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UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

DISH Network Corporation, a Nevada corporation; DISH Network L.L.C., a Colorado limited liability company; and DISH Network Service L.L.C., a Colorado limited liability company,

Plaintiffs,

v.

Eric Tewa, Sr., in his official capacity as Chief Revenue Officer of the Hopi Tribe Office of Revenue Commission, an agency of a federally-recognized Indian tribe; Lamar Keevama, in his official capacity as Deputy Commissioner of the Hopi Tribe Office of Revenue Commission, an agency of a federally-recognized Indian tribe; and Merwin Kooyahoema, in his official capacity as Deputy Commissioner of the Hopi Tribe Office of Revenue Commission, an agency of a federally-recognized Indian tribe,

Defendants.

CASE NO.: 3:12-cv-08077-JAT

REPLY IN SUPPORT OF MOTION TO DISMISS COMPLAINT PURSUANT TO FED. R. CIV. P. 12(b)(1) AND 12(b)(6)

ORAL ARGUMENT REQUESTED

REPLY IN SUPPORT OF MOTION TO DISMISS COMPLAINT PURSUANT TO FED. R. CIV. P. 12(b)(1) AND 12(b)(6)

COME NOW Defendants, Eric Tewa, Sr., in his official capacity as Chief Revenue Officer of the Hopi Tribe Office of Revenue Commission, an agency of a federally-recognized Indian tribe; Lamar Keevama, in his official capacity as Deputy Commissioner of the Hopi Tribe Office of Revenue Commission, an agency of a federally-recognized Indian tribe; and Merwin Kooyahoema, in his official capacity as Deputy Commissioner of the Hopi Tribe Office of Revenue Commission, an agency of a federally-recognized Indian tribe, by and through their attorneys of record, MADDOX, ISAACSON &

CISNEROS, LLP, and hereby submit this Reply (hereinafter, "Reply") in Support of Motion to Dismiss Complaint Pursuant to Fed. R. Civ. P. 12(b)(1) and 12(b)(6) (hereinafter, "Motion"). This Reply responds to the Opposition (hereinafter, "Opposition" or "Opp.") to the Motion, filed by DISH Network Corporation, DISH Network L.L.C., and DISH Network Service L.L.C. (hereinafter, collectively, "Dish").

This Reply is made and supported by the following Memorandum of Points and Authorities, the papers and pleadings on file with the Court, and oral argument or documentary evidence that the Court may entertain.

Dated this 10th day of August, 2012.

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MEMORANDUM OF POINTS AND AUTHORITIES

Because Dish fails to state claims for which relief may be granted and fails to provide any valid reasons not to exhaust remedies in tribal court, the Complaint must be dismissed. The question before the Court is whether the Communications Act of 1934, as amended by the Telecommunications Act of 1996, (collectively, hereinafter, "Acts"), prevents the Hopi Tribe from imposing fees on Dish. Dish's argument that the Acts do prevent such fees relies on a series of interdependent premises, all of which are wrong. To summarize:

1. Dish is incorrect in arguing that a general statute applies to Indian tribes.

2. Even if Dish were right, the Acts are not general statutes. Therefore, the Acts do not disallow Hopi taxation of Dish.

3. Even if the Acts were general statutes, *Donovan v. Coeur d'Alene Tribal Farm,* 751 F.2d 1113, 1116 (9th Cir. 1985) allows the use of legislative history and other means to show Congress did not intend the

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Acts to apply to Indian tribes. However, before resorting to legislative history for such purpose, Plaintiffs first submit that legislative history is not necessary where, as here, the statutes' meaning is plain. The plain meaning of the Telecommunications Act shows that the Hopi may tax Dish.

4. The plain meaning of the Telecommunications Act also shows that preemption does not apply to Indian tribes.

5. An examination of legislative history leads to the same conclusion: the Acts were not intended to apply to Indian tribes, and Indian law has not been preempted.

6. Because the Act does not disallow Hopi taxation, the Hopi Tribe may tax Dish under *Montana v. United States,* 450 U.S. 544, 566, 101 S. Ct. 1245, 1258 (1981), as Dish has entered the Hopi reservation to conduct business with tribal members.

