

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

Supreme Court Number 20130075

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

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.

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

APPELLANT'S APPENDIX

PRINGLE & HERIGSTAD, PC
Debra L. Hoffarth, Attorney (ND ID# 05668)
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Minot ND 58702-1000
Phone (701) 852-0381

APPENDIX

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PU-11-701 **North Central Electric Cooperative, Incorporated** Status:Open
 Description: **vs. Otter Tail Power Company**
 Case Type: Complaint Portfolio: Brian P. Kalk
 Date Filed: 12/12/2011 Advisory Staff: Jerry R. Lein
 Category: Electric Docket Count: 57

Doc	Filed	Description	Pages:	Exhibit:	Certified to Court
1	12/12/2011	Complaint - extension of utility system By: North Central Electric Cooperative, Incorporated by Debra Hoffarth, Pringle & Herigstad, P.C	20		<input type="radio"/> Yes <input type="radio"/> No
2	12/21/2011	Commission Motion finding complaint a prima facie case and serving the complaint on the Respondent By: Public Service Commission	1		<input type="radio"/> Yes <input type="radio"/> No
3	12/23/2011	Affidavit of Service cert. mail - Formal Complaint and Motion dated Dec. 21, 2011 By: Public Service Commission	22		<input type="radio"/> Yes <input type="radio"/> No
4	1/17/2012	Answer to Complaint By: Otter Tail Power Company by Paul Sanderson, Zuger Kirmis and Smith	5		<input type="radio"/> Yes <input type="radio"/> No
5	1/17/2012	Notice of Appearance, Notice of Motion to Dismiss, Motion to Dismiss, Brief in Support of Motion By: Otter Tail Power Company by Paul Sanderson, Zuger Kirmis and Smith	15		<input type="radio"/> Yes <input type="radio"/> No
6	1/26/2012	Letter re Motion to Dismiss, response and filing dates By: North Central Electric Cooperative, Incorporated by Debra Hoffarth, Pringle & Herigstad, P.C	1		<input type="radio"/> Yes <input type="radio"/> No
7	2/2/2012	Brief of North Central Electric responding to Otter Tail's Motion to Dismiss including exhibits By: North Central Electric Cooperative, Incorporated by Debra Hoffarth, Pringle and Herigstad	60		<input type="radio"/> Yes <input type="radio"/> No
8	2/6/2012	Right of way plats By: North Central Electric Cooperative, Incorporated by Debra Hoffarth, Pringle & Herigstad, P.C	10		<input type="radio"/> Yes <input type="radio"/> No
9	2/13/2012	Reply Brief in Support of Otter Tail Power Company's Motion to Dismiss By: Otter Tail Power Company by Paul Sanderson, Zuger Kirmis and Smith	8		<input type="radio"/> Yes <input type="radio"/> No
10	2/14/2012	Letter request for Administrative Law Judge By: Public Service Commission	3		<input type="radio"/> Yes <input type="radio"/> No
11	2/14/2012	North Central Electric Cooperative, Inc. Brief Responding to Otter Tail's Reply Brief on Motion to Dismiss By: North Central Electric Cooperative, Incorporated by Debra Hoffarth, Pringle & Herigstad, P.C	4		<input type="radio"/> Yes <input type="radio"/> No
12	2/21/2012	Letter designating Administrative Law Judge By: Allen Hoberg - Office of Administrative Hearings	1		<input type="radio"/> Yes <input type="radio"/> No
13	2/17/2012	Letter comments By: Turtle Mountain Band of Chippewa Indians by Merle St. Claire, Chairman	1		<input type="radio"/> Yes <input type="radio"/> No
14	3/23/2012	Letter regarding Court Reporter By: Public Service Commission	1		<input type="radio"/> Yes <input type="radio"/> No
15	4/24/2012	Prehearing Conference Summary and Stipulations By: Allen Hoberg, ALJ - Office of Administrative Hearings	3		<input type="radio"/> Yes <input type="radio"/> No
16	4/25/2012	Commission Motion issuing Notice of Hearing By: Public Service Commission	1		<input type="radio"/> Yes <input type="radio"/> No

Doc	Filed	Description	Pages:	Exhibit:	Certified to Court
17	4/25/2012	Notice of Hearing By: Public Service Commission	2		<input type="radio"/> Yes <input type="radio"/> No
18	4/26/2012	Petition to Intervene for Special Appearance to Object to Jurisdiction By: Turtle Mountain Band of Chippewa Indians by Merle St. Claire, Chairman	4		<input type="radio"/> Yes <input type="radio"/> No
19	4/27/2012	Email re request for waivers of 45 day rule By: Public Service Commission	1		<input type="radio"/> Yes <input type="radio"/> No
20	4/27/2012	Email re waiver of 45 day rule By: Otter Tail Power Company by Paul Sanderson, Zuger Kirmis and Smith	1		<input type="radio"/> Yes <input type="radio"/> No
21	4/27/2012	Notice of Appearance of Counsel By: Turtle Mountain Band of Chippewa Indians by Rjay J. Brunkow, Tribal Attorney	3		<input type="radio"/> Yes <input type="radio"/> No
22	4/27/2012	Email re waiver of 45 day rule By: North Central Electric Cooperative, Incorporated by Debra Hoffarth, Pringle & Herigstad, P.C	2		<input type="radio"/> Yes <input type="radio"/> No
23	4/30/2012	Objection to Petition to Intervene for Special Appearance to Object to Jurisdiction By: North Central Electric Cooperative, Incorporated by Debra Hoffarth, Pringle & Herigstad, P.C	17		<input type="radio"/> Yes <input type="radio"/> No
24	5/1/2012	Email re no objection to Petition to Intervene for Special Appearance to Objection to Jurisdiction By: Otter Tail Power Company by Paul Sanderson, Zuger Kirmis and Smith	2		<input type="radio"/> Yes <input type="radio"/> No
25	5/1/2012	Petition to Intervene for Special Appearance to Object to Jurisdiction By: Turtle Mountain Band of Chippewa Indians by Clara J. Holloway, Zuger Kirmis & Smith	4		<input type="radio"/> Yes <input type="radio"/> No
26	5/2/2012	Notice of Appearance By: Turtle Mountain Band of Chippewa Indians by Clara J. Holloway, Zuger Kirmis & Smith	3		<input type="radio"/> Yes <input type="radio"/> No
27	5/2/2012	Email re Petition to Intervene for Special Appearance to Object to Jurisdiction By: Al Hoberg, ALJ - Office of Administrative Hearings	1		<input type="radio"/> Yes <input type="radio"/> No
28	5/2/2012	Order on Petition to Intervene for Special Appearance to Object to Jurisdiction By: Allen Hoberg, ALJ - Office of Administrative Hearings	3		<input type="radio"/> Yes <input type="radio"/> No
29	5/2/2012	Email re No objection to Petition to Intervene for Special Appearance to Object to Jurisdiction By: Otter Tail Power Company by Paul Sanderson, Zuger Kirmis and Smith	2		<input type="radio"/> Yes <input type="radio"/> No
30	5/2/2012	Objection to Intervention by Turtle Mountain Band of Chippewa Indians By: North Central Electric Cooperative, Incorporated by Debra Hoffarth, Pringle & Herigstad, P.C	7		<input type="radio"/> Yes <input type="radio"/> No
31	5/4/2012	Order Granting Intervention By: Allen Hoberg, ALJ - Office of Administrative Hearings	4		<input type="radio"/> Yes <input type="radio"/> No
32	5/4/2012	Copy of email to ALJ with attached Stipulation By: North Central Electric Cooperative, Incorporated by Debra Hoffarth, Pringle & Herigstad, P.C	7		<input type="radio"/> Yes <input type="radio"/> No
33	5/4/2012	Motion for Admission Pro Hac Vice of Rjay J. Brunkow and Affidavit By: Otter Tail Power Company by Tracy Vigness Kolb, Zuger Kirmis&Smith	5		<input type="radio"/> Yes <input type="radio"/> No

