

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

North Central Electric Cooperative, Inc.,)	Supreme Court
)	Case No. 20130075
Appellant)	
vs.)	
)	
North Dakota Public Service Commission,)	
Otter Tail Power Company and)	
Turtle Mountain Band of Chippewa Indians)	
)	
Appellees)	
)	
)	

APPEAL FROM THE DISTRICT COURT
ORDER AND JUDGMENT ENTERED FEBRUARY 25, 2013
THE HONORABLE GAIL HAGERTY
SOUTH CENTRAL JUDICIAL DISTRICT,
BURLEIGH COUNTY, NORTH DAKOTA,
CIVIL NO. 08-2012-CV-01464

**BRIEF OF APPELLEE
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STATEMENT OF THE ISSUE

[1] Whether the Public Service Commission correctly determined it lacked regulatory jurisdiction over the Turtle Mountain Band of Chippewa Indians' Tribal Resolution permitting Otter Tail Power Company to supply electric service to the tribal owned Sky Dancer Casino located on tribal trust land.

STATEMENT OF THE CASE

[2] The Turtle Mountain Band of Chippewa Indians (“Tribe”) passed a resolution designating Otter Tail as the electric service provider for the Sky Dancer Casino (“Casino”) on November 23, 2011. Thereafter, North Central Electric Cooperative, Inc. (“North Central”) commenced this case by filing a Complaint against Otter Tail Power Company (“OTP”) with the North Dakota Public Service Commission (“PSC”) seeking to enjoin OTP from providing electric service to the Sky Dancer Casino under North Dakota’s Territorial Integrity Act (“TIA”), N.D.C.C. Ch. 49-03. App. 5. OTP moved for an Order dismissing North Central’s Complaint because the PSC had no regulatory jurisdiction over the Turtle Mountain Band of Chippewa Indians’ Tribal Resolution permitting OTP to supply electric service to the tribal owned Casino located on tribal trust land. App. 27-28. The PSC ordered North Central’s Complaint be dismissed, concluding it had no regulatory jurisdiction over OTP’s electric service to the Casino. App. 77. North Central appealed the PSC’s Order to the district court. App.84. The district court affirmed the PSC’s Order dismissing North Central’s Complaint. App. 166. North Central now appeals that decision. App. 169.

STATEMENT OF FACTS

[3] OTP is a public utility incorporated under the laws of Minnesota and engaged, among other things, in the generation, transmission, and distribution of electric energy as an electric utility. App. 28. OTP sells electric energy at retail in the states of Minnesota, North Dakota, and South Dakota. Id. OTP is currently a non-exclusive supplier of electric energy on the Turtle Mountain Reservation. App. 70.

[4] The Turtle Mountain Band of Chippewa Indians is a federally-recognized Indian tribe. App. 28. The Tribe is located on the Turtle Mountain Reservation in Rollette County, North Dakota. Id. The Tribe promulgated the Turtle Mountain Tribal Code, which includes the Turtle Mountain Tribal Utility Code. App. 55.

[5] The Sky Dancer Casino is a gaming casino owned and operated by the Tribe and located on tribal trust land on the Turtle Mountain Reservation. App. 55. On November 23, 2011, the Tribe passed Resolution Number TMBC598-11-11, authorizing the Tribe to enter into a contract with OTP to provide electric service to the Sky Dancer Casino. App. 38.

[6] Following the filing of North Central's Complaint with the PSC, the Tribe, through its Tribal Chairman, filed a letter with the PSC stating it was aware of the proceeding and that the Tribe confirms it is exercising its inherent sovereignty to determine which utility will provide electric service to the Casino pursuant to the legal precedent set forth in Devils Lake Sioux Tribe v. North Dakota Public Service Commission, 896 F.Supp. 955 (D.N.D. 1995) ("Devils Lake Sioux Tribe (1995)"). Docket Entry (DE) 13. On May 1, 2012, the Tribe served a Petition to Intervene for Special Appearance to Object to Jurisdiction in the underlying action. DE 25. On May

4, 2012, the Administrative Law Judge granted the Tribe's Petition to Intervene for Special Appearance to Object to Jurisdiction. DE 31. The Tribe appeared at the May 7, 2012, hearing to contest the PSC's jurisdiction over its determination of which utility would provide service to the Casino. DE 39.

STANDARD OF REVIEW

[7] Courts exercise limited review in appeals from administrative agency decisions under the Administrative Agencies Practice Act, and the agency's decision is accorded great deference. Berger v. N.D. Dep't of Transp., 2011 ND 55, ¶ 5, 795 N.W.2d

707. This Court will not reverse an agency decision unless:

1. The order is not in accordance with the law.
2. The order is in violation of the constitutional rights of the appellant.
3. The provisions of this chapter have not been complied with in the proceedings before the agency.
4. The rules or procedure of the agency have not afforded the appellant a fair hearing.
5. The findings of fact made by the agency are not supported by a preponderance of the evidence.
6. The conclusions of law and order of the agency are not supported by its findings of fact.
7. The findings of fact made by the agency do not sufficiently address the evidence presented to the agency by the appellant.
8. The conclusions of law and order of the agency do not sufficiently explain the agency's rationale for not adopting any contrary recommendations by a hearing officer or an administrative law judge.

N.D.C.C. § 28-32-46; Dakota Res. Council v. N.D. PSC, 2012 ND 72, ¶ 5, 815 N.W.2d

286. In reviewing an agency's findings of fact, this Court does not substitute its judgment for that of the agency or make independent findings. Capital Elec. Coop. v. City of Bismarck, 2007 ND 128, ¶ 31, 736 N.W.2d 788.

