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UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

DISH Network Corporation, et al., Plaintiffs, v. Eric Tewa, Sr., et al., Defendants.	No. CV 12-8077-PCT-JAT **PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION TO DISMISS THE COMPLAINT** (Oral Argument Requested)

DISH Network Corporation, DISH Network L.L.C. and DISH Network Services L.L.C. (collectively "DISH" or the "DISH Plaintiffs") oppose the motion of defendants Eric Tewa, Sr., Lamer Keevama, and Merwin Kooyahoema (collectively the "Revenue Commission") to dismiss the DISH Plaintiffs' complaint in this case.

PRELIMINARY STATEMENT

DISH seeks declaratory and injunctive relief against Defendants' efforts, as members of the Revenue Commission, to require the DISH Plaintiffs to comply with the provisions of Hopi Tribal Ordinance 17A. This Ordinance would require DISH to

register to do business on the Hopi Tribe's reservation, pay an annual license fee, and comply with many other obligations, including, among other things, consenting to the jurisdiction of the Hopi Tribal Court. DISH also seeks to enjoin the Revenue Commission from its continued prosecution in the Hopi Tribal Court of *Hopi Tribe Office of Revenue Commission v. DISH Network Corp., DISH Network Service L.L.C. and DOES 1 through 50*, Case No. 2011-cv-0130. DISH alleges in its complaint that (1) the application of Hopi Tribal Ordinance 17A to DISH is preempted by Section 303(v) of the Communications Act, which gives the Federal Communications Commission ("FCC") "exclusive jurisdiction to regulate the provision of direct-to-home satellite services";[1] and (2) the parts of the Ordinance that impose charges are also preempted by Section 602 of the 1996 Telecommunications Act, which bars the imposition of local charges on direct-to-home satellite service, including fees for the right to do business in a particular jurisdiction.[2]

The Revenue Commission seeks the dismissal of the complaint under Rule 12(b)(1) of the Federal Rules of Civil Procedure on the ground that DISH has failed to exhaust its tribal remedies and under Rule 12(b)(6) on the ground that the complaint fails to state a claim on which relief can be granted. Neither of these provisions applies. Tribal exhaustion is a matter of comity, not a matter of subject matter jurisdiction. Where, as here, a nonmember alleges that federal law preempts tribal regulatory jurisdiction over the nonmember, exhaustion of tribal court remedies is not required; nor is tribal court exhaustion required where, as here, the tribal court's lack of jurisdiction is clear as a matter of federal law, and tribal exhaustion would contribute nothing but delay. Contrary to the position of the Revenue Commission, the federal statutory provisions in question are laws of general applicability that preempt the application of Hopi Tribal Ordinance 17A to the DISH Plaintiffs.

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[1] 47 U.S.C. § 303(v).

[2] 47 U.S.C. § 152 note.

COUNTERSTATEMENT OF THE CASE

DISH Network Corporation is merely the holding company of DISH Network L.L.C. and DISH Network Service L.L.C. DISH Network Corporation does not provide Direct Broadcast Satellite ("DBS") service to the Hopi Tribe, Tribal Members, or residents of the Hopi Reservation. It has no consensual relationship or commercial agreements with the Hopi Tribe or with any members of the Tribe. It has no presence on, and does not enter, the Hopi Reservation. (Compl. ¶¶ 16-17.)

DISH Network L.L.C ("DISH Network") provides DBS service pursuant to licenses issued by the Federal Communications Commission ("FCC") under the Communications Act, 47 U.S.C. § 303 *et seq*. DISH provides DBS service to about 14 million households across the nation, including a small number of residents (fewer than 900) of the Tribe's reservation. DBS programming is transmitted to DISH's subscribers throughout the United States by a number of satellites, none of which is located on, or indeed above, the Hopi Reservation. The programming is uplinked to these satellites from uplink centers, none of which is situated on the Reservation. In turn, the several hundreds of programming networks that constitute DISH's DBS service travel to these uplink centers from points in the United States and abroad, none of which is on the Hopi Reservation. (Compl. ¶ 13.)