7. Because all of Dish's arguments fail, tribal court jurisdiction does not cause delay, and thus Dish must first exhaust remedies in the Hopi Tribal Court before bringing the Complaint to this Court.

I. LEGAL ARGUMENT

Dish's Complaint fails to state a claim for which relief may be granted under 12(b)(6) and fails to meet the jurisdictional requirements of Fed. R. Civ. Pro. 12(b)(1).

A. Dish's Claims are Not Claims for Which Relief May Be Granted, as for Starters, *Tuscarora* is Inapplicable to the Facts at Bar

Dish's argument fails at the outset, as Dish relies on the inapplicable dictum of *Federal Power Comm'n v. Tuscarora Indian Nation,* 362 U.S. 99, 80 S. Ct. 543 (1960), for the notion that general statutes apply to Indian tribes. *See* Opp. at 8:14 - 9:8. In no uncertain terms the court in *Morrison v. Viejas Enterprises* said that the *Tuscarosa* dictum has been eroded:

> In *Federal Power Comm'n v. Tuscarora Indian Nation, 362 U.S. 99, 80 S. Ct. 543, 4 L. Ed. 2d 584 (1960),* the Supreme Court stated in dicta that "a general statute in terms applying to all persons includes Indians and their property interests." *Tuscarora, 362 U.S. at 116.* However, ***Tuscarora* has since been eroded** by the Supreme Court's decision in *Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 102 S. Ct. 894, 71 L. Ed. 2d 21 (1982)* in which the Court found that tribes enjoy "inherent power necessary to tribal self-government and territorial management." *Merrion, 455 U.S. at 141; see also Donovan v. Navajo Forest Products Industries, 692 F.2d 709, 711-12 (10th Cir. 1982)* (noting that *Tuscarora* did not involve an Indian treaty and finding that "[t]he *Tuscarora* rule does not

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> apply to Indians if the application of the general statute would be in derogation of the Indians' treaty rights.").

Morrison v. Viejas Enterprises, 2011 U.S. Dist. LEXIS 81922, at *7-8 (Jul. 26, 2011) (emphasis added). Dish suggests that "a more accurate statement of the law would be that the broad rule articulated in *Tuscarora* has been qualified" by the exceptions identified in *Donovan v. Coeur d'Alene Tribal Farm,* 751 F.2d 1113, 1116 (9th Cir. 1985), *see* Opp. at 10:3-9, but the *Morrison* court said no such thing. The court instead further emphatically stated, **"a party's reliance on *Tuscarora* to show 'that the general statutes of the United States apply to Indians and non-Indians alike, is misplaced.'"** *Id.* at *8-9 (emphasis added) (quoting *United States v. Winnebago Tribe of Nebraska,* 542 F.2d 1002, 1005 (11 Cir. 1976)). *Morrison* explained, "'[t]he bare proposition that broad general statutes have application to Native American tribes does not squarely resolve whether there was an abrogation of tribal immunity . . . .'" *Id.* (citing *Sanderlin v. Seminole Tribe of Florida,* 243 F.3d 1282, 1292 (11th Cir. 2001)).

The court could not have been clearer: the *Tuscarora* dictum that general statutes apply to Indian tribes has been eroded because all Indian tribes enjoy the benefits of sovereign immunity. Any reliance on *Tuscarora* is misplaced. Likewise here, the Hopi Tribe as a sovereign may collect fees from Dish when Dish enters the reservation to conduct business with members of the Hopi Tribe. The dictum of *Tuscarora* does not apply, as tribal immunity has not been abrogated.

B. The Acts Are Not General Statutes and Therefore Do Not Disallow the Hopi Tribe from Imposing Fees on Dish

Even if *Tuscarora* remained unquestioned, Dish's argument fails. Dish argues that the Communications Act and Telecommunications Act are statutes of general applicability, *see* Opp. at 8:21-9:1, but provides no analysis to support the bald assertion. Dish also ignores the extensive analysis the Hopi Tribe provided, *see* Motion at 15:6 - 25, indicating that in fact the Acts are not general statutes. Most significantly, Dish fails to answer the question of how a statute may be considered "general," where the plain term of the statute excludes states. *See* Motion at 15:17-25. Dish's failure to prove the threshold issue of whether the Acts are "general" statutes means Dish's argument fails at an early step.

