Jeffcoat-Sacco, Illona

From: Hoberg, Allen C.
Sent: Monday, May 07, 2012 1:14 PM
To: Jeffcoat-Sacco, Illona
Cc: Gruman, Mark E.
Subject: FW: ND PSC Case Number PU-11-701
Attachments: Cert of Service 05-07-12 PDF.pdf; Special Appearance ND PSC 5-7-12.pdf

Ms. Jeffcoat-Sacco : I received this today while the hearing was being conducted. At this point I do not need a copy. I am not sure whether the Commission received a copy so I am forwarding this to you for filing, if necessary. ALJ Hoberg

From: lmbaer@baerlodge.com [mailto:lmbaer@baerlodge.com]
Sent: Monday, May 07, 2012 10:51 AM
To: psanderson@zkslaw.com; bgerhardson@otpc.com; Hoberg, Allen C.; rjaybru@hotmail.com; tkolb@zkslaw.com; dhoffarth@srt.com
Subject: ND PSC Case Number PU-11-701

Attached is a corrected certificate of service of the brief and brief. The original omitted Ms. Debra Hoffarth on behalf of North Central Power.

Larry M. Baer **ND 03284: IA AT0010021**
1550 South Deer Road
West Des Moines, Iowa 50266
515.988.4204

PUBLIC SERVICE COMMISSION

STATE OF NORTH DAKOTA

North Centra Electric Cooperative, Inc.	)	
	)	
Complainant,	)	**Case No. PU-11-701**
	)	
vs	)	
	)	
Ottertail Power Company, Inc.	)	
	)	
Respondent.	)	

SPECIAL APPEARANCE OBJECTING TO JURISDICTION

The Turtle Mountain Band of Chippewa Indians does hereby make special appearance before the Public Service Commission of the State of North Dakota for the limited purpose of objection to the jurisdiction of the Commission to hear and determined cases affecting the health and welfare of the Turtle Mountain Tribe and its membership. The question presently before the Public Service Commission of the State of North Dakota in the above entitled case relates to the choice of the electric utility to provide electric utility service to a business owned and operated by the Turtle Mountain Band of Chippewa Indians operating and doing business wholly within the exterior boundaries of the Turtle Mountain Indian Reservation. For the reasons set forth herein, the Public Service Commission of the State of North Dakota lacks subject matter regulatory and adjudicatory jurisdiction in such instance. The same result would be reached in instances of utility services to Tribal members; businesses owned by Tribal Members; and service to the Tribe and its political subdivisions.

This brief is filed in support of the pending Motion filed on behalf of Respondent, Otter Tail Power Company, to dismiss the Complaint for want of jurisdiction.

FACTS

The Public Service Commission of the State of North Dakota (PSC) asserts that it possesses civil adjudicatory jurisdiction to determine which electric utility may provide service to a Tribally owned and operated business wholly located within the exterior boundaries of the Turtle Mountain Indian Reservation. Two utilities now appear before the PSC, to contest their right to service – Otter Tail Power Company and North Central Electric Cooperative.

The Turtle Mountain Band of Chippewa Indians, acting by and through its Tribal Council has already addressed such issue under criteria determined to be of importance, affecting the health and welfare of the Tribe. The Tribal Council selected Otter Power Company to provide such service. (North Central didn't even respond to a request for an application) For the reasons stated herein, the PSC is without jurisdiction to second guess the decision made by the Tribe.

It should also be noted that the State of North Dakota only selectively chooses to regulate electric facility development – regulating investor owned utilities like Otter Tail Power, and not the rural electric cooperatives. As a result, in the past few years, the rural electric cooperatives have built redundant high voltage electric transmission lines through the Turtle Mountain Indian Reservation on routes nearly parallel to the transmission lines of Otter Tail. This duplication of service has made it financially more difficult for Otter Tail to upgrade its existing services to the Reservation. It has also resulted in an additional visual scar to the landscape of the Reservation, evidenced by the duplicate lines now passing in front of the Tribal Offices on each side of the highway. Making matters worse, is the fact the cooperative lines were built without lawful easements in place prior their construction – after-the-fact condemnation actions are now filed in

U.S. District Court seeking to condemn that which the cooperatives have already taken. [1] One sided regulation is no regulation at all. The source of electric power by which North Central now seeks to provide electricity to the Tribal hotel and casino is unlawfully constructed, in violation of both Tribal and Federal law.

Central Power Electric Cooperative, Inc. – Appraisal of subject area.