Subscribers enter into a subscription agreement with DISH Network. Subscribers are provided with a satellite dish receiver that is usually attached to the roof of their residence and oriented toward the satellite signal, and a set top box to decode the encoded signal. The set top box is connected to the subscriber television set. DISH Network has no presence on the reservation, and never enters the reservation. Prospective subscribers must contact DISH Network at one of its off-reservation locations to arrange for service, and DISH Network receives payments under its subscription agreement only at off-reservation locations. (Compl. ¶ 15.)

DISH Network Service L.L.C. ("DISH Service") provides installation service for DISH Network. DISH Service enters the reservation to install the satellite dish receiver

and the decoder box at the subscriber's residence. DISH Service has no consensual relationship or commercial agreements with the subscriber. (Compl. ¶ 16.)

DISH Network (originally named Echostar) started its nationwide service in 1996. It provided DBS service to residents of the Hopi Reservation for many years without incident. Until 2009, neither the Revenue Commission nor any other Hopi Tribe authority had suggested to DISH that any tribal rule governed the provision of that service. It was only in that year that the Revenue Commission contacted DISH Service and stated that DISH Service had to apply for and obtain a license to do business on the Hopi Reservation, pay an annual fee, allegedly pursuant to Hopi Tribal Ordinance 17A[3], and comply with other requirements imposed by Hopi Tribal Ordinance 17A on persons who register to do business. (*See* Dkt. 1-2, Compl., Ex. A.) DISH Service respectfully declined to do so on the ground that tribal regulation and taxation of its DBS service is preempted by federal law. (*See generally* Compl. ¶¶ 18-19.)

On December 12, 2011, the Revenue Commission filed suit against DISH Network Corporation and DISH Service in the Hopi Tribal Court, *Hopi Tribe Office of Revenue Commission v. DISH Network Corp., DISH Network Service L.L.C. and DOES 1 through 50*, Case No. 2011-cv-0130, seeking injunctive relief to require DISH Network Corporation and DISH Service to obtain a business license and pay an annual fee. In addition, the Revenue Commission is seeking damages, including a $500 a day penalty for failure to obtain a license and pay the annual fee in the past. (Compl. ¶ 20.)

On April 5, 2012, DISH Network Corporation and DISH Network Service filed a motion to dismiss the Tribal Court complaint on a number of grounds, including,

[3] Ordinance 17A applies only to a "reservation business" and, Section 17.1.5(k) defines reservation business in relevant part as "any business that engages at a *fixed location* within the jurisdiction of the Hopi Reservation in the sale or purchase of goods or services . . . ." (emphasis added). The DISH Plaintiffs are located outside of the reservation, and none sell services from a fixed location within the Reservation.

among others, that the Communications Act preempted tribal regulation or taxation of DBS service and that the Hopi Tribe lacked legislative or judicial jurisdiction over DISH Network Corporation or DISH Service because neither of them has a "consensual" or "commercial" relationship with the Hopi Tribe or any of its members. In response, the Revenue Commission filed a motion for leave to amend its complaint to add DISH Network, which has subscription agreements with persons residing on the Hopi Reservation. The Hopi Tribal Court has not yet acted upon the Revenue Commission's motion.

ARGUMENT

I. THE COMPLAINT STATES A CLAIM FOR RELIEF BECAUSE FEDERAL LAW PREEMPTS HOPI REGULATORY JURISDICTION.

A. The Communications Act Gives the FCC *Exclusive Jurisdiction* To Regulate The Provision Of Direct-To-Home Satellite Service And Necessarily Preempts Regulation Of Such DBS Service By The Hopi Tribe.

