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12

13 UNITED STATES DISTRICT COURT

14 DISTRICT OF ARIZONA

15 DISH Network Corporation, a Nevada
corporation; DISH Network L.L.C., a
Colorado limited liability company; and
16 DISH Network Service L.L.C., a
Colorado limited liability company,
17

18 Plaintiffs,

19 v.

20 Eric Tewa, Sr., in his official capacity as
Chief Revenue Officer of the Hopi Tribe
Office of Revenue Commission, an
21 agency of a federally-recognized Indian
tribe; Lamar Keevama,
22 in his official capacity as Deputy
Commissioner of the Hopi Tribe Office
23 of Revenue Commission, an agency of a
federally-recognized Indian tribe; and
24 Merwin Kooyahoema, in his official
capacity as Deputy Commissioner of the
25 Hopi Tribe Office of Revenue
Commission, an agency of a federally-
26 recognized Indian tribe,
27

28 Defendants.

No.

**COMPLAINT FOR
DECLARATORY JUDGMENT
AND INJUNCTIVE RELIEF**

1 Plaintiffs DISH Network Corporation, DISH Network L.L.C. (“DISH”), and
2 DISH Network Service L.L.C. (“DISH Service”) (collectively “DISH Plaintiffs”), allege
3 as follows:

4 **PRELIMINARY STATEMENT**

5 1. The DISH Plaintiffs file this action for Declaratory Judgment and
6 Injunctive Relief under 28 U.S.C. §§ 2201-2202 against Defendants Eric Tewa, Sr.,
7 Lamar Keevama, and Merwin Kooyahoema, who are officials of the Hopi Tribe, a
8 federally-recognized Indian tribe (the “Tribe”), and members of the Hopi Tribe Office
9 of Revenue Commission (“Revenue Commission”). The DISH Plaintiffs seek
10 declaratory and injunctive relief against Defendants’ efforts, in their official capacities
11 as members of the Revenue Commission, to require DISH Network Corporation and
12 DISH Service to register to do business on the Tribe’s reservation, pay an annual license
13 fee, and comply with many other obligations required of persons who register to do
14 business on the reservation including, among other things, the requirement of consenting
15 to the jurisdiction of the Hopi Tribal Court.

16 2. DISH Network Corporation, DISH, and DISH Service are non-
17 members of the Tribe and, as such, are presumed to be beyond the Tribe’s regulatory
18 and adjudicatory jurisdiction. Although DISH, a subsidiary of DISH Network
19 Corporation, provides Direct Broadcast Satellite (“DBS”) television service to a small
20 number of persons who reside on the Tribe’s reservation, Section 303(v) of the
21 Communications Act preempts non-federal regulation of DBS service, and Section 602
22 of the Communications Act explicitly bars local governments from taxing or imposing
23 any fee on the right of DBS providers to do business within their jurisdictions. 47
24 U.S.C. § 303(v); 47 U.S.C. § 152 note. Under long-standing federal court precedent,
25 these preemptive provisions extend to tribal regulations and fees.

26 **PARTIES AND JURISDICTION**

27 3. This is an action for a declaratory judgment under 28 U.S.C. §§ 2201-
28 2202 and related relief.

1 4. Plaintiff DISH Network Corporation is a corporation organized under
2 the laws of the State of Nevada with its principal place of business in Colorado.
3 Plaintiffs DISH and DISH Service are Colorado limited liability companies with their
4 principal places of business in Colorado.

5 5. Defendant Eric Tewa, Sr. is the Chief Revenue Officer of the Hopi
6 Tribe and the head of the Revenue Commission. On information and belief, Defendant
7 Tewa is responsible for the enforcement of the DISH Plaintiffs' alleged obligations
8 under Tribal Ordinance 17A to register to do business and pay a \$500 annual license fee.
9 Defendant Tewa is sued only in his official capacity.

10 6. Lamar Keevama is a Deputy Commissioner of the Revenue
11 Commission. On information and belief, Defendant Keevama is responsible for the
12 enforcement of the DISH Plaintiffs' alleged obligations under Tribal Ordinance 17A to
13 register to do business and pay a \$500 annual license fee. Defendant Keevama is sued
14 only in his official capacity.

15 7. Merwin Kooyahoema is a Deputy Commissioner of the Revenue
16 Commission. On information and belief, Defendant Kooyahoema is responsible for the
17 enforcement of the DISH Plaintiffs' alleged obligations under Tribal Ordinance 17A to
18 register to do business and pay a \$500 annual license fee. Defendant Keevama is sued
19 only in his official capacity.