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C. The Acts Themselves Allow the Hopi Tribe to Impose Fees on Dish

Even if *Tuscarora* did apply, and the Acts were "general" statutes, the third *Donovan* exception, that "legislative history or some other means" establish that Congress intended the law not to apply on reservations," *Donovan* at 1116, compels the conclusion that the Complaint must be dismissed. However, before analyzing the instant facts under *Donovan,* Plaintiffs first submit that the Court need not look to legislative intent to determine whether Indian tribes may impose fees on Dish under the Telecommunications Act.

A court may rely on legislative history to determine the meaning of a statue only after expressing a belief that the language is not plain, but instead is ambiguous. "In aid of the process of construction we are at liberty, if the meaning be uncertain, to have recourse to the legislative history of the measure and the statements by those in charge of it during its consideration by the Congress." *Unitea States v. Great Northern Ry.,* 287 U.S. 144 (1932). On the other hand, "we do not resort to legislative history to cloud a statutory text that is clear." *Ratzlaf v. United States,* 510 U.S. 135, 147-48 (1994).

Dish argues that the Hopi Tribe must find evidence of legislative intent that the Telecommunications Act does not apply to Indian tribes. However, because the plain language of the Telecommunications Act does not support the assertion that Indian tribes are local jurisdictions with no power to tax direct-to-home satellite service providers, and all canons of statutory construction also cannot support Dish's position, an examination of legislative intent is unnecessary. "Judges interpret laws rather than reconstruct legislators' intentions. Where the language of those laws is clear, we are not free to replace it with an unenacted legislative intent." *INS v. Cardoza-Fonseca,* 480 U.S. 421, 452-452–53, 107 S. Ct. 1207, 1224 (1987) (Scalia, J., concurring).

1. Dish's Argument Demands an Improper Dereliction of the Plain Meaning Rule

"[C]ourts must presume that a legislature says in a statute what it means and means in a statute what it says there. When the words of a statute are unambiguous, then, this first canon is also the last: judicial inquiry is complete."' *Connecticut Nat'l Bank v. Germain,* 503 U.S. 249, 253-54 (1992) (citations

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omitted). Dish cannot cite the plain language of the Communications Act to support the argument that Hopi taxation is disallowed. Section 602 of the Act states that providers of direct-to-home satellite services "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." In plain language, the Act further defines "local jurisdiction" as "any municipality, city, county, township, parish, transportation district, or assessment jurisdiction, or any other local jurisdiction in the territorial jurisdiction of the United States with the authority to impose a tax or fee, but does not include a State." 47 U.S.C. § 152 (b)(3) note. Congress did not list "Indian tribes" among "local jurisdictions." Under the plain language of section 602, direct-to-home satellite services are not exempt from taxation by Indian tribes.

2. All Canons of Statutory Construction Support the Conclusion that the Communications Act Does not Apply to the Hopi Tribe

Even if the Court were to disagree that the language of the Communications Act is clear and does not require interpretation, all canons of statutory construction lead to the conclusion that the Act allows Hopi taxation. For example, "[a]s a rule, '[a] definition which declares what a term "means" . . . excludes any meaning that is not stated." *Colautti v. Franklin,* 439 U.S. 379, 392 (1979) (quoting 2A C. Sands, Statutes and Statutory Construction § 47.07 (4th ed. Supp. 1978)). Under the doctrine of *noscitur a sociis,* "a word is known by the company it keeps." *Gustafson v. Alloyd Co.,* 513 U.S. 561, 575 (1995). A corollary to *noscitur a sociis* is *ejusdem generis,* meaning that "where general words follow an enumeration of specific items, the general words are read as applying only to other items akin to those specifically enumerated." *Harrison v. PPG Industries, Inc.,* 446 U.S. 578, 588 (1980).