Section 303(v) of the Communications Act provides that the FCC has "exclusive jurisdiction to regulate the provision of direct-to-home satellite services." 47 U.S.C. § 303(v). Express preemption is the strongest possible form of federal preemption. Numerous federal courts have ruled that a grant of exclusive regulatory jurisdiction to a federal agency necessarily preempts state and local regulation in the same field. For example, in *City of Auburn v. United States*, 154 F.3d 1025 (9th Cir. 1998), the Ninth Circuit held that the grant of "exclusive jurisdiction" to the Surface Transportation Board over certain aspects of railroad operations expressly preempted local land use and environmental regulations. *Id.* at 1031 ("We believe the congressional intent to preempt this kind of state and local regulation of rail lines is explicit in the plain language of the ICCTA [Interstate Commerce Commission Termination Act] and the statutory framework surrounding it."). As the Fourth Circuit Judge Niemeyer has observed with respect to this particular provision of the Communications Act: "[s]till other areas that, before 1996, were left to the States are completely inundated by federal

preemption, **such as in the area of satellite service.** *See, e.g., id.* § 303(v)." *Verizon Md., Inc. v. Global Naps, Inc.*, 377 F.3d 355, 371 (4th Cir. 2004) (Niemeyer, J., dissenting) (emphasis added).

Furthermore, the legislative history of Section 303(v) confirms the congressional intent underlying the choice of the adjective "exclusive." Congress believed that exclusive federal jurisdiction was necessary to "ensure . . . a unified, national system of rules reflecting the national, interstate nature of [direct-to-home satellite service]," H.R. Rep. No. 104-204 (I), at 123, 104th Cong. (1995), and that "any additional regulatory burdens imposed by State or local governments would be inappropriate and contrary to the Federal scheme for [direct-to-home satellite service] regulation." S. Rep. No. 103-367, at 56, 103d Cong. (1994).[4]

If Ordinance 17A were held applicable to DISH and its DBS services, it would place a number of specific, local requirements on the provision of DBS services to the residents of the Hopi reservation. (*See* Ex. A, Dkt. # 1.2, to Compl.). Ordinance 17A, for example, would allow the Hopi Tribe to prevent the provision of DBS services to persons living on the Hopi reservation if the Hopi Tribe believes that DISH does not "adequately serve the economic needs of the community." (17.6.4). Ordinance 17A would also require DISH to post a bond (17.2.3), would impose a gross receipts tax and would authorize the collection of other fees and taxes (17.3.1 and 17.3.2), would require DISH to consent to the general jurisdiction of the Hopi tribal court (17.3.6), would impose specific requirements for customer disclosures, including translation of such disclosures into Hopi (17.5.2 and 17.5.4), would allow the Hopi Tribe to dictate the format of customer bills (17.5.3), and would give customers various rights, including the right to require the attendance of a DISH representative at the Hopi

[4] The Hopi Tribal Court has itself recognized that federal statutes preempt Hopi Tribal ordinances where, as here, Congress expressly reserves to itself the exclusive power to regulate a given area of law. *Sunrise Quoyavema v. Hopi Tribal Court*, 4 Am. Tribal Law 415, 419 (Hopi Ct. App. 2002) citing *Ariz. Farmworkers Union v. Phoenix Vegetable Distribs.*, 747 P.2d 574, 577 (Ariz. Ct. App. 1986).

Tribe's public meetings to answer its complaints (17.4.9). It was to relieve DBS providers from a patchwork of such local requirements that Congress placed exclusive jurisdiction for the regulation of DBS service in a single federal agency, the FCC.

B. Section 602 Of The Telecommunications Act Exempts The DISH Plaintiffs From Local Fees And Taxes, Including Taxes Imposed By The Hopi Tribe.

Section 602 of the 1996 Telecommunications Act states: "[a] provider of direct-to-home satellite service shall be exempt from the collection or remittance, or both, of any tax or fee imposed by any local taxing jurisdiction on direct-to-home satellite service." 47 U.S.C. § 152 note. The term "tax or fee" is defined broadly to include "any … tax, license, or fee that is ***imposed for the privilege of doing business,*** regulating, or raising revenue for a local taxing jurisdiction." *Id.* (emphasis added).