SUMMARY OF THE ARGUMENT

[8] The PSC correctly determined it lacked regulatory jurisdiction over the Turtle Mountain Band of Chippewa Indians' Tribal Resolution permitting OTP to supply electric service to the tribal owned Sky Dancer Casino located on tribal trust land. The PSC's decision is consistent with the current state of the law set forth in the Devils Lake Sioux Tribe (1995) case recognizing a narrow exception to State regulatory jurisdiction when the regulation would interfere with a Tribe's inherent authority to determine the electric service provider to a tribal owned business on tribal trust land. The PSC's decision is also consistent with the long-standing United States Supreme Court precedent recognizing Indian Tribes' right to self-government and the inherent authority to govern the activities occurring on tribal land.

[9] On appeal, North Central is requesting this Court overrule the PSC's determination as to its regulatory jurisdiction and to deprive the Tribe of its right to determine which electric service provider will provide service to a facility that it owns and is located on tribal trust land. North Central's chief argument is that this Court must follow the precedent set forth in the Otter Tail (1990) case. North Central's argument is misplaced, as the Otter Tail (1990) case decided a different legal issue than the narrow issue in the present case. This brief sets forth the critical distinctions between the Otter Tail (1990) case, the Devils Lake Sioux Tribe (1995) case, and the present action. OTP's brief also analyzes the U.S. Supreme Court opinions and sets forth its position that the PSC's order in this case is consistent with those opinions.

LAW AND ARGUMENT

[10] OTP requests this Court affirm the PSC's Order dismissing North Central's Complaint. The PSC's decision recognizes the Tribe has authority to determine the electric service provider for a tribal owned facility located on tribal trust land.

I. The PSC's Order dismissing North Central's Complaint is in accordance with the law, articulated in the Devils Lake Sioux Tribe (1995) case, holding that a tribe may by resolution or contract determine who is to supply electrical service to Tribal owned facilities located upon Indian owned or tribal trust lands, without regard to the rate structure or other regulations of the North Dakota Public Service Commission.

[11] The Devils Lake Sioux Tribe (1995) opinion is directly on point in this case. It is a decision that concluded a dispute between the PSC and OTP that spanned seven years of litigation. Because the course of that litigation had a complicated and lengthy history, it is summarized below in section VII of this brief. While the course of that litigation may have been long and complex, the ultimate holding of the Devils Lake Sioux Tribe (1995) Court is not complicated. That holding carved out a narrow, but important, exception to the PSC's authority to regulate electric service over tribal land:

the Tribe may by resolution or contract determine who is to supply electrical service to Tribal owned businesses located upon Indian owned or trust lands, without regard to the rate structure or other regulations of the North Dakota Public Service Commission, and the Public Service Commission is restrained from any sanctions against Otter Tail, or any future competitor, for providing such service.

896 F.Supp. at 961. The Devil's Lake Sioux Tribe (1995) Court concluded this narrow exception protects the Tribe's inherent sovereignty and authority to regulate consensual relationships between the Tribe and the utilities, while preserving the political integrity, economic security, and health and welfare of the Tribe. See id. (citing Montana v. United States, 450 U.S. 544 (1981)).

[12] The narrow exception articulated in the holding of the Devils Lake Sioux Tribe (1995) case applies directly to the present case. The PSC found that the Sky Dancer Casino is owned and operated by the Tribe on tribal trust land and that the Tribe passed a resolution authorizing OTP to provide electric service to the Casino. App. 69. Based upon these findings, the PSC dismissed North Central's Complaint concluding the Tribe has authority to determine the electric service provider for the Casino, and it would not be permissible to restrain or sanction OTP for providing such service. App. 77.

II. The Otter Tail (1990) case, relied upon by North Central in its argument, addressed an issue different from and broader than the issue presented in this case and in the Devils Lake Sioux Tribe (1995) case.

[13] North Central's arguments in this case largely rely on a misapplication of the North Dakota Supreme Court's ruling in Otter Tail (1990). The issue discussed in the Otter Tail (1990) case was whether the Devils Lake Sioux Indian Tribe had the inherent sovereignty over electric service to all locations within the reservation boundaries. 451 N.W.2d at 99 (determining the Tribe does not have unlimited inherent sovereignty to regulate all electric service on the reservation). This issue is much broader than the issue addressed in the Devils Lake Sioux Tribe (1995) case and the issue in controversy in the present case: specifically, whether a tribe has inherent sovereign authority over those limited locations where the electric service to be provided is to a tribal owned business located on tribal trust land. This narrower issue was not addressed in the ruling of the Otter Tail (1990) case.

[14] The importance of the distinction between the broader issue and the narrower issue was highlighted by Justice Levine in her concurrence opinion in the Otter Tail (1990) case. In it she recognized the critical distinction between these two issues

and stated she would have reached a different result if she was asked to determine the narrower issue of the Tribe's regulatory authority over electric service to a tribal business located on tribal land. 451 N.W.2d at 108.

[15] As described above, the narrower issue was, however, addressed in the Devils Lake Sioux Tribe (1995) case, where the Court ruled that a tribe may by resolution or contract determine who is to supply electrical service to tribal owned facilities located upon Indian owned or tribal trust lands, without regard to the rate structure or other regulations of the North Dakota PSC. 896 F.Supp. at 961. The PSC correctly interpreted both cases and concluded the issue present in this case is analogous to the narrow issue in Devils Lake Sioux Tribe (1995) case. App. at 77. In dismissing North Central's Complaint, the PSC correctly determined the Devils Lake Sioux Tribe (1995) holding is the appropriate authority.