Dish argues that Indian tribes are included in the general term, "any other local jurisdiction in the territorial jurisdiction of the United States with the authority to impose a tax or fee." *See* Opp. at 12:1-13. However, "local jurisdiction" indeed "keeps company" with "municipality, city, county, township, parish, transportation district, or assessment jurisdiction," none of which can arguably be used to describe Indian tribes. Moreover, under *ejusdem generis,* the more general term, "local jurisdiction," is "read as applying to the other items "more akin" to the specific terms,"any municipality, city, county, township, parish,

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transportation district, or assessment jurisdiction." Thus *ejusdem generis* does not allow Dish's reading, that Indian tribes are encompassed by the more general term. Accepting Dish's argument would be to "ascrib[e] to one word a meaning so broad that it is inconsistent with its accompanying words, thus giving 'unintended breadth to the Acts of Congress.'" *Gustafson* at 575 (quoting *Jarecki v. G. D. Searle & Co.,* 367 U.S. 303, 307, 81 S. Ct. 1579 (1961)).

Another construction of statutory construction is that "where Congress knows how to say something but chooses not to, its silence is controlling." *Freemanville Water Sys., Inc. v. Poarch Band of Creek Indians,* 563 F.3d 1205, 1209 (11th Cir. 2009). Congress knows how to say that Indian tribes may not tax direct-to-home satellite service providers, as Congress is familiar with the concept of Indian tribes as something other than local jurisdictions. The concept of Indian tribes as something more dates back to the very beginnings of U.S. history.

3. Indian Nations are Not Local Jurisdictions

Congress' understanding of Indian tribes as something more than local jurisdictions derives from, reflects, and is consistent with, Supreme Court jurisprudence of Indian affairs. Since the very beginning of the U.S. - American Indian relationship, Indian tribes have been considered as both nations, states, and tribes, but never as anything lesser. *See Cherokee Nation v. Georgia,* 30 U.S. 1, 16, 1831 U.S. LEXIS 337 (1831) (recognizing the Cherokee as a "nation," "state" and "Indian tribe.").

a. The Hopi are a State

As a state, an Indian tribe is "a distinct political society, separated from others, capable of managing its own affairs and governing itself." *Id.* at 16. The Court acknowledged,

> **[Indian tribes] have been uniformly treated as a state from the settlement of our country.** The numerous treaties made with them by the United States recognize them as a people capable of maintaining the relations of peace and war, of being responsible in their political character for any violation of their engagements, or for any aggression committed on the citizens of the United States by any individual of their community. Laws have been enacted in the spirit of these treaties. The acts of our government plainly recognize the Cherokee nation as a state, and the courts are bound by those acts.

Id. at 30-31 (emphasis added).

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Congress is familiar with the concept of Indian tribes as states. For example, the fact that an Indian tribe is also a state has meant that Congress has allowed the Environmental Protection Agency to treat Indian tribes "in the same manner as a state." *See Montana v. United States Environmental Protection Agency,* 941 F.Supp. 945, 950 (D. Mont., Missoula Div. 1996) ("Under section 518(e) of the [Water Quality Act of 1987], the EPA is authorized to treat an Indian tribe in the same manner as a state for certain purposes, including the development of water quality standards")(citing 33 U.S.C. §§ 1377(e); 40 C.F.R. §§ 131.3-131.8 (1995)). Because the Indian tribe is a state, Congress may delegate responsibilities that otherwise belong to the executive branch of U.S. government. *See id.* at 951.

