

**IN THE SUPREME COURT**  
**STATE OF NORTH DAKOTA**

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Supreme Court Number 20130075

Burleigh County District Court Number 08-2012-CV-01464

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NORTH CENTRAL ELECTRIC COOPERATIVE, INC.

Plaintiff/Appellant,

vs.

NORTH DAKOTA PUBLIC SERVICE COMMISSION,  
OTTER TAIL POWER COMPANY AND  
TUTLE MOUNTAIN BAND OF CHIPPEWA INDIANS

Defendants/Appellees.

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APPEAL FROM THE DISTRICT COURT  
SOUTH CENTRAL JUDICIAL DISTRICT  
BURLEIGH COUNTY, STATE OF NORTH DAKOTA

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**REPLY BRIEF OF APPELLANT**  
**NORTH CENTRAL ELECTRIC COOPERATIVE, INC.**

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[¶1.] North Central Electric Cooperative, Inc. (“North Central”) filed its Appellant’s Brief on April 22, 2013. Otter Tail Power Company (“Otter Tail”), the Turtle Mountain Band of Chippewa Indians (“Tribe”) and the Public Service Commission (“PSC”) filed their Appellee's Briefs on May 28, 2013. Oral arguments are scheduled for June 11, 2013. North Central will rely chiefly on its Appellant Brief and the record to refute the factual and legal assertions raised in Appellees’ Briefs.

[¶2.] **LAW AND ARGUMENT**

[¶3.] This is an egregious case of interference and wasteful duplication under the Territorial Integrity Act (“TIA”). North Central began providing service to the Sky Dancer Hotel and Casino (“Casino”) on December 2, 1998. App. 7, ¶ 3. At the time of the Complaint with the PSC, North Central had seven metered services on the Casino property. *Id.* Otter Tail had to construct 2½ miles of build-out and 3 miles of underbuild, cross North Dakota State Highway 5, cross Central Power Electric Cooperative, Inc.’s transmission line, cross North Central’s distribution line, and utilize North Central’s easement to provide electric service to the Casino. Transcript p. 101, ll. 16-21; App. 7, ¶ 9; App. 62, ¶ 10. Otter Tail’s closest consumer was three miles from the Casino. App. 70, ¶ 10. The Appellees all agree that the PSC has no regulatory authority over Otter Tail’s blatant disregard of the TIA.

[¶4.] The Appellees argue that the PSC does not have jurisdiction over the Tribe’s regulation of electric service to a tribal-owned business on tribal-owned land. North Central disagrees.

[¶5.] The PSC asserts that the *Montana* analysis is superfluous as the only facts relevant to its inquiry are whether or not the land is tribal-owned and whether it involves a tribal-owned business. PSC’s Brief, ¶¶ 6, 16. This is error. The Courts are clear that the *Montana* analysis is used to make this determination. Application of Otter Tail Power Co., 451 N.W.2d 95, 104-07 (N.D. 1990) (“Otter Tail 1990”); Devils Lake Sioux Indian Tribe v. North Dakota Pub. Serv. Comm’n, 896 F.Supp. 955, 961 (D.N.D. 1995) (“Devils Lake Sioux Indian Tribe”); Baker Electric Cooperative, Inc. v. Chaske, 28 F.3d 1466, 1477 (8<sup>th</sup> Cir. 1994).

[¶6.] The Tribe argues that federal law preempts the regulatory authority of the PSC in this case. Tribe’s Brief, ¶ 8. The Tribe cites the Indian Tribal Energy Development and Self-Determination Act of 2005 for its argument. Id. at ¶ 13. This argument was not made below and should be disregarded by the Supreme Court. Even if the Court accepts this argument, there is no preemption of state law by this Act. 25 U.S.C. § 3501 *et. seq.*

[¶7.] The Tribe further argues that its “choice was influenced by economic considerations and current and future costs savings because of a less expensive rate structure.” Tribe’s Brief, at ¶ 14. However, the record is clear that the Tribe presented no evidence, no exhibits, and no testimony regarding the economic impact regarding the choice of electric suppliers or how PSC regulation imperiled the Tribe. The Tribe bears the burden of establishing interference with its sovereign authority or that the PSC’s actions will adversely affects its tribal health or welfare. Otter Tail 1990, 451 N.W.2d at

105. The Tribe's failure to adduce evidence is fatal. The Tribe must do more than simply assert it has inherent sovereignty.

