also focuses on actions, and determines whether an act is ethically right or wrong in light of the consequences that will stem from the act. This area of ethics also is referred to as consequentialism since the consequences control the act.¹⁷⁸ While a person may act in a way that in and of itself might be contrary to what is deemed right, such action will be acceptable if the consequences produce a greater good. There are several sub-categories of ethical philosophy that fall in the teleology category, two of which are egoism and utilitarianism.¹⁷⁹

Egoism provides that an act is right if the consequences for the individual are right; utilitarianism broadens the view by defining the right act to be the one that will provide the greatest good for the most people who will be affected by the decisions.¹⁸⁰ Utilitarianism favors laws with consequences that produce the greatest good for the greatest number of individuals.¹⁸¹ Utilitarianism is often referred to as a cost benefit analysis theory because the costs of the alternative actions and consequences are determined and the correct act is illustrated by the consequences that will be most beneficial.¹⁸² It is the magnitude of the benefit or harm that matters morally, not to whom a benefit or burden befalls.¹⁸³ Here, as with deontology, the ethical question is whether to act in a certain way or not, whether the decision is based on the rightness of the act itself, or whether the act is right because of the ensuing consequences. Virtue ethics changes the focus from acts and rule-following to the character of a person.¹⁸⁴

a. Fundamentals of Virtue Ethics

Virtue ethics does not judge actions according to the actual subjective motives of the actor but instead “identifies particular traits as more or less worthy, asks what sort of acts these traits dispose a person to perform, and then rates acts according to whether or not they are of the kind a person possessed of worthy character traits would perform.”¹⁸⁵ Virtue ethics links moral intention with moral action, and moral imagination is key to assisting individuals develop virtues of character and to translate them into virtuous actions.¹⁸⁶ The interest in the moral philosophy

of virtue ethics has increased recently in ethics circles, although the foundations of virtue ethics can be traced back to the writings of Aristotle.¹⁸⁷ More importantly to the Skywalker case, interest in the application of virtue ethics to business ethics education and practice also has grown.¹⁸⁸

Virtue ethics has been referred to as the “[e]thics of being rather than of doing.”¹⁸⁹ This moral philosophy looks more closely at what type of person one chooses to be rather than on whether or not the acts taken by an individual are right or wrong.¹⁹⁰ In essence it is an examination of character and the traits a person holds and the influence those traits will have on the decision-making process. The philosophy involves the identification of character traits, virtues that will best serve achieving a good and happy life, what ethicists would refer to as “flourishing.”¹⁹¹ The discussion of the role of virtues in striving for the good life has been an ethical discussion that dates back to Aristotle and Plato.¹⁹² The shift is away from the deontological or teleological view of the rightness or wrongness of action to a consideration of what type of person one chooses to be.¹⁹³

One who possesses virtues acts as an extension of those virtues not in obedience to a rule or based on a determination of the consequences that will follow from the act.¹⁹⁴ Simply stated, a virtuous person will do the right thing effortlessly, and with no internal opposition, as a matter of character.¹⁹⁵ The development of the character traits that can be classified as virtues is not a one shot activity but is behavior that is habituated over a life time.¹⁹⁶ “What kind of person do you want to be?”¹⁹⁷ Virtue is character development, day in, day out, over a lifetime.¹⁹⁸ A person is motivated to develop virtuous character traits because it is those traits that will bring happiness and “constitute a good and full human life.”¹⁹⁹

Traits that lead to unhappiness are vices.²⁰⁰ “[A] virtue is a deep-seated trait of character that provides (normative) reasons for action together with appropriate motivations for choosing, feeling, desiring, and reacting well across a range of situations.”²⁰¹ They are human qualities that enable us to achieve a good life.²⁰² Virtuous traits serve two functions in that they influence behavior and result in appropriate behaviors. Moreover, the behaviors of people who have particular virtues are consistent and predictable.²⁰³ Virtues can be seen as a praiseworthy character trait.²⁰⁴ Virtues must be directed “towards good and, once achieved, virtuous participation in practices is an essential component of leading a good, meaningful life.”²⁰⁵ Some virtues have been identified as universals in that they are common across cultures and religions: courage, humanity, justice, temperance, and transcendence.²⁰⁶

A person who has virtues, acts from virtue. The virtuous actions flow from a virtuous character. For that result to follow, “[w]e must know that what we are doing are virtuous actions; secondly, we must choose these actions and choose them for their own sake (and take enjoyment in doing so); and lastly, we ‘must do them from a firm and unchanging state.’”²⁰⁷ The question asked before action is taken is simply, “What would a virtuous person do in a similar situation?”²⁰⁸ Practical reasoning is a component of virtue ethics. A person must think through and understand the internal values that make him act in a particular way.²⁰⁹ The person must hold beliefs that conform to attitudes and the desire to act in accordance with those beliefs.²¹⁰ This internal discipline represents both the character of the person and the motivational factors that will encourage or constrain the person’s actions.²¹¹ Once a person’s character is known, it is possible to predict that person’s behavior in various circumstances.²¹² Values, therefore, are the core from which people operate; hence, they help cultivate particular character strengths. The behaviors associated with character strengths, in turn, forge the evolution of values that people hold.²¹³

b. Virtue Ethics and the Skywalk Case

Since the students will learn of the events that comprise the Skywalk case from first person narratives, they will be able to consider and reflect on the virtues, or vices, exhibited by the characters. Observation of the characters and their actions are a means by which students can model their own behavior.²¹⁴ The Skywalk case is particularly useful in that the characters and the motivations for their actions are not black and white and illustrate the gray areas in which ethical decision making is more complex and difficult.²¹⁵ Moreover, students will be able to consider the character of each player in the Skywalk case and ask “Do I want to be a person who behaves in that way?” and “How would a virtuous person behave in that situation?” Hopefully, this activity will aid students as they continue to develop their own character.²¹⁶

The identification of virtues and vices, and reflecting on how a virtuous person behaves will allow students to identify their own values, an important component of learning,²¹⁷ and promote the premise that ethics is self-improvement and that individuals are responsible for improving themselves.²¹⁸ Reflection is also a strong element both in virtue ethics and in learning.²¹⁹ Not only must virtuous persons think through their values and ensuing actions, but reflection on ethical issues posed in the classroom also “has been shown to increase cognitive moral development in business students.”²²⁰

3. Suggestions for Teaching the Application of Ethical Analysis to the Skywalk Case

While there are many alternatives as to how to teach an ethical analysis of Skywalk story, the following suggestions allow students to immediately become part of the story. Break the class into small groups of three or four students. To provide students with the broadest range of individual opinion within the group, instructor assignment of students to groups will allow a mix of student skills and levels, as well as require students to interact with students with whom they may not be familiar. Assign each group a Skywalk character: Developer, Tribal Spokesperson or Rancher. Then, as an in-class or outside of class assignment, have each group’s members read the narrative of the character assigned. Allow the group time to discuss the character and to consider why their character acted as he did.

Once students are familiar with their character, advise students that they will conduct interviews of the other players in the story. To that end, students will need to consider and document what information would be helpful to broaden their understanding of the conflict(s) represented by the Skywalk case. The group members then interact with each other, conducting interviews with students within the various groups, responding to questions using the information contained with their character’s narrative, and ultimately gain a broader view of the Skywalk saga.

With a more complete understanding of the facts, students can analyze better the situations presented in Skywalk with views of law and ethics. As an introduction to ethics, students can analyze and reflect on the actions of the characters in light of virtue ethics. By considering the conduct of all three players, students will be able to view the actions of the characters through different lenses. Ultimately, the questions for the students can include:

- Did your character act within the bounds of the law?
- Did your character engage in ethical conduct?

- How could the actions of these characters impact business relationships? For example, would you do business with the Tribe, Developer or the Rancher?
- What is the best outcome from your character's point of view?
- Does your character reflect traits that you would consider virtuous?
- Would you want to be a person who behaved as your character behaved?
- How could your character have behaved in a manner that could be considered more virtuous?

Ultimately, the Skywalk case will require that students make decisions about whether or not characters in the story acted ethically. To accomplish that objective, it will be necessary to guide students through the ethical decision-making process.²²¹ Ethical decision-making models provide an analytic basis for students to make decisions regarding the ethical conduct of the Skywalk players, and several models are available.²²² Working through the steps outlined in these models reinforces the importance recognizing issues, gathering information and evaluating actions and alternatives. One appropriate model to use in guiding students in their evaluation of the behavior of the characters in the Skywalk case is a model that identifies these stages in the ethical decision making process: decision maker; facts; options and consequences; duties and obligations; decision and justification; and evaluation of outcome.²²³

Following the steps in this model, students first identify persons who have the authority to make decisions.²²⁴ In the Skywalk case, that stage is rather straightforward as all characters have the individual authority to make decisions regarding their actions. The next stage, identification of facts,²²⁵ is completed using the process of interviewing the other characters in the Skywalk case, discussed earlier. This process allows the students to clarify the information provided by their character and the information needed to gather a more comprehensive view of the events. The third step guides students to make decisions about what alternate actions are available and how those actions will impact others.²²⁶ Students can consider not just the options available to their character, but alternative actions available to the other players in the case, as well.

Next the students will be called upon to identify legal principles that are at play in the scenario. Part of this process will be to identify what law, if any, *controls* an act and identifying how the law would apply to the facts presented.²²⁷ The next stage deals primarily with the ethical considerations involved.²²⁸ Do the actions of the characters display virtuous behavior? If not, what actions would do so? Students also could be given the opportunity to consider alternative outcomes when considering utilitarian or teleological ethics, discussed previously. Finally, the model asks students to evaluate the decisions made in terms of the outcomes for the characters involved.²²⁹ In the Skywalk case, this evaluation is particularly important, especially if students are asked to consider alternate decisions and the various outcomes that could result from making different decisions.

In considering the consequences of actions, another opportunity for analysis is considering the consequences of the Tribe's actions on future business dealings; in other words, students should consider whether or not potential business partners would be reluctant to enter into contractual deals with the Tribe in the future.²³⁰ Students can consider and comment on such questions as: "How will the use of eminent domain to seize contract rights affect future collaboration between the Tribe and other developers?" "Would other developers and business persons be hesitant to enter into a contract with the Tribe considering their actions with Developer?"²³¹ "Why would anyone want to do business with this Tribe?"²³² "Does the action of

seizing contractual rights weaken future business opportunities?”²³³

B. The Law

1. Sovereign Immunity

The origin of sovereign immunity in the U.S. legal system stems from the English common law, which recognized that the king was immune from suit unless consent was given.²³⁴ The U.S. Constitution preserves the principle, exempting citizens of foreign states from the jurisdiction of the federal judiciary.²³⁵ The Supreme Court has characterized Native American Tribes as *domestic independent nations*.²³⁶ Indian tribes enjoy the attributes of sovereignty over both their members and their territory, and tribal officials acting within the scope of their official capacities are entitled to immunity from liability.²³⁷ As a sovereign government, the doctrine bars suits against Native American Indian tribes absent a waiver by the tribe or congressional abrogation.²³⁸ Any waiver of immunity must be clear.²³⁹ Tribal sovereign immunity bars a lawsuit even for breach of contracts involving a business off the reservation or tribal lands.²⁴⁰

Tribal courts often hear contract disputes, and courts have held that remedies provided by a tribal court system must be exhausted before a dispute may be heard by another court.²⁴¹ The doctrine of tribal exhaustion is judicially created out of comity, and provides that the parties to any case arising on Native American lands or involving Native Americans must exhaust their tribal remedies before turning to the federal courts for relief.²⁴² Exhaustion is not required, however, in cases in which the assertion of tribal jurisdiction is motivated by a desire to harass or is conducted in bad faith.²⁴³ Tribal jurisdiction over non-Indians on the reservation exists when a non-Indian “enter[s into] consensual relationships with the tribe or its members, through commercial dealings, contracts, leases, or other arrangements.”²⁴⁴

In the Skywalk case, the Ninth Circuit ordered the Developer to exhaust remedies in tribal court.²⁴⁵ The lower court also determined that the bad faith exception to the rule did not apply, nor had the developer established that proceeding in Trial Court would prove futile, particularly since SNW conceded that the Hualapai Tribal Court could consider the jurisdictional and constitutional challenges to the ordinance raised by the Developer.²⁴⁶ Exhaustion of remedies in Tribal Court was proper in this case, particularly because the Developer challenged an ordinance passed by the Hualapai Tribal Council, on tribal land, to authorize condemnation of his interests in the construction and operation of Skywalk on tribal land.²⁴⁷ As demonstrated by the Skywalk case, although binding arbitration often is selected as a dispute resolution forum, an arbitration award still must be enforced, which can prove challenging given the exhaustion doctrine.²⁴⁸

There are several other issues associated with the extent of sovereign immunity generally and Native American Tribes, particularly with the explosion in the number of Tribal casinos. For example, the Supreme Court heard argument this term in *Michigan v. Bay Mills Indian Community*²⁴⁹ which asks the Court to consider the extent of tribal sovereign immunity in questioning whether or not the Court should carve out a limited exception to tribal sovereign immunity for off-Indian land commercial activity supervised by operations on the reservation, or alternatively, substantially restrict tribal sovereign immunity.²⁵⁰