III. There are also several other aspects of the Otter Tail (1990) case that make it distinguishable from the present case.

[16] In addition to deciding a different legal issue, the Otter Tail (1990) case is distinguishable from the present case for several other reasons. North Central's argument on appeal fails to recognize the critical factual distinctions between the present case and the Otter Tail (1990) opinion.

[17] One such critical distinction is the fact that the Devils Lake Sioux Tribe did not intervene to assert its inherent sovereignty in the Otter Tail (1990) case. See 451 N.W.2d at 97. The Otter Tail (1990) Court held that OTP lacked standing to assert the Devils Lake Sioux Tribe's self-government interests. Id. In the present case, however, the Tribe has intervened for the limited purpose of asserting its inherent sovereignty over

the determination of which utility will provide service to its Casino. DE 31. Accordingly, the issue of tribal sovereignty is properly before the Court on this appeal.

[18] Another factual distinction between in the present case and the Otter Tail (1990) case is that when Otter Tail (1990) was decided the Devils Lake Sioux Tribe had not asserted any regulatory control over electric utilities on the reservation. Justice Meschke repeatedly relied upon the fact that the Devils Lake Sioux Tribe had no comprehensive system for regulation of electric utilities on the reservation and this was the first instance where the Tribe attempted any type of electric utility regulation. 451 N.W.2d at 101, 103. The Otter Tail (1990) Court recognized the Tribe had not developed any regulations regarding rates, service, safety standards, or service territory. Id. at 103. The Court also determined the Tribe had traditionally acquiesced to “the State’s exclusive and long-standing regulation of electric power suppliers.” Id. The Tribe’s failure to assert any jurisdiction over regulating electric utilities in the past and its acquiescence to State regulatory authority was a significant consideration in this Court’s holding the Tribe did not have the inherent sovereignty to regulate electric service on the reservation. Id. at 103-04.

[19] However, within months of the Otter Tail (1990) decision, the Devils Lake Sioux Tribe adopted a comprehensive set of regulations governing the rates and provisions of service to all customers on the reservation. Devils Lake Sioux Tribe (1995), 896 F.Supp. at 958-59. By adopting regulations to govern electric service on the reservation, the Devils Lake Sioux Tribe manifested an intent and authority to regulate the activities of non-Indians supplying electric service on the reservation that threatens the political integrity, economic security, and health and welfare of the Tribe. Id., at 961

(citing Montana exception factors). This was a critical factual distinction from the Otter Tail (1990) decision. The Devils Lake Sioux Tribe (1995) Court concluded that based upon the Tribe's actions in developing a regulatory system, it carved out an exception to the general rule of state regulatory control over non-Indians on the reservation, that when electric service is sought to be provided to a tribal owned business located on tribal land, the necessary nexus between tribal interests and inherent sovereignty is present. Id. Due to this nexus, the court concluded the Devils Lake Sioux Tribe had a right to determine which utility provided electric service to its facilities and "the Public Service Commission is restrained from any sanctions against Otter Tail, or any future competitor, for providing such service" to the Tribe. Id.

[20] In the present case, the Turtle Mountain Band of Chippewa Indians has adopted a comprehensive set of regulations governing the rates and provisions of service to all customers on the Turtle Mountain Reservation. App. 69. By adopting regulations governing electric service on the reservation, the Tribe has manifested an intent and authority to regulate the activities of non-Indians supplying electric service on the Turtle Mountain Reservation. See Devils Lake Sioux Tribe, 896 F.Supp. at 961. The Tribe's conduct in enacting regulations to govern electric service on the Reservation demonstrates an inherent sovereignty to regulate activities that affect the Tribe's interests, which is analogous to the actions of the Devils Lake Sioux Tribe in adopting similar regulations. Id. Due to the Tribe's inherent authority to regulate electric service to its businesses located on tribal land under this narrow exception, the PSC is not permitted to exert regulatory authority over electric service to the tribal owned Sky Dancer Casino located on tribal trust land. Id.

IV. The PSC's Order in this case and the Devil's Lake Sioux Tribe (1995) ruling are in accord with U.S. Supreme Court precedent governing tribal sovereignty.

[21] In addition to misinterpreting the Otter Tail (1990) case, North Central argues that the Devil's Lake Sioux Tribe (1995) opinion should be ignored and the PSC's Order in this case overturned based upon U.S. Supreme Court cases addressing issues of tribal sovereignty. North Central's arguments are not supported by the cases it cites.

[22] The Devil's Lake Sioux Tribe (1995) case is consistent with and supported by the U.S. Supreme Court precedent on tribal authority over tribal affairs. Additionally, the PSC conducted a detailed analysis of the leading U.S. Supreme Court precedent cases when it reached its decision that its exercise of jurisdiction in this case would violate the Tribe's inherent sovereignty. App. at 72-76.

[23] The issue in this case is whether the PSC's regulatory authority would infringe on the right of the Tribe to make its own laws governing electric service to a tribal facility on tribal land. See Williams v. Lee, 358 U.S. 217, (1959) (stating absent governing Acts of Congress, the question has always been whether state action infringed on the right of Indians to make their own laws and be governed by them). Indian tribes are unique aggregations possessing attributes of sovereignty over both their members and their territory and, because of their sovereign status, tribes and their reservation lands are insulated in some respects by an immunity from state and local control. New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 332 (1983). The traditional notions of Indian sovereignty provide a crucial backdrop against which any assertion of state authority must be assessed. Id. at 334.