North Central is one of several distribution electric cooperatives which own and control their own transmission electric cooperative, Central Power Electric Cooperative, Inc. Central Power delivers electricity to all of North Central's facilities located within the Turtle Mountain Indian Reservation. As mentioned above, Central Power is in the process of attempting to condemn necessary right of way for the transmission line it unlawfully built in 2008, built in part directly in front of the Tribal Casino and Hotel, and clearly visible in North Central's "Exhibit 2" attached to North Central's Complaint filed before the Commission. Central Power has already been told by the North Dakota Supreme Court that it possesses no "quick take" authority to seize land upon which to build its electric transmission lines and then finish the condemnation process later. Central Power Elec. Co-op., Inc. v. C-K, Inc. 512 N.W.2d 711 (N.D. 1994) Yet that is exactly what it has done again on the Reservation. More significant, is Central Power's characterization of the land it has seized directly in front of the Tribe's Hotel and Casino, land which is located directly across the highway from a major locally owned private lumber yard and hardware supply store, and direclty next door to a long established and privately owned restaurant and bar:

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[1]There are at least fourteen separate cases now pending in US District Court wherein Central Power Electric Cooperative, Inc., is now condemning land it has unlawfully occupied with a high voltage electric transmission line more than four years ago. Like the State of North Dakota, neither the Turtle Mountain Tribe, nor the United States allow a "quick taking" of land for a power line right of way as been done in each of these fourteen cases.

"The subject property is cropland." Page 12

"The development potential for the subject property for another use such as housing, commercial, industrial, etc. is slow to non-existent in the private sector." Page 27 and 43

"Desirability of the property is the same as other property in the area. The highest and best use of the property is agriculture, and the commodity price of agricultural products in the world market dictate the desirability of ownership." Page 27 and 43

"A survey shows no private market commercial activity in or near the subject property. No one was aware of any future development. Tribal government activities are in the areas with a tribally owned Casino. No private commercial enterprises are in the immediate area.. Page 52

"As vacant, the use of the property as agricultural would produce the highest residual land value and the most Maximally Productive use of the property." Page. 52

(All the above are direct quotes taken from the appraisal report filed on behalf of Central Power for the taking of the very real estate depicted in Exhibit 2 and attached to the North Central Complaint now before this Public Service Commission.)

Why would North Central want to compete with Otter Tail if the highest and best use of this parcel of land is "cropland" and there is not potential for development? And the privately owned lumber yard, hardware store, restaurant and the tavern – all located right next door -- should all be torn down and replaced by wheat fields in order to achieve their highest and best use? Its hard to give credibility to the assertions of electric cooperatives when these are the "facts" they ask the Tribe and its membership to believe when taking this very same land for their own use when building their own electric facilities.

I. Jurisdictional authority of the civil law of the State of North Dakota do not extend to the Turtle Mountain Indian Reservation.

The Turtle Mountain Indian Reservation is not a political subdivision of the State of North Dakota. To the contrary, the Congress of the United States has consistently required the State of North Dakota to specifically disclaimed any claim of jurisdiction over Tribal lands.

Congress has done so repeatedly, first, when the area was but a territory, then upon statehood, and more recently in enactments that would have allowed the removal of such barrier had the State of North Dakota acted. The unambiguous history of Congressional intent to treat Indian Reservations as separate civil adjudicatory jurisdictions follows.

A. Federal Preemption.

The Constitution vests in the Congress of the United States the exclusive right to regulate commerce with Indian Tribes. U.S. Const., Art. I, Sec. 8, Cl. 3. Such Constitutional provision is commonly referred to as the "Indian Commerce Clause." Congress is also granted the power to make treaties with the various Indian Tribes. U.S. Const., Art. II, Sec. 2, Cl. 2. In exercise of such powers, the Congress has adopted various statutory schemes affecting virtually all activities within Indian Country and preempting state authority to deal with Indian Tribes, their membership, and their lands. Some of the acts include: (1) restrictions on right of Tribes or their members to contract[2]; (2) requirement of licensure of Indian traders doing business on reservations with Indians[3]; (3) control over the means of obtaining and granting of the on-reservation right-of-ways for roads, rail roads, telephone and electric lines[4]; (4) provide for the issuance of allotments, patents, and the control over land alienation[5]; (5) control over the sale, surrender or leasing of allotted lands for grazing, mineral extraction, timber harvesting, etc[6].; (6)

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[2] 25 U.S.C. §§ 81, 85.

[3]25 U.S.C. §§ 261-264.

[4]25 U.S.C. §§ 311-328.

[5]5 U.S.C. §§ 331-358.

[6]25 U.S.C. §§ 391-416; 2101-2108.

provision of education facilities[7]; (7) provision of health care facilities[8]; (8) administration of estates and determination of heirship[9]; (9) Indian child custody determination[10]; (10) regulation of Indian gaming[11]; and perhaps most far reaching, (11) the Indian Reorganization Act of 1934[12], and related statements of Congressional intent to strengthen Tribal government functions and the delivery of health and welfare services[13].