Dish's Complaint must be dismissed because an Indian tribe is a state and hence not a local jurisdiction, and thus the Hopi Tribe may tax Dish under the express language of section 602 of the Communications Act.

b. The Hopi are also a Nation

The Supreme Court has also acknowledged Indian tribes "nations," though more accurately, as "domestic dependent nations." *Id.* at 33. This nomenclature continued through the treaty-making period of U.S. history, *see , eg.,* Indian Appropriations Act of 1893, 27 Stat. L. 645, § 16. (empowering the President of the United States to "enter into negotiations with the Cherokee Nation, the Choctaw Nation, the Chickasaw Nation, the Muscogee (or Creek) Nation, the Seminole Nation . . . .") and has survived to present day Supreme Court precedent. *See, e.g., United States v. Jicarilla Apache Nation,* 131 S.Ct. 2313, 2325, 2011 U.S. LEXIS 4381, at *29 (2011) (Indian tribes are "domestic dependent nations"); *accord, Merrion,* 455 U.S. 130, 141, 102 S.Ct. 894, 903-04 (1982). Not by coincidence has the Federal Communications Commission, which enforces the Communication and Telecommunications Act, stated that Indian tribes are "domestic dependent nations." *See* Motion at 18:4-13.

In *Wilson v. Marchington,* 127 F.3d 805, 808 (9th Cir. 1997), the court answered the question of whether, given the status of Indian tribes as nations, Indian tribes were intended to be considered "territories or possessions" under a particular statute. The court answered in the negative, finding that if

Congress had intended to include Indian tribes under the umbrella of the statute, Congress could have done so. *See id.* at 809.

Similarly here, Congress could have included Indian tribes as "any other local jurisdiction ***in the territorial jurisdiction of the United States*** with the authority to impose a tax or fee," *see* 47 U.S.C. § 152 (b)(3) note (emphasis added), but did not. The omission thus disproves Dish's argument, that where the Communications Act disallows taxation by "any other local jurisdiction in the territorial jurisdiction of the United States with the authority to impose a tax or fee," *see* Opp. at 12:1-13, the term includes Indian nations. The fact that the Hopi are a nation does not allow Dish's interpretation.

c. The Hopi are a State, Nation, and Tribe

Since *Cherokee* days, "state" and "nation" have been used to define and describe Indian tribes. *Cherokee* provided a third term, the self-referent, "Indian tribe." *See Cherokee* at 18-19. *Cherokee* acknowledged that the Commerce Clause empowered Congress to regulate commerce with (1) foreign nations, (2) the several states, and (3) Indian tribes." *Id.* at 34. "Indian tribes" distinguished American Indians "by a name appropriate to themselves." *Id.* at 18. Where an "Indian tribe" is equivalent though different from foreign nations and several states under the Commerce Clause, Dish cannot effectively argue that an Indian tribe is simply a kind of local jurisdiction.

d. The Designation of Indian Tribes as States, Nations and Tribes is an Important Facet of American Law

A ruling that the Hopi Tribe is nothing more than a local jurisdiction would be not only incorrect as a matter of law but would also undermine the longstanding and "undisputed existence of a general trust relationship between the United States and the Indian people." *United States v. Mitchell,* 463 U.S. 206, 225, 103 S.Ct. 2961, 2972 (1983). This trust relationship, after all, dates back from the *Cherokee* acknowledgment that Indian tribes were "under the protection of the United States." *See Cherokee* at 17. No "local jurisdiction" would have this direct relationship with the United States government. The three-part nomenclature of "state," "nation," and "Indian tribe" derives from the fact that "[t]he condition of the Indians in relation to the United States is perhaps unlike that of any other two people in existence,"

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the relationship between the two being "marked by peculiar and cardinal distinctions which exist nowhere else." *Id.* at 16. This trust relationship has continued to modern times. *See, e.g., HRI, Inc. v. EPA,* 198 F.3d 1224, 1245 (10th Cir. 2000) (under the trust doctrine, the United States has a responsibility to protect Indian interests).

The U.S. - Indian tribe trust relationship underlies another doctrine of statutory construction that the Hopi Tribe raised in the Motion: statutes must be construed liberally in favor of Indians, with any ambiguous provisions interpreted to their benefit. *See* Motion at 18:25 - 19:2 (citing *Montana v. Blackfeet Tribe,* 471 U.S. 759, 766, 105 S. Ct. 2399 (1985)). However, Dish has offered no counter-argument.

The Court should honor the relationship between the United States and Indian tribes by dismissing Dish's Complaint. Because the Communications Act exempts taxation on satellite TV providers only by local jurisdictions but not by states, the Hopi Tribe may impose fees on Dish, a satellite provider. More than a century and a half of case law demands this conclusion.