[24] Indian tribes possess a broad measure of civil jurisdiction over the activities of non-Indians on Indian reservation lands in which the tribes have a significant interest. Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 139 (1982); Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134, 152 (1980). Both the tribes and federal government are committed to the goals of promoting tribal self-government and encouraging tribal self-sufficiency and economic development. See Mescalero Apache Tribe, 462 U.S. at 334–35; see also White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 149 (1980) (recognizing a federal policy of “encouraging tribes to revitalize their self-government and assume control over their business and economic affairs”); Kerr-McGee Corp. v. Navajo Tribe of Indians, 471 U.S. 195 (1985) (stating the Federal Government is firmly committed to the goal of promoting tribal self-government). The U.S. Supreme Court has repeatedly held Indian tribes have the power to manage the use of their lands and resources and to undertake and regulate economic activity within the reservations. Id. at 335.

[25] Resolution of conflicts between the jurisdictions of States and Indian tribes has depended on whether the state action infringed on the rights of Indian tribes to make their own laws and be ruled by them. Fisher v. Montana, 424 U.S. 382, 386 (1976) (noting the right of the tribe to govern itself independent of state law has been consistently protected by federal law). A State may not assert regulatory authority over a tribal reservation or its members if it will unlawfully infringe on the right of the Tribe to make its own laws and be ruled by them. White Mountain Apache Tribe, 448 U.S. at 142; Mescalero Apache Tribe, 462 U.S. at 332 (explaining a State may not act in a manner that infringes on an Indian Tribe’s right to make their own laws and be ruled by

them). Tribal sovereignty is dependent on, and subordinate to, only the Federal Government, not the States. Colville, 447 U.S. at 154. If the authority of Indian governments over reservation affairs is to be taken away from the Tribes, it is for Congress to do it. Williams, 358 U.S. at 223. “Only the Federal Government may limit a tribe’s exercise of its sovereign authority.” Merrion, 455 U.S. at 147. This Court has also recognized “Within Indian country state jurisdiction is preempted both by federal protection of tribal self-government and by federal statutes on other subjects relating to Indians, tribes, their property and federal programs.” See Winer v. Penny Enterprises, Inc., 2004 ND 21, ¶ 10, 674 N.W.2d 9 (citing F. Cohen, Handbook of Federal Indian Law 349 (1982)).

[26] The exercise of the PSC’s jurisdiction in this case would plainly interfere with the Tribe’s power of self-government exercised through its Tribal resolution selecting OTP as the electric service provider for the Casino and its enactment of the Tribal Utility Code. North Central has failed to cite any federal statute which would give the State of North Dakota the authority to interfere with the Tribe’s right of self-government in selecting an electric service provider for its land. See Fisher, 424 U.S. at 388. The PSC’s exercise of jurisdiction over the Tribe’s determination of which utility would provide electric service to the Casino would effectively nullify the Tribe’s unquestioned authority to regulate its own land and resources, would interfere with the Tribe’s utility regulation code, and threaten Congress’ firm commitment to the encouragement of tribal self-sufficiency and economic development. See Mescalero Apache Tribe, 462 U.S. at 343. Accordingly, the PSC’s determination in this case that it

does not have authority to interfere with the Tribe's inherent sovereignty is consistent with the U.S. Supreme Court decisions cited herein and long-standing federal policy.

[27] North Central's Complaint against OTP in this case is a collateral attack on the Tribe's sovereignty to regulate its Casino located on the Tribe's land. In support of its position, North Central argues the PSC's Order is not consistent with U.S. Supreme Court decision in Montana and its progeny. However, North Central fails to cite a single case in which the U.S. Supreme Court, or any other court, has held that a State has regulatory authority over a tribal business located on tribal owned land. Likewise, OTP is unaware of any case that specifically contradicts the Devils Lake Sioux Tribe (1995) case holding an Indian tribe has the exclusive authority to determine which electric utility can supply service to a tribal owned business on tribal land. See 896 F.Supp. at 961.

[28] North Central's argument is based in part, upon its misinterpretation of the holding in Montana. North Central argues the PSC did not properly apply the Montana test in determining whether it had regulatory jurisdiction over electric service to the casino. However, the issue in Montana was whether the Tribe had the power to regulate fishing and hunting of nonmembers on reservation land owned by nonmembers. 450 U.S. at 557. With respect to the Tribe's authority to regulate its own land, the Montana Court agreed with the lower court's decision, holding the Tribe may prohibit nonmembers from hunting or fishing on land belonging to the Tribe or held by the United States in trust for the Tribe. Id. The narrow issue in the present case falls squarely within the Montana holding that a Tribe has regulatory authority over tribal owned land.

[29] The Montana opinion only addressed the narrow issue of whether the Tribe had regulatory authority over nonmembers on non-tribal owned land. 450 U.S. at

557. There was no dispute the Tribe had complete authority to regulate nonmember activity on tribal trust land. See id.; see also White Mountain Apache Tribe, 448 U.S. at 151 (explaining there is a significant geographical component to tribal sovereignty, which remains highly relevant in determining whether State authority has exceeded its permissible limits). Likewise, in Brendale the majority also concluded the Tribe had the sole regulatory authority to zone the land in the “closed” area of the reservation. 492 U.S. at 444, 449. Because the activity at issue involves regulation of tribal trust land, the Tribe has the exclusive authority to regulate such land. Montana, 450 U.S. at 557.