B. Congressional Withholding of State Civil Authority Within Reservations.

Not only has Congress unilaterally acted to recognize and reinforce Tribal self-government, Congress has also acted in concert with the State of North Dakota to specifically deny State civil adjudicatory authority over Tribes, their land and their members. For more than One Hundred years, Congress and the State of North Dakota have enacted specific acts, entered compacts and adopted Constitutional provisions consistent with the proposition that the State of North Dakota has no civil adjudicatory over acts occurring within the exterior boundaries of the various Indian Reservations within the State[14]. Apart from the general proscription against State

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[7]25 U.S.C. §§ 271-304b; 2501-2511; 2600-2651.

[8]25 U.S.C. Ch. 18.

[9]25 U.S.C. §§ 371-380.

[10]25 U.S.C. §§ 1901-1963.

[11]25 U.S.C. §§ 2701-2721.

[12]25 U.S.C. §§ 476-478.

[13]25 U.S.C. §§ 450-450m.

[14]See 48 U.S.C. § 1451, representing a general Congressional mandate to exclude Indian lands from the jurisdiction of any State or Territory until such Tribe "signifies its assent to the President to be embraced within a particular Territory.", a law last amended by Congress in 1983, but still left the Congressionally mandated "jurisdictional" exclusion intact . Pub. L. 98-213,

assumption of jurisdiction in Indian lands, Congress and the State of North Dakota, on at least five occasions, have jointly acted to preserve the exclusion of Indian lands from the civil adjudicatory jurisdiction of the State of North Dakota:

First, by the passage of the Organic Law creating the territory of Dakota (Act of March 2, 1861, Ch. 86, 12 Statutes at Large 239), the Congress of the United States mandated that the Indian lands within said territory "shall be excepted out of the boundaries and constitutes no part of the territory of Dakota".

Second, the United States Congress did again mandate that the Indian lands within Dakota Territory, soon-to-be- States of South and North Dakota, shall remain within the exclusive jurisdiction of the Congress of the United States. The State's Enabling Act (Act of February 22, 1889, Ch. 180, Section 1, 25 Statutes at Large 676), Section Four provided in pertinent part:

> "all lands lying within said limits owned or held by any Indians or Indian Tribes; and that until the title thereto shall have been extinguished by the United States, the same shall be and remain subject to the disposition of the United States, and **said Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States**." (Emphasis added)

Third, the State of North Dakota, in the State's Compact with the United States entered pursuant to the State's enabling act, did consent to exclusive federal jurisdiction over all Indian lands within the newly formed State. The North Dakota Constitution of 1889, Article XIII,

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Sec. 14(a), Dec. 8, 1983, 97 Stat. 1462.

Section One, provided:

> "that they [people of the State of North Dakota] forever disclaim all right and title to . . . all lands lying within said limits owned or held by any Indian or Indian Tribe, and that until the title thereof shall have been extinguished by the United States, the same shall be and remain subject to the disposition of the United States, and that **said Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States** . . ." (Emphasis added)

The present version of the Constitution of the State of North Dakota continues to affirm such specific language of the Compact by incorporation through reference as being irrevocable without consent of both the United States and the people of the State of North Dakota. Constitution of the State of North Dakota, Art. XIII, Sec. 4.

C. North Dakota's Failure to assume civil jurisdiction of Indian Lands.

Fourth, the Congress of the United States did grant to states such as the State of North Dakota, the opportunity to unilaterally assume civil and criminal adjudicatory jurisdiction over the Indian lands and Indian people within such states in 1953, through the enactment of what is commonly referred to as "Public Law 280."[15] As originally adopted, Public Law 280 granted State legislatures the authority to unilaterally enact legislation to extend civil and criminal adjudicatory jurisdiction onto any Indian reservations found within such state.[16] The operative provision of the Act relative to the assumption of civil adjudicatory jurisdiction directed:

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[15]Act of August 15, 1953, ch. 505, Pub.L. No. 83-280, 67 Stat. 588; 18 U.S.C. § 1162; 25 U.S.C. §§ 1321-1325; and 28 U.S.C. § 1360.

[16]28 U.S.C. § 1322(a).

"Those **civil laws of such State that are of general application to private persons** or private property shall have the same force and effect within such Indian country as they have elsewhere within the State . . ."[17] (Emphasis added)

Congress made exceptions for probate matters, certain regulatory matters (which would be of significance herein had the State of North Dakota accepted Public Law 280 jurisdiction), and control over alienation of Trust lands, but the intent and purpose of Public Law 280 was to make the laws of an adopting State to become the civil law of the Tribes. For fifteen years (1953-1968), the State of North Dakota had the opportunity to unilaterally extend its civil adjudicatory laws over any of the Indian Reservations within its boarders. Enactment of Public Law 280 by Congress recognized the absence of state civil adjudicatory jurisdiction within Indian Reservations and offered to the various states the unilateral opportunity to assume such jurisdiction[18]. The State of North Dakota chose not to enact Public Law 280 enabling legislation during the period of time in which state unilateral action was all that was necessary to assert such jurisdiction.