2. Property Issues

a. Eminent Domain

A sovereign government's right to exercise the power of eminent domain to obtain property for public uses is a part of the jurisprudence of common law jurisdictions.²⁵¹ The right existed when the United States Constitution was adopted, and may be exercised by federal and state governments.²⁵² The right is accompanied by the duty to pay just compensation for the taking.²⁵³ The exercise of eminent domain must be related rationally to a public purpose, as well.²⁵⁴ Most recently, the U.S. Supreme Court approved, as a constitutionally legitimate public use, the proposed taking of property to increase revenues and to revitalize a distressed city.²⁵⁵

Similarly, the Indian Civil Rights Act provides in pertinent part, "No Indian tribe exercising powers of self-government shall . . . take any private property for public use without just compensation."²⁵⁶ Historically, tribes recognized common ownership of lands, a public use doctrine that exceeds the eminent domain model.²⁵⁷ However, current examples exist of the exercise of eminent domain by Native American Tribes.²⁵⁸ Tribes have taken private land for easements for road projects and utilities as permitted by their tribal codes.²⁵⁹ The Bureau of Indian Affairs also recognizes the right of tribal governments to take lands claimed by tribal members for public uses.²⁶⁰ The somewhat ironic twist in the Skywalk case is that it was a Native American Tribe who took private property instead of the Tribe losing its lands to the federal government. Previously, Native American Tribes have lost lands "through removal from their homeland, the allotment of tribal lands into individual parcels, and the escheatment of those individual lots back to the jurisdictional tribe or federal government."²⁶¹

But there are other issues associated with the exercise of eminent domain by the Tribe in the case. The property taken was not real property. Although fixtures, like a bridge, typically will be a part of any taking and often subject to just compensation rules,²⁶² there was no underlying land taken by the Tribe in this case. So could the Tribe condemn solely intangible rights in this case? All property, real and personal, tangible and intangible (such as contract rights, corporate stock, patent rights and trade secrets) can be subject to the government's exercise of eminent domain.²⁶³ Therefore, the Tribe feasibly could take contract rights if such authority was granted by the Tribal Council resolution.²⁶⁴

The federal district court recognized that, in accordance with the policy of tribal self-government and self-determination, it must defer to tribal court jurisdiction and allow the Tribe interpret its own ordinance and define its own jurisdiction.²⁶⁵ "The Tribal Court is the appropriate forum in which to address the validity of the condemnation ordinance and action under the Tribe's constitution and tribal procedures, as well as the effect of the condemnation on the Skywalk and assets related to the Skywalk, in addition to the valuation of the property condemned by the Tribe."²⁶⁶ Of course, any taking must be for public use. Students should examine the condemnation resolution to identify the factors alleged by the Tribe that could justify a taking for public use,²⁶⁷ and debate if the allegations are sufficient.

Subsequently, in examining whether or not the arbitrator exceeded his authority, the district court did consider the narrow question of whether or not the taking could include GCSD's chose in action for breach of contract and its right to arbitrate that claim, which decision it concluded would not "interfere to any significant degree in the litigation of broader condemnation issues in Tribal Court."²⁶⁸ The district court then proceeded to confirm the arbitration award, finding that SNW had waived its sovereign immunity and consented to binding arbitration, including an award of money damages, in the 2003 Agreement, and that the Tribe's exercise of eminent domain did not extend to the taking of GCSD's right to arbitrate or

right to money damages on its already-accrued breach of contract claims.²⁶⁹

The litigation, however, did not end; SNW appealed the confirmation of the award and also filed for bankruptcy.²⁷⁰ Questions remain unanswered. For example, must GCSO stand in line with other SNW creditors in bankruptcy court? Or would the transfer of SNW's assets to the newly formed *Grand Canyon Development Corporation* be deemed fraudulent under bankruptcy law?²⁷¹ Could the successor corporation, a wholly owned tribal enterprise presumably protected by sovereign immunity, be liable if the arbitration award was upheld on appeal?

b. Trespass to Land

Trespass to land occurs when someone invades another person's exclusive right to the possession of their property without consent.²⁷² The unauthorized entry onto the private property of another person constitutes a trespass because landowners have a right to exclude other persons from their land, and to collect damages for violations of that right,²⁷³ or to secure an injunction against future invasions.²⁷⁴ This case raises several issues concerning trespass.

First, the tribe was upset because the helicopters operated by the Rancher flew over sacred areas. How is property ownership defined? The common law doctrine of *cujus est solum ejus usque ad coelum* provides that a property owner possesses the land as well as all that which is to upward to heaven and downward to the center of the earth.²⁷⁵ Of course, that principle established hundreds of years ago, has given way to modern day forms of transportation.²⁷⁶ As a result, the helicopters would trespass if they landed, but not as they flew at a reasonable altitude. Nuisance would be a more appropriate cause of actions than trespass in this case, if frequent, low flights interfered with the use and enjoyment of the land.²⁷⁷

Second, the Rancher concluded that the Tribe objected to steps that were constructed so that tourists would not slip when exiting the river. The right to exclude others from one's property is "perhaps the most fundamental of all property interests."²⁷⁸ Therefore, even though the Tribe may have consented to the tourists' visits, as owner, the Tribe subsequently may enjoin their entry onto the reservation, remove the structure, and even keep the steps, depending on the circumstances surrounding their construction.²⁷⁹

c. Easement

An easement is a non-possessory right to use another person's real property within prescribed limits and without removing anything from the property,²⁸⁰ such as an easement to go across another's land to access the shore of a lake. In contrast, a license only confers a personal right to do some act or acts on the land of another.²⁸¹ Some easements are prepared by deeds and are recorded in the official records. In contrast, an unrecorded easement is a legal right to use the land of another that is not recorded in the official records. Such prescriptive easements may be created by persons who repeatedly use the land of another for access over many years; if the owner fails to object to the use, an easement can arise by prescription.²⁸²

The Diamond Bar Road was the source of the controversy. The previous owner had allowed persons to use the road previously without objection. Had a prescriptive easement arisen? It is not likely because the use was with permission. For an easement to be acquired by prescription, there be a continuous, open and notorious use of a definite right in the land of another which is adverse to the property owner. Even if there was a prescriptive easement, then

who would own it? The Tribe? The Public? Some states permit the general public to acquire an easement by prescription, but others do not.²⁸³ In the absence of a prescriptive easement or a recorded easement, the property right that the Tribe had been granted by the previous owner would be a license. A license is a personal right, which means that the right may be terminated by the licensor or when the licensor no longer owns the property, because it is not an interest in land.

This scenario allows students to examine the difference between a right of way and an easement, as well as the requirements for establishing a prescriptive easement and the characteristics of such an easement. In order to acquire rights in the Diamond Bar Road, the owner must grant the Tribe an easement in writing under the Statute of Frauds, usually through purchase, and it should be recorded. The case reports that the Rancher did in fact sell a permanent easement in exchange for \$750,000 and the promise to build underpasses for the livestock, move the Joshua trees, plant trees along the front of the ranch to block the road, and put up fencing and cattle guards by the end of a four-year period. The agreement seemed to have been negotiated with the assistance of the Bureau of Indian Affairs.²⁸⁴

Unfortunately, a dispute arose concerning performance of the agreement. The Rancher alleged that the improvements were not completed in the requisite time period, and so he began charging the public to cross his land, and enforcing his private property right to exclude with armed security. The situation escalated, and culminated in threats, incarceration, and the self-help enforcement of rights by both parties. This situation highlights a common issue when parties enter into a contract, i.e., the parties tend to frame the agreement toward performance, and not the possibility of a breach.

So what happens when there is an alleged breach? In this case, since the Tribe was given a right of way on other property, may the Rancher keep the payment of \$750,000? What if the improvements harmed the Rancher's land as a whole when the work ceased abruptly? If the work was not performed in a timely manner, does the contract end? If the contract ends, then does the Rancher have an immediate right to exclude? How is it determined if the contract is breached and if the breach is material, resulting in the termination of the contract? More importantly, how does contract law apply since it involves the sale of an interest in land? The risk management of unplanned contingencies is crucial. Unintended consequences are often the fruit of unguarded optimism.

3. Contractual Issues

a. Arbitration

Arbitration is a process of dispute resolution in which one or more impartial third persons renders a decision after a hearing at which both parties have an opportunity to be heard. Parties typically agree to arbitrate before a claim arises by including an arbitration clause in their contract, which identifies a way to resolve those disputes that the parties have agreed to submit to arbitration.²⁸⁵ The U.S. Federal Arbitration Act of 1925 ("FAA") provides for the enforceability of a written arbitration provision in any maritime transaction or contract involving interstate commerce, and declares that such agreements "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."²⁸⁶ The purpose of the statute is "to reverse the longstanding judicial hostility to arbitration agreements . . . and to place arbitration agreements upon the same footing as other

contracts."²⁸⁷

Originally the FAA was viewed as being applicable primarily to contract disputes between business entities.²⁸⁸ Supreme Court precedent, however, sanctions arbitration as a dispute resolution mechanism, permitting the arbitration of statutory claims,²⁸⁹ such as those involving securities law²⁹⁰ and employment.²⁹¹ The Court also recognizes that the FAA's liberal policy favoring arbitration should withstand state substantive or procedural policies to the contrary.²⁹²

Most arbitration clauses provide for binding arbitration, meaning the award is final. All state and federal courts have the power under statute to enforce an arbitrator's award, if that becomes necessary. A losing party may appeal an arbitrator's decision to a court. However, courts seldom overturn arbitration awards, except in cases of serious arbitrator misconduct, for example, fraud or oppression, but not for a mistaken application of the law governing the dispute. Since arbitration clauses foreclose litigation as an option, they effectively force the parties to settle their dispute through arbitration, although the purpose "is not to preclude a person from bringing claims but to provide an alternate forum for redress."²⁹³

As in contracts, arbitration agreements may provide for the law to govern the agreement ("choice of law") as well as the venue for the arbitration ("choice of forum"). In this case the parties to the Skywalk agreement chose mandatory arbitration for any controversy complaint or dispute arising out of the contract.²⁹⁴ They agreed upon a sole arbitrator with the caveat that if the parties could not agree on an arbitrator, each side was to select one arbitrator and the two arbitrators were to select the third for a panel of three arbitrators. The agreement specified that the commercial rules of the American Arbitration Association would govern the dispute. It selected the laws of the state of Arizona and the Hualapai tribe to govern the dispute, unless those laws waived the Tribe's sovereign immunity or required appearance in a forum other than federal court.

Arbitration is becoming similar to litigation,²⁹⁵ although it was once considered to be a less expensive, more expedient and less complex alternative to litigation. Students should explore the American Arbitration website and resources to determine how to examine critically if arbitration is a better solution to disputes than litigation.²⁹⁶ For example:

- What are the costs associated with arbitration? What is the daily rate for arbitrators and what is the filing fee with AAA?²⁹⁷
- How are attorneys paid? When are attorneys' fees due? Are contingency arrangements permitted and are statutory attorneys' fees awarded in such tribunals?²⁹⁸
- What is essence of the proposed *Arbitration Fairness Act of 2013-14*, and what issues does it seek to redress in alternate dispute resolution?²⁹⁹
- If there is no precedent set by arbitration, how is the justice system impacted by these private systems, and is that result desirable? In other words, courts set precedents when they develop the common law and interpret statutes and constitutional provisions. How might the proliferation of ADR might affect that process since settlements through mediation do not become a part of our body of law, nor do decisions of arbitrators? Are the value judgments that favor conciliation and expediency replacing the value judgment that favors the search for truth and justice associated with the judiciary?

Additionally, instead of reading and critiquing the results of the decision of the arbitration panel in the actual case,³⁰⁰ students could be asked to conduct an arbitration of the controversy.

The class may be divided into representatives of SNW and representatives of GCSD, who prepare their arguments based on the information provided in court documents and news articles, and arbitrators, who decide the dispute and justify their decision. There are several pedagogical models already available upon which to structure such an exercise.³⁰¹

Mediation is another form of alternate dispute resolution in which a third party assists the parties to a resolution of the dispute, instead of rendering the decision like an arbitrator.³⁰² One goal of mediation is the preservation of relationships; therefore mediation is more likely to reach a successful resolution when the parties participate voluntarily and in good faith. The process values collaborative, problem-solving skills, rather than winning in an adversarial process. Ask students to explain whether or not they think mediation would or would not be suitable for the disputes in the case given the circumstances surrounding the controversy.

b. Good Faith and Fair Dealing

The law of most states recognizes that there is an obligation implied in every contract to perform the agreement in good faith and to refrain from doing anything that would deprive the other parties the benefit of their bargain.³⁰³ The obligation is recognized by the Restatement of Contracts,³⁰⁴ as well as by the Uniform Commercial Code.³⁰⁵ The duty of good faith generally is imposed as a matter of law, and in some jurisdictions cannot be disclaimed by express provisions to the contrary.³⁰⁶ This implied covenant of good faith and fair dealing, however, does not exist independently of a breach of contract claim.³⁰⁷ Since contract law is a matter of state law, the interpretation and application of that standard will vary among jurisdictions.³⁰⁸ The contract between SNW and GCSD selected the law of Arizona to govern the dispute, providing it did not waive SNW's or the Nation's sovereign immunity or require SNW or the Nation to appear in any courts or other proceedings in the State of Arizona, except federal courts.³⁰⁹

Arizona broadly interprets the implied covenant of good faith and fair dealing.³¹⁰ The Arizona Supreme Court held that that a breach of the implied covenant of good faith and fair dealing may occur if a jury might reasonably find that one wrongfully exercised a contractual power for “a reason beyond the risks” that the other party assumed under the contract or for a reason inconsistent with the other party’s justified expectations.³¹¹ “...Arizona law recognizes that a party can breach the implied covenant of good faith and fair dealing both by exercising express discretion in a way inconsistent with a party's reasonable expectations and by acting in ways not expressly excluded by the contract's terms but which nevertheless bear adversely on the party's reasonably expected benefits of the bargain.”³¹²

Arguably, the Tribe’s condemnation resolution, by which it exercised its power of eminent domain and set aside contractual provisions to the contrary, willfully created a post-hoc exemption from the obligations imposed by the contract for the primary benefit of the Tribe. On the other hand, the resolution set forth its justifications for the exercise of that power, all of which counsel against any breach of a covenant of good faith and fair dealing.³¹³ Moreover, the right to exercise eminent domain is guaranteed under the Tribal constitution as well as federal law, providing just compensation is paid. How do these legal realities square with a party’s reasonable expectations under contract law?