Doc	Filed	Description	Pages:	Exhibit:	Certified to Court
34	5/12/12	Special Appearance Objecting to Jurisdiction By: Larry Baer and RJ Brunkow for Turtle Mountain Band of Chippewa Indians	25		<input type="radio"/> Yes <input type="radio"/> No
35	5/8/2012	Order Granting Admission Pro Hac Vice By: Allen Hoberg, ALJ - Office of Administrative Hearings	3		<input type="radio"/> Yes <input type="radio"/> No
36	5/8/2012	Letter closing OAH file By: Allen Hoberg, ALJ - Office of Administrative Hearings	1		<input type="radio"/> Yes <input type="radio"/> No
37	5/9/2012	Special Appearance Objecting to Jurisdiction By: Larry Baer and RJ Brunkow for Turtle Mountain Band of Chippewa Indians	24		<input type="radio"/> Yes <input type="radio"/> No
38	4/23/2012	Electronic record of pre-hearing conference By: Public Service Commission	1		<input type="radio"/> Yes <input type="radio"/> No
39	5/7/2012	Electronic record of formal hearing By: Public Service Commission	1		<input type="radio"/> Yes <input type="radio"/> No
40	5/8/2012	Objection to Special Appearance Objecting to Jurisdiction By: North Central Electric Cooperative, Incorporated by Debra Hoffarth, Pringle & Herigstad, P.C	5		<input type="radio"/> Yes <input type="radio"/> No
41	5/10/2012	Order Striking Brief By: Allen Hoberg, ALJ - Office of Administrative Hearings	4		<input type="radio"/> Yes <input type="radio"/> No
42	5/10/2012	Response to Tribe's Special Appearance and North Central's Objection By: Otter Tail Power Company by Paul Sanderson, Zuger Kirmis and Smith	4		<input type="radio"/> Yes <input type="radio"/> No
43	5/11/2012	Response to Otter Tail's response to Tribe's Special Appearance and North Central's objection By: Allen Hoberg, ALJ - Office of Administrative Hearings	1		<input type="radio"/> Yes <input type="radio"/> No
44	5/11/2012	Response to Objection to the Special Appearance Objecting to Jurisdiction by the Turtle Mountain Band of Chippewa Indians By: Larry Baer and RJ Brunkow for Turtle Mountain Band of Chippewa Indians	7		<input type="radio"/> Yes <input type="radio"/> No
45	5/14/2012	Special Appearance Objecting to Jurisdiction By: Larry Baer and RJ Brunkow for Turtle Mountain Band of Chippewa Indians	24		<input type="radio"/> Yes <input type="radio"/> No
46	5/17/2012	Letter - Order Striking Brief further response By: Allen Hoberg, ALJ - Office of Administrative Hearings	2		<input type="radio"/> Yes <input type="radio"/> No
47	5/17/2012	Proposed Findings of Fact, Conclusions of Law, and Order By: Otter Tail Power Company by Bruce Gerhardson	6		<input type="radio"/> Yes <input type="radio"/> No
48	5/17/2012	Proposed Findings of Facts, Conclusions of Law and Order By: North Central Electric Cooperative, Incorporated by Debra Hoffarth, Pringle & Herigstad, P.C	18		<input type="radio"/> Yes <input type="radio"/> No
49	5/22/2012	Transcript of Hearing By: Emineth & Associates Court Reporters	120		<input type="radio"/> Yes <input type="radio"/> No
50	6/4/2012	Electronic record of work session By: Public Service Commission	1		<input type="radio"/> Yes <input type="radio"/> No
51	6/14/2012	Commission Motion adopting Order granting Motion for Dismissal of Formal Compliant By: Public Service Commission	1		<input type="radio"/> Yes <input type="radio"/> No
52	6/14/2012	Findings of Fact, Conclusions of Law, and Order By: Public Service Commission	12		<input type="radio"/> Yes <input type="radio"/> No

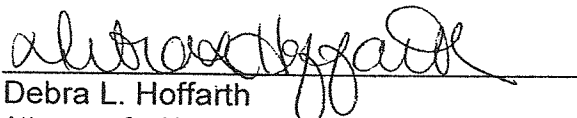
Doc	Filed	Description	Pages:	Exhibit:	Cerified to Court
53	8/21/2012	Affidavit of Service Cert. Mail- Order By: Public Service Commission	13		<input type="radio"/> Yes <input type="radio"/> No
54	6/28/2012	Request for Reconsideration By: North Central Electric Cooperative, Incorporated by Debra Hoffarth, Pringle & Herigstad, P.C	10		<input type="radio"/> Yes <input type="radio"/> No
55	7/9/2012	Response of Otter Tail Power Company to Request for Reconsideration By: Otter Tail Power Company by Paul Sanderson, Zuger Kirmis and Smith	10		<input type="radio"/> Yes <input type="radio"/> No
56	7/13/2012	Reply to Otter Tail Power Company's Response to Request for Reconsideration By: North Central Electric Cooperative, Incorporated by Debra Hoffarth, Pringle & Herigstad, P.C	4		<input type="radio"/> Yes <input type="radio"/> No
57	8/6/2012	APPEAL - Notice of Appeal and Specifications of Error, Undertaking on Appeal to District Court By: North Central Electric Cooperative, Incorporated by Debra Hoffarth, Pringle & Herigstad, P.C	20		<input type="radio"/> Yes <input type="radio"/> No

10. Otter Tail is subject to the jurisdiction of the Public Service Commission. Application of Otter Tail Power Co., 354 N.W.2d 701 (N.D. 1984); Application of Otter Tail Power Co., 451 N.W.2d 95, (N.D. 1990).