One final opportunity was afforded by the Congress to allow States to extend civil adjudicatory over Indian Country, but this time, the Congress required Tribal assent. In 1968, Public Law 280 was amended to require not only state legislative adoption, but also to require

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[17]28 U.S.C. § 1360(a). Note that if North Dakota had taken advantage of this jurisdictional grant, State law, and not Tribal law, would have become the "law of place" applicable to "private persons" and thus have met the requirements of the Federal Tort Claims Act. By not adopting the Act's extension of jurisdiction, the opposite is now true, the "law of the place" applicable to "private persons" is that of the Tribe's.

[18]Five States and the Territory of Alaska were Congressionally mandated to assume civil jurisdiction over Indian Reservations within their borders.

that each of the affected Tribes also adopt similar legislation before the civil adjudicatory jurisdiction of a state can be extended to Tribal lands.[19] No Tribe within the State of North Dakota has ever consented to the extension of State civil adjudicatory jurisdiction within their respective reservations.

D. Congressional Intent to Encourage Tribal Self-Government.

Not only does the foregoing North Dakota State-specific analysis of Congressional and State intent conclude State civil adjudicatory jurisdiction is excluded from the Turtle Mountain Indian Reservation, a like analysis of general statutory provisions reaches the same conclusion. With the adoption of the Indian Reorganization Act of 1934[20], Tribes were given the power to adopt constitutions and bylaws that would become effective upon ratification by membership vote and approval by the Secretary[21]. Subsequently, Congress has passed two additional far reaching acts affecting Indian self-rule: the Indian Civil Rights Act of 1968[22]; and the Indian Self-Determination and Education Assistance Act of 1975[23], both of which acts affirm the continuation of Tribal self-rule.

E. Exercise of Self Government by Turtle Mountain Chippewa Indians

Not only has Congress facilitate self-government by Indian Tribes in general, the Turtle

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[19]28 U.S.C. §§ 1322, 1325-1326

[20]Act of June 18, 1934, ch. 576, 48 Stat. 984 (now codified at 25 U.S.C. §§ 461-479).

[21]25 U.S.C. § 476.

[22]Pub. L. No. 90-284, § 406, 82 Stat. 73, 80 (1968) (now codified at 25 U.S.C. §§ 1153, 1301-1303, 1321-1326, 1331, 1341) The Act even permitted States to retrocede jurisdiction assumed under Public Law 280.

[23]Pub. L. No. 93-638m 88 Stat. 2203 (now codified at 25 U.S.C. §§ 450-450n).

Mountain Band of Chippewa Indians have historically exercised such rights of self-government over their lands and their people to the fullest extent permitted. The Turtle Mountain Indian Reservation is the federally recognized homeland of the Turtle Mountain Band of Chippewa Indians. The Turtle Mountain Band of Chippewa Indians is presently organized under a constitution approved by the United States Secretary of the Interior on June 16, 1959, pursuant to the Indian Reorganization Act of 1934, 25 U.S.C. §476. The reservation was established by Executive Orders of December 21, 1882, March 29, 1884, and June 3, 1884, and an agreement adopted by Congress in the Act of April 21, 1904, ch. 1402, 33 Stat. 189, which was approved by the Band on February 15, 1905. See Turtle Mountain Band of Chippewa Indians v. United States, 203 Ct.Cl. 426, 490 F.2d 935, 941 (1974).[24] The Tribal membership of said Reservation, within the limitations imposed upon of a dependent sovereign of the United States of America, has adopted their own constitution, their own laws and regulations, and have created their own judicial system for the resolution of disputes within said jurisdiction.

Both by statute and by case law, the Tribe has a right to have its own governmental institutions; its own regulatory bodies; and its own judicial system to resolve disputes arising within its jurisdiction . See, e.g., Davis v. Muellar, 643 F.2d 521, 533 (8th Cir.) cert. denied 454 U.S. 892 (1981). Persons and entities entering voluntary consensual relations with members of the Tribe within the exterior boundaries of the Reservation regularly subject themselves to the jurisdiction of the laws, regulations and judicial procedures adopted by the Tribe. Jurisdiction over the activities of non-Indians on the Reservation "presumptively lies in the tribal courts

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[24]The Tribe's first direct agreement with the United States as a part of what was then referred to as the "Pembina Bands" was the Treaty of October 2, 1863 (13 Stat. 667), by which they were to retain much of present day Northeastern North Dakota.

unless affirmatively limited by a specific treaty provision or federal statute." Iowa Mutual vs. LaPlante, 480 U.S. 9 (1987).