Remarks made in the Congressional record underscore the breadth of this exclusion. *See* 141 Cong. Rec. H8293 (daily ed. Aug. 2, 1995) (statement of Rep. Hyde) ("This change balances the need to protect State sovereignty against the need to protect the direct broadcast services from the administrative nightmare that would result from subjecting them to local taxation in numerous local jurisdictions."); 142 Cong. Rec. H1158 (daily ed. Feb. 1, 1996) (statement of Rep. Hyde) ("Section 602 reflects a legislative determination that the provision of direct-to-home satellite service is national, not local in nature…. To permit thousands of local taxing jurisdictions to tax such a national service would create an unnecessary and undue burden on the providers of such services.").

Section 602 makes only a single exception to the broad exemption from local—*i.e.* non-federal—taxation for taxes imposed and collected by states. Subsection 602 (c) states: "Preservation of State Authority. — This section shall not be construed to prevent taxation of a provider of direct-to-home satellite service by a State or to prevent a local taxing jurisdiction from receiving revenue derived from a tax or fee imposed and collected by a State." 47 U.S.C. § 152 note.

There is, of course, good reason why this exemption is confined only to states, and not to other taxing jurisdictions, like a tribe. According to the Bureau of Indian Affairs, the United States has more than 560 recognized Indian Tribes, Tribal Governments Overview, http://www.doi.gov/governments/tribalgovernments.cfm (last visited June 27, 2012). Congress intended to permit only a limited number of entities to impose taxes on DBS service, in order to exempt DBS providers from "the administrative nightmare that would result from subjecting them to local taxation in numerous local jurisdictions."); 141 Cong. Rec. H8293 (daily ed. Aug. 2, 1995) (statement of Rep. Hyde). *See also, DirecTV, Inc. and Echostar Satellite, L.L.C. v. Treesh,* 290 S.W.3d 638, 643 (Ky. 2009), *cert. denied*, 130 S. Ct. 1053 (2010). (Congress preempted local taxation in part because satellite providers are a national service that does not depend on local rights-of-way or community physical facilities or services.)

C. The Communications Act Is A Federal Statute Of General Applicability And Its Preemption Provisions Apply To The Hopi Tribe And Ordinance 17A.

Federal laws apply with equal force to tribes as well as other governmental entities. In *FPC v. Tuscarora Indian Nation,* the Supreme Court held: "it is now well settled by many decisions of this Court that a general statute in terms applying to all persons includes Indians and their property interests." 362 U.S. 99, 116 (1960); *see also United States v. Mitchell*, 502 F.3d 931, 947 (9th Cir. 2007) ("[T]he baseline is that federal statutes of nationwide applicability, where silent on the issue, presumptively do apply to Indian tribes."). In the Ninth Circuit, a statute of general applicability will apply to an Indian tribe unless: 1) the law touches the right to self-governance in purely intramural matters; 2) the application of the law to the tribe would abrogate treaties; or 3) legislative history or some other means establishes that Congress intended the law not to apply on reservations. *Donovan v. Coeur d'Alene Tribal Farm*, 751 F.2d 1113, 1115-16 (9th Cir. 1985).

The federal statutes in question—the Communications Act, or amended,

including the 1996 Telecommunications Act—are statutes of general applicability. Section 303(v)'s preemption language, and the Section 602 exemption from taxation, apply to the Hopi Tribe, barring the application of one of the *Donovan* exceptions. But the *Donovan* exceptions do not apply: neither provision touches on the right of self-governance in purely intramural matters, *i.e.* matters among tribal members; neither provision would abrogate any treaties; and finally, there is no evidence that Congress intended these provisions not to apply on reservations and, in fact, the legislative history indicates that its intent was for the Act to apply broadly.

D. The Revenue Commission's Arguments That The Communications Act Does Not Preempt Hopi Ordinance 17A Are Without Merit.

The Revenue Commission contends (Defs' Mot. 12-15) that the Hopi Tribe has a "sovereign" right to tax persons who do business within the exterior boundaries of its reservation, citing *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 137 (1982), but its reliance on this case is misplaced. The Court in *Merrion* noted that the tribe's right to tax was retained "unless divested … by federal law or necessary implication of [its] dependent status," *id*. at 137.[5] Thus, *Merrion* supports the position the DISH Plaintiffs have asserted here—that federal law may divest the Hopi Tribe of its right to regulate and tax the provision of DBS service to members of the Hopi Tribe.