[¶8.]       **I.       THE PSC HAS REGULATORY AUTHORITY.**

[¶9.]       The TIA is at the heart of this case and has been the law governing provision of electric service in rural areas since 1965. The TIA's purpose is to minimize wasteful duplication of investment, facilities, and services and to minimize conflicts between electric public utilities and rural electric cooperatives. Capital Elec. Cooperative, Inc. v. Public Serv. Comm'n of the State of North Dakota, 534 N.W.2d 587, 590, 592 (N.D. 1995).

[¶10.]      The TIA requires an electric public utility to obtain a certificate of public convenience and necessity before it may construct an extension of its plant, system, transmission or distribution lines to serve any customer outside the limits of any municipality. N.D.C.C §§ 49-03-01 and 49-03-01.1. The PSC erred by not enforcing the TIA to Otter Tail's actions.

[¶11.]      In 1984, the North Dakota Supreme Court reviewed the jurisdiction of the PSC over service to the Bureau of Indian Affairs School on the Turtle Mountain Indian Reservation. Application of Otter Tail Power Co., 354 N.W.2d 701, 702 (N.D. 1984) ("Otter Tail 1984"). In that case, the Court determined that Otter Tail had agreed to follow PSC regulations when it purchased the BIA's electrical system in 1968. Id. at 703. The Court found that the PSC had jurisdiction, which did not infringe upon the rights of tribal self-government. Id. at 705.

[¶12.] In 1990, the North Dakota Supreme Court reviewed jurisdiction of the PSC on the Fort Totten Indian Reservation. Otter Tail 1990, 451 N.W.2d 95. The Court concluded that the PSC did have jurisdiction. Id. at 98. This is the controlling law in North Dakota on this issue.

[¶13.] As part of its decision, the Court considered the Spirit Lake Tribe's treaty and its inherent sovereignty. Id. at 101-07. The Court noted that state law allocating electric services between competing utilities did not amount to regulating the use or development of tribal property. Id. at 103. The Court determined that the Tribe had no inherent sovereignty to regulate the choice of electric suppliers. Id. at 103. The electric supply system was not confined to the reservation and could impact non-reservation customers. Id. at 105, 107. The Court viewed the Tribe's request for power from Otter Tail as "the Tribe reaching outside the reservation to regulate a public utility, rather than a 'reaching in' by a non-Indian business entity." Id. at 105. The Court found that the Tribe did not derive the power to regulate an electric service on the reservation under either of the *Montana* exceptions and "the State's interest in regulating a public utility outweighed the minimal burden on tribal self-government." Id. at 104-07.

[¶14.] Here, the Tribe is trying to reach outside the reservation boundaries to regulate utilities. The PSC has extensive authority to regulate electric public utilities and its authority does not regulate the use or development of tribal land.

[¶15.] Appellees urge this Court to find that Devils Lake Sioux Indian Tribe is the binding authority and is directly on point with this case. It is not. In that case, the Tribe entered evidence to show how the PSC's actions affected its tribal sovereignty. 896 F.Supp. at 957-60. The evidence included its treaties with the United States, the reservation location and size, the percentage of fee land, unemployment statistics, and census information. Id. The Court also reviewed evidence regarding rates and existing loads in determining the impact of the PSC's regulation. Id. None of this evidence was presented in this case. The Devils Lake Sioux Indian Tribe case is a fact specific situation and should not be applied here.

[¶16.] Even if the Devils Lake Sioux Indian Tribe case is on point as Appellees suggest (and North Central does not concede), the PSC still has the authority to act in this case under the TIA. Tribal sovereignty does not prevent state regulatory authority because a reservation is part of the state's territory. Nevada v. Hicks, 533 U.S. 353, 361-62, 121 S.Ct. 2304 (2001). Where state interests "outside the reservation are implicated," the State can exercise its regulatory authority on tribal land. Id. at 362; see also Otter Tail 1990, 451 N.W.2d at 107.

[¶17.] The PSC failed to recognize or analyze the changed Indian Law jurisprudence since 1995. See generally, Hicks, 533 U.S. at 361 (holding that a state can exercise regulatory authority on tribal land); Atkinson Trading Co. v. Shirley, 532 U.S. 645, 650-51 (2001) (stating that tribal sovereignty is limited to those matters that are "necessary to protect tribal self-government



or to control internal relations” as is consistent with the tribe’s dependent status); Plains Commerce Bank v. Long Family Land and Cattle Co., 554 U.S. 316, 328-29, 341 (2008) (indicating that a Tribe lacks jurisdiction over non-Indian conduct on non-Indian land and non-Indian conduct must “imperil the subsistence of” the Tribe or “avert catastrophic consequences”).