The Turtle Mountain Band has exercised its right to assume Tribal regulatory and civil adjudicatory jurisdiction over the broadest spectrum of cases permitted by the United States. The Tribal Code defining the Tribe's jurisdiction was amended in 1987 to give the Tribal Government subject matter jurisdiction "to the extent permitted by the Tribal Constitution and by the laws of the United States." Turtle Mountain Tribal Code of 1976, § 2.0102 (as amended 1987).

The Turtle Mountain Band of Chippewa Indians have never adopted the civil laws of the State of North Dakota to be a statement of their laws. Nor have the Tribal Courts adopted as their own the civil procedures, rules and regulations as have been adopted by the Supreme Court of the State of North Dakota. To the contrary, the Tribe has adopted its own constitution, its own statutes, its own regulations and its own judicial system of justice.

2. Tribal regulatory and adjudicatory jurisdiction exist over non-Indian "private persons" (including utilities) for business transacted with the Tribe, the Tribal Membership, and Tribal businesses within the exterior boundaries of the Reservation.

The Turtle Mountain Tribe asserts such jurisdiction, but such assertion is tempered by a qualifying statement: "to the extent permitted by the Tribal constitution and by the laws of the United States." The question is therefore asked, do the laws of the United States permit such assumption of jurisdiction over non-member private persons, such as utilities, engaged in the delivery and sale of utility services (such as water, sewer, gas, telephone, cable TV, and electric

power) to the residences and businesses owned by Tribal members and to the Tribe itself and Tribally owned businesses located within the jurisdictional lands of the Tribe? An analysis of applicable statutory and case law says yes.

Where does one go to define the civil adjudicatory powers of an Indian Tribe? The answer is complex. Simply because a Treaty. fails to delineate specific powers of a tribe does not mean that the tribe has been divested of such *See,* United States v. Wheeler, 435 U.S. 313 (1978); McClanahan v. Arizona State Tax Commissioner, 411 U.S. 164 (1978); Williams v. Lee, 358 U.S. 217 (1959). The Supreme Court "has referred to Treaties made with the Indians as *'not a grant of rights to the Indians,* but a grant of rights from them – a *reservation of those not* granted.'" Wheeler, 435 U.S. at 327 n. 24, 98 S.Ct. at 1088 n. 24 (quoting United States v. Winans, 198 U.S. 371, 381, 25 S.Ct 662, 664, 49 L.Ed. 1089 (1905) (emphasis added))." None of the Treaties and Agreements entered into between the Turtle Mountain Band of Chippewa Indians and the United States contain grants of any powers to the Tribe, rather, each were primarily written for the purpose of documenting additional takings of lands from the Tribe.[25]

Even though the Tribe's self government powers were not defined by Treaty, Agreements, Executive Orders, or Acts of Congress, one can discern the nature and extent of Tribal jurisdictional authority through an analysis of various Acts passed by the Congress and judicial opinions interpreting such acts. The Supreme Court has recognized that, "[t]hrough various Acts governing Indian tribes, Congress has expressed the purpose of 'fostering tribal self-

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[25]Executive Orders of December 21, 1882, March 29, 1884, and June 3, 1884, and an agreement adopted by Congress in the Act of April 21, 1904, ch. 1402, 33 Stat. 189, which was approved by the Band on February 15, 1905. See Turtle Mountain Band of Chippewa Indians v. United States, 203 Ct.Cl. 426, 490 F.2d 935, 941 (1974). The United State's first recognition of the Tribe's land base was contained in the Treaty of October 2, 1863 (13 Stat. 667).

government. "' Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 138 (1982). "Indian tribes within 'Indian country' are a good deal more than 'private, voluntary organizations.' They are unique aggregations possessing attributes of sovereignty over both their members and their territory." Id. (citations and quotations marks removed). "[i]t is clearly established law that Indian tribes do not derive their sovereign powers from congressional delegation. Rather, tribal sovereignty is inherent, and tribes retain 'attributes of sovereignty over both their members and their territory, to the extent that sovereignty has not been withdrawn by federal statute or treaty." Iowa Mutual Ins. Co. v. LaPlante, 480 U.S. 9, 14 (1987); United States v. Wheeler, 435 U.S. 313, 323 (1978)); *see also* Santa Clara Pueblo v. Martinez, 436 U.S. 49, 60 (1978).