20 8. Defendants have acted, have threatened to act, or may act under the
21 purported authority of the Tribe to the injury of the DISH Plaintiffs. Defendants'
22 actions are in violation of federal law and in excess of federal limitations placed upon
23 the authority of the Tribe and the Defendants. Because these actions exceed the Tribe's
24 lawful authority, the Defendants' actions are stripped of their official character, and the
25 Defendants no longer share in the Tribe's sovereign immunity. They are, therefore,
26 subject to suit for their actions. *Ex parte Young*, 209 U.S. 123, 159-60 (1908),
27 *superseded by statute on other grounds*, Pub. L. No. 94-574, § 1, 90 Stat. 2721(1976);
28 *Burlington N. & Santa Fe R.R. Co. v. Vaughn*, 509 F.3d 1085, 1092 (9th Cir. 2007) (*Ex*

1 *parte Young* doctrine extends to Indian tribes).

2 9. This Court has jurisdiction over the federal questions raised in this
3 Complaint pursuant to 28 U.S.C. § 1331. Plaintiffs' claims, which challenge the legality
4 of an Indian tribe's exercise of jurisdiction over a non-member, arise under federal law.
5 "[W]hether a tribal court has adjudicative authority over nonmembers is a federal
6 question." *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316,
7 324 (2008).

8 10. An actual case or controversy exists between the parties warranting
9 this Court's declaration and related relief pursuant to 28 U.S.C. §§ 2201-2202.

10 11. Venue is proper in this district under 28 U.S.C. § 1391(b).

11 12. Exhaustion of tribal court remedies is not required here, because the
12 absence of tribal court jurisdiction is clear. *Elliott v. White Mountain Apache Tribal Ct.*,
13 566 F.3d 842, 847 (9th Cir. 2009) ("[W]hen it is 'plain' that tribal court jurisdiction is
14 lacking . . . the exhaustion requirement 'would serve no purpose other than delay.'")
15 (citations omitted). Moreover, when a dispute turns solely on a question of federal law,
16 the rationale for exhaustion of tribal remedies is inapplicable. *Burlington N. Santa Fe*
17 *R.R. Co. v. Assiniboine & Sioux Tribes of the Fort Peck Reservation, Mont.* 323 F.3d
18 767 (9th Cir. 2003).

19 **GENERAL ALLEGATIONS**

20 13. DISH provides DBS service to about 14 million households across the
21 nation, including a small number of residents (fewer than 900) of the Tribe's
22 reservation. DBS programming is transmitted to DISH's subscribers throughout the
23 United States by a number of satellites, none of which is located on the Tribe's
24 reservation. In fact, DISH's satellites are "geostationary," meaning they move at the
25 same velocity as the Earth itself, and therefore are stationed at a fixed longitude, some
26 22,236 miles above the Earth's equator. The programming is uplinked to these satellites
27 from uplink centers in Cheyenne, Wyoming and Gilbert, Arizona, among other
28 locations, none of which is situated on the Reservation. In turn, the several hundreds of

1 programming networks that constitute DISH's DBS service travel to these uplink
2 centers from points in the United States and abroad, none of which is on the
3 Reservation.

4 14. DISH provides its service pursuant to licenses issued by the Federal
5 Communications Commission ("FCC") under the Communications Act, 47 U.S.C. § 303
6 et. seq.

7 15. Subscribers enter into a subscription agreement with DISH.
8 Subscribers are provided with a satellite dish receiver that is usually attached to the roof
9 of their residence and oriented toward the satellite signal and a set top box to decode the
10 encoded signal, which is attached to their television set. DISH has no presence on the
11 reservation, and never enters the reservation. Prospective subscribers must contact
12 DISH at one of its off-reservation locations to arrange for service and DISH receives
13 payments under the subscription agreement only at off-reservation locations.

14 16. DISH Service provides installation service for DISH. DISH Service
15 enters the reservation to install the satellite dish receiver and the decoder box on the
16 subscriber's residence. DISH Service has no independent relationship or agreements,
17 express or implied, with the subscriber.

18 17. DISH Network Corporation is the holding company of DISH. DISH
19 Network Corporation provides no service to the Hopi Tribe, Hopi Tribal Members, or
20 residents of the Hopi Reservation. Like DISH, it has no presence on, and does not enter,
21 the Hopi Reservation.

22 18. In 2009, the Revenue Commission informed DISH Service for the first
23 time that it had to apply for and obtain a license to do business on the Hopi Reservation
24 and pay an annual fee, allegedly pursuant to Hopi Tribal Ordinance 17A. (Attached
25 herein as Ex. A.)

26 19. DISH Service respectfully declined to apply for a Hopi business
27 license or pay a business license fee on two grounds. First, Tribal regulation of DBS
28 service is preempted by Section 303(v) of the Communications Act, which specifically

1 gives the FCC “exclusive jurisdiction to regulate the provision of direct-to-home
2 satellite services.” 47 U.S.C. § 303(v). Second, local fees or taxes on direct-to-home
3 satellite service are preempted by Section 602 of the 1996 Telecommunications Act. 47
4 U.S.C. § 152 note. In Section 602 (c), Congress provided a limited exception to the
5 general rule contained in this Section, specifically for States, but did not extend the
6 exception to any other taxing entities, such as tribes.