The Revenue Commission contends that the language in the *Tuscarora* case concerning the applicability of federal law to Indian tribes is "dicta"; that statement,

[5] The Supreme Court has held repeatedly that the implication of the tribes' dependent status is that tribal regulatory and judicial authority over nonmembers is limited to conduct that falls within the exceptions set forth in *Montana v. United States*, 450 U.S. 544 (1981). In *Montana*, the Supreme Court held that a tribe can have regulatory or judicial jurisdiction over a nonmember only where the nonmember has a consensual relationship with the Tribe or its members, or the conduct of the nonmember "threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." *Id.* at 566. The limitation applies as well to the authority to tax nonmembers. *Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 656 (2001). The Hopi Tribe's power to regulate or tax any of the DISH Plaintiffs rests in the first instance on the existence of a consensual or commercial relationship between the particular DISH entity and the Tribe or its members with a sufficient nexus to the regulation sought to be imposed to satisfy the requirement of *Montana.*

however, represents, and has been treated, as an authoritative expression of the law. *See e.g., Mitchell*, 502 F.3d at 947. ("[T]he baseline is that federal statutes of nationwide applicability, where silent on the issue, presumptively do apply to Indian tribes."). The Revenue Commission relies on *Morrison v. Viejas*, No. 11cv97 WQH (BGS), 2011 U.S. Dist. LEXIS 81922 (S.D. Cal. July 26, 2011), for the proposition that the Supreme Court's *dictum* in *Tuscarora* has been eroded, but a more accurate statement of the law would be that the broad rule articulated in *Tuscarora* has been qualified in those circumstances identified as exceptions by the *Donovan* court. *Donovan*, 751 F.2d at 1116. The *Morrison* decision, on which the Revenue Commission relies, holds that, where a statute is silent with respect to Indian tribes, it applies to the tribe *except* in the three situations identified as exceptions in *Donovan*. *Morrison*, 2011 U.S. Dist. LEXIS, at *9. As discussed above, none of these exceptions is applicable here.[6]

The Revenue Commission also argues that the Communications Act is not a statute of general applicability, because it is inapplicable to states. First of all, Section 303(v) of the Communications Act, which gives the FCC exclusive regulatory jurisdiction over the provision of DBS service, applies across the board and preempts state, local, and tribal government regulation of DBS service equally. While Section 602 of the 1996 Telecommunications Act does make an exception for state-imposed and collected taxes imposed and collected by the state, this does not make it inapplicable to states. In fact, Section 602 applies to (and bars) taxes imposed by a local authority and collected by the state or taxes imposed by the state and collected by a local authority. *DirecTV, Inc. and Echostar Satellite, L.L.C. v. Treesh*, 290 S.W.3rd 638, 643 (Ky. 2009) (Taxes authorized and collected by the state, but imposed by local authorities, are

[6] *Morrison* involved an effort by a former tribal employee to sue the tribe under the Family Medical Leave Act. The question presented was not whether the Act applied to the tribe, but whether the employee's ability to sue the tribe was barred by tribal sovereign immunity. Although the court held that sovereign immunity barred a suit for damages, it apparently concluded the Family Medical Leave Act applied to the tribe because it noted that a suit against a tribal officer in his official capacity could have been brought under the *Ex Parte Young* doctrine. 2011 U.S. Dist. LEXIS, at *11-12.

preempted.) In any event, every provision in an act does not have to apply equally to every entity covered to allow the act to qualify as a statute of general or nationwide applicability. The Revenue Commission's assertion, unsupported by any authority, is without merit.

The Revenue Commission contends that "legislative history and other means" indicate that the Communications Act was not intended to apply on the Reservation, but it fails to provide any support for this statement. The Revenue Commission asserts that the burden of showing congressional intent to divest a tribe of its sovereign powers rests upon the party seeking such divestiture. Where a federal statute of nationwide applicability is silent on the issue of its applicability to Indian tribes, however, the presumption is that the statute does apply, *Mitchell*, 502 F.3d at 947, and the burden of showing that it does not apply falls on the tribe.