The Supreme Court explained that "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." Washington v. Confederated Tribes of Colville Indian Reservation, 447 U.S. 134,155 (1980). More recently, however, the Supreme Court has qualified this broad declaration by the imposition of "tests" tied to what may or may not be within the scope of Tribal self-government interests. *See* Strate v. A-1 Contractors, 520 U.S. 438, 445 (1997) ("absent express authorization by federal statute or treaty, tribal jurisdiction over the conduct of nonmembers exists only in limited circumstances"); Montana v. United States, 450 U.S. 544, 565 (1981) ("the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe"). Specifically, in Montana, *supra,* the Supreme Court found the Crow Tribe lacked authority to regulate hunting and fishing by non-members on reservation land owned in fee simple by non-Indians, finding such conduct not to threaten the Tribe's self-government interests. Montana, 450 U.S. at 565. However, the Montana court held in the

absence of express denial of authority from Congress or by treaty, tribal civil authority over nonmembers may exist in certain circumstances. Id. at 565-66. The court, in pertinent part, stated, "[t]o be sure, Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non- Indian on their reservations, even on non-Indian fee lands . . ." Id. (citations omitted). These two tests continue to be applied by the court in the more recent cases. Strate, *supra*, 520 U.S. at 446 (citations omitted). In Strate, the Court addressed whether the Three Affiliated Tribes (Mandan, Hidatsa, and Arikara) had jurisdiction over a personal injury action against a non-Indian corporation as a result of an auto accident involving two non-Indians on a public highway maintained by the state pursuant to federally granted right-of-way over Indian lands. Strate, 520 U.S. at 442-44. In response to the argument that the rule of Montana did not control the case because the land underlying the highway was held in trust for the tribe, the court stated, "[w]e 'can readily agree,' in accord with Montana, that tribes retain considerable control over nonmember conduct on tribal land." Id at 454. "On the particular matter before us, however," the court concluded that "[tlhe right-of-way North Dakota acquired for the State's highway renders the 6.59 mile stretch equivalent, for nonmember governance purposes, to alienated non-Indian land." Id This is in sharp contrast to the single purpose of utility services connected to residences and businesses of Tribal members and the Tribe, in which there is a direct one-on-one consensual contractual relationship.

In the Strate decision, the Supreme Court applied the two Montana exceptions to determine if the Tribe had a self-government interest over what the Court had determined to be "Non-Indian lands" (a highway right-of-way granted to the State of North Dakota). The Court concluded that the first exception, which applied to "activities of nonmembers who enter

consensual relationships with the tribe or its members," did not apply because the auto accident **involved only non-Indians**, and thus, "presents no 'consensual relationship' [with the Tribe] of the qualifying kind." Id. at 457.[26] Regarding the second Montana exception, which applies to conduct that threatens the "health or welfare of the tribe," the court recognized that careless driving "surely jeopardized the safety of tribal members. Id. at 458. "But," the court continued, "if Montana's second exception requires no more, the exception would severely shrink the rule." Id. The court cautioned that "[r]ead in isolation, the Montana rule second exception can be misperceive." Id. at 459. Viewing the second Montana exception in the context of previous cases relating to tribal civil authority, the court concluded that because "[n]either regulatory nor adjudicatory authority over the state highway accident at issue **is needed** to preserve 'the right of reservation Indians to make their own laws and be ruled by them,' " the second Montana exception did not apply. Ib. (Quoting Williams, 358 U.S. at 220). [27] Again, in sharp contrast, is the absolute need of a people to access to reliable utility services.

Inherent in the extension of utility services to the Tribe, a Tribal Member or Tribal Business within the Turtle Mountain Jurisdiction is the knowing creation of a direct commercial transaction with the Tribe or Tribal member involved. Jurisdiction lies with the Tribe under such facts.

Jurisdiction of the Tribal Court is also supported by application of the two Montana

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[26]Contrasted with the instant case in which the agents of the United States were there for the benefit of Tribal members and had direct contact with the membership of the Tribe. It was a Tribal member is the alleged victim of the medical malpractice.

[27]In contrast, the instant case involves provision of necessary residential and business services directly to the Tribe, its membership, and the business owned by Tribal Members and the Tribe–each go to the heart of a Tribe's ability to protect the "health and welfare of the Tribe."

exceptions allowing Tribal jurisdiction over non-members:

A. First Montana Exception

All affect utilities voluntarily provide utility services to the membership of the Turtle Mountain Chippewa Tribe. Such activity fits squarely within the first exception for "activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements." Id. The Utilities have in fact established a "consensual relationship with the Tribe", specifically intended to benefit the Tribe and its membership. Pursuant to Montana, the failure of a private person, to meet its obligations under such contractual relationships or to seek the enforcement of its own rights and interest is enough to hold all utilities operating within the Reservation accountable to the regulatory environment, due process requirements and adjudicatory jurisdiction of the Tribe. Each Utility's contract to extend services to Tribal members within the Tribal Reservation represents a "'consensual relationship" which brings the conduct within the scope of the first Montana exception. Strate, 520 U.S. at 457; Montana, 450 U.S. at 565- 66.