In a different context, the Developer argued that the assertion of tribal jurisdiction was made in bad faith, an exception to the comity principle.³¹⁴ However, the federal district court concluded that the bad faith exception applies “primarily to actions of the Tribal Court, not the actions of litigants or other branches of tribal government;”³¹⁵ therefore, it did not consider the

conduct of the Hualapai Tribal Council with respect to the Skywalk project generally. The Ninth Circuit also noted that “[B]ad faith by a litigant instituting the tribal court action will not suffice” as an exception to comity,³¹⁶ but did not decide any issues of bad faith in the context of the contract’s administration. Students should research the interpretation of the covenant of good faith and fair dealing under the law of their state to determine its application generally, and then explain how their state law might apply to this case specifically.

4. Defamation

The law and the government has an interest in protecting the good the names of citizens and in deterring the potential for violence, or “the general threat to good order inherent in insult,” which might occur if the legal system afforded no remedy for defamatory statements.³¹⁷ Traditionally, courts examined if a statement hurt someone’s reputation by examining whether or not the statement exposed the plaintiff to “hatred, ridicule, contempt, scorn or shame.”³¹⁸ A more modern test examines whether or not the statement lowers the plaintiff in the estimation of the community or by deterring others from associating with him or her.³¹⁹

Of course, one cannot defame someone by telling the truth. However, who is responsible for establishing the truth or falsity of the alleged defamatory statement? In *Philadelphia Newspapers v. Hepps* the Supreme Court held that libel plaintiffs must prove falsity when the speech in question relates to a matter of public concern or involves a public figure.³²⁰ When considering truth as a defense, the issue of fact versus opinion arises. Facts can be proven true or false, while opinion is not capable of such a resolution. Opinion is generally viewed as being protected under the U.S. constitution, so it cannot be the basis for a libel suit.³²¹ While the constitution does not protect a false fact about someone that injures that person’s reputation, it values opinion as being an integral part of public debate and discussion.

In *New York Times v. Sullivan* the Supreme Court interpreted the First Amendment as requiring that public officials must establish actual malice in order to recover in a defamation lawsuit.³²² The Court defined malice as the speaker or publisher having “knowledge of falsity or reckless disregard of whether it (defamatory statement) was false or not.”³²³ In other words, state tort law cannot permit courts to award damages unless the false statements were not only false, but deliberately false, or recklessly false, or knowingly false, or in cases where the speaker/publisher entertained “serious doubts as to the truth of his publication.”³²⁴

In contrast, state libel laws do not have to impose a malice requirement for suits brought by private persons.³²⁵ Plaintiffs are allowed to succeed under a negligence standard, that is, if they could prove that the speaker or publisher of the defamatory statement either knew or should have known that the statement was false.³²⁶ It is very important then, to ascertain is the plaintiff in a libel suit is a public or private person. In addition to public officials, such as elected or administrative governmental officers, public persons who have prominence regarding public issues or events also must meet the malice standard,³²⁷ defined generally as “figures have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved,” inviting attention and comment.³²⁸

The defamation complaint filed by the developer David Jin focused on statements that allegedly were made about his failure to abide by his promises concerning the development of the Visitor’s Center. It alleged that the Tribe knew that the eminent domain ordinance would be unpopular, and that the defendants in the defamation suit “conspired to defame and disparage” Jin to gain support for the ordinance and the exercise of eminent domain. It further alleges that

the defendants' strategic statements, such as "*The Hualapai have begged Mr. Jin to keep his promises and complete the work. Instead, Jin and his various subsidiaries have behaved like Arizona's version of Leona Helmsley and Bernie Madoff...*,"³²⁹ impugned Jin's reputation and were designed to turn public opinion against him.

Students may access the complaint to examine,³³⁰ as it raises several key issues in a defamation lawsuit. The following questions can be assigned to guide students through the legal analysis of the complaint:

- What were the statements that allegedly damaged the plaintiff's reputation?
- Were they fact or opinion? Explain by example. What is the significance of the distinction?
- Was Jin a public figure under defamation law, i.e., had he thrust himself to the forefront of a public issue for the purpose of influencing its resolution? Explain.
- If he is a public figure, did the defendant recklessly disregard the truth or falsity of the statements made (the malice standard)?
- Is truth a defense or must plaintiff prove falsity? Justify your response.
- How does the allegation that "untold numbers of people in Arizona, Nevada and nationwide markets have been exposed to false statement" relate to damages? How does the allegation that there was a conspiracy to defame to build support for the eminent domain ordinance relate to intent and to damages?

One other issue is important to note in this case. Generally, a person who is deceased can be neither defamed, nor have their privacy invaded.³³¹ Mr. Jin died subsequent to the filing of the defamation suit. Such lawsuit, however, may survive death under state statutes.³³²

5. Trademark

The Trademark Act of 1946 (Lanham Act) is a U.S. law that protects registered trademarks from infringement. Under the law, a trademark is "any word, name, symbol, or device, or any combination thereof...used to distinguish ...goods, including a unique product, from those manufactured or sold by others and to indicate the source of the goods, even if that source is unknown."³³³ To be protected against infringement, trademarks should be registered and used in the context of business/commerce.³³⁴ A registered trademark is presumptively valid after five years, but can be challenged in first five years by other alleged holders.³³⁵ Prior to applying for a trademark, an applicant should research the intended trademark through the U.S. Patent and Trademark Office to insure that the mark has not already been taken.³³⁶

Trademarks cannot be generic,³³⁷ and must be distinctive, not merely descriptive.³³⁸ Categories of distinctiveness that are eligible for protection include a mark or phrase that is suggestive of the product's characteristics or arbitrarily associated with a product, or fanciful, or descriptive, but only if the descriptor has acquired a secondary meaning distinctive of the applicant's goods. Federal law protects the economic value of a trademark by allowing an injunction against infringement;³³⁹ however, it is up to the holder of the mark to bring a lawsuit to protect the right of exclusion and the holder's business interest in the mark, which is what the Rancher did.

The Hualapai Tribe attempted to register the mark *Grand Canyon West* in standard characters for services identified as "airport services; air transportation services; arranging for

recreational travel tours and providing related transportation of passengers by air, boat, raft, rail, tram, bus, motorized on-road and off-road vehicles, non-motorized vehicles featuring bicycles, and domestic animals.”³⁴⁰ Grand Canyon West Ranch, LLC, which provided helicopter tours of the Grand Canyon from the ranch, opposed the application. There were two issues presented by the contested trademark case. First, the Ranch claimed that the mark was merely geographically descriptive and had not acquired the distinctiveness required for trademark protection. Second, the Ranch claimed that the Tribe did not use the purported mark on some of the enumerated services prior to the filing date of the application.

The Trademark Trial and Appeal Board noted that an application may be considered void for fraud or if the applicant had not used the applied-for mark on any of the goods or services identified in the application prior to filing.³⁴¹ The Ranch, however, did not plead fraud, so the Board determined that as long as the mark was used on some of the identified goods or services as of the filing of the application, the application was not void in its entirety, and could be amended to reflect the appropriate scope of activities.³⁴² In essence the Board held that as long as the mark was used on some of the identified goods/services as of the filing in a use-based application, in the absence of fraud, the application is not void in its entirety and may be amended.³⁴³

The controversy continued after the application was amended, centering on whether or not the mark was distinctive or had acquired secondary meaning under the statute, as well as the services identified in the application.³⁴⁴ The Trademark Trial and Appeal Board concluded that Grand Canyon West was primarily geographically descriptive of the applicant’s services, but that the services identified in the application had acquired distinctiveness and could be protected under the statute.³⁴⁵ However, the Board concluded that the Tribe committed fraud by including certain services in its revised identification of services when applicant knew or should have known that it had not used the mark in connection with those services.³⁴⁶ The Board also noted that the finding of fraud would not affect the applicant’s ability to file a new application to register its mark for actual services offered at the time the application was filed. The Hualapai Tribe filed an appeal to the Federal Circuit of the TTAB’s decision, and the American Intellectual Property Law Association filed an amicus curiae brief in support of the Hualapai Tribe out of concern that innocent mistakes could be classified improperly as being fraudulent, instead of requiring an affirmative showing of intentional deceit, materiality and injury.³⁴⁷ The Hualapai also sought a declaratory judgment in the U.S. District Court in Arizona for infringement.³⁴⁸

The litigation seems to have abated. Currently, the Ranch is advertised as the Grand Canyon Ranch Resort.³⁴⁹ The Hualapai are using the name Grand Canyon West, but without the ® or ™ designation.³⁵⁰ Because the dispute remains unresolved, students may consider the previous decisions of the Trademark Trial and Appeal Board in the case, the complaint filed in federal district court and the brief of the American Intellectual Property Law Association to determine how the U.S. Court of Appeals for the Federal Circuit would rule on whether or not the phrase can be trademarked and which party is legally entitled to its use, providing it is sufficiently distinctive. Using those resources to formulate an appellate decision allows students to examine legal materials not usually included in their text, i.e., an administrative decision, a brief and a complaint.

IV. Epilogue

On March 28, 2014 the Skywalk bridge celebrated its seven-year anniversary. It has garnered numerous accolades and awards, such as being named *Best New Bridge* by Travel and Leisure magazine,³⁵¹ in addition to hosting events such as the world's highest couture fashion show,³⁵² a zombie *Thriller* dance routine,³⁵³ and the BBC's *Nina and the Neurons* children's program.³⁵⁴ On June 13, 2013 developer David Jin lost his battle with cancer,³⁵⁵ but "[t]he Grand Canyon Skywalk will be David's legacy for eternity."³⁵⁶ The parties finally reached a confidential settlement of all claims on April 25, 2014,³⁵⁷ after three years of acrimonious litigation.

Heli USA Airways, owned by the Rancher, Nigel Turner, filed for Chapter 11 bankruptcy protection on October 29, 2013.³⁵⁸ The petition claims that the company, which had been in business in Southern Nevada for eighteen years, lost business when the controversy about the completion of the road to his ranch transpired.³⁵⁹ After the fallout from the Skywalk taking, two members of the Hualapai tribe, "leaders in the takeover of the Grand Canyon Skywalk" were recalled from the Tribal Council.³⁶⁰

The Skywalk fallout did not stop the Tribe from exercising eminent domain in the taking of another developer's, contractual rights, specifically, the revenue-sharing rights between the Tribe and Jim Brown, the developer of the *Hualapai Ranch*.³⁶¹ The Hualapai Ranch was envisioned as a western-themed resort offering "western-centric fun."³⁶² Similar to the Skywalk taking, the Tribe alleges contractual breach and safety issues as the basis of the eminent domain action; that controversy is now being litigated.³⁶³ Lessons were learned, though; the action was commenced in the Hualapai Tribal Court.³⁶⁴

¹ See Susan L. Willey, Nancy Reeves Mansfield & Margaret Sherman, *Integrating Ethics Across the Curriculum: A Pilot Study to Assess Student's Ethical Reasoning*, 29 J. LEG. STUD. EDUC. 263 (2012) (examining the ability of graduate and undergraduate students to identify and assess ethical and legal issues).

² The case also is supported by rich Internet resources for students to explore. The Developer in the case established a depository of links to legal documents concerning the disputes discussed, including complaints, briefs and court orders. *Key Legal Documents*, GRAND CANYON SKYWALK FACTS, available at <http://grandcanyonskywalkfacts.com/documents/> (last visited May 17, 2014). Additionally, the website includes a great deal of information in support of his position, in addition to links to newspaper articles concerning the project.

³ See Lucien J. Dhooge, *Creating a Course in Global Business Ethics: A Modest Proposal*, 28 J. LEG. STUD. EDUC. 207, 211-12 (2011) (noting that legal compliance does not necessarily constitute ethical compliance).

⁴ Sylvia Moreno, *Tribe's Canyon Skywalk May Bring Riches but Also Deepens Divide*, WASH. POST, Mar. 8, 2007, available at <http://www.washingtonpost.com/wp-dyn/content/article/2007/03/07/AR2007030702557.html> (last visited May 6, 2014).