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

15 21. Numerous federal courts have held that a grant of exclusive regulatory
16 jurisdiction to a federal agency necessarily preempts state and local regulation in the
17 same field. *See City of Auburn v. United States*, 154 F.3d 1025 (9th Cir. 1998). The
18 legislative history of Section 303(v) makes clear that Congress believed that exclusive
19 federal jurisdiction was necessary to “ensure . . . a unified, national system of rules
20 reflecting the national, interstate nature of DBS service,” H.R. Rep. No. 104-204 [I], at
21 123, 104th Cong. (1995), and that “any additional regulatory burdens imposed by State
22 or local governments would be inappropriate and contrary to the Federal scheme for
23 DBS regulation.” S. Rep. No. 103-367, at 45, 103d Cong. (1994).

24 22. Section 602 of the Telecommunications Act states that “[a] provider of
25 direct-to-home satellite service shall be exempt from the collection or remittance, or
26 both, of any tax or fee imposed by any local taxing jurisdiction on direct-to-home
27 satellite service.” 47 U.S.C. § 152 note. The term “tax or fee” is defined broadly to
28 include “any local sales tax, local use tax, local intangible tax, local income tax,

1 business license tax, utility tax, privilege tax, gross receipts tax, excise tax, franchise
2 fees, local telecommunications tax, or any other tax, license, or fee that is imposed for
3 the privilege of doing business, regulating, or raising revenue for a local taxing
4 jurisdiction.” *Id.* See 141 Cong. Rec. (statement of Rep. Hyde) (“This change balances
5 the need to protect State sovereignty against the need to protect the direct broadcast
6 services from the administrative nightmare that would result from subjecting them to
7 local taxation in numerous local jurisdictions.”); 142 Cong. Rec. (statement of Rep.
8 Hyde) (“Section 602 reflects a legislative determination that the provision of direct-to-
9 home satellite service is national, not local in nature. . . . To permit thousands of local
10 taxing jurisdictions to tax such a national service would create an unnecessary and
11 undue burden on the providers of such services.”). States are explicitly exempted from
12 that prohibition, but tribes are not.

13 23. Sections 303(v) and Section 602 of the Communications Act apply to
14 Tribes. A federal statute of general applicability, like the Communications Act, applies
15 to an Indian tribe unless one of the following three exceptions apply: 1) the law touches
16 the right to self-governance in purely intramural matters; 2) the application of the law to
17 the tribe would abrogate treaties; or 3) legislative history or some other means
18 establishes that Congress intended the law not to apply on reservations. See *Donovan v.*
19 *Coeur d'Alene Tribal Farm*, 751 F.2d 1113, 1116 (9th Cir. 1985). See also *Solis v.*
20 *Matherson*, 563 F.3d 425, 430 (9th Cir. 2009). None of these exceptions applies here.

21 24. Allowing the Hopi Tribe to apply Hopi Ordinance 17A to the DISH
22 Plaintiffs and DBS service would defeat Congress’s purpose in giving the FCC
23 “exclusive jurisdiction to regulate the provision of [DBS] services.” 47 U.S.C. § 303(v).
24 Ordinance 17A, for example, would allow the Hopi Tribe to prevent the provision of
25 DBS services to persons living on the Hopi reservation merely because the Hopi Tribe
26 believes that DISH Plaintiffs do not “adequately serve the economic needs of the
27 community.” (Hopi Tribal Ordinance 17A § 17.6.4). Ordinance 17A would also require
28 DISH Plaintiffs to post a bond (*Id.* § 17.2.3), would impose a gross receipts tax and

1 authorize the collection of other fees and taxes (*Id.* §§ 17.3.1 and 17.3.2), would require
2 DISH Plaintiffs to consent to the jurisdiction of the Hopi Tribal Court (*Id.* § 17.3.6),
3 would impose specific requirements for customer disclosures, including translation of
4 such disclosures into Hopi (*Id.* §§ 17.5.2 and 17.5.4), would allow the Hopi Tribe to
5 dictate the format of customer bills (*Id.* § 17.5.3), and would give customers various
6 rights, including the right to require the attendance of a DISH Plaintiff representative at
7 the Hopi Tribe’s public meetings to answer complaints (*Id.* § 17.4.9). It was to relieve
8 DBS providers from the patchwork of such different and conflicting local requirements
9 that Congress placed exclusive jurisdiction for the regulation of DBS service in a single
10 federal agency, the FCC.