Therefore, under N.D.C.C. §§ 49-02-02 (2), (4), 49-03-01.1, 49-03-01.4, 49-03-05, North Central requests the Commission, with or without notice, to make its order restraining, enjoining and requiring Otter Tail to cease and desist from constructing an extension of its electric public utility plant and system to and from serving any customer at the place to be served and to require Otter Tail to conform to the laws of this State, until the further order of the Commission after hearing after due notice and that Otter Tail be ordered to remove the extension if its electric public utility plant and system to the Sky Dancer campus.

Dated this 12th day of December, 2011

PRINGLE & HERIGSTAD, P.C.

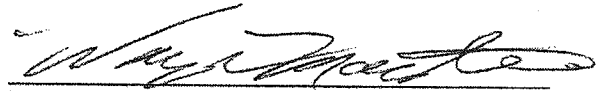


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temporary construction service. I also spoke with Dennis Ellefson, area manager of Rugby, Garrison, Jamestown, and Oakes who informed me that Otter Tail had received a request for electric service to Sky Dancer's new building on the Sky Dancer campus, including temporary construction service.

7. On December 1, 2011, North Central discussed this matter with the Turtle Mountain Tribal Chairman who confirmed the Tribe had requested electric service from Otter Tail.
8. On December 7, 2011, North Central received a request to locate its electrical lines for Otter Tail via North Dakota One-Call. The request indicates that the work to be done is the installation of electric main/poles & anchors at a location staked to the construction of the new casino. The request to locate and photographs are attached hereto as Exhibits 1 and 2.
9. On December 9, 2011, Otter Tail began construction of an extension of its public utility plant and system and of its transmission and distribution lines for electrical service on the Sky Dancer campus. It appears that Otter Tail will bore under Highway 5 and that Otter Tail will cross over two of North Central's main three phase underground feeders, one of which serves the Sky Dancer campus, with an overhead distribution line. Otter Tail will cross under Central Power Electric Cooperative, Inc.'s transmission, which provides electrical service to North Central's facilities. It is estimated that Otter Tail's construction will be complete by 12/13/2011. Photographs of the construction are attached hereto as Exhibit 3.
10. Otter Tail's construction of an extension of its public utility plant and system and of its transmission and distribution lines to serve Sky Dancer would interfere with North Central's service and system and is wasteful duplication of facilities.
11. Otter Tail has not obtained from the Public Service Commission a certificate that public convenience and necessity require or will require such construction and service by Otter Tail.

Dated this 12th day of December, 2011.



Wayne Martian, Manager
North Central Electric Cooperative, Inc.

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

SUBSCRIBED AND SWORN TO before me this 12th day of December, 2011.

DEBRAL HOFFARTH
Notary Public
State of North Dakota
My Commission Expires Sept. 23, 2012

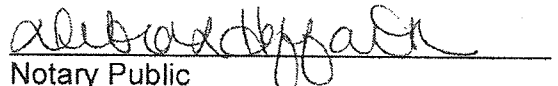

Notary Public
For the State of North Dakota
My commission expires: 9/29/2012

EXHIBIT 1

NORTH DAKOTA ONE-CALL
REQUEST TO LOCATE

NORTH DAKOTA ONE-CALL

Request #: 11163327

LORQ ROUTINE

Send To: NCENTL01 Seq No: 1 Map Ref:

Original Call Date: 12/07/11 Time: 10:02 AM CT Op: mnkimb
Work to Begin Date: 12/09/11 Time: 10:15 AM CT
Transmit Date: 12/07/11 Time: 10:42 AM CT Op: mnkimb

County: ROLETTE Place: TURTLE MOUNTAIN UNOR
Address: Street: HWY 281
Nearest Intersecting Street: 39TH AVE NE

Type of Work: INSTALLATION OF ELECTRIC MAIN//POLES & ANCHORS
Work Being Done For: OTTER TAIL POWER

Depth: 6FT Explosives: N Taling/Boring: Y

Extent of Work: FROM GO E HWY 281 APPROX 1/2 MILE TO SKY DANCER CASINO
: APPROACH LOCATED ON N SIDE OF RD AND STAKES LOCATED ON S SIDE OF APPROACH
: AND MARK 25FT RADIUS OF EACH OF APPROX 15 STAKES GOING N AND W TO NEW
: CONSTRUCTION OF NEW CASINO AND FROM THIS POINT MARK 20FT RADIUS OF WHITE
: FLAGGD AREA GOING N INTO CASINO

Remarks: CALLER STATES WORK IS ALSO UNDERGROUND CABLE
: CALLER STATES 39TH AVE NE AKA BIA 11 AKA ROLETTE RD/HWY 281 AKA HWY 5

Twp: 162N Rng: 71W Sect-Qtr: 34

Ex. Coord NW Lat: 48.8210012 Lon: -99.8549928 SE Lat: 48.8046020 Lon: -99.8313530

Company : OTTER TAIL POWER Fax:
Contact Name: MIC DECOTEAU (701)477-3577
Alt. Contact: MIC DECOTEAU / C Phone: (701)550-0023
Caller Address: P.O. BOX 877 Call Back:
ROLLA, ND 58367