⁵ *Hualapai Tribe and the Skywalk*, Grand Canyon National Park Arizona, NAT'L PARK SERV., DEPT. OF THE INTERIOR, available at <http://www.nps.gov/grca/planyourvisit/skywalk.htm> (last visited May 6, 2014).

⁶ *Welcome*, GLACIER SKYWALK, available at <http://glacierskywalk.ca/> (last visited May 17, 2014).

⁷ Moreno, *supra* note 4.

⁸ *Id.*

⁹ *Id.*

¹⁰ Pictures of the structure are provided in Appendix 2.

¹¹ *Observation Deck Reaches Dizzying Heights*, DAILY MAIL ONLINE, Mar. 21 2007, available at <http://www.dailymail.co.uk/news/article-443560/Grand-Canyon-observation-deck-reaches-dizzying-heights.html> (last visited May 16, 2014).

¹² *Skywalk at the Grand Canyon*, Lochas Engineering, available at <http://www.lochsa.com/skywalk-grand-canyon-0> (last visited May 6, 2014) (hereinafter *Lochas Engineering*).

¹³ *About the Grand Canyon Skywalk*, GRAND CANYON SKYWALK FACTS, available at <http://grandcanyonskywalkfacts.com/skywalk-facts/> (last visited May 17, 2014).

¹⁴ *Impossible Places-The Skywalk a Step Too Far?*, ROYAL GEOG. SOC., available at <http://www.rgs.org/OurWork/Schools/Teaching+resources/Key+Stage+3+resources/Impossible+places/The+Skywal>

k+a+step+too+far.htm (last visited May 6, 2014).

¹⁵ *A Canyon with a View, This View Made Possible with Lincoln Electric*, MADEPOSSIBLEWITH, available at <http://madepossiblewith.com/campaigns/grandcanyon/grand-canyon-skywalk.php> (last visited May 6, 2014) (hereinafter *This View Made Possible*).

¹⁶ *Id.*

¹⁷ *Grand Canyon Skywalk Uses SentryGlas® for Strength, Safety Glass*, DUPONT, available at http://www2.dupont.com/SafetyGlass/en_US/whats_new/grand_canyon_skywalk.html (last visited May 6, 2014) (hereinafter *Sentry Glas®*).

¹⁸ *This View Made Possible*, *supra* note 15.

¹⁹ *Sentry Glas®*, *supra* note 17.

²⁰ *Lochas Engineering*, *supra* note 12.

²¹ *Travel 365: Grand Canyon Skywalk, Arizona*, NAT'L GEOG. available at <http://travel.nationalgeographic.com/travel/365-photos/skywalk-grand-canyon-arizona/> (last visited May 6, 2014).

²² Dennis Wagner, *Grand Canyon Skywalk Judgment Could Devastate Tribe*, *USA Today*, Feb. 19, 2014, available at <http://www.usatoday.com/story/news/nation/2013/02/19/grand-canyon-skywalk-judgment-tribe/1929813> (last visited May 6, 2014).

²³ *Hualapai Tourism*, available at <http://www.hualapaitourism.com/the-grand-canyon-skywalk/> (last visited May 6, 2014).

²⁴ Tim O'Reiley, *Legal Battle Surrounding Grand Canyon Skywalk Still Flares*, *LAS VEGAS REV.-J.*, Jan. 2, 2014, available at <http://www.reviewjournal.com/business/legal-battle-surrounding-grand-canyon-skywalk-still-flares> (last visited May 6, 2014).

²⁵ Jude Joffe-Block, *Management of the Grand Canyon Skywalk on Shaky Ground*, *FRONTERAS*, Apr. 22, 2011, available at <http://m.fronterasdesk.org/content/management-grand-canyon-skywalk-shaky-ground> (last visited May 6, 2014).

²⁶ *Id.* Jin agreed to put up \$30 million to build the Skywalk and a Visitor Center. *Id.*

²⁷ Richard N. Velotta, *Developer of Grand Canyon Skywalk Dies of Cancer*, *VEGAS INC.*, June 14, 2013, available at <http://www.vegasinc.com/business/real-estate/2013/jun/14/developer-grand-canyon-skywalk-dies-cancer/> (last visited May 6, 2014).

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³⁰ Joffe-Black, *supra* note 25 (discussing the conflict regarding payment of fees and allegations of both sides).

³¹ *Frequently Asked Questions*, GRAND CANYON SKYWALK FACTS, available at <http://grandcanyonskywalkfacts.com/faq/> (last visited May 6, 2014).

³² Zach St. George, *A Roadblock to the Skywalk: Dispute Over Grand Canyon Access Triggered Feud*, *AZCENTRAL*, Aug. 18, 2013, available at <http://www.azcentral.com/news/arizona/articles/20130816skywalk-dispute-grand-canyon-access-feud.html> (last visited May 6, 2014).

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³⁵ Suzanne Adams-Ockrassa, *Skywalk Visionary and Designer, David Jin, 51, Dies*, *NAVAJO-HOPI OBSERVER*, June 18, 2013, available at <http://nhonews.com/main.asp?SectionID=1&SubSectionID=795&ArticleID=15515> (last visited May 22, 2014).

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³⁷ *Id.*

³⁸ O'Reiley, *supra* note 24.

³⁹ *This View Made Possible*, *supra* note 15.

⁴⁰ *Impossible Places-The Skywalk a Step Too Far?*, ROYAL GEOG. SOC., available at <http://www.rgs.org/OurWork/Schools/Teaching+resources/Key+Stage+3+resources/Impossible+places/The+Skywalk+a+step+too+far.htm> (last visited May 6, 2014).

⁴¹ Wagner, *supra* note 22.

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⁴³ Adams-Ockrassa, *supra* note 35.

⁴⁴ *Id.*

⁴⁵ *FAQ*, *supra* note 28.

⁴⁶ *Id.*

⁴⁷ Complaint, Grand Canyon Skywalk Development Inc., v. Steele et al., et al, Documents, GRAND CANYON SKYWALK FACTS, available at <http://grandcanyonskywalkfacts.com/skywalk-facts/> (last visited May 21, 2014) (hereinafter Defamation Complaint).

⁴⁸ *FAQ*, *supra* note 28.

⁴⁹ Jin, *supra* note 42.

⁵⁰ Defamation Complaint, *supra* note 47.

⁵¹ Jin, *supra* note 42.

⁵² *FAQ*, *supra* note 28.

⁵³ Defamation Complaint, *supra* note 47.

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ Jin, *supra* note 42.

⁵⁷ *FAQ*, *supra* note 28.

⁵⁸ Defamation Complaint, *supra* note 47.

⁵⁹ O'Reiley, *supra* note 24.

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⁶¹ Defamation Complaint, *supra* note 47.

⁶² *Hualapai Tribe Declares Eminent Domain to Manage Grand Canyon Skywalk*, INDIAN COUNTRY TODAY MEDIA NETWORK.COM, Feb. 13, 2012, available at <http://indiancountrytodaymedianetwork.com/2012/02/13/hualapai-tribe-declares-eminent-domain-manage-grand-canyon-skywalk-97413> (last visited May 7, 2014).

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⁶⁴ Felicia Fonseca, *Hualapai Corporation Seeks Bankruptcy Protection*, Mar. 5, 2013, THE ASSOCIATED PRESS, available at <http://www.bigstory.ap.org/article/hualapai-corporation-seeks-bankruptcy-protection> (last visited May 7, 2014).

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⁶⁷ Grand Canyon Skywalk Develop., LLC v. 'Sa' Nyu Wa, Inc., et al., 715 F.3d 1196 (9th Cir. 2013).

⁶⁸ Grand Canyon Skywalk Develop., LLC v. Grand Canyon Resort Corp., et al, 134 S. Ct. 825 (2013).

⁶⁹ *FAQ*, *supra* note 28.

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⁷³ Defamation Complaint, *supra* note 47.

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- ⁹² Velotta, *supra* note 27.
- ⁹³ Moreno, *supra* note 4.
- ⁹⁴ *Id.*
- ⁹⁵ St. George, *supra* note 32.
- ⁹⁶ *FAQ*, *supra* note 28.
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- ¹²² *Id.*
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¹⁶⁰ Edward J. Conry & Caryn Beck-Dudley, *Legal Reasoning and Practical Reasonableness*, 33 AM. BUS. L.J. 91, 96-108 (1996) (discussing natural law).

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¹⁶² Edwin S. Corwin, *The "Higher Law" Background of American Constitutional Law*, 42 HARV. L. REV. 149, 157 (1928) (citing Cicero passage from *The Republic*).

¹⁶³ As Thomas Paine observed, "But where, say some, is the King of America? I'll tell you, Friend. He reigns above... let a day be solemnly set apart for proclaiming the charter; let it be brought forth placed in the divine law, the word of God... For as in absolute governments the king is law, so in free countries the law ought to be king; and there ought to be no other." DAVID F. BURG, *THE AMERICAN REVOLUTION* 387 (2007) (providing excerpt from Thomas Paine's book, *COMMON SENSE*).

¹⁶⁴ "We hold these truths to be self-evident, that all men are created equal, that they are Endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness. That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed. That whenever any Form of Government becomes destructive of these ends, it is the Right of the people to alter or to abolish it, and to institute new Government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to affect their Safety and Happiness." THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

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¹⁶⁸ Janet Thompson Jackson, *What Is Property? Property Is Theft: The Lack of Social Justice in U.S. Eminent Domain Law*, 84 ST. JOHN'S L. REV. 63, 73-74 (2010).

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¹⁷² Deontology also is referred to as formalism or "universal theory." Marisa Anne Pagnattaro, *International Legal and Ethical Considerations at Pfizer, Inc.*, 22 J. LEG. STUD. EDUC. 169, 190 (2005) (discussing formalism, consequentialism, and social contract in the context of the distribution potentially life-saving drugs).

¹⁷³ David McNaughton, *Deontology*, in THE OXFORD HANDBOOK OF ETHICAL THEORY § 5.1 (David Copp, ed. 2005). For case studies discussing in part the categorical imperative in a deontological framework see Lucien J. Dhooge, *A Fire in the Global Village: Teaching Ethical Reasoning and Stakeholder Interests Utilizing Tobacco*, 29 J. LEG.

STUD. EDUC. 92 (2012); Lucien J. Dhooge, *What's Wrong with Bribery? An Example Utilizing Access to Safe Drinking Water*, 30 J. LEG. STUD. EDUC. 131 (2013); See also Robert J. Landry III, *Ethical Considerations in Filing Personal Bankruptcy: A Hypothetical Case Study*, 29 J. LEG. STUD. EDUC. 59, 77 (2012) (applying Kant's categorical imperative to bankruptcy).

¹⁷⁴ McNaughton, *id.* at § 6.1.

¹⁷⁵ *Id.* at § 1.1

¹⁷⁶ *Kantian Duty Based Ethics*, SEVEN PILLARS INSTITUTE FOR FINANCE AND ETHICS, available at <http://sevenpillarsinstitute.org/morality-101/kantian-duty-based-deontological-ethics> (last visited May 7, 2014).

¹⁷⁷ *Deontological Ethics*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY 2.4, Dec 12, 2012, available at <http://plato.stanford.edu/entries/ethics-deontological/> (last visited May 7, 2014).

¹⁷⁸ O.C. FERRELL, JOHN FRAEDRICH & LINDA FERRELL BUSINESS ETHICS: ETHICAL DECISION MAKING AND CASES 150 (8th ed. 2013). Aristotle and Thomas Aquinas are associated with this philosophical theory.

¹⁷⁹ *Id.* at 151.

¹⁸⁰ *Id.*

¹⁸¹ Ferrera, *supra* note 166, at 167.

¹⁸² Ferrell, et al., *supra* note 178, at 151.

¹⁸³ “This conception of impartiality supports a maximizing moral standard.” David O. Brink, *Some Forms and Limits of Consequentialism*, in THE OXFORD HANDBOOK OF ETHICAL THEORY § 6 (David Copp, ed. 2005).

¹⁸⁴ David McPherson, *Vocational Virtue Ethics: Prospects for a Virtue Ethics Approach to Business*, 116 J. BUS. ETHICS 283, 283 (2013). For an overview of virtue ethics see Caryn Beck-Dudley, *No More Quandaries: A Look at Virtue Through the Eyes of Robert Solomon: A Review Essay of Ethics and Excellence: Cooperation Integrity in Business*, 34 AM. BUS. L.J. 119-24 (1996).

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¹⁸⁸ Rose Catacutan, *Education in virtues as goal of business ethics instruction*, 7 AFRICAN J. BUS. ETHICS 62, 63 (2013).

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¹⁹³ *Id.* at 295.

¹⁹⁴ McPherson, *supra* note 184, at 285.

¹⁹⁵ Annas, *supra* note 190, at § 1.1.

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¹⁹⁷ *Id.* at 41.

¹⁹⁸ Robert Audi, *Virtue Ethics as a Resource in Business*, 22 BUS. ETHICS Q. 273, 274 (2012).

¹⁹⁹ DESJARDINS, *supra* note 196, at 41.

²⁰⁰ *Id.* at 42.

²⁰¹ Alzola, *supra* note 189, at 380.

²⁰² Arjoon Surendra, *Aristotelian-Thomistic Virtue Ethics, Emotional Intelligence and Decision-Making*, ADVANCES MGT, Apr. 2010, at 7.