[30] North Central’s argument that the PSC failed to properly analyze the Montana exceptions is misplaced. In setting forth the second prong of the test determining whether Indian tribes retain inherent sovereign power to exercise civil jurisdiction over non-Indians on the reservation, the Montana Court stated, “A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians **on fee lands** within its reservation when the conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.” 450 U.S. at 566¹ (emphasis added). In South Dakota v. Bourland, 508 U.S. 679, 689 (U.S. 1993), the U.S. Supreme Court explained the holdings in Montana and Brendale:

Montana and Brendale establish that when an Indian tribe conveys ownership of its tribal lands to non-Indians, it loses any former right of absolute and exclusive use and occupation of the conveyed lands. The abrogation of this greater right, at least in the context of the type of area at issue in this case, implies the loss of regulatory jurisdiction over the use of the land by others.

¹ In Montana, non-Indian fee lands refer to reservation land acquired in fee simple by non-Indian owners. 450 U.S. at 548.

The Montana and Brendale opinions must be read in light of their limited applicability to circumstances where the Tribe is attempting to regulate activity on land within the reservation not owned by the Tribe. When the land is owned by the Tribe, it has the absolute and exclusive use and occupation of the land, which also implies regulatory jurisdiction over tribal owned land. See Bourland, 508 U.S. at 689; Montana, 450 U.S. at 557.

[31] North Central argues the PSC's determination the Tribe has the inherent sovereignty to determine which electric service provider will provide service to its tribal owned business located on tribal trust land is contrary to numerous other United States Supreme Court opinions. See Appellant Brief, ¶ 31 (citing Plains Commerce Bank v. Long Family Land and Cattle Co., 554 U.S. 316 (2008); Atkinson Trading Co. v. Shirley, 532 U.S. 645 (2001); Strate v. A-1 Contractors, 520 U.S. 438 (1997); and Bourland, 508 U.S. at 694-95). However, each of the cases cited to by North Central are distinguishable from the present case.

[32] In Bourland, the Court was presented with the issue of whether the Tribe may regulate hunting and fishing by non-Indians on lands owned by the United States. 508 U.S. at 681-82. The Court found when Congress acquired the tribal land for the United States it eliminated the Tribe's power to exclude non-Indians from these lands, and with that the incidental regulatory jurisdiction formerly enjoyed by the Tribe over its lands. Id. at 688. The Bourland opinion does not restrict the Tribe's regulatory authority over non-Indians on land owned by the Tribe.

[33] In Strate, the Court was presented with the issue of whether tribal courts had adjudicatory jurisdiction over personal injury actions arising on the reservation

against defendants who are not tribal members. 520 U.S. at 442. As part of its analysis, the Court reviewed the general rule in Montana. Id. at 446. The Court recognized the Montana rule only applies to civil authority over the conduct of nonmembers on non-Indian land. Id. The Strate Court explained the Montana rule does not apply to a Tribe’s regulatory authority over land owned by or held in trust for the Tribe. Id. (stating the “Montana Court recognized that the Crow Tribe retained power to limit or forbid hunting and fishing by nonmembers on land still owned by or held in trust for the Tribe”). The Strate Court agreed with the Montana precedent that “the tribes retain considerable control over nonmember conduct on tribal land.” Id. at 454.

[34] In Atkinson, the Court was presented with the issue of whether the Montana exceptions permit a Tribe’s attempt to tax nonmember activity occurring on non-Indian fee land. 532 U.S. at 647. The Atkinson opinion again focused on the application of the Montana decision to tribal jurisdiction of non-Indian conduct occurring on non-Indian fee land. Id. at 651-52. The Court specifically recognized that an Indian Tribe’s sovereign power to tax is limited to tribal land. Id. at 653. The Court ultimately concluded that the Tribe’s taxation of nonmembers on non-Indian land was invalid because it had no relation to the political integrity of the Tribe. Id. at 659.

[35] In its most recent case addressing Indian sovereignty, the U.S. Supreme Court was presented with the issue of whether the tribal court had jurisdiction to adjudicate a claim against a nonmember bank for the sale of fee land it owned to another nonmember. Plains Commerce Bank, 554 U.S. at 320. The Court again analyzed Montana to determine the scope of a tribe’s inherent sovereignty to regulate the conduct of nonmembers. Id. at 328. The Court explained the sovereignty Indian tribes retain is of

a unique and limited character and centers on the land held by the tribe and on tribal members within the reservation. *Id.* at 327. The status of the land is relevant to the applications of the Montana exceptions. *Id.* at 331. The Plains Commerce Bank Court determined the cases since Montana addressing regulation on tribal owned land have permitted a Tribe's regulation of nonmember conduct on tribal land. *Id.* at 333 (citing Merrion, 455 U.S. 130, Kerr-McGee Corp., 471 U.S. 195, and Mescalero Apache Tribe, 462 U.S. 324).

[36] None of the cases cited by North Central are contrary to the PSC's determination that it did not have regulatory authority over the Tribe's Resolution permitting OTP to supply electric service to the tribal owned Casino located on tribal trust land. Rather, the Montana opinion and its progeny support the PSC's determination that an Indian Tribe has regulatory authority to control nonmember conduct occurring on tribal land. *See* Montana, 450 U.S. at 557; Bourland, 508 U.S. at 689. This rule is particularly true when the Tribe's regulation concerns a tribal owned business located on tribal land. *See* Devils Lake Sioux Tribe (1995), 896 F.Supp. at 961.