11 25. Because federal law has given the FCC exclusive jurisdiction to
12 regulate the provision of DBS, any regulatory jurisdiction the Hopi Tribe may have
13 otherwise had over the provision of DBS service has been preempted. Since a tribe’s
14 adjudicatory jurisdiction cannot exceed its regulatory jurisdiction, the Hopi Tribal Court
15 lacks subject matter jurisdiction over the Revenue Commission’s tribal court suit against
16 DISH Corporation and DISH Service in which the Revenue Commission seeks to
17 require their compliance with Hopi Tribal Ordinance 17A. The FCC’s exclusive
18 jurisdiction would also preempt a Tribal Court action against DISH.

19 26. The Hopi Tribal Court also lacks subject matter jurisdiction over DISH
20 Network Corporation and DISH Service, non-Indian companies, under the principles
21 articulated in *Montana v. United States*, 450 U.S. 544 (1981). An attempt by an Indian
22 tribe or its tribal court to exercise jurisdiction over the conduct of nonmembers is
23 presumptively invalid, and the tribe bears the burden of showing that it has a basis for
24 jurisdiction over them. *Plains Commerce Bank*, 554 U.S. at 330. Neither DISH
25 Corporation nor DISH Service has any consensual agreement with the Hopi Tribe or its
26 members and the consensual relationship between DISH and certain individual residents
27 of the Hopi Reservation with respect to the provision of DBS service would not support,
28 under the principles of *Montana*, jurisdiction over any of the DISH Plaintiffs with

1 respect to matters not closely related to those consensual relationships.

2 **FIRST CLAIM FOR RELIEF (DECLARATORY JUDGMENT)**

3 27. The allegations in paragraph 1 through 26 are re-alleged and
4 incorporated by reference as if set forth in full herein.

5 28. The Court should declare that Hopi Tribal Ordinance 17A is federally
6 preempted by 47 U.S.C. § 303(v), and that any and all fees imposed under the
7 Ordinance or otherwise by the Tribe are preempted by 47 U.S.C. § 152 note.

8 29. The Court should declare the Hopi Tribal Revenue Commission
9 Business License, Ordinance No. 17A, invalid and inapplicable as to DISH Network
10 Corporation, DISH, and DISH Service.

11 30. The Court should declare that the Defendants lack authority to lawfully
12 apply and enforce Ordinance 17A against DISH Network Corporation, DISH, or DISH
13 Service.

14 **SECOND CLAIM FOR RELIEF (INJUNCTION)**

15 31. The allegations set forth in paragraph 1 through 30 are re-alleged and
16 incorporated by reference as if set forth in full herein.

17 32. Defendants should be enjoined from applying or enforcing Hopi
18 Ordinance 17A against DISH Network Corporation, DISH, or DISH Service or
19 requiring DISH Network Corporation, DISH, or DISH Service to register to do business
20 or pay any levy or tax for the privilege of doing business on the reservation.

21 33. Defendants should be enjoined from continuing to prosecute *Hopi*
22 *Tribe Office of Revenue Commission v. DISH Network Corporation, DISH Network*
23 *Service L.L.C. and DOES 1 through 50*, Case No. 2011-cv-0130 in the Hopi Tribal
24 Court.

25 **PRAYER FOR RELIEF**

26 WHEREFORE, Plaintiffs seek judgment against Defendants, as follows:

27 1. For a declaratory judgment that: federal law preempts the Tribe from
28 regulating the provision of DBS service to the Reservation; Ordinance 17A is null, void

1 and of no effect as to the provision of DBS service on the reservation; and Defendants
2 lack the authority to lawfully apply and enforce the provisions of Ordinance 17A against
3 DISH Network Corporation, DISH, or DISH Service, through tribal proceedings or
4 otherwise.

5 2. For a permanent injunction: prohibiting the Defendants from continuing
6 to prosecute or adjudicate *Hopi Tribe Office of Revenue Commission v. DISH Network*
7 *Corporation, DISH Network Service L.L.C. and DOES 1 through 50*, Case No. 2011-cv-
8 0130 in Tribal Court, or taking any steps to enforce Ordinance 17A as to Plaintiffs;
9 prohibiting the Defendants from collecting taxes or fees from DISH Plaintiffs for the
10 privilege of doing business on the Reservation or otherwise in connection with the
11 provision of DBS service to residents of the Reservation; and enjoining the
12 commencement, prosecution, maintenance, or consideration of any proceedings in tribal
13 court against DISH Plaintiffs seeking to require any of the above from DISH Plaintiffs.

14 3. For such other and further relief as the Court may deem appropriate.

15 RESPECTFULLY SUBMITTED this 19th day of April, 2012.

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17 By /s/ Peter S. Kozinets

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27 * *Pro Hac Vice Applications*
28 *Forthcoming*