²⁰³ Alzola, *supra* note 189, at 380.

²⁰⁴ Audi, *supra* note 198, at 273.

²⁰⁵ Ron Beadle & Kelvin Knight, *Virtue and Meaningful Work*, 22 BUS. ETHICS Q. 433, 444 (2012).

²⁰⁶ Crossan, et al., *supra* note 171, at 286.

²⁰⁷ McPherson, *supra* note 184, at 285 (quoting Aristotle).

²⁰⁸ Alzola, *supra* note 189, at 379.

²⁰⁹ “For virtue ethics, the purpose of good moral education is to get the pupil to think for himself about the reasons on which he acts, and so the content of what he has been taught.” Annas, *supra* note 190, at § 1.1.

²¹⁰ Audi, *supra* note 198, at 274.

²¹¹ Crossan, et al., *supra* note 171, at 287.

²¹² Audi, *supra* note 198, at 280.

²¹³ Crossan, et al., *supra* note 171, at 287.

²¹⁴ *Id.* at 290.

²¹⁵ *Id.* at 293.

²¹⁶ *Id.* at 293.

²¹⁷ Floyd, et al., *supra* note 169, at 757.

²¹⁸ Annas, *supra* note 190, at § 1.3.

²¹⁹ Crossan, et al., *supra* note 171, at 295.

²²⁰ *Id.*

²²¹ Questions help students to think logically to a conclusion instead of jumping to one. Pyramid ideation, a system for asking basic questions to identify relationships between essential facts in a given situation assists the inquirer in value exploration, choosing or developing an ethical theory and applying the theory. Scott Sibary, *Question-Centered Legal Analysis*, 11 J. LEG. STUD. EDUC. 241 (1993). *See also* Susan W. Dana, Nancy G. Dodd & F. William Brown, *Sunabi, Inc.: The Case of the Disgruntled Employee*, 21 J. LEG. STUD. EDUC. 151, 160-80 (2003) (using questions to lead students through each stage of Kolb's four stages of experiential learning: concrete experience, reflective observation, abstract conceptualization, and active experimentation); Murray S. Levin, *Reflections on Enhancing the Understanding of Law Through Ethical Analysis*, 27 J. LEG. STUD. EDUC. 247, 254-71 (2010) (providing sample discussion questions for ethical analysis); Tony McAdams, *Managers Confront Competing Practical, Legal, and Ethical Claims: A Comprehensive Teaching Case*, 26 J. LEG. STUD. EDUC. 87, 101-08 (2009) (using questions to extract ethical reasoning in an employment discrimination case).

²²² *See, e.g., Making Ethical Decisions*, JOSEPHSON INSTITUTE OF ETHICS, available at http://www.sjohnson.com/acad/ethics/making_ethical_decisions.pdf (last visited May 7, 2014); *Online Resources for Sample Ethical Decision Making Models*, THE ETHICS NETWORK, RYERSON UNIVERSITY, available at <http://www.ryerson.ca/ethicsnetwork/resources/ethicaldecision/> (last visited May 7, 2014). *See also* Janell M. Kurtz & Drue K. Schuler, *Competitive Intelligence at Proctor & Gamble: A Case Study in Trade Secrets*, 21 J. LEG. STUD. EDUC. 109, 122-23, 148-49 (citing examples of models); Sean P. Melvin, *Case Study of a Coffee War: Using the Starbucks v. Charbucks Dispute to Teach Trademark Dilution, Business Ethics, and the Strategic Value of Legal Acumen*, 20 J. LEG. STUD. EDUC. 27, 43-45 (2012) (discussing models of ethical decision making); Mitchell & Yordy, *supra* note 166 (discussing models for teaching ethics and focusing on one that includes code, outcomes, values, editorial and rules analysis: "COVER"). For a model based on virtue ethics, see Crossan, et al., *supra* note 171, at 287.

²²³ Willey, Mansfield & Sherman, *supra* note 1, at 276.

²²⁴ *Id.*

²²⁵ *Id.*

²²⁶ *Id.*

²²⁷ *Id.* at 278.

²²⁸ *Id.*

²²⁹ *Id.*

²³⁰ For an excellent ethical analysis of renegeing in the context of employment see Tonia Hap Murphy, *Reneging: A Topic to Promote Engaging Discussions About Law and Ethics in a Business Law or Legal Environment Course*, 26 J. LEG. STUD. EDUC. 325 (2009). *See also* Marc Lampe & Craig B. Barkacs, *Adding an Ethical Dimension to the Teaching of Contract Law*, 11 J. LEG. STUD. EDUC. 227 (1993) (discussing contract theories in the context of ethical analysis).

²³¹ Note that another developer subsequently did enter into a business venture with the Tribe, which also ended in litigation. *Hualapai Tribe takes 2nd project from partners*, NATIVE AM. TIMES, Mar. 5, 2013, available at <http://www.nativetimes.com/index.php/business/news/8493-hualapai-tribe-takes-2nd-project-from-partners> (last visited May 20, 2014). *See also infra* notes 361-64, and accompanying text.

²³² Doug McMurdo, *Lawsuit: Hualapai Tribe Snatched Ranch Away Unfairly*, DAILY MINER, Jan. 30 2014, available at <http://www.kingmandailyminer.com/m/Articles.aspx?ArticleID=59805> (last visited May 7, 2014).

²³³ Guerin, *supra* note 129.

²³⁴ Sean M. Monahan, Note, *A Tempest in the Teapot: State Sovereign Immunity and Federal Administrative Adjudications in Federal Maritime Commission v. South Carolina State Ports Authority*, 88 CORNELL L. REV. 1794, 1798-99 (2003). *See also* James E. Pfander, *Sovereign Immunity and the Right to Petition: Toward a First Amendment Right to Pursue Judicial Claims Against the Government*, 91 NW. L. REV. 899 (1997) (outlining the origin of sovereign immunity).

²³⁵ “[T]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.” U.S. CONST. amend. 11. Eleventh Amendment immunity extends to suits brought by foreign sovereigns, as well. *Principality of Monaco v. Mississippi*, 292 U.S. 313, 325 (1934).

²³⁶ “Though the Indians are acknowledged to have an unquestionable, and heretofore unquestioned right to the lands they occupy, until that right shall be extinguished by a voluntary cession to our government, yet it may well be doubted whether those tribes which reside within the acknowledged boundaries of the United States can, with strict accuracy, be denominated foreign nations. They may, more correctly, perhaps, be denominated domestic dependent nations.” *Cherokee Nation v. Georgia*, 30 U.S. 1, 17 (1831).

²³⁷ “Indian tribes have long been recognized as possessing the common-law immunity from suit traditionally enjoyed by sovereign powers.” *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978). *See also* 41AM. JUR. 2D *Indians; Native Americans* §§ 7-8 (2014) (discussing the doctrine as applied to Native American government).

²³⁸ *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978). Representatives of the tribe cannot waive immunity unless expressly delegated that power, providing the tribe's constitution and bylaws do not delegate such authority. 41AM. JUR. 2D *Indians; Native Americans* §10 (2014). *See also* R. Lance Boldrey & Jason Hanselman, *Advising Clients Doing Business in Indian Country*, Mich. B.J., Feb. 2010, at 34; Kenton Keller Pettit, *The Waiver of Tribal Sovereign Immunity in the Contractual Context: Conflict Between the Ninth Circuit and the Alaska Supreme Court?*, 10 ALASKA L. REV. 363, 364 (1993). For a historical perspective of the doctrine of tribal sovereign immunity see William Wood, *It Wasn't an Accident: The Tribal Sovereign Immunity Story*, 62 AM. U. L. REV. 1587 (2013).

²³⁹ *See, e.g.*, *United States Fidelity & Guaranty Co.*, 309 U.S. 506, 513 (1940) (holding that a tribe does not waive its sovereign immunity from actions because those actions were pleaded in a counterclaim to an action filed by the tribe); *Oklahoma Tax Comm'n v. Potawatomi Tribe*, 498 U.S. 505 (1991) (noting that sovereign immunity is not waived by seeking an injunction against the a proposed tax assessment).

²⁴⁰ *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 751 (1998). The Kiowa tribe case involved a promissory note between the Tribe's Industrial Development Commission and a private entity outside the boundaries of the Tribe's lands. The Tribe defaulted on the note. In holding that the Tribe was immune from suit, the Court emphasized that no distinction has ever been drawn between a governmental or commercial activity or where the activity takes place.

²⁴¹ *Iowa Mutual Insurance Co v LaPlante*, 480 U.S. 9 (1987).

²⁴² *Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845 (1985). For an overview of the application of the doctrine see Deborah F. Buckman, *Construction and Application of Federal Tribal Exhaustion Doctrine*, 186 A.L.R. FED. 71 (2003).

²⁴³ *Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 857 (1985) (citing *Juidice v. Vail*, 430 U.S. 327 (1977)). Other exceptions to the exhaustion requirement include cases in which the action violates express jurisdictional prohibitions, there is inadequate opportunity to challenge the court's jurisdiction, or federal grant fails to provide for tribal governance of nonmembers' conduct. *Burlington N. R.R. Co. v. Red Wolf*, 196 F.3d 1059, 1065 (9th Cir. 1999).

²⁴⁴ *Plains Commerce Bank v Long Family Land & Cattle Co.*, 554 U.S. 316 (2008).

²⁴⁵ *Grand Canyon Skywalk Development, LLC v. 'Sa' Nyu Wa, Inc.*, 715 F.3d 1196 (9th Cir. 2013).

²⁴⁶ *Grand Canyon Skywalk Development, LLC v. 'Sa' Nyu Wa, Inc.*, No. CV12-8030-PCT-DGC, 2012 U.S. Dist. LEXIS 24993, at *9 (D. Ariz. Feb. 28, 2012), *aff'd*, 715 F.3d 1196 (9th Cir. 2013).

²⁴⁷ *Grand Canyon Skywalk Dev., LLC v. Vaughn*, No. CV11-8048-PCT-DGC, 2011 U.S. Dist. LEXIS 67620 (D. Ariz. June 23, 2011).

²⁴⁸ *Gaming World Int'l, Ltd v White Earth Band of Chippewa Indians*, 317 F3d 840, 849–852 (8th Cir. 2003).

²⁴⁹ 695 F.3d 406 (6th Cir. 2012).

²⁵⁰ The state of Michigan brought suit for operating a casino not located on tribal lands in violation of the Indian Gaming Regulatory Act, posing the question as to whether or not tribes still enjoy sovereign immunity when engaging in commercial activity on lands subject to the jurisdiction of the state.

²⁵¹ *See* Donna R. Christie, *A Tale of Three Takings: Taking Analysis in Land Use Regulation in the United States, Australia, and Canada*, 32 BROOKLYN J. INT'L L. 343(2007) (discussing the law of land use regulation in three common law jurisdictions).

²⁵² *Kohl v. United States*, 91 U.S. 367, 371 (1876).

²⁵³ The Fifth Amendment to the U.S. Constitution admonishes that “private property [shall not] be taken for public use, without just compensation.” U.S. CONST. amend. V, § 5.

²⁵⁴ *Hawaii Housing Authority et al. v. Midkiff et al.*, 467 U.S. 229, 241 (1984).

²⁵⁵ *Kelo v. City of New London*, 545 U.S. 469 (2005). For educational uses of this precedential case see Lamar Odom & Analco González, *Kelo v. City of New London: An Ideal Case to Teach Ethical and Legal Principles*, 25 J. LEG. STUD. EDUC. 343 (2008) (summarizing the case and suggesting an approach for using it to introduce the legal principles typically covered in a graduate business law course); Patricia Pattison, *Outrage and Engage: A Story of Eminent Domain*, 31 J. LEG. STUD. EDUC. 55 (2014) (advocating the use of this story of the owners' struggle to defend their homes against condemnation by eminent domain case on first day of class to outrage students and engage them in learning more about the legal process).

²⁵⁶ 25 U.S.C. § 1302(5) (8) (2014).

²⁵⁷ Stacy L. Leeds, *By Eminent Domain or Some Other Name: A Tribal Perspective on Taking Land*, 41 TULSA L. REV. 51, 70-72 (2005).

²⁵⁸ *Id.* at 70-77.

²⁵⁹ *Id.* at 72. "The tribes that expressly authorize eminent domain powers typically restrict the power to lands owned by tribal citizens within the tribe's political and territorial boundaries." *Id.* at 74.

²⁶⁰ *Id.* at 75.

²⁶¹ Kristina L. McCulley, Comment, *The American Indian Probate Reform Act of 2004: The Death of Fractionation or Individual Native American Property Interests and Tribal Customs?*, 30 AM. INDIAN L. REV. 401, 401 (2005/2006). See also John K. Flanagan, *The Invalidity of the Nez Perce Treaty of 1863 and the Taking of the Wallowa Valley*, 24 AM. INDIAN L. REV. 75, 96-98(1999/2000) (asserting that just compensation was not paid for the taking of property by the federal government).

²⁶² See Comment, *Eminent Domain: Depreciated Reproduction Cost in the Valuation of Trade Fixtures*, 14 WM. & MARY L. REV. 430 (1972) (discussing the issue of fixture in takings).