[37] North Central also argues there has been no express federal preemption of State regulatory authority in this case. North Central's argument is misplaced, as the critical preemption issue in this case is not whether federal law has preempted the PSC's regulatory authority, but rather is whether the inherent sovereignty of the Tribe to regulate its own business on tribal land has been preempted by any act of Congress. The PSC, relying on the precedent in the Devils Lake Sioux Tribe (1995) case, properly determined assertion of its regulatory authority over the Tribe's determination of electric service provider in this case would be a direct violation of the Tribe's inherent

sovereignty. App. 77. The PSC's determination it did not have regulatory authority to infringe on the Tribe's inherent sovereignty is consistent with United States Supreme Court precedent. See e.g., White Mountain Apache Tribe, 448 U.S. at 142 (stating a State may not assert regulatory authority over a Tribe if it will unlawfully infringe on the right of the Tribe to make its own laws and be ruled by them). Accordingly, the PSC's determination in this case is consistent with federal law.

V. No additional factual analysis is required to support the PSC's ruling that its exercise of jurisdiction over a tribal facility on tribal trust land would impermissibly interfere with the Tribe's inherent authority.

[38] North Central spends a significant portion of its brief arguing the PSC's conclusion was erroneous under a Montana analysis because there was no factual showing by the Tribe that the "health, welfare or safety of any Tribal Member is in any way threatened" by the PSC's regulation over electric service to the Casino. Appellant Brief, at ¶ 25. The Devil's Lake Sioux Tribe (1995) case expressly ruled that no such showing is required. 896 F.Supp. at 961. In that case, the Court performed an extensive factual examination to determine if the Tribe had a broader authority to regulate electric service across the entire footprint of the reservation, as that issue was still being litigated in that case. Id. at 959-60. The Court found that the facts did not support such a showing. Id. at 961. Despite the findings that no factual showing of specific harm to health, welfare or safety of the Tribe was achieved, the Court concluded no such factual showing is required where electric service is to be provided to a tribal business located on tribal trust land because "the necessary nexus between Tribal Interests and inherent sovereignty is present" in such instances even without an additional factual showing. Id.

[39] In the present case, the PSC made the critical findings of fact: the Casino was owned by the Tribe and located on tribal trust land. Any additional findings of fact would be superfluous to its determination that any PSC regulation of electric service to the Casino would be a violation of the Tribe's inherent sovereignty. See id. Whether the Tribe could demonstrate additional facts to show a broader authority is not at issue in this case because the electric service being regulated by the Tribe is to its own business located on tribal trust land. See id.

VI. The PSC's conclusions of law and order are supported by its findings of fact.

[40] North Central also contends the PSC's findings of fact were not supported by the evidence. There are no material facts in dispute in the present appeal. OTP and North Central stipulated to all the evidence presented to the PSC. App. 55 and 61. The two critical facts that form the basis of the PSC's holding in this case are not in dispute. It is undisputed the Tribe owns and operates the Sky Dancer Casino, which is located on tribal trust land. App. 55. The PSC relied upon these undisputed facts to conclude the Tribe has sovereign jurisdiction to determine who is to supply electrical service to tribal owned businesses located upon tribal trust lands, without regard to its regulations. App. 76-77. Accordingly, North Central's argument that the PSC's findings of fact are not supported by the evidence is without merit.

VII. Summary of the Devils Lake Sioux Tribe litigation over Tribe's authority over electrical service.

[41] In dismissing North Central's Complaint in this case, the PSC properly determined, as a matter of law, it had no regulatory authority over an Indian Tribe's resolution determining who will provide electric service to a tribal owned Casino located on tribal trust land. See App. 77. The PSC's Order is in accordance with the law

governing tribal sovereignty and an Indian Tribe's determination of who may supply electricity to a tribal facility on tribal land.

[42] This issue was the subject of years of litigation in an analogous case between OTP and the PSC, arising from a dispute with a different electric cooperative over electric service to a tribal owned business located on tribal land on the Spirit Lake Reservation. The dispute began with this Court's decision in Application of Otter Tail Power Co., 451 N.W.2d 95 (N.D. 1990) (hereinafter referred to as "Otter Tail (1990)") and culminated with a decision by the U.S. District Court for the District of North Dakota in Devils Lake Sioux Indian Tribe v. North Dakota Public Service Commission, 896 F.Supp. 955 (D.N.D. 1995). The Devils Lake Sioux Tribe (1995) case carved out a narrow exception to the general rule of State regulatory authority, holding a Tribe may determine who is to supply electrical service to tribal owned businesses located upon Indian trust lands, without regard to the regulations of the North Dakota Public Service Commission. 896 F.Supp. at 961. For purposes of assisting the Court in understanding the development of the current law and the PSC's Order, it is important to analyze the facts and holdings of these cases.

[43] The Otter Tail (1990) case began over a dispute between OTP and Baker Electric Cooperative ("Baker Electric") regarding who had the right to provide electric service to a tribal owned manufacturing business on the Spirit Lake Reservation. 451 N.W.2d at 95. In 1988, the Devils Lake Sioux Tribe passed a resolution designating OTP as the electric service provider to the business and that the Tribe had the power to regulate all electric service, wherever located, on the reservation. Id. at 96-97. OTP then filed a "Notice of Intent to Extend Service" to the tribal business with the PSC. Id. at 97.