UNITED01

Link To Map for NCENTL01: <http://nd.itic.occinc.com/YWH4-CF2-W62-D2Y>

EXHIBIT 2

PHOTOGRAPHS OF OTTER TAIL
STAKING

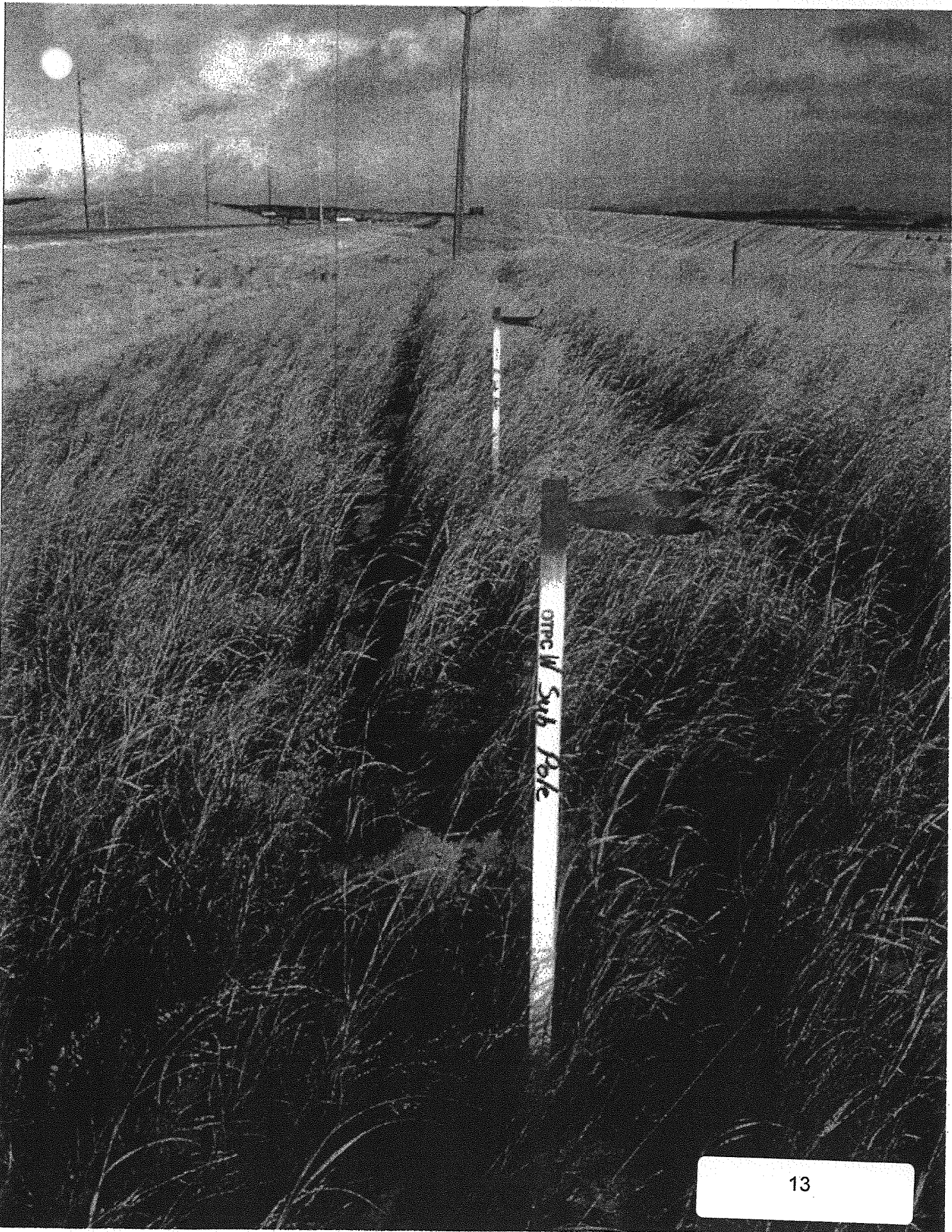


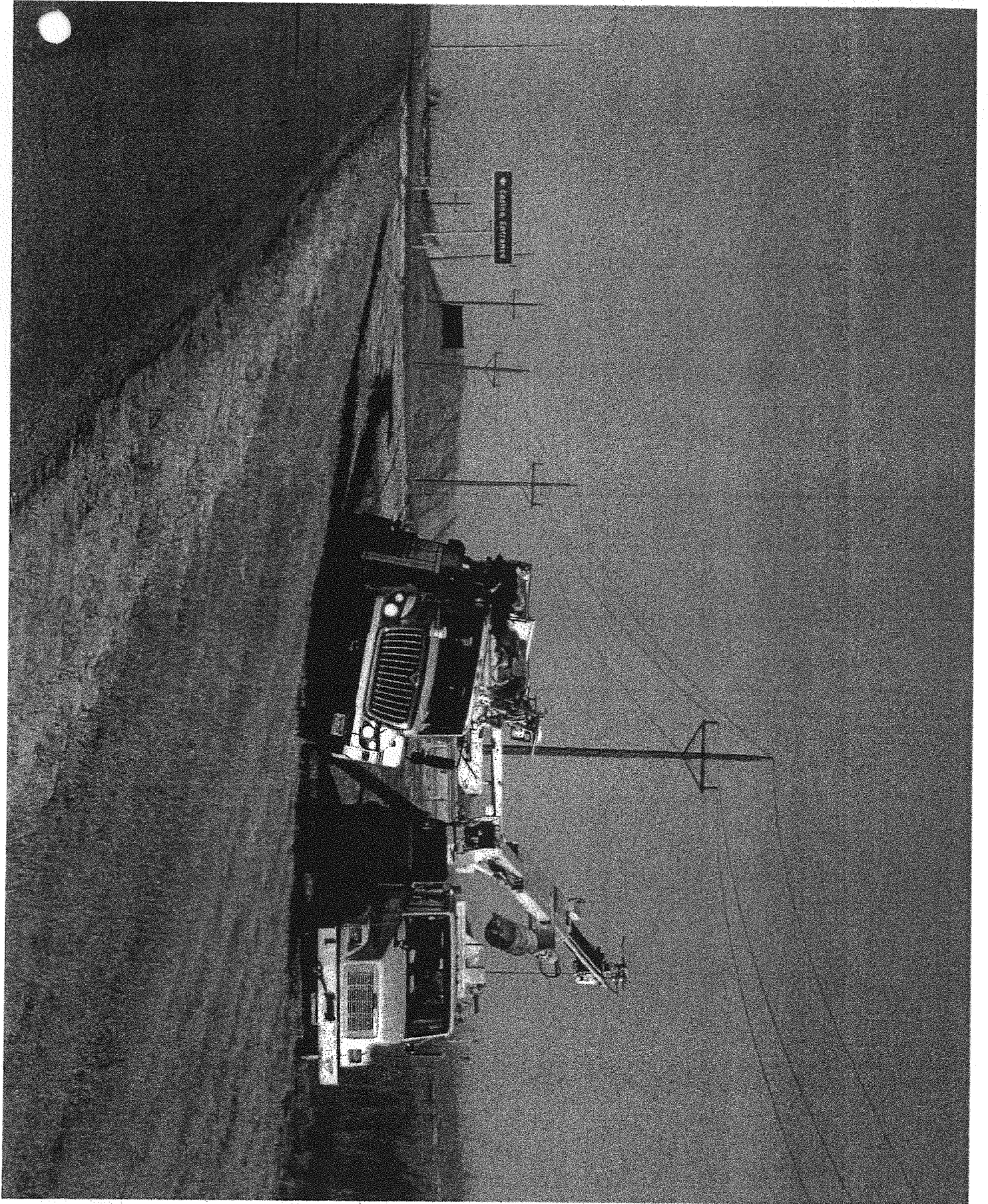


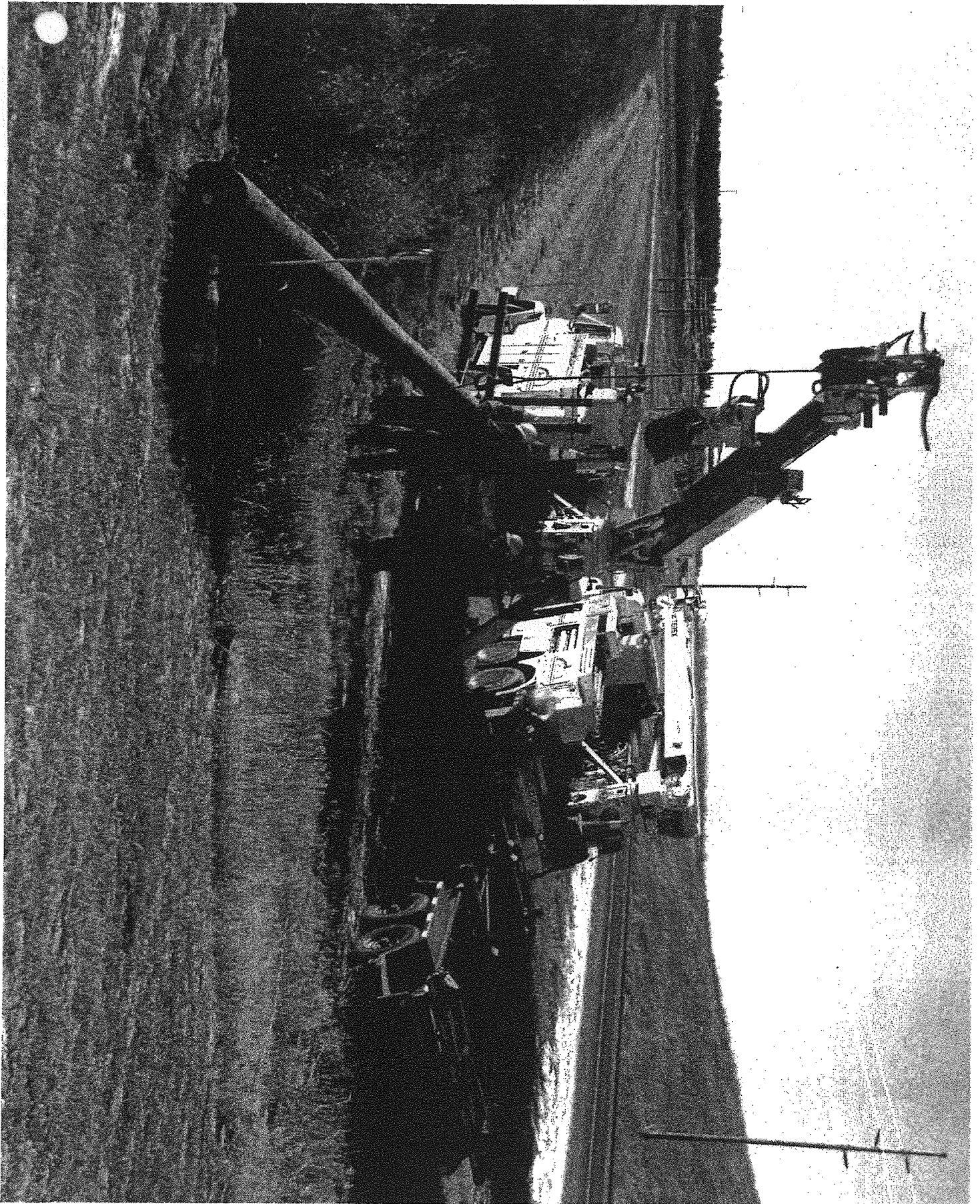


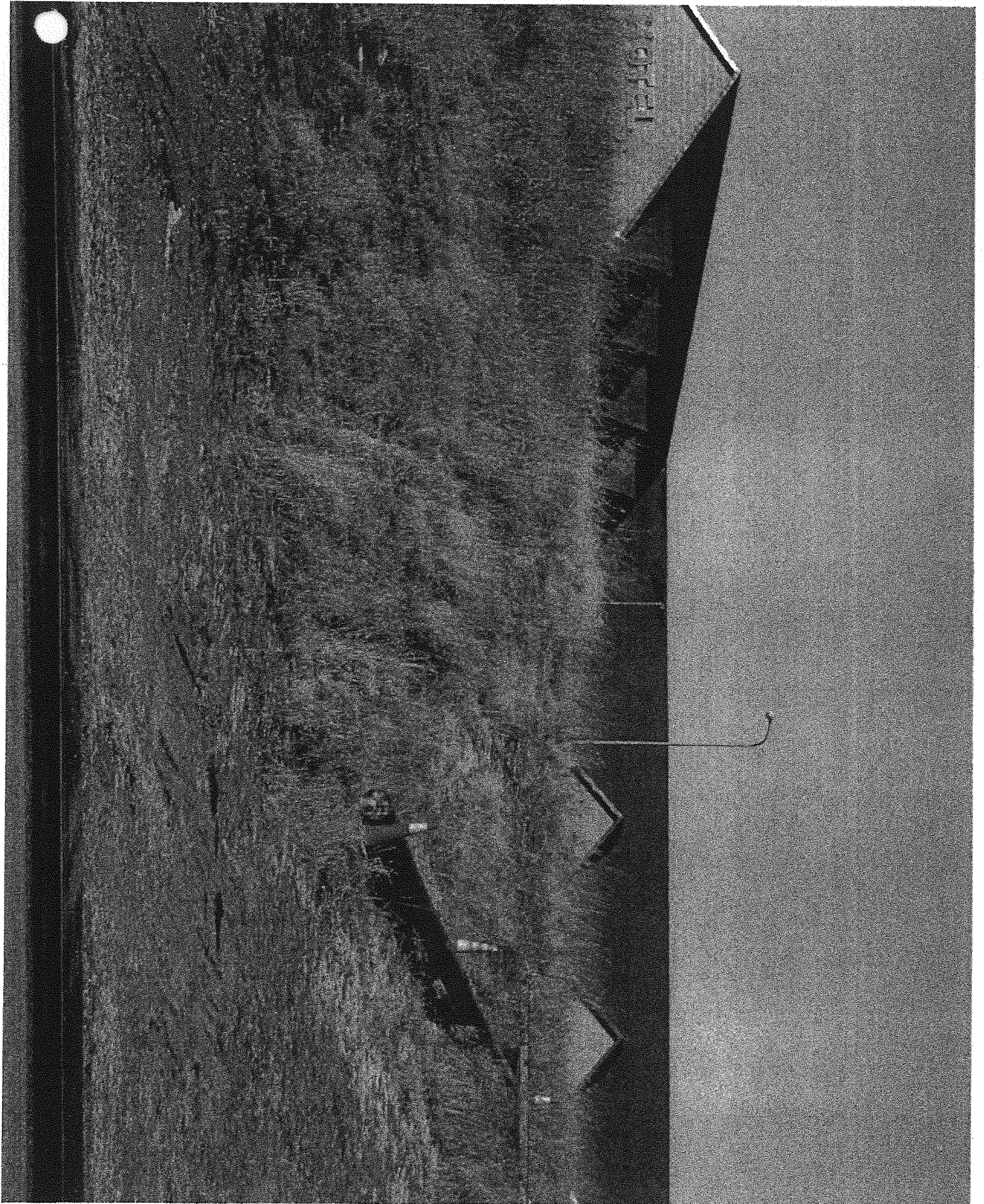


EXHIBIT 3

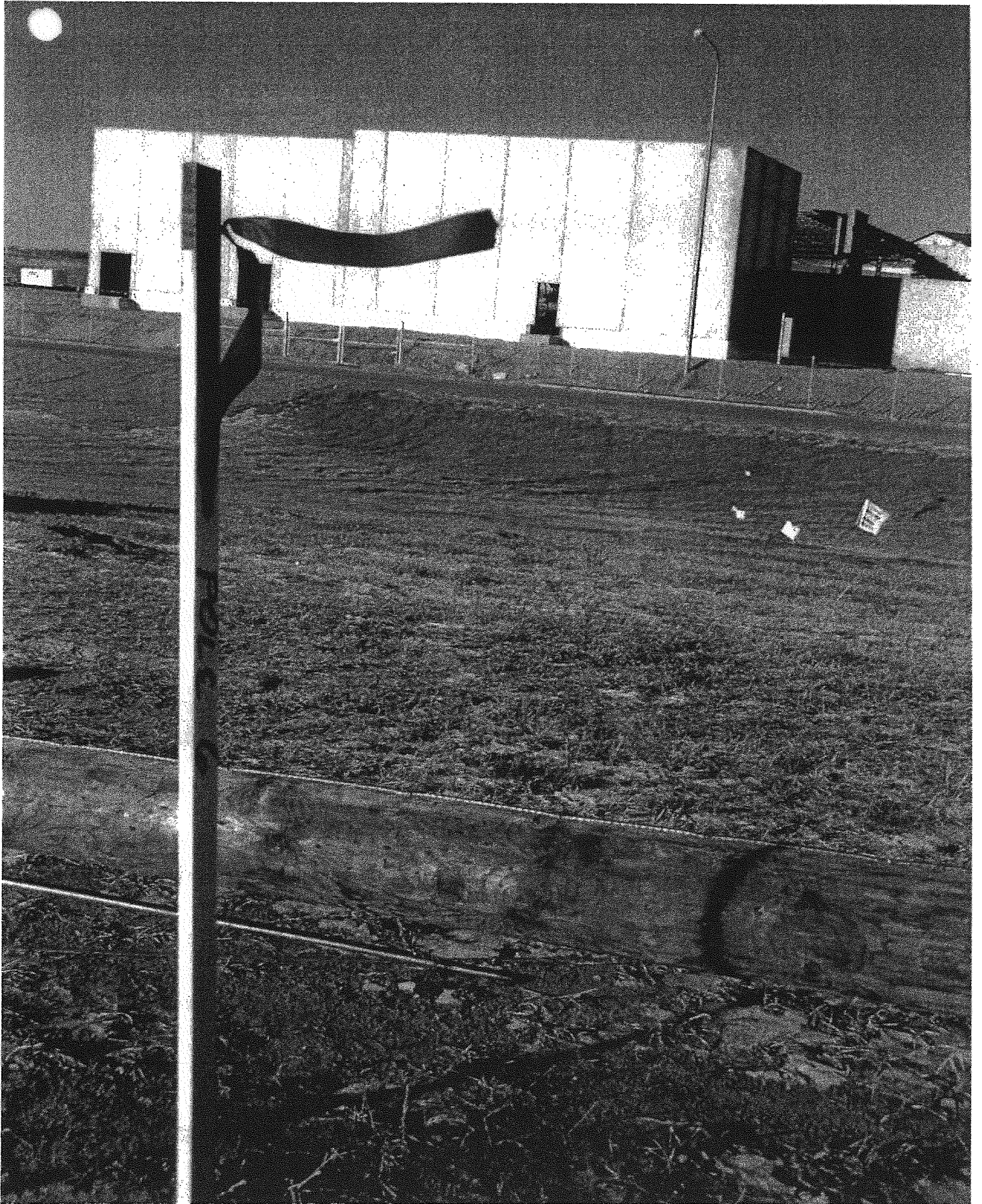
PHOTOGRAPHS OF OTTER TAIL
CONSTRUCTION

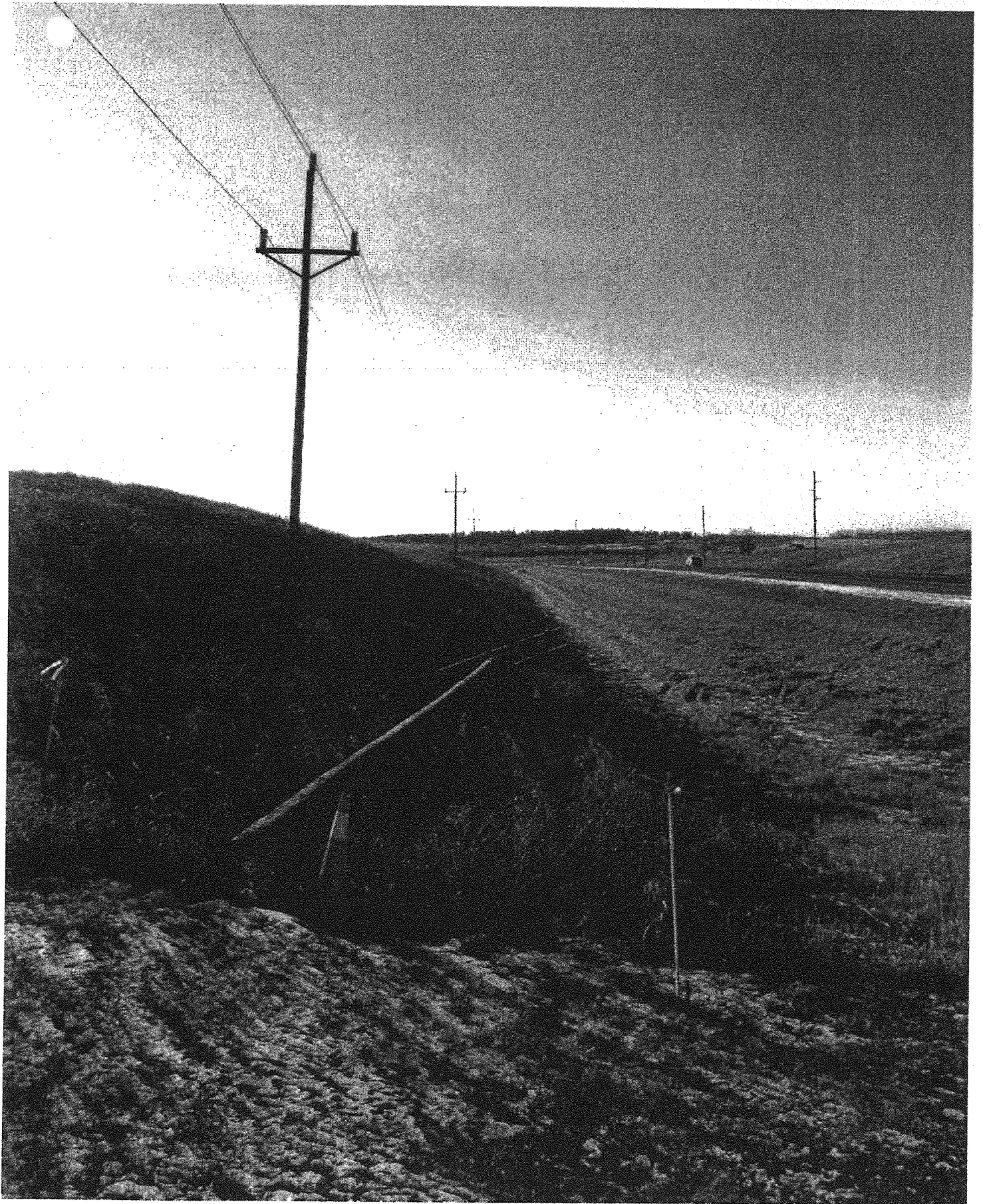












BEFORE THE PUBLIC SERVICE COMMISSION OF NORTH DAKOTA

North Central Electric Cooperative, Inc.,))	
Complainant,))	ANSWER OF OTTER TAIL
vs.))	POWER COMPANY
Otter Tail Power Company,))	
Respondent.))	Case No. PU – 11 - 701

Otter Tail Power Company ("OTP") states the following as its Answer to North Central Electric Cooperative, Inc.'s ("North Central") Complaint.

I.

Except as otherwise admitted, qualified, or explained, OTP denies each and every allegation of the Complaint.

II.

With respect to the allegations contained in paragraph 1 of the Complaint, OTP admits North Central is a rural electric cooperative under N.D.C.C. § 49-03-01.5(6), but denies the remaining allegations contained in the paragraph.