²⁶³ 26 AM. JUR. 2d *Eminent Domain* § 95 (2014). See *infra* Appendix 4 (providing the text of the resolution and a link to the statutory enactment).

²⁶⁴ The resolution permitted the taking, *inter alia*, of "[A]ll property interests, tangible or intangible, for any use of the Tribe, or any other use authorized by the Tribal Council." Law & Order Code § 2.16 B (3), Eminent Domain.

²⁶⁵ *Grand Canyon Skywalk Development, LLC v. The Hualapai Indian Tribe of Arizona, et al.*, 966 F. Supp. 2d 876, 887 (Ariz. 2013) (citation omitted).

²⁶⁶ *Grand Canyon Skywalk Development, LLC v. 'Sa' Nyu Wa, Inc.*, 923 F. Supp. 2d 1186, 1200 (Ariz. 2013).

²⁶⁷ The resolution is set forth in Appendix 3, *infra*.

²⁶⁸ *Id.*

²⁶⁹ *Id.* at 1188. The district court then pronounced: "But even if the Court were to read the broad language of the Tribe's ordinance and its declaration of taking as meaning that GCSD's existing cause of action immediately became the property of the Tribe as if the Tribe, not GCSD, had been the contracting partner with SNW from the beginning — in effect, writing GCSD out of the contract for all purposes except just compensation — the Court is not persuaded that the sovereign power of eminent domain is expansive enough to support such a purported statutory right." *Id.* at 1201.

²⁷⁰ *Hualapai corporation seeks bankruptcy protection*, ABC 9 KTRE, Mar. 19, 2013, available at <http://www.ktre.com/story/21527233/hualapai-corporation-seeks-bankruptcy-protection> (last visited May 20, 2014).

²⁷¹ Terry Anderson, *The Grand Canyon of Property Rights*, HOOVER INSTITUTION STANFORD UNIVERSITY, Apr. 17, 2013, available at <http://www.hoover.org/publications/defining-ideas/article/144831> (last visited May 20, 2014) (characterizing the transfer as an "end run").

²⁷² 75 AM. JUR. 2D *Trespass* §1 (2014).

²⁷³ *Id.* § 18.

²⁷⁴ *Id.* § 88.

²⁷⁵ See Yehuda Abramovitch, *The Maxim "Cujus Est Solum Ejus Usque Ad Coleum" As Applied in Aviation*, 8 MCGILL L.J. 247-2657 (1961/1962) (discussing the history of the common law maxim).

²⁷⁶ *Id.* at 245-69.

²⁷⁷ Note, *Airplane Noise, Property Rights and the Constitution*, 65 COLUM. L. REV. 1428, 1433 (1965).

²⁷⁸ *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 539 (2005).

²⁷⁹ 35A AM. JUR. 2d *Fixtures* § 47 (2014). Technically, tribal land is owned by the federal government in trust for the benefit of a particular tribe as the beneficial or equitable owner of the land. Padraic I. McCoy, *The Land Must Hold the People: Native Modes of Territoriality and Contemporary Tribal, Justifications for Placing Land Into Trust Through 25 C.F.R. Part 151*, 27 AM. INDIAN L. REV. 421, 446 n.103 (2002/2003). See also Paige E. Hoster, Comment, *Understanding the Value of Judicial Diversity Through the Native American Lens*, 36 AM. INDIAN L. REV. 457, 470-79 (2011/2012) (providing an overview of tribal law concerning federal policies, jurisdiction and

ownership).

²⁸⁰ 25 AM. JUR. 2D *Easements and Licenses* § 1 (2014).

²⁸¹ *Id.* at §2.

²⁸² *Id.* at §§ 39-45.

²⁸³ *Id.* at § 40.

²⁸⁴ Students may become acquainted with this governmental agency by researching its history and function using information provided on its webpage. *Indian Affairs*, U.S. DEPARTMENT OF THE INTERIOR, *available at* <http://www.bia.gov/> (last visited April 5, 2014).

²⁸⁵ *Avedon Engineering, Inc. v. Seatex*, 126 F.3d 1279 (10th Cir. 1997).

²⁸⁶ 9 U.S.C. § 2 (2014).

²⁸⁷ *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991).

²⁸⁸ Jack Wilson, *No-Class-Action Arbitration Clauses, State-Law Unconscionability, and the Federal Arbitration Act: A Case for Federal Judicial Restraint and Congressional Action*, 23 QUINNIPIAC LAW REV. 737 (2004).

²⁸⁹ In determining whether or not federal statutory claims may be arbitrated, courts first must examine if the parties agreed to submit their claims to arbitration, and then decide if Congress intended to preclude a waiver of judicial remedies for the statutory rights at issue. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985).

²⁹⁰ *Shearson/American Express Inc. v. McMahon*, 482 U.S. 220 (1987).

²⁹¹ *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991) (upholding a pre-dispute arbitration agreement signed by a non-union employee as a condition of employment when Age Discrimination in Employment Act was at issue). *See also* *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001) (confining exemption in the FAA, which provides that the Act shall not apply to "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce," to transportation workers, rather than all employment).

²⁹² *Moses H. Cone Memorial Hospital v. Mercury Constr. Corp.*, 460 U.S. 1 (1983).

²⁹³ Melissa Briggs Hutchens, Note, *At What Costs?: When Consumers Cannot Afford the Costs of Arbitration in Alabama*, 53 ALA. L. REV. 599, 619 (2002).

²⁹⁴ "Any controversy, claim or dispute arising out of or related to this Agreement shall be resolved through binding arbitration. The arbitration shall be conducted by a sole arbitrator; provided however, if the parties cannot agree upon an arbitrator, each party will select an arbitrator and the two arbitrators will select the sole arbitrator to resolve the dispute. Either party may request and thus initiate arbitration of the dispute by written notice... to the other party. The Arbitration Notice shall state specifically the dispute that the initiating party wishes to submit to arbitration. The arbitration shall be conducted in accordance with the Commercial Arbitration Rules of the American Arbitration Association.... Judgment upon the award... rendered by the arbitrator may be enforced through appropriate judicial proceedings in any federal court having jurisdiction....The parties agree that the resolution of any dispute shall be conducted expeditiously, to the end that the final disposition thereof shall be accomplished within 120 days or less." In the Matter of the Arbitration of Grand Canyon Skywalk Development, LLC and 'Sa' Nyu Wa, Inc., American Arbitration Assoc. Commercial Panel, No. 76 517 Y 00191 11 S1M, Aug. 16, 2012, *available at* http://grandcanyonskywalkfacts.com/wp-content/uploads/2012/10/Arbitration_Decision.pdf (last visited May 17, 2014).

²⁹⁵ Jean R. Sternlight, *Is the U.S. Out on a Limb? Comparing the U.S. Approach to Mandatory Consumer and Employment Arbitration to that of the Rest of the World*, 56 U. MIAMI L. REV. 831 (2002); Thomas J. Stipanowich, *Arbitration: The New Litigation?*. 2010 U. ILL. L. REV. 1.

²⁹⁶ Parties should evaluate their most significant potential liability exposure, and then determine if there is a fee-shifting statute favorable to their position in the event of litigation before choosing arbitration.

²⁹⁷ Students can research the fees in their area as they vary by region. *See also* Reginald Alleyne, *Arbitrators' Fees: The Dagger in the Heart of Mandatory Arbitration for Statutory Discrimination Claims*, 6 U. PA. J. LAB. & EMPLOY. L. 1 (2003) (suggesting that the administrative fees and compensation of the arbitrators, which must be paid up-front, can be a substantial financial burden);

²⁹⁸ For a discussion of these issues see Christopher R. Drahozal, *Arbitration Costs and Contingent Fee Contracts*, 59 VANDERBILT L. REV. 729 (2006); Christopher R. Drahozal, *Arbitration Costs and Forum Accessibility: Empirical Evidence*, 41 U. MICH. J. L. REFORM 813 (2008).

²⁹⁹ S.878, 113th Congress (2013-2014). For a discussion of an earlier version of the legislation see Joshua T. Mandelbaum, *Stuck in a Bind: Can the Arbitration Fairness Act Solve the Problems of Mandatory Binding Arbitration in the Consumer Context?*, 94 IOWA L. REV.1075 (2009).

³⁰⁰ In the Matter of the Arbitration of Grand Canyon Skywalk Development, LLC and 'Sa' Nyu Wa, Inc., American

Arbitration Assoc. Commercial Panel, No. 76 517 Y 00191 11 S1M, Aug. 16, 2012, *available at* http://grandcanyonskywalkfacts.com/wp-content/uploads/2012/10/Arbitration_Decision.pdf (last visited May 17, 2014).

³⁰¹ See, e.g., Peter M. Edelstein, *Using an Authentic Arbitration as a Teaching Model*, 17 J. LEG. STUD. EDUC. 325 (1999); Nancy A. King & Gail A. Lasprogata, *What's in a Domain Name? Online Simulations and Virtual Dispute Resolution Experience for Business Law Students*, 20 J. LEG. STUD. EDUC. 159 (2002); Gail A. Lasprogata, *Virtual Arbitration: Contract Law and Alternative Dispute Resolution in Cyberspace*, 19 J. LEG. STUD. EDUC. 107 (2001); Donna M. Steslow, *My Car is a Lemon! Using the Better Business Bureau's Auto Line® Model of ADR*, 27 J. LEG. STUD. EDUC. 105 (2010).

³⁰² For a discussion of mediation characteristics see, e.g., Susan L. Podziba, *The Human Side of Complex Public Policy Mediation*, 19 NEGOTIATION J. 285 (2003); John Burwell Garvey, *"Mediator" Is an Action Noun Action Steps for Conducting an Effective Mediation*, 46 N.H.B.J. 7 (2005); Robert Rubinson, *Client Counseling, Mediation, and Alternative Narratives of Dispute Resolution*, 10 CLINICAL L. REV. 833 (2004). See also Tanya M. Marcum & Sandra J. Perry, *It's Not Easy Being Green: Bringing Real Life to the Undergraduate Legal Environment of Business Classroom*, 27 J. LEG. STUD. EDUC. 81, 96-98 (2010) (providing an exercise on mediation for students concerning the negotiation of a lease extension).

³⁰³ See Steven J. Burton, *Breach of Contract and the Common Law Duty to Perform in Good Faith*, 94 HARV L. REV. 369 (1980) (providing an in-depth discussion of the principle); Harold Dubroff, *The Implied Covenant of Good Faith in Contract Interpretation and Gap-Filling: Reviving a Revered Relic*, 80 ST. JOHN'S L. REV. 559 (2006) (summarizing the development of the implied covenant of good faith and the evolution of contract interpretation).

³⁰⁴ RESTATEMENT (SECOND) OF CONTRACTS § 205 (1981).

³⁰⁵ "Every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement." U.C.C. 2-205 (2002).

³⁰⁶ Michael P. Van Alstine, *Of Textualism, Party Autonomy, and Good Faith*, 40 William & Mary L. Rev. 1223, 1226 (1999).

³⁰⁷ *Medtronic, Inc. v. ConvaCare, Inc.*, 17 F.3d 252, 256 (8th Cir. 1994).

³⁰⁸ For example, in Texas the covenant of good faith and fair dealing "arises only when a contract creates or governs a special relationship between the parties." *Subaru of America, Inc. v. David McDavid Nissan, Inc.*, 84 S.W.3d 212, 225 (Tex. 2002). California does not permit the implied covenant to impose substantive duties or limits on the contracting parties beyond those incorporated in the specific terms of their agreement. *Guz v. Bechtel Nat'l, Inc.*, 24 Cal. 4th 317, 349-50, 8 P.3d 1089 (Cal. 2000). Illinois law permits express disavowal of the covenant. *Foster Enters., Inc. v. Germania Fed. Sav. & Loan Ass'n*, 421 N.E.2d 1375, 1380 (Ill. Ct. App. 1981).

³⁰⁹ The contract also provided that the venue and jurisdiction for any litigation under the agreement should be federal courts sitting in the State of Arizona, and located in or around Peach Springs, Arizona. These contract clauses are known as choice of law and choice of forum provisions, and typically are enforced unless deemed unconscionable. 17A AM. JUR. 2d *Contracts* §§ 260-61 (2014).

³¹⁰ *Wagenseller v. Scottsdale Memorial Hospital*, 710 P.2d 1025 (Ariz. 1985). The implied covenant of good faith and fair dealing prohibits "a party from doing anything to prevent other parties to the contract from receiving the benefits and entitlements of the agreement." *Rawlings v. Apodaca*, 726 P.2d 565, 569-70 (Ariz. 1986).

³¹¹ *Wells Fargo Bank v. Arizona Laborers, Teamsters and Cement Masons Local No. 395 Pension Trust*, 38 P.3d 12 (Ariz. 2002) (citing the Restatement of Contract comments).

³¹² *Bike Fashion Corp. v. Kramer, et al.*, 46 P.3d 431, 435 (Ariz. Ct. App. 2002).

³¹³ See Appendix 3 (setting forth justification in condemnation resolution).

³¹⁴ See *supra* notes 242-248, and accompanying text.