The PSC responded that it had jurisdiction over the service and OTP should formally apply for a certificate of public convenience and necessity. Id. OTP then petitioned the district court for a writ of prohibition on the grounds that the PSC lacked jurisdiction over electric service on the Spirit Lake Reservation. Id. The district court granted OTP's writ and set a hearing. Id. At that time, Baker Electric sought an application for supervisory writ from the North Dakota Supreme Court. Id.

[44] On appeal to this Court, OTP argued the PSC lacked jurisdiction over electric service on the reservation. 451 N.W.2d at 97. This Court first concluded OTP lacked standing to assert the Devils Lake Sioux Tribe's sovereignty and self-government interests because the Tribe did not intervene in the case. Id. at 98. The Court also determined that, even if the Tribe had intervened, it did not have exclusive authority to regulate electric service throughout the reservation, as OTP asserted. Id.

[45] In reaching this conclusion, the Court examined the recent U.S. Supreme Court precedent governing the interplay between state regulation and Indian sovereignty. Specifically, the Court analyzed Brendale v. Confederated Tribes and Bands of Yakima Indian Nations, 492 U.S. 408 (1989) and Montana v. United States, 450 U.S. 544 (1981). The Otter Tail (1990) Court analyzed the two Montana exceptions to the general rule that Indian Tribes do not have regulatory control over non-members on non-tribal land located on the reservation:

First, a tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements. Second, a tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.

Id. at 99 (citations omitted). The Court determined neither of these exceptions gave the Devils Lake Sioux Tribe the power to regulate an electric service on the reservation. Id. at 105-06.

[46] In reaching its decision, the Otter Tail (1990) Court repeatedly recognized the Tribe's resolution was the first instance when the Devils Lake Sioux Tribe attempted any regulation of electric utilities. 451 N.W.2d at 101. The Court further explained the significance of this position:

The Devils Lake Sioux Tribe has established no comprehensive system for the regulation of electric utilities on the reservation, and this is the only instance where the Tribe has attempted any type of electric utility regulation. There is no tribal regulation of rates, service and safety standards or service territory generally. The tribe does not employ engineers, accountants and other professionals or technicians to regulate utilities.

Id. at 103. The Court found the Devils Lake Sioux Tribe "has traditionally accommodated, if not acquiesced in, the State's exclusive and long-standing regulation of electric power suppliers." Id. The Court also found the PSC had traditionally exercised jurisdiction over electric suppliers on the reservation. Id. at 105. Based upon these facts, the Otter Tail (1990) Court concluded the Tribe did not possess the inherent sovereignty to regulate the provision of electric service on the reservation. Id. at 104. The Court remanded the case back to the district court with instructions to vacate the writ of prohibition and proceed with contempt proceedings against OTP. Id. at 107.

[47] Following the Otter Tail (1990) opinion, the PSC, OTP, and Baker Electric continued litigating the scope of the PSC's authority over the Tribe's determination of which utility would provide electric service in a series of cases in federal court. See Baker Electric Coop v. Otter Tail Power Co., 116 F.3d 1207 (8th Cir.

1997); Devils Lake Sioux Tribe (1995), 896 F.Supp. 955 (D.N.D. 1995); and Baker Electric Coop v. Chaske, 28 F.3d 1466 (8th Cir. 1994). However, unlike the State litigation, the Devils Lake Sioux Tribe joined the fray in the federal cases to assert its inherent tribal sovereignty. The question in the Devils Lake Sioux Tribe (1995) case determined the narrower issue of whether an Indian Tribe has the inherent sovereignty over electric service to tribal owned businesses located on tribal trust land. 896 F.Supp. at 961 (carving out a narrow exception to the State's authority to regulate electric service).

[48] In July 1990, shortly after the Otter Tail (1990) decision, the Devils Lake Sioux Tribe enacted the Tribal Utilities Code which asserted extensive regulatory authority over electric service within the boundaries of the reservation. Chaske, 28 F.3d 1466 at 1470. Baker Electric then commenced an action against the Devils Lake Sioux Tribe arguing it lacked regulatory jurisdiction over electric utilities doing business on the reservation. Id.

[49] In August 1990, the PSC ordered OTP to discontinue service to the tribal facility, which was the subject of the Otter Tail (1990) opinion. Chaske, 28 F.3d 1466 at 1470. The Devils Lake Sioux Tribe then commenced an action against the PSC alleging the Tribe had the right to purchase electric service from the supplier of its choice. Id. The Tribe also requested and was granted an injunction that prevented the PSC from interfering with its choice of electric service provider. Id. (noting the injunction prohibiting the PSC's interference with the Tribe's contract was in place for thirty months while the litigation was ongoing). OTP also commenced an action against the

PSC seeking to prevent it from interfering with OTP's contract with the Devils Lake Sioux Tribe to provide electric service to a tribal facility located on tribal trust land. Id.

[50] The federal district court dismissed Baker Electric's case against the Devils Lake Sioux Tribe on the grounds of tribal sovereign immunity. Chaske, 28 F.3d at 1470. The district court also rescinded the injunction prohibiting the PSC from interfering with the Tribe's regulation of electric service on the reservation. Id. In addition, the district court dismissed OTP's case against the PSC on the grounds of res judicata. Id. Ultimately, the district court concluded the Tribe had the inherent sovereign power to decide which utility provider to patronize and could do so without regard to the North Dakota's TIA. Id.