III.

OTP admits the allegations contained in paragraph 2 of the Complaint.

IV.

With respect to the allegations contained in paragraph 3 of the Complaint, OTP admits it has begun construction of an extension of its public utility plant and system to provide electric service to the Turtle Mountain Band of Chippewa Indians' ("Tribe") facility located on the Turtle Mountain Reservation, with a specific property description of N1/2 of the SW1/4, Section 34, Township 162N, Range 71W, Rolette County, but specifically

denies that a certificate of public convenience and necessity is required to supply electric service to the Tribe's facility located on Tribal Trust land on the Turtle Mountain Reservation. OTP's position is supported by Devils Lake Sioux Indian Tribe v. North Dakota Public Service Comm'n, 896 F.Supp. 955 (D.N.D. 1995), which held that the North Dakota Public Service Commission had no regulatory authority over a federally recognized Indian Tribe's right to determine who supplies electric service to Tribal-owned facilities located on the reservation.

V.

OTP admits the allegations contained in paragraphs 4 and 6 of the Complaint.

VI.

OTP denies the allegations contained in paragraphs 5, 7, 8, 9, and 10 of the Complaint.

VII.

With respect to the paragraph of the Complaint which appears as a "Therefore" clause, OTP denies such allegations and asserts the relief requested in such paragraph is inappropriate in this case.

VIII.

OTP affirmatively asserts the Complaint fails to state a claim against it upon which relief can be granted.

XI.

OTP affirmatively asserts the Public Service Commission does not have regulatory authority over the Tribe's determination of who will provide electric service to a Tribally-

owned facility located on Tribal land on the Turtle Mountain Reservation pursuant to the legal precedent set forth in Devils Lake Sioux Indian Tribe v. North Dakota Public Service Comm'n, 896 F.Supp. 955 (D.N.D. 1995).

WHEREFORE, Otter Tail Power Company respectfully requests that the Complaint be dismissed.

Dated this 16th day of January, 2012.

By: /s/ Bruce Gerhadson
Bruce Gerhadson
Associate General Counsel
Otter Tail Power Company
215 S Cascade St.
Fergus Falls, MN 56538-0496
Telephone: 218-739-8475

Paul R. Sanderson (ID# 05830)
ZUGER KIRMIS & SMITH
Attorneys for Otter Tail Power Company
P.O. Box 1695
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government. This power is an aspect of the retained sovereignty of the Turtle Mountain Band of Chippewa Indians, an American Indian Tribe, limited only to the extent that such power has been specifically limited or withdrawn by federal law." Id. at § 21.0101(1). The Tribal Utility Code was enacted pursuant to the sovereign tribal powers delegated to the Tribal Council under the Tribal Constitution. Id. at § 21.0101(4).

The Sky Dancer Casino is a gaming casino owned and operated by the Tribe and located on the Turtle Mountain Reservation. Strickland et.al. v. DeCoteau et.al., TMAC No. 04-003, at 1 (Mar. 14, 2005). The Sky Dancer Casino is located on Tribally-owned Trust land. See Exhibit A (Warranty Deed).