B. Second Montana Exception.

Taking into consideration the scope of the second Montana exception as further defined and applied in Strate, even the second narrow exception recognized in Montana is applicable. The conduct of non-Indian Utilities fits squarely within the narrow scope of the second exception in which the conduct of non-members so impacts the "health or welfare of the tribe" to trigger the second Montana exception. Montana, 450 U.S. at 555-56. Unlike Strate, this case does not present a routine auto accident between two non-Indians, nor even a routine tort between an Indian and a non-Indian. Rather, each utility has entered into a contract affecting the use and

enjoyment of a personal residence of a Tribal member, of the Tribal government, or of a Tribal business providing the welfare of the membership. The provision of necessary utilities has a direct and substantial impact on the welfare of the Tribe and its individual membership, much more than would a simple isolated tort between individuals. The conditions and rules through which utility services are delivered within the Turtle Mountain Jurisdiction has a significant impact on "the right of reservation Indians to make their own laws and be ruled by them" as it may jeopardize their very ability to survive as a people. *See* Strate, 520 U.S. at 458. Thus the second Montana exception is also met in this case because the conduct as alleged herein, has a "direct effect" on the "health [and] welfare of the tribe." Montana, 450 U.S. at 556.

C. Turtle Mountain Tribal Law

The Jurisdictional provision of Turtle Mountain Tribal Code, Section 2.0102 , reads as follows:

2.0101 Jurisdiction

1. The Tribal court shall have general and original jurisdiction in all civil actions to the extent permitted by the Tribal constitution and by the laws of the United States. Such jurisdiction shall include, but not be limited to, jurisdiction over the following:

   a) business transactions conducted within the territorial jurisdiction of the Tribal Court as defined in Section 2.0102(3) of this Code; and

   b) Contracts to be performed within the Court's territorial jurisdiction, including contracts to insure any person, property, or risk, located within the Court's territorial jurisdiction; and

c) ownership, leasehold, use, or possession of any property, or interest therein, located within the Court's territorial jurisdiction; and

d) Tortuous acts committed within the Court's territorial jurisdiction; or injury effected within the Court's territorial jurisdiction by tortuous acts committed elsewhere.

2. The Tribal Court, except as it may be limited by the Tribal laws or law of the United States has all inherent power of any Court, including, but not limited to:

a) The power to make rules for the conduct of business;

b) The power to issue orders, decrees, subpoenas or writs necessary to implement its decisions;

c) The power to punish for contempt;

d) The power to administer oaths or affirmations;

e) The power to issue separation agreements;

f) The power to enforce its decisions by either a personal command to the party or parties or by a declaration that relief is granted, regardless of the nature of the matter before the Court.

3. The territorial jurisdiction of the Court extends total territory within the exterior boundaries of the Turtle Mountain Jurisdiction as defined by section 1.0501 of this Code unless otherwise provided.

4. The Court shall not have jurisdiction over any suit brought against the Tribe without the consent of the Tribe. Nothing in this Code shall be

construed as consent by the Tribe to be sued.. Turtle Mountain Tribal Code of 1976, § 2.0101 as amended by Tribal Resolution No. 3548-09-87 (emphasis added)

The Tribe's intent to reach off-Reservation non-Indians with its regulatory and adjudicatory jurisdiction whose conduct falls within the Tribe's jurisdiction statement is further expressed by the Tribe's long arm statute, which reads as follows:

2.0406 Long-arm statute.

Any person subject to the jurisdiction of the Tribal Court and doing any of the following acts:

1. The transaction of any business in the Turtle Mountain Jurisdiction;
2. The commission of any act which results in accrual of a tort action within the reservation;
3. The ownership, use or possession of any property or any interest therein, situated within the Turtle Mountain Jurisdiction;
4. Contracting to insure any person, property, or risk located within this reservation at the time of contracting;
5. Entering into a contract for services to be rendered or for materials to be furnished in the Turtle Mountain Jurisdiction by such person, shall be, in a civil action arising out of any of the above enumerated acts, subject to service of process outside the reservation in the same manner provided for service within the reservation with the same force and effect as though service had been made within the Turtle Mountain Jurisdiction.

Turtle Mountain Tribal Code of 1976 § 2.0406 (emphasis added)

Similar expansive jurisdictional interest in asserting Tribal jurisdiction over non-Indians doing business within the Turtle Mountain Jurisdiction is further expressed in the Tribe's Tribal Employment Rights Ordinance governing businesses and individuals who conduct commercial business within the exterior boundaries of the Tribal Reservation:

> "18.0107 Jurisdiction.
>
> All persons subject to the provisions of this Title shall be deemed to have consented to the full and exclusive jurisdiction of the Turtle Mountain Court as a condition of doing business within the boundaries of the Turtle Mountain Band of Chippewa jurisdiction." Turtle Mountain Tribal Code of 1976 § .0406

The Tribe's "Tribal Employment Rights Ordinance" (TERO) also incorporates the same broad jurisdictional assertion over the conduct of non-Indian business within the Turtle Mountain Jurisdiction. Section 2.10 of the TERO Code requires all business enterprises doing business within the "exterior boundaries of the Reservation" to obtain a business license. Otter Tail Power Company, Central Power Electric Cooperative, Inc.; North Central Electric Cooperative; and Great Plains Electric Cooperative – have each complied and have had issued to them business licenses to conduct their business operations within the Turtle Mountain Jurisdiction. By application for their Tribal Business license, each have voluntarily consented to the regulatory and adjudicatory authority of the Turtle Mountain Tribe.