The only legislative history that the Revenue Commission does cite in support of its view is not the legislative history of the Communications Act. The DISH Plaintiffs, on the other hand, rely on the legislative history of Section 303(v) itself, which makes it clear that Congress intended to divest all non-federal entities of jurisdiction over DBS service, because Congress had concluded that "any additional regulatory burdens imposed by State or local governments would be inappropriate and contrary to the Federal scheme for [direct-to-home satellite service] regulation." S. Rep. No. 103-367, at 56, 103d Cong. (1994). Rather than supporting the exclusion of tribal governments from the scope of Section 303(v), the legislative history of the provision supports their inclusion.

The Revenue Commission's final argument rests on the language of Section 602 of the 1996 Telecommunications Act, which effects a separate, specific preemption of tribal regulatory authority to impose broadly defined taxes or fees on DBS service providers. As mentioned, that provision, Section 602 of the 1996 Act states: "[a] provider of direct-to-home satellite service shall be exempt from the collection or

remittance, or both, of any tax or fee imposed by any local taxing jurisdiction on direct-to-home satellite service." 47 U.S.C. § 152 note.

The Revenue Commission nevertheless contends that the tribes are not included in the scope of this provision on the ground that they do not qualify as a "municipality, city, county, township, parish, transportation district, or assessment jurisdiction . . . . " *Id*. The Revenue Commission has failed, however, to consider the full definition, which includes an all-important catch-all clause: "or any other local jurisdiction in the territorial jurisdiction of the United States with the authority to impose a tax or fee . . . ." *Id.* By its terms—every local taxing jurisdiction in the territorial jurisdiction of the United States—this clause includes tribal governments. The proper interpretation of the definition of "local taxing jurisdiction" is thus clear. Congress included in the definition every entity in the territorial United States that could impose a tax on DBS providers, and then excluded only "States."

II. BECAUSE THE FEDERAL COMMUNICATIONS ACT AND THE 1996 TELECOMMUNICATIONS ACT HAVE CLEARLY PREEMPTED TRIBAL REGULATORY JURISDICTION OVER DBS SERVICE, EXHAUSTION OF TRIBAL REMEDIES WOULD SERVE NO PURPOSE BUT DELAY.

Federal courts have held that challenges to the jurisdiction of a tribal court should first be brought to the tribal court, a doctrine often called "tribal court exhaustion." Tribal court exhaustion is, however, a "prudential rule," "based on comity" and "not an unyielding requirement." *Strate v. A-1 Contractors*, 520 U.S. 438, 449 n.7 & 453 (1997). The decision to abstain "involves a discretionary exercise of a court's equity powers." *Stock W. Corp. v. Taylor*, 964 F.2d 912, 917 (9th Cir. 1992) (en banc) (internal quotation marks and citation omitted). When it is plain that tribal court jurisdiction is lacking, so that the exhaustion requirement would serve no purpose other than delay, the federal court should address the challenge to the tribe's jurisdiction immediately without waiting for the plaintiff to exhaust tribal remedies. *Nevada v. Hicks*, 533 U.S. 353, 369 (2001). "Comity does not require deference to a court which

has no jurisdiction." *Rolling Frito-Lay Sales LP v. Stover*, No. CV 11-1361-PHX-FJM, 2012 WL 252938, at *5 (D. Ariz. Jan. 26, 2012).