D. The Communications Act and Telecommunications Act Only Preempt Local Jurisdictions, and the Hopi Tribe is Not a Local Jurisdiction

All sources and constructions of law, from the Acts themselves to canons of statutory interpretation, common law, executive/administrative statements, and ultimately, common sense, demand the conclusion that Indian tribes are not "local jurisdictions" on par with any "municipality, city, county, township, parish, transportation district, or assessment jurisdiction." *See supra.* Dish repeatedly calls the Hopi Tribe a "local jurisdiction," but the bald assertion remains unsupported. For Dish's arguments to be valid, Congress, not Dish, would need to call Indian tribes "local jurisdictions." Congress has never done so.

The plain language of section 602 also compels the conclusion that the Communications Act does not preempt Hopi law and therefore has not divested the sovereignty of the Hopi Tribe. While Dish argues that section 303(v) of the Communications Act provides exclusive jurisdiction to the FCC, *see* Opp. at 5:14-16, the preemption of taxation powers under section 602 only occurs relative to *local jurisdictions*. In support of the Opposition, Dish cites cases holding that "express preemption" is the strongest form

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of preemption. *See* Opp. at 5:16. While the statement contains some truth, Dish ignores what the statute expressly preempts: local, non-Indian law.

Subsection (a) of section 602 starts out with the very word, "preemption," then explains that providers of direct-to-home satellite services are exempt from any "local taxing jurisdiction," further defined under subsection (b) as a "municipality, city, county, township, parish, transportation district, or assessment jurisdiction, or any other local jurisdiction in the territorial jurisdiction of the United States," but not including a "state." The plain terms of the statute thus provide that the Act only preempts local laws, which cannot be used to describe the laws of an Indian nation, Indian state, or Indian tribe. *See Cherokee, supra.* Whether as state, nation or Indian Tribe, the Hopi Tribe is not a local jurisdiction. Dish provides no evidence that any of the 560 federally recognized Indian tribes, *see* Opp. at 8:1-13, has ever been called a "local jurisdiction." Thus any argument about preemption is unavailing.

E. *Donovan* Allows Hopi Taxation of Dish

Even if the Court does not agree that the language of the Telecommunications Act contains no ambiguity about the Hopi right to tax Dish, the Complaint must still be dismissed under the *Donovan* exception, which allows legislative history or other means to prove that Congress did not intend a particular "general" statute to apply to Indian tribes. *See Donovan* at 1116.

The Hopi Tribe has provided an abundance of such evidence for this Court, including legislative history; the reference by the Supreme Court and Congress to Indian nations as "domestic, dependent nations"; and statements by the Federal Communications Commission, which enforces the Communication and Telecommunications Act, that Indian tribes are "domestic dependent nations." *See* Motion at 17:26-18:13 (citing Statement of Policy on Establishing a Government-to-Government Relationship with Indian Tribes, 16 FCC Rcd 4078, 4080 (2000) ("As domestic dependant nations, Indian Tribes exercise inherent sovereign powers over their members and territory.")). All the evidence shows that Indian tribes, as states, nations, and tribes, are not "local jurisdictions." Dish argues that such evidence "is not the legislative history of the Communications Act," *see* Opp. At 11:13-14, but *Donovan*

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allows legislative history *or other means,* such as the Hopi Tribe provided, to prove the exception. *Donovan* at 1116. Dish has provided no substantive response to this evidence.

Dish cites the legislative history of the Communications Act indicating original intent that state and local governments should not impose regulatory burdens that would be "contrary" to the federal scheme. *See* Opp. at 7:4-28. However, the comment is from 1994 and therefore is not persuasive in the era of the Communications Act as amended by the Telecommunications Act of 1996, which specifically gives states the power to enforce their own laws. 47 USC § 152 note, section (b)(3). Common sense requires that where Congressional views have been expressed in a duly enacted statute such as 47 USC § 152 (b)(3) note, the views thereby embodied must be applied.