³¹⁵ *Grand Canyon Skywalk Development, LLC v. 'Sa' Nyu Wa*, No. CV12-8030-PCT-DGC, 2012 U.S. Dist. LEXIS 36385, at *18 (D. Ariz. Mar. 19, 2012)

³¹⁶ *Grand Canyon Skywalk Development, LLC v. 'Sa' Nyu Wa*, 715 F.3d 1196. 1201 (9th Cir. 2013).

³¹⁷ S.F.C. MILSOM, *HISTORICAL FOUNDATIONS OF THE COMMON LAW* 179 (2nd ed. 1981). Defamation historically was considered a spiritual offense, which gave rise to ecclesiastical proceedings. It later became a matter for the royal courts. *Id.* at 380-81.

³¹⁸ 50 AM. JUR. 2d *Libel and Slander* § 6 (2014). State statutes often incorporate this phrase. See, e.g., *Beauharnais v. People of State of Illinois*, 343 U.S. 250 (1952) (examining Illinois statute); *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496 (1991) (interpreting New York statute).

³¹⁹ Kenneth M. Fitzgerald, Comment, *Humor and the Law of Libel: Serious Protections for Attacks Made in Jest*, 40 FED. COMM. L.J. 377 (1988).

³²⁰ 475 U.S. 767, 776 (1986).

³²¹ “There is no such idea as a false idea...” *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974). *But see also* *Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (1990) (qualifying statements with the phrase “in my opinion” does not confer protective status if the assertion is a factual one).

³²² 376 U.S. 254 (1964).

³²³ *Id.* at 279-280. Moreover, a finding of malice by the jury is subject to independent review on appeal, and must be proven by “clear & convincing evidence,” entitled to an independent examination by the court. “Judges, as expositors of the Constitution, must independently decide whether the evidence in the record is sufficient to cross the constitutional threshold that bars the entry of any judgment that is not supported by clear and convincing proof of ‘actual malice.’” *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 511 (1984).

³²⁴ *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968).

³²⁵ States can define a lower standard such as negligence, but not strict liability, for the publication of false statement. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 347 (1974).

³²⁶ In other words, if the speaker/publisher failed to exercise the care that a reasonable person would exercise in validating the claims made, then the plaintiff can recover, which is a much easier burden of proof for the plaintiff than trying to prove the speaker/publisher knew the story was false and deliberately published it anyway (which is the malice standard required of public person plaintiffs).

³²⁷ *Associated Press v. Walker & Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967) (cases reported together).

³²⁸ *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 345 (1974).

³²⁹ The complaint is available at <http://turtletalk.files.wordpress.com/2013/04/gcsd-v-steele-et-al-complaint.pdf> (last visited May 20, 2014).

³³⁰ *Id.*

³³¹ 1 AM. JUR. 2d *Abatement, Survival, and Revival* § 79 (2014).

³³² Francis M. Dougherty, *Defamation action as surviving plaintiff's death, under statute not specifically covering action*, 42 A.L.R.4th 272 (1985).

³³³ 15 U.S.C.S § 1127 (2014).

³³⁴ Registration under the Lanham Act provides notice to the public of the registrant's claim of ownership as well as a presumption of ownership, the exclusive right to use the mark, the ability sue for infringement in federal court, to use of the U.S registration to obtain registration in foreign countries, and to file with the U.S. Customs Service to prevent importation of infringing foreign goods.

³³⁵ 15 U.S.C. § 1052(f) (2014).

³³⁶ Applications can be submitted online. If approved for publication in the Official Gazette, there is a thirty day opposition period, during which the public may object to the proposed trademark. If the proposed trademark meets the requirements for protection and there are no objections, USPTO will issue a registration certification.

³³⁷ *Soweco, Inc. v. Shell Oil Co.*, 617 F.2d 1178, 1184 (5th Cir.1980).

³³⁸ 15 U.S.C. § 1052(e) (2014).

³³⁹ To prove trademark infringement under the statute, the plaintiff must show (1) that it owns a valid and protectable mark; (2) that the alleged infringer used a "reproduction, counterfeit, copy, or colorable imitation" of that mark in commerce and without consent; and (3) that such use is likely to cause confusion. Often the primary issue will be whether or not there exists a likelihood of confusion among customers and prospective customers. In determining whether or not there is a likelihood of confusion, courts consider several factors: (1) the strength or distinctiveness of the mark; (2) the similarity of the two marks; (3) the similarity of the goods/services the marks identify; (4) the similarity of the facilities the two parties use in their businesses; (5) the similarity of the advertising used by the two parties; (6) the alleged infringer's intent; and (7) actual confusion. *Pizzeria Uno Corp. v. Temple*, 747 F.2d 1522, 1527 (4th Cir. 1984).

³⁴⁰ *Grand Canyon West Ranch, LLC v. Hualapai Tribe*, 78 USPQ2d 1696 (TTAB 2006), *available at* <http://www.uspto.gov/web/offices/com/sol/foia/ttab/other/2006/91162008.pdf>.

³⁴¹ *Id.*

³⁴² *Id.*

³⁴³ *Id.* In other words, when fraud is not proven, but the mark has not been used on all of the goods or services listed, the defect may be cured by deleting those goods/services on which the mark was not used or by amending the application.

³⁴⁴ *Grand Canyon West Ranch, LLC v. Hualapai Tribe*, 88 USPQ2d 1501 (TTAB 2008), *available at* <http://ttabvue.uspto.gov/ttabvue/ttabvue-91162008-OPP-61.pdf>.

³⁴⁵ *Id.*

³⁴⁶ *Id.*

³⁴⁷ A copy of the brief is available at http://www2.aipla.org/Content/ContentGroups/About_AIPLA1/AIPLA_Reports/20084/AIPLAGrandCanyonBrief-4.pdf (last visited Mar. 31, 2104).

³⁴⁸ A copy of the complaint is available at <http://www.scribd.com/doc/12354025/Grand-Canyon-Resort-Corporation-v-Grand-Canyon-West-Ranch-LLC> (last visited Mar. 31, 2104).

³⁴⁹ *Overview*, Grand Canyon Ranch Resort, available at <http://www.grandcanyonranch.com/overview.html> (last visited Mar. 31, 2104).

³⁵⁰ *Experience the Hualapai Legacy*, Hualapai Tourism, available at <http://www.hualapaitourism.com/> (last visited Mar. 31, 2104).

³⁵¹ *Top New Landmarks*, TRAVEL & LEISURE, Jan. 2012, available at <http://www.travelandleisure.com/articles/top-new-landmarks-2012> (last visited Mar. 17, 2104).

³⁵² *Models Will Dare to Walk the Grand Canyon Skywalk in Haute Couture*, ARIZONA FOOTHILLS, available at <http://www.arizonafoothillsmagazine.com/valleygirlblog/shopping/models-will-dare-to-walk-the-grand-canyon-skywalk-in-haute-couture/> (last visited Mar. 17, 2014). For a video of the event see *The Finale: World's Highest J Autumn Fashion Show 2013 on the Grand Canyon Skywalk*, YOUTUBE, available at <http://www.youtube.com/watch?v=okYBZDfk5zQ> (last visited Mar. 17, 2014).

³⁵³ Stacey Wittig, *Zombie Walk at Grand Canyon National Park*, EXAMINER, available at <http://www.examiner.com/article/zombie-walk-at-grand-canyon-skywalk-video> (last visited Mar. 17, 2014) (providing video of the zombie walk).

³⁵⁴ Kim Steele, *Hualapai sharing international spotlight with Kingman*, KINGMAN DAILY MINER, Aug. 13, 2013, available at (last visited Mar. 17, 2014).

³⁵⁵ Ken Ritter & Felicia Fonseca, *Grand Canyon Skywalk developer David Jin dies in L.A.*, LAS VEGAS REV., June 14, 2013, available at <http://www.reviewjournal.com/news/nevada-and-west/grand-canyon-skywalk-developer-david-jin-dies-la> (last visited Mar. 17, 2014).

³⁵⁶ *Skywalk developer David Jin dies after cancer battle*, ABC 15 ARIZONA, available at http://www.abc15.com/dpp/news/region_northern_az/other/skywalk-developer-david-jin-dies-after-cancer-battle (last visited May 15, 2014).

³⁵⁷ Felicia Fonseca, *Tribe reaches agreement over Grand Canyon Skywalk*, LAS VEGAS REV. J., Apr. 25, 2014, available at <http://www.reviewjournal.com/business/tourism/tribe-reaches-agreement-over-grand-canyon-skywalk> (last visited May 15, 2014).

³⁵⁸ Information about the company's services is available on the company's website: <http://www.heliusa.com/>.

³⁵⁹ Richard N. Velotta, *Helicopter tour operator files for bankruptcy*, VEGASINC, Oct. 29, 2013, available at <http://www.vegasinc.com/business/real-estate/2013/oct/29/helicopter-tour-operator-files-bankruptcy/> (last visited April 10, 2014).

³⁶⁰ Dennis Wagner, *Hualapai Recall 2 Tribal Leaders in Takeover of Skywalk*, THE REPUBLIC, AZCENTRAL, Mar. 7 2013, available at <http://www.azcentral.com/news/state/articles/20130307hualapais-recall-tribal-leaders-takeover-skywalk.html> (last visited May 7, 2014).

³⁶¹ Dennis Wagner, *Hualapai Tribe Battles Over Another Project*, THE REPUBLIC, AZCENTRAL, Mar. 2, 2013, available at <http://www.azcentral.com/news/articles/20130228hualapai-tribe-battle-project.html> (last visited May 7, 2014).

³⁶² Doug McMurdo, *Lawsuit: Hualapai Tribe Snatched Ranch Away Unfairly*, DAILY MINER, Jan. 30 2014, available at <http://www.kingmandailyminer.com/m/Articles.aspx?ArticleID=59805> (last visited May 7, 2014). Developer Jim Brown, Western Destinations, entered into a contract with the Hualapai to develop a resort on the reservation. Brown invested the money to develop the ranch and then operated the attraction with an agreement for revenue sharing until 2017. The resort provided activities such as horseback riding, barns, cabins, kitchen and other guest amenities, with Brown's investment being about \$1 million. Brown claims that the Tribe notified him that certain upgrades had to be made to several buildings at the resort within a thirty day period, and that the upgrades would require tearing down and rebuilding, a task which allegedly was impossible to complete within the time frame. The Tribe then claimed that Brown was negligent in his operation of the resort, breached the contract and the failure to upgrade buildings posed a safety hazard. Brown's contractual rights were then taken by the Tribe. Brown claims that after he was dispossessed of his rights, that the Tribe continued the resort operations, including the use of the building the Tribe claimed posed a safety issue. *Id.*

³⁶³ *Id.*

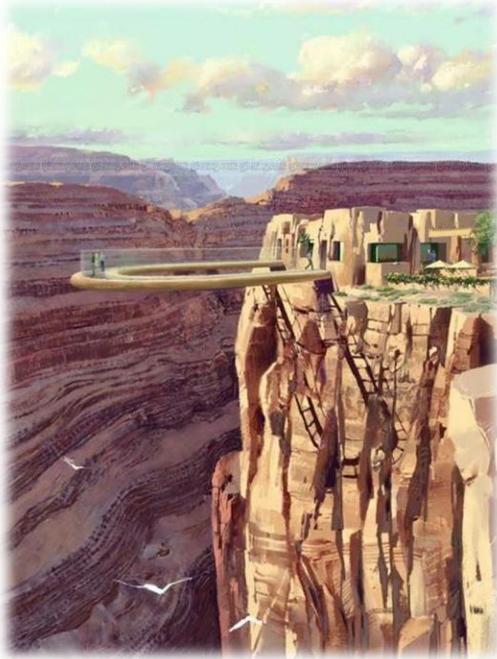
³⁶⁴ *Id.* For a copy of the complaint see <http://turtletalk.files.wordpress.com/2014/01/verified-complaint->

Appendix 1 Chronology of Events

1996	Developer approaches Tribe regarding project		
1996	Rancher helicopter tours over Tribe lands	Rancher and HT	
2000	Rancher purchases Grand Canyon Ranch	Rancher	
2001	Helicopter tours of west rim stopped	HT	
2003	Contract signed	GCS D and SNW	
2004	Suit to stop realignment of Diamond Bar Road	Rancher	
2006	Trademark dispute over “Grand Canyon West” and “Grand Canyon West Ranch”	Rancher and HT	Grand Canyon West Ranch, LLC v. Hualapai Tribe, 78 USPQ2d 1696 (TTAB 2006)
2007	Agreement regarding Diamond Bar Road	Rancher and BIA	
2008	Trademark dispute over “Grand Canyon West” and “Grand Canyon West Ranch”	Rancher and HT	Grand Canyon West Ranch, LLC v. Hualapai Tribe, 88 USPQ2d 1501 (TTAB 2008)
April 2011	Eminent Domain Resolution passed	HT	
February 2012	Condemnation Resolution passed	HT	
July 2011 March 2012	Exhaustion required in Tribal court; No finding of bad faith	GCS D	GCS D, LLC v. Vaughn, et al., No. CV11-8048-PCT-DGC, 2011 U.S. Dist. LEXIS 80517 (D. Ariz. July 22, 2011); GCS D, LLC v. Vaughn, et al., No. CV11-8048-PCT-DGC, 2012 U.S. Dist. LEXIS 36385 (D. Ariz. Mar. 19, 2012);
June 2011 February 2012	Declaratory judgment sought to invalidate condemnation ordinance denied	GCS D	GCS D, LLC v. Vaughn, et al., No. CV11-8048-PCT-DGC, 2011 U.S. Dist. LEXIS 67620 (D. Ariz. June 23, 2011); GCS D, LLC v. Vaughn, et al., No. CV11-8048-PCT-DGC, 2012 U.S. Dist. LEXIS 24993 (D. Ariz. Feb. 28, 2012)
August 2012	Arbitration AAA Panel	GCS D	Award to GCS D \$28,500,000