The Revenue Commission contends that the tribal exhaustion doctrine supports tribal self-government (Defs' Mot. 7). But recent Supreme Court cases limiting tribal authority over nonmembers have made it clear that "the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe," *Montana*, 450 U.S. at 565, and that the tribes have, by virtue of their incorporation into the American republic lost "the right of governing . . . person[s] within their limits except themselves." *Oliphant* v. *Suquamish Tribe*, 435 U.S. 191, 209 (1978).[7] *See also Plains Commerce Bank.*, 554 U.S. at 328; *Hicks*, 533 U.S. at 369; *Atkinson Trading*, 532 U.S. at 656. These cases have substantially undermined the rationale for the tribal court exhaustion doctrine in cases involving challenges by nonmembers to tribal court jurisdiction.[8] Since tribes are now presumed *not* to have regulatory authority or judicial jurisdiction over the activities of nonmembers, except in the limited circumstances identified in *Montana*, the rationale for deferring initially as a matter of comity to tribal courts when nonmember defendants challenge the tribal court's subject matter jurisdiction is significantly weakened. Where, as here, the challenge to the subject matter jurisdiction of the tribal court rests on a claim of express federal preemption, a clear matter of *federal* law, deference to the tribal court would contribute nothing but delay.

The Revenue Commission also contends that tribal exhaustion serves a practical purpose. But no practical purpose is served if, as here, the challenge to tribal court

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[7] In its most recent pronouncement on the jurisdiction of tribes over the conduct of nonmembers, the Supreme Court stated that "[T]he inherent sovereign powers of an Indian tribe *do not* extend to the activities of nonmembers of the tribe" and that "efforts by a tribe to regulate nonmembers … are '*presumptively invalid.*'" *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 328 (2008) (emphasis added).

[8] When it promulgated the exhaustion doctrine, the Supreme Court assumed that that tribal jurisdiction over the activities of non-Indians on reservation land "presumptively lies in the tribal courts." *Iowa Mut. Ins. Co. v. La Plante*, 480 U.S. 9, 18 (1987). *See* Canby, *American Indian Law In A Nutshell*, 234 (5th ed. 2009). ("The rulings in *Strate* and *Hicks* have greatly diminished the tribal exhaustion requirement as a practical matter.").

jurisdiction rests on a pure question of federal law. This Court has itself recognized that nonmembers have a *federal* right to judicial intervention to protect them from the improper exercise of jurisdiction over them by a tribal court. *Rolling Frito-Lay Sales LP*, 2012 WL 252938. Both the Supreme Court and lower courts have declined to require tribal exhaustion where federal statutes have arguably preempted tribal regulation. *See, e.g. El Paso Natural Gas Co. v. Neztsosie*, 526 U.S. 473 (1999); *Sprint Commc'ns Co., L.P. v. Native Am. Telecom, LLC*, No. CIV 10-4110-KES**,** 2010 WL 4973319 (D.S.D. Dec. 1, 2010))

Finally, the Revenue Commission argues that the DISH Plaintiffs have not demonstrated that the Hopi Tribe lacks regulatory jurisdiction over them. First of all, its argument ignores completely the DISH Plaintiffs' threshold and dispositive contention that section 303(v) of the Federal Communications Act and section 602 of the 1996 Telecommunications Act preempt tribal regulatory authority over the DISH Plaintiffs' DBS service. The Revenue Commission focuses instead on whether, assuming the Hopi Tribe's regulatory jurisdiction over DBS service survives federal preemption, the Hopi Tribe has regulatory or judicial jurisdiction over the DISH Plaintiffs. The Hopi Tribe can have neither regulatory nor judicial jurisdiction over DISH Network Corporation, or DISH Network Service, because neither of them has a consensual commercial relationship with the Hopi Tribe or any of its members. DISH does have a subscription agreement with hundreds of residents of the Hopi Reservation, but the Revenue Commission has failed to demonstrate, as it must, that any of them are members of the Tribe. In addition, any consensual relationship between DISH and certain individual residents of the Hopi Reservation with respect to the provision of DBS service would not support, under the principles of *Montana*, jurisdiction over any of the DISH Plaintiffs with respect to matters not closely related to that consensual relationship, which would include the provisions of Ordinance 17A.

CONCLUSION

For the reasons given above, the DISH Plaintiffs submit that the Revenue Commission's Motion to Dismiss Complaint Pursuant to Rule 12(b)(1) and Rule 12(b)(6) should be denied.

RESPECTFULLY SUBMITTED this 19th day of July, 2012.

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