The Tribe has enacted a comprehensive regulatory scheme to regulate electric service on the Turtle Mountain Reservation. See Title 21, Turtle Mountain Tribal Code. The Tribe specifically found that the power to regulate public utilities on the Reservation is an essential aspect of the retained sovereignty of the Turtle Mountain Band of Chippewa Indians, limited

only to the extent that such power has been specifically limited or withdrawn by federal law." See Turtle Mountain Tribal Code, § 21.0101(1). Acting by Resolution of the Tribal Council, the Tribe has exercised such authority and selected Ottertail Power.

CONCLUSION

The Turtle Mountain Band of Chippewa Indians could not have made its intent more clear to assert full and exclusive regulatory and adjudicatory jurisdiction over the conduct of Utilities doing business with Tribal members on real property located within the exterior boundaries of the Turtle Mountain Indian Reservation. The conduct occurs exclusively within the exterior boundaries of the Turtle Mountain Indian Reservation; the known and intended beneficiaries of such conduct are the Tribe, members of the Turtle Mountain Band of Chippewa Indians, and their businesses; and the purpose and intent of such conduct directly affected the welfare of such member and that of the Turtle Mountain Chippewa Tribe

An extended period of time was granted to the State of North Dakota by Congress to assert civil adjudicatory jurisdiction over Tribal lands, beginning with the passage in 1953 of Public Law 280, and continuing through 1968, but the State of North Dakota elected not to do so, and the State has not negotiated to do so with the Turtle Mountain Tribe thereafter. Absent such action on the part of the State of North Dakota, by the plain meaning the Congressional Acts and the State Constitution, the civil laws of the State of North Dakota have regulatory and adjudicatory jurisdictional authority within the exterior boundaries of the Tribal Reservations found within the State's borders. The Turtle Mountain Tribe could not make its intent more clear to assert full and exclusive jurisdiction over the conduct of the employees and agents of Utilities.

The compelling facts supporting Tribal jurisdiction include: the land served is located exclusively within the exterior boundaries of the Turtle Mountain Indian Reservation; the

known and intended beneficiaries are known members of the Turtle Mountain Band of Chippewa Indians, the Tribe, and their businesses; and the conduct has a direct and substantial impact on the welfare of the Turtle Mountain Chippewa Tribe. Under such facts, the Tribe possess exclusive subject matter and personal regulatory and adjudicatory jurisdiction over the conduct of utilities on their Reservation lands.

Dated this 7th day of May, 2012

_____/s/_____
RJ Brunkow, Tribal Attorney
PO Box 900
Highway 5 West
Belcourt, ND 58316
(701) 477-2616

_____/s/_____
Larry M. Baer (N.D. #03284)
1550 South Deer Road.
West Des Moines, Iowa 50266
LMBAER@BAERLODGE.COM
(515) 988-4204

PUBLIC SERVICE COMMISSION

STATE OF NORTH DAKOTA

North Centra Electric Cooperative, Inc.	)	
	)	
Complainant,	)	**Case No. PU-11-701**
	)	
vs	)	
	)	
Ottertail Power Company, Inc.	)	
	)	
Respondent.	)	

SPECIAL APPEARANCE OBJECTING TO JURISDICTION

The undersigned special counsel for the Turtle Mountain Band of Chippewa Indians does certify that a copy of the attached **Brief in Support of the Tribe's Special Appearance to Object to the Jurisdiction of the Public Service Commission of the State of North Dakota** to hear and determine choice of power supplier cases involving Tribally owned entities and businesses located within the exterior boundaries of the Turtle Mountain Indian Reservation and its territories was duly served by e-mail transmission upon the following with original by US Mails sent to the Commission at its offices in Bismarck, North Dakota:

Paul R. Sanderson	psanderson@zkslaw.com
Bruce Gerhardson	begerhardson@otpc.com
ALF Alan Hoberg	ahoberg@nd.gov
RJay Brunkow	rjaybru@hotmail.com
Tracy Kolb	tkolb@zkslaw.com
Debra Hoffarth	dhoffarth@srt.com

Dated this 7th day of May, 2012

/s/

Larry M. Baer (N.D. #03284)
1550 South Deer Road.
West Des Moines, Iowa 50266
LMBAER@BAERLODGE.COM
(515) 988-4204