2013	Ruling in favor of GCSD in action to enforce arbitration award	GCSD	GCSD, LLC v. 'Sa' Nyu Wa, Inc., 923 F. Supp. 2d 1186 (Ariz. 2013).
2013	Injunction to stop construction on Diamond Bar Road	Rancher v. BIA	Judge refuses to enjoin alignment and paving of road but orders BIA to honor concessions
2013	Federal action to invalidate eminent domain; must exhaust remedies in Tribal Court.	GCSD	GCSD, LLC v. 'Sa' Nyu Wa, Inc., 715 F.3d 1196 (9 th Cir. 2013) <i>aff'g</i> GCSD, LLC v. Hualapai Indian Tribe, 2013 U.S. Dist. LEXIS 117857 (D. Ariz. Aug. 19, 2013)
March 2013	Bankruptcy filed	SNW	Pending
August 2013	Suit to compel arbitration against Tribe and Tribal Council members dismissed	GCSD	GCSD, LLC v. The Hualapai Tribe of Arizona, 966 F. Supp. 2d 876 (D. Ariz. 2013)
November 2013	Federal court order re: Diamond Bar R	Rancher and BIA	
December 2013	Petition for writ of cert to US Supreme Court	GCSD	Denied, GCSD v. Grand Canyon Resort Corp., 134 S. Ct. 825 (Dec. 16, 2013)
January 2014	Federal defamation case	Jin and former Skywalk manager v. seven Tribal members and PR counsel	GCSD, LLC v. Steele, et al., No.2:13-cv-00596-JAD-GWF, 2014 U.S. Dist. LEXIS 1550 (D. Ariz. Jan. 6, 2014);
April 2014			All claims settled

Appendix 2 Photos





Appendix 3 Tribal Condemnation Resolution

HUALAPAI TRIBAL COUNCIL RESOLUTION NO. 15-2012 OF THE GOVERNING BODY OF THE HUALAPAI TRIBE OF THE HUALAPAI RESERVATION PEACH SPRINGS, ARIZONA

WHEREAS, ‘Sa’ Nyu Wa, Inc. (“SNW”), a Hualapai India tribally-chartered corporation, and Grand Canyon Skywalk Development, LLC (“GCSD”), a Nevada limited liability company, entered into a Development and Management Agreement, dated as of December 31, 2003, as amended (The Skywalk Agreement”), pursuant to which GCSD became obligated to construct a glass bridge known as the Skywalk and other project improvements at Eagle Point and to manage certain Skywalk operations;

WHEREAS, the Skywalk Agreement required GCSD to construct, *inter alia*, the following project improvements: glass bridge; visitor’s center (including VP room, a gift shop, a display area, at least 2 restrooms and a small kitchen); amphitheater; outdoor landscape; drainage structures; parking; exterior lighting and signage; electrical power infrastructure; telecommunications infrastructure; solid waste disposal infrastructure; potable water system; and sewage/wastewater system (collectively, the “Project Improvements”);

WHEREAS, the Skywalk Agreement specified that “time was of the essence” and originally required GCSD to substantially complete the Project Improvements no later than May, 1, 2005:

WHEREAS, GCSD failed to provide SNW or the Hualapai Tribe design contracts and construction contracts regarding the Project Improvements and failed to provide to SNW or the Hualapai Tribe complete plans and specifications regarding any Project improvements, and thereby undertook a trust responsibility in connection with connecting with constructing the Project Improvements;

WHEREAS, GCSD failed to complete a single Project Improvement other than the glass bridge (which work, in its unfinished condition, is sometimes referred to herein collectively as the “unfinished Skywalk facility”);

WHEREAS, GCSD has indicated by statements and conduct that it has no intention of ever doing any further construction of the Project improvements;

WHEREAS, the Skywalk Agreement required GCSD to manage the project and, in addition, shortly after the glass bridge opened to the public in 2007, GCSD accepted the trust responsibility of handling all moneys paid by visitors to the unfinished Skywalk facility;

WHEREAS, GCSD has failed to account to SNW or the Tribe for such moneys and has disregarded and abused its management and fiduciary obligations under the Skywalk Agreement;

WHEREAS, GCSD’s actions and failures to act have resulted in loss of revenues from the maximization of visitor use of the unfinished Skywalk facility, and other revenue-producing activities that could be conducted on or in the unfinished Skywalk facility;

WHEREAS, GCSD’s actions and failures to act have adversely affected revenues of the Tribe and the Tribe’s other enterprises, including visitorship, including visitorship to other attractions at Grand Canyon West and

utilization of the Hualapai Lodge;

WHEREAS, GCSD's actions and failures to act have resulted in the deterioration and unpleasant nature of the unfinished Skywalk facility on the Hualapai Reservation, resulting in an eyesore and a blemish to the Hualapai Reservation and in health and safety issues;

WHEREAS, GCSD's actions and failures to act have resulted in the long-prevailing unsightliness and adverse conditions on the Hualapai Reservation at the site of the unfinished Skywalk facilities arising in connection with: outdoor portable toilets; and the noise and expense arising in connection with external portable electric generators that consume diesel fuel, that generate loud noise, and that expel polluting exhaust;

WHEREAS, GCSD has repeatedly commenced and vexatiously pursued litigation against the Hualapai Tribal Council, SNW, and Tribal officials in the Hualapai Tribal Court, the United States District Court for the District of Arizona, and with the American Arbitration Association;

WHEREAS, the unfinished Skywalk facility is the property of, and a public facility of, the Hualapai Tribe, and is located on unique, priceless and unalienable Hualapai land known as Eagle Point, which is of cultural significance to the Tribe;

WHEREAS, the foregoing actions and failures to act of GCSD have damaged unique, priceless, unalienable, and culturally-significant Hualapai land, the reputation and goodwill of the Hualapai Tribe and its people, and the Hualapai Tribe's economic prospects with respect to its limited natural resources;

WHEREAS, the Hualapai Tribal Council is the legislative body of the Hualapai Tribe and is empowered by the inherent sovereign rights and powers and the Constitution of the Hualapai Indian Tribe to exercise eminent domain over all property subject to the Hualapai Tribe, and to control access to, and the conduct of business on, Tribal lands;

WHEREAS, Article IX, Section (c) of the Constitution of the Hualapai Indian Tribe expressly states that the Tribe may "take any private property for public use" so long as "just compensation is provided";

WHEREAS, United States law similarly recognizes the right of Indian tribes to exercise the power of eminent domain (including 25 U.S.C. §1302);

WHEREAS, United States and Hualapai law also recognize the exercise of eminent domain over intangible property such as contracts;

WHEREAS, Section 2.16 of the Hualapai Law and Order Code sets forth the procedures by which the Hualapai Tribe may exercise its powers of eminent domain over all property within the Hualapai Reservation;

WHEREAS, Section 2.16 of the Hualapai Law and Order Code provides that the Hualapai Tribe may exercise its powers of eminent domain over all tangible or intangible property, including intangibles such as contracts, franchises, leases, patents, trade routes and other types of property, including contracts pertaining to the possession, occupation, use, design, development, improvement, construction, operation, and/or management of the property, including property owned by the Tribe;

WHEREAS, Section 2.16(B) of the Hualapai Law and Order Code provides that the Hualapai Tribe may exercise its power of eminent domain for public use, any use of the Tribe, or any other use authorized by the Hualapai Tribal Council;

WHEREAS, the Hualapai Tribal Council declares that the construction and operation of the Project Improvements and the integration thereof with the life and traditions of the Hualapai Tribe is a public use and the acquisition of GCSD's contractual interest in the Skywalk Agreement is necessary to carry out such public use;

WHEREAS, the Hualapai Tribal Council declares that the protection and preservation of its unique, priceless, and unalienable lands and natural resources is a public use and the acquisition of GCSD's contractual interest in the Skywalk Agreement is necessary to carry out such public use;

WHEREAS, the exercise of the Hualapai Tribe's inherent powers of eminent domain over GCSD's contractual interest in the Skywalk Agreement is a purpose for which eminent domain may be exercised under sections 2.16(B), subparts (1) through (14), of the Hualapai Law and Order Code;

WHEREAS, the Hualapai Tribe stands ready to make just compensation to GCSD for the exercise of eminent domain over GCSD's contractual interest in the Skywalk Agreement;

WHEREAS, the amount of currently-estimated just compensation for GCSD's contractual interest in the Skywalk Agreement is \$11,040, 000;

WHEREAS, pursuant to section 2.16 of the Hualapai Law and Order Code, the Hualapai Tribe may, but is not required to, post a bond or deposit as a condition of initiating a condemnation proceeding;

WHEREAS, THEREFORE, BE IT RESOLVED that the Hualapai Tribal Council assembled this 7th day of February, 2012, does hereby authorize and direct the Hualapai Tribe to consummate the acquisition of GCSD's contractual interest in the Skywalk Agreement under the power of eminent domain and to do all things necessary to

accomplish this purpose;

BE IT FURTHER RESOLVED that no settlement figure, purchase price, or stipulation to purchase such interest is binding upon the Tribe or its agents until the Hualapai Tribal Council approves any figure, purchase price, or stipulation to purchase either by ordinance or resolution; and

BE IT FINALLY RESOLVED that the Hualapai Tribe shall not post a bond or deposit and money as a condition of initiating a condemnation proceeding unless the Hualapai Tribal Council approves any such bond or deposit by ordinance or resolution.

CERTIFICATION

I, the undersigned, as Chairwoman of the Hualapai Tribal Council, hereby certify that the Hualapai Tribal Council of the Hualapai Tribe is composed of nine (9) members of whom eight (8), constituting a quorum, were present at a Special Council meeting held on the 7th day of February, 2012; and that the foregoing resolution was duly adopted by a vote of five (5) in favor, one (1) opposed, one (1) not voting, two (2) excused, pursuant to the authority of Article V and Article IX of the Constitution of the Hualapai Tribe, approved March 13, 1991.

Louise Benson, Chairwoman, HUALAPAI TRIBAL COUNCIL

ATTEST:

Adeline Crosier, Assistant Secretary, HUALAPAI TRIBAL COUNCIL

Appendix 4 Eminent Domain Resolution

HUALAPAI TRIBAL COUNCIL RESOLUTION NO. 20-2011
OF THE GOVERNING BODY OF THE HUALAPAI TRIBE OF THE HUALAPAI RESERVATION
PEACH SPRINGS, ARIZONA
(Enactment of Law and Order Code Section 2.16, Eminent Domain)

WHEREAS, the Hualapai Tribal Council is the legislative body of the Hualapai Tribe and is empowered by inherent sovereign rights and powers, the Constitution of the Hualapai Indian Tribe to exercise eminent domain over all property subject to the jurisdiction of the Hualapai Tribe; and

WHEREAS, it has been the law, customs and tradition from a time beyond memory that the Hualapai People, acting through their leaders, may take property of an individual within its territory for the public good, provided a fair trade is made for such property; and

WHEREAS, the Hualapai Tribal Council is empowered by the Constitution of the Hualapai Indian Tribe to take any and all actions necessary and proper to the exercise of its powers and duties under the Constitution, and those powers and duties vested in the Tribal Council through its inherent sovereignty ; and

WHEREAS, the Hualapai Tribal Council has a duty under the Constitution of the Hualapai Indian Tribe and the traditions of the Hualapai People to ensure just compensation for the taking of private property for a public use; and

WHEREAS, to ensure due process and equal protection under the law, The Hualapai Tribal Council finds it necessary to create procedures for the exercise of its listing and inherent power of eminent domain.

NOW, THEREFORE, BE IT RESOLVED that the Hualapai Tribal Council assembled this 4th day of April, 2011, does hereby approve and enact Section 2.16 of the Hualapai Tribe Law and Order Code, attached hereto as Ex. A,** and

BE IT FINALLY RESOLVED that Section 2.16 shall go into effect immediately upon passage by the Tribal Council.

CERTIFICATION

I, the undersigned, as Chairman of the Hualapai Tribal Council, hereby certify that the Hualapai Tribal Council of the Hualapai Tribe is composed of nine (9) members of whom (9), constituting a quorum, were present at a Special Council meeting held on the 4th day of April, 2011; and that the foregoing resolution was duly adopted by a vote of (9) in favor, (0) opposed, (0) not voting, (0) excused, pursuant to authority of Article V, Section (a) of the Constitution of the Hualapai Tribe, approved March 13, 1991.

Wilfred Whatoname, Sr., Chairman
HUALAPAI TRIBAL COUNCIL

ATTEST:

Adeline Crozier, Assist. Secretary
HUALAPAI TRIBAL COUNCIL

**The complete text of the legislative enactment (Section 2.16) approved by the resolution is available at <http://grandcanyonskywalkfacts.com/wp-content/uploads/2012/11/Eminent-Domain-Resolution-20-2011.pdf>