F. The Relationship between Dish and the Hopi Residents Is Consensual

Because federal law does not disallow the Hopi Tribe from taxing direct-to-home satellite service companies, the next question is whether the Hopi may impose fees on Dish, a non-Hopi. Under *Montana v. United States,* the answer is *yes.*

Dish correctly cites *Montana v. United States,* 450 U.S. 544, 566, 101 S. Ct. 1245, 1258 (1981) for the law that a tribe has regulatory and judicial jurisdiction over nonmembers where the nonmember has a consensual relationship with the tribe or its members, *see* Opp. At 9, fn. 5. However, Dish argues that neither Dish Network Corporation nor Dish Network Service has a consensual commercial relationship with the Hopi Tribe or any Tribal members. *See* Opp. at 16-19. Dish does admit that Dish Service "enters the reservation to install the satellite dish receiver and the decoder box at the subscriber's residence," but again states that Dish Service has no consensual or commercial agreements with the subscriber. *See* Opp. at 3: 28 - 4:2. If Dish's assertion were true, then Dish Service, in affixing receivers and boxes on Hopi homes, would be liable for trespass and trespass to chattel. To the contrary, of course, all three Dish entities have the consent, whether express or implied, for Dish and Dish's agents to install such equipment.

In this regard, the instant case is similar to *Dish Network Service LLC v. Laducer,* Case No. 4:12-cv-058, 2012 U.S. Dist. LEXIS 94183 (D. N. Dakota, NW Div. July 9, 2012). The facts of that case involved

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Dish Network Service's provision of television services to Mr. Laducer, an Indian tribal member, at his home on the Turtle Mountain Indian Reservation. *Id.* at *1. Dish Network Services filed a complaint in state court against Mr. Laducer, alleging non-payment for services. *Id.* at *2. Mr. Laducer then filed a complaint in tribal court for abuse of process. *Id.* at *2-4. The state court dismissed the complaint by Dish Network Services for lack of jurisdiction. *Id.* at *2-4. Dish Network Service next filed a complaint in the federal district court and sought injunctive relief against Mr. Laducer from prosecuting and maintaining claims against Dish Network Service in the tribal court. *Id.* at *5. The court denied Dish Network Service's motion for a preliminary injunction on multiple grounds, including the fact that Dish Network had "voluntarily entered into a contract" with an Indian tribal member "to provide services on the reservation." *Id.* at 14. Citing *Montana,* the court declared, "By entering into a consensual contractual relationship with tribal members on tribal land, Dish Network subjected itself to the jurisdiction of the Tribal Court." *Id.* Likewise here under *Montana,* the Hopi Tribe may collect fees from Dish because Dish entered into a consensual contractual relationship with Hopi tribal members.

Dish also argues that the Hopi Tribe must prove that the residents receiving Dish service are in fact members of the Hopi Tribe. *See* Opp. at 14:19-22. The fact that the occupants of tribal lands are tribal members is axiomatic. *See Havasupai Tribe v. United States,* 752 F. Supp. 1471, 1478 (1990) (explaining that Indian "aboriginal title" describes the Indian possessory interest in land which Indians have inhabited "since time immemorial") (citing *County of Oneida v. Oneida Indian Nation,* 470 U.S. 226, 234, 105 S. Ct. 1245 (1985); Cohen, Original Indian Title, 32 Minn. L. Rev. 28 (1947)). Where the Hopi have occupied Hopi land since time immemorial, Dish's allegation has no merit.

Dish further argues that even if Dish has consensual relationships with Hopi tribal members, the relationships would not support, under *Montana,* jurisdiction over Dish "with respect to matters not closely related to that consensual relationship, which would include the provisions of Ordinance 17A." *See* Opp. at 14:22-26. However, *Montana* does not require a "close relationship" or nexus test, and even if such a test were required, the express purpose of Ordinance 17A is "to prescribe rules for the regulation and enforcement of Reservation businesses for the protection of Indian consumers and businesses with the

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view of attaining economic self-sufficiency for the Hopi Tribe." Ordinance 17A, Section 17.1.2. Therefore, Ordinance 17A is indeed closely related to the consensual relationship.