[51] In Chaske, the Eighth Circuit Court of Appeals consolidated the four related appeals. Id. With respect to the Devils Lake Sioux Tribe's case against the PSC, the Eighth Circuit Court determined the district court abused its discretion in rescinding the Tribe's injunction against the PSC because the Tribe faced the threat of irreparable harm if the PSC was permitted to interfere with the Tribe's regulation of electric service providers on the reservation. Id. at 1474 (remanding with instructions to reinstate the injunction). The Eighth Circuit Court also reversed the district court's dismissal of OTP's case against the PSC concluding the case was not barred by res judicata. Id. at 1476. The Eighth Circuit Court then remanded all cases back to the district court with instructions to make detailed findings as to whether the Tribe had authority to regulate electric service on the reservation and whether that authority preempts the regulatory authority of the PSC. Id.

[52] On remand, the district court made extensive findings of fact regarding the issues in dispute between the OTP, the PSC, and Baker Electric concluding no material facts were in dispute which would preclude deciding the issue of whether the Devils Lake Sioux Tribe and OTP could contract for electric service to a tribal facility. Devils Lake Sioux Tribe (1995), 896 F.Supp. 955. Of particular importance to the district court was its finding that the Tribe had recently adopted a comprehensive electric regulatory code governing the rates and service on the reservation. Id. at 958-59.

[53] In reaching its conclusion on tribal inherent sovereignty, the district court analyzed the United States Supreme Court's Brendale and Montana opinions. Devils Lake Sioux Tribe (1995), 896 F.Supp. at 961. Specifically, the court recognized the second exception of the Montana rule provided an Indian tribe retains the inherent power to exercise civil authority over the conduct of non-Indians on fee lands within the reservation when that conduct has a direct effect on the political integrity, economic security, or the health and welfare of the tribe. Id. at n. 3. The Devils Lake Sioux Tribe (1995) Court found that no showing had been made that the health, welfare, or safety of the tribe was threatened by the PSC's regulation. Id. at 961. However, despite no factual showing, the court concluded where electric service is to be provided to a tribal business located on tribal trust land, "the necessary nexus between Tribal Interests and inherent sovereignty is present." Id.

[54] In Devils Lake Sioux Tribe (1995), the District Court limited the Tribe's regulatory authority exclusively to tribal facilities located on tribal land. 896 F.Supp. at 961. The State of North Dakota, acting through the PSC, maintains regulatory authority over electric service provided to other individuals, businesses, and locations on the

reservation. Id. The court also concluded a reservation wide utility regulation scheme, without regard to land ownership, is beyond the inherent sovereignty of the tribe. Id.

[55] The holding of the Devils Lake Sioux Tribe (1995) represents the current status of the law in North Dakota regarding the PSC's regulatory authority over tribal resolutions for electric service to tribal facilities located on tribal land. Since 1995, the PSC, OTP, various Indian Tribes, and the numerous electric cooperatives in the State have all been operating under the decision set forth by the federal court with respect to electric service on North Dakota's reservations.

CONCLUSION

[56] Pursuant to the narrow exception to the general rule of State regulatory authority over land on the reservations, the PSC lacks jurisdiction over the Turtle Mountain Band of Chippewa Indians' inherent sovereignty to contract with Otter Tail Power Company to provide electric service to the tribal owned Sky Dancer Casino located on tribal trust land. Therefore, the North Dakota Public Service Commission properly analyzed the uncontested facts and controlling law in concluding Otter Tail Power Company's providing electric service to the Sky Dancer Casino fits within the narrow exception over which it had no regulatory jurisdiction. For these reasons, Otter Tail Power Company respectfully requests the Court affirm the order of the Public Service Commission dismissing North Central's Complaint.

Dated this 28th day of May 2013

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CERTIFICATE OF COMPLIANCE

[57] The undersigned, as attorneys for the Appellee Otter Tail Power Company in the above matter, hereby certify, in compliance with Rule 32(a) of the North Dakota Rules of Appellate Procedure, that the above brief was prepared with proportional type face and that the total number of words in the above brief, excluding words in the table of contents, table of authorities, signature block, certificate of service and certificate of compliance totals 7,765.

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IN THE SUPREME COURT

STATE OF NORTH DAKOTA

North Central Electric Cooperative, Inc.,)	Supreme Court
)	Case No. 20130075
Appellant)	
vs.)	
)	
North Dakota Public Service Commission,)	
Otter Tail Power Company and)	
Turtle Mountain Band of Chippewa Indians,)	
)	
Appellees)	
)	
)	

APPEAL FROM THE DISTRICT COURT
ORDER AND JUDGMENT ENTERED FEBRUARY 25, 2013
THE HONORABLE GAIL HAGERTY
SOUTH CENTRAL JUDICIAL DISTRICT,
BURLEIGH COUNTY, NORTH DAKOTA,
CIVIL NO. 08-2012-CV-01464

AFFIDAVIT OF ELECTRONIC SERVICE

STATE OF NORTH DAKOTA)
) ss.
COUNTY OF BURLEIGH)

The undersigned, being first duly sworn on oath, deposes and says that I am a United States citizen, over 18 years of age, and on May 28, 2013, I served a true and correct copy of the attached:

BRIEF OF APPELLEE OTTER TAIL POWER COMPANY

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Subscribed and sworn to before me, today, May 28, 2013


NOTARY PUBLIC,
Burleigh County, North Dakota