[¶18.] The United States Supreme Court has made clear that Indian Tribes have very limited jurisdiction over non-members. Tribal sovereignty is limited to those matters that are “necessary to protect tribal self-government or to control internal relations”. Atkinson, 532 U.S. at 650-51. In fact, in order for non-Indian conduct to be regulated by a Tribe, the conduct must imperil the Tribe. Plains Commerce, 554 U.S. at 341. There is no evidence of any harm to the Tribe or its members by the PSC’s regulation of Otter Tail’s activities. The PSC’s regulation does not imperil the Tribe. The Tribe’s preference for Otter Tail is nothing more than one factor to consider under the TIA and is not controlling. Otter Tail 1990, 451 N.W.2d at 104.

[¶19.] Appellees gloss over the important facts that Otter Tail utilized a state right-of-way, crossed Central Power’s electric service, utilized North Central’s easement, and crossed North Central’s distribution lines to provide electrical service to the Sky Dancer Casino. Transcript p. 101, ll. 16-21; App. 7, ¶ 9; App. 62, ¶ 10. These are property interests held by non-Indians, entitled to protection and limit tribal sovereignty. The Tribe has no authority over non-Indian conduct on state highways. Strate v. A-1 Contractors, 520 U.S. 438, 456, 117 S.Ct. 1404 (1997). When the Tribe provided the

easements for the state highways and electric service, it gave up its “gatekeeping right” and its regulatory jurisdiction over the land. Id.; see also Big Horn County Elec. Cooperative, Inc. v. Adams, 219 F.3d 944, 950 (9<sup>th</sup> Cir. 2000). Without the utilization of the non-Indian property rights, Otter Tail could not have provided electric service to the Casino. It is important to note that the Tribe has waived sovereign immunity under its Gaming Compact. App. 62 and 70, ¶ 12; Docket No. 14 of District Court (Ex. B); Docket No. 7 of PSC (Ex. B), pp. 20-58.

[¶20.] Minimal burdens on tribal self-government are allowable. Otter Tail 1990, 451 N.W.2d at 107. Regulation by the PSC under the TIA over Otter Tail’s action is at most, a minimal burden on the Tribe in this case. The record in this case is devoid of specific facts showing how regulation under the TIA would adversely affect the Tribe.

[¶21.] **II. THERE IS NO EVIDENCE THAT THE TRIBE’S AUTHORITY IS IMPERILED.**

[¶22.] In this case, the Tribe presented no evidence regarding the effects on its political integrity, health or welfare. This is fatal to the Appellees’ arguments. Since it had not evidence from the Tribe, the PSC relied on facts from the Otter Tail 1990 case to analyze the facts of this case. App. 72-76. Each case regarding tribal sovereignty or jurisdiction is fact and case specific. Utilizing the facts from other cases to make findings in this case was error.

[¶23.] Appellees also argue that the Tribe’s utility code, makes this case distinguishable from Otter Tail 1990 and allows for the Tribe to assert its

sovereign authority. The Tribal Utility Code was not a part of the record. No evidence was presented that the Tribe in this case has in fact regulated utilities or relied upon the Tribal Code in its actions vis-à-vis North Central or Otter Tail. Most importantly, the courts have ruled that the Tribe does not have the authority to regulate utilities. Otter Tail 1990, 451 N.W.2d at 104 (holding that a Tribe does not have inherent authority to regulate choice of electric service providers); Devils Lake Sioux Indian Tribe, 896 F.Supp. at 961-62 (holding that a Tribe does not have inherent authority to regulate electric utilities).

[¶24.]      **CONCLUSION**

[¶25.]      Based on the arguments above, North Central respectfully requests that the PSC's order be reversed and the matter be remanded to the PSC for summary disposition in favor of North Central.

Dated this 6<sup>th</sup> day of June, 2013.

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[¶26.] **CERTIFICATE OF COMPLIANCE**

[¶27.] The undersigned, as attorney for the Appellant North Central Electric Cooperative, Inc., and as the author of the attached brief, hereby certifies, in compliance with Rule 32(a) of the North Dakota Rules of Appellate Procedure, that the above brief was prepared with proportional typeface and 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 does not exceed 2,000.

Dated this 6<sup>th</sup> day of June, 2013.

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