Because this case involves the engagement of business at a fixed location on the Hopi reservation, *see* Hopi Tribal Ordinance 17A, and because such business is consensual, this Court should dismiss the Complaint under Fed. R. Civ. Pro. 12(b)(6).

G. Dish Provides No Good Reason to Avoid the Exhaustion of Tribal Remedies

The Hopi Tribe respectfully submits that this Court does not have jurisdiction over this case under Fed. R. Civ. Pro. 12(b)(1) because jurisdiction first belongs to the Hopi Tribal Court. Dish contends this Court does have jurisdiction for reasons the Hopi Tribe has disproved. Dish argued that tribal exhaustion was unnecessary because the Communications Act is a general statute that applies to all Indians, *see* Opp. at 8:14 - 9:8; section 602 of the Telecommunications disallows the Hopi Tribe, as a "local jurisdiction," from collecting the fees, *see id.* at 7:4 - 8:13; the Communications Act preempts tribal authority, *see* Opp. at 5:14 - 7:3; and the business relationship between Dish and the Hopi tribal members was not consensual. *See* Opp. at 14:16-19. For reasons shown *supra,* each of Dish's arguments fail.

Thus Dish also fails in stating that therefore, tribal exhaustion would serve no purpose but delay. *See id.* at 12:14 - 14:26. Where all of Dish's arguments about "general" statutes, local jurisdictions and preemption fail, so must the argument that the tribal court exhaustion doctrine is demanded only by comity and that the rule is not "unyielding." *See id.* at 12:18-22. Comity is not a doctrine under which a court may exercise discretion. *Dish Network Service LLC v. Laducer* at *10-11("It is well-established that principles of comity require that tribal court remedies must be exhausted before a federal district court should consider relief in a civil case regarding tribal-related activities on reservation land.") (citing *Krempel v. Prairie Island Indian Community,* 125 F.3d 621, 622 (8th Cir. 1997); *Iowa Mut. Ins. Co. v. LaPlante,* 480 U.S. 9, 107 S. Ct. 971 (1987); *Nat'l Farmers Union Ins. Cos. v. Crow Tribe,* 471 U.S. 845, 105 S. Ct. 2447 (1985); *Bruce H. Lien Co. v. Three Affiliated Tribes,* 93 F.3d 1412 (8th Cir. 1996)). "The requirement of exhaustion of tribal remedies is not discretionary; it is mandatory." *Burlington N. R.R. Co. v. Crow Tribal Council,* 940 F.2d 1239, 1245 (9th Cir. 1991)); *see also Dish Network Service LLC* at *11 (Notwithstanding the prudential

nature of the rule, tribal exhaustion is "mandatory . . . when a case fits within the policy.") (citing *Gaming World Int'l, Ltd. v. White Earth Band of Chippewa,* 317 F.3d 840, 849 (8th Cir. 2003); *LaPlante,* 480 U.S. 9, 20 n.14, 107 S. Ct. 971; *Nat'l Farmers Union,* 471 U.S. 845, 856, 105 S. Ct. 2447; *Duncan Energy Co. v. Three Affiliated Tribes,* 27 F.3d 1294, 1300 (8th Cir. 1994)).

The exhaustion of tribal remedies also causes Dish no prejudice. The case against Dish is based on the failure of Dish to pay fees in accordance with Hopi Tribal Ordinance 17. Though Dish complains that the Ordinance itself allows the Hopi Tribe to regulate activity in other ways, *see* Opp. at 6:12 - 7:1, Dish has not alleged that the Hopi Tribe has not taken such additional measures; thus Dish's arguments are not ripe. What the Hopi Tribe seeks instead is for Dish to pay for the privilege of conducting business on Hopi land with members of the Hopi Tribe. This Court should allow the Complaint to go forward in the Hopi Tribal Court and dismiss the Complaint under Fed. R. Civ. Pro. 12(b)(1).

II. CONCLUSION

For the foregoing reasons, the Court must dismiss the Complaint.

Dated this 10th day of August, 2012.

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