North Central is currently providing electric service to the Sky Dancer Casino. See Complaint. However, on November 23, 2011, the Tribal Council 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 starting June 1, 2012. See Exhibit B (Tribal Resolution TMBC598-11-11).

On December 12, 2011, North Central filed a Complaint with the North Dakota Public Service Commission ("Commission") seeking to enjoin OTP from constructing an extension of its public utility system to serve the Sky Dancer Casino. See Complaint. The basis for North Central's Complaint was that the North Dakota Public Service Commission ("Commission") has regulatory authority over OTP's providing electric service to the Tribe on the Reservation under the Territorial Integrity Act pursuant to the North Dakota Supreme Court case Application of Otter Tail Power Co., 451 N.W.2d 95 (N.D. 1990) (hereinafter referred to as "Otter Tail (1990)").

OTP served its Answer to North Central's Complaint on January 16, 2012. See Answer. OTP denied the Commission has any regulatory control over a federally recognized Indian Tribe's determination of who will provide electric service to Tribal-owned facilities located on Tribal land on the Reservation. Id. OTP's position is based the legal precedent set forth in Devils Lake Sioux Indian Tribe v. North Dakota Public Service Comm'n, 896 F.Supp. 955 (D.N.D. 1995). Id.

ISSUE

Whether the Public Service Commission has regulatory authority over the Turtle Mountain Band of Chippewa Indians' Tribal Resolution permitting Otter Tail Power Company to supply electric service to the Tribally-owned Sky Dancer Casino located on Tribal Trust land within the exterior boundaries of the Turtle Mountain Reservation.

LAW AND ARGUMENT

OTP moves the Commission for an order dismissing North Central's Complaint because the Commission does not have regulatory authority over the Tribe's determination to permit OTP to provide electric service for the tribal-owned Sky Dancer Casino located on the Tribe's land within the exterior boundaries of the Turtle Mountain Reservation. OTP files the Motion to Dismiss as a supplemental pleading pursuant to N.D.C.C. § 28-32-21(1)(h).

A. Standard of Review.

OTP's Motion to Dismiss is brought pursuant to N.D.R.Civ.P. 12(b)(vi). "The purpose of a N.D.R.Civ.P. 12(b)(vi) motion is to test the legal sufficiency of the statement of the claim presented in the complaint." See Ziegelmann v. DaimlerChrysler Corp., 2002

ND 134, ¶ 5, 649 N.W.2d 556. A motion to dismiss a complaint under Rule 12(b)(vi) of the North Dakota Rules of Civil Procedure should be granted "if it is disclosed with certainty the impossibility of proving a claim for which relief can be granted." *Id.* A judgment dismissing a complaint for failure to state a claim should be found if the court cannot "discern a potential for proof to support it." *Id.* If matters outside the pleadings are presented in support of a motion to dismiss under N.D.R.Civ.P. 12(b)(vi), the motion is treated as a motion for summary judgment under N.D.R.Civ.P. 56. Zutz v. Kamrowski, 2010 ND 155, ¶ 8, 787 N.W.2d 286.

B. An Indian Tribe may by resolution determine who is to supply electrical service to a Tribally-owned business located on Tribal land without regard to the regulations of the North Dakota Public Service Commission.

OTP seeks to dismiss North Central's Complaint because the current law provides that the Commission has no regulatory authority over an Indian Tribe's resolution determining who will provide electric service to a Tribally-owned facility located on Tribal land within the exterior boundaries of the Reservation. North Central's Complaint in this case is based upon its interpretation of the Otter Tail (1990) case. However, North Central's reliance upon the Otter Tail (1990) case is misplaced as it was overruled by the subsequent appellate history of the parties.

North Central erroneously relies upon the Otter Tail (1990) case as support for its claim that the Commission has regulatory authority over the Tribe's resolution to permit OTP to supply electric service to the Sky Dancer Casino. In the Otter Tail (1990) case, the North Dakota Supreme Court held that that the Commission had regulatory authority over OTP's electric service contract to provide service to the Devils Lake Sioux Tribe's facility

located on the reservation. 451 N.W.2d at 107. One of the key factors in the Supreme Court's decision was that the Devils Lake Sioux Tribe had not previously attempted any regulation of electric utilities. Id. at 101. The Court concluded that the Devils Lake Sioux Tribe did not have the authority through its inherent sovereignty to regulate electric service to its facilities. Id. at 103-04.

However, the Otter Tail (1990) holding was just the beginning of the legal dispute between OTP, the Commission, the Devils Lake Sioux Tribe, and the electric cooperatives. Following the Otter Tail (1990) opinion, the parties continued litigating the issue of the Commission's authority over the Tribe's 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 Indian Tribe v. North Dakota Public Service Comm'n, 896 F.Supp. 955 (D.N.D. 1995); and Baker Electric Coop v. Chaske, 28 F.3d 1466 (8th Cir. 1994).

The issue of whether the Commission had regulatory authority over the Devils Lake Sioux Tribe's resolution permitting OTP to provide electric service to a Tribally-owned business located on Tribal land culminated in the North Dakota Public Service Comm'n case. 896 F.Supp. 955. Following the Otter Tail (1990) case, the Devils Lake Sioux Tribe brought a direct action against the Commission in federal court. Id. Prior to commencing its action against the Commission, the Devils Lake Sioux Tribe enacted a complex utility regulation scheme and claimed it had the sovereign power to regulate electric service on the reservation. Id. at 957. The court determined that the Tribe has the inherent sovereignty to contract with whomever it will for the provisions of electric service to its lands and businesses and such sovereignty takes precedence over power of the State of North

Dakota on the reservation. Id. (finding that where the service is to a Tribal business located on Tribal land, the necessary nexus between Tribal interests and inherent sovereignty is present). In the North Dakota Public Service Comm'n case, the North Dakota District Court held that:

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 Commission did not appeal the holding of the district court. The holding of the North Dakota Public Service Comm'n case is the current status of the law regarding the Commission's regulatory authority over Tribal resolutions for electric service to Tribal facilities located on the reservation. Id. The North Dakota Public Service Comm'n opinion effectively overruled the holding in the Otter Tail (1990) case.

In the present case, the Sky Dancer Casino is owned and operated by the Tribe on Tribal Trust land located on the Turtle Mountain Reservation. See Strickland et.al. v. DeCoteau et.al., TMAC No. 04-003, at 1 (Mar. 14, 2005). The Tribe passed a Resolution authorizing it to enter into a contract with OTP to provide electric service to the Sky Dancer Casino starting June 1, 2012. See Exhibit B. The inherent sovereignty of the Tribe to determine who will provide electric service to its facilities located on its land takes precedent over the right of the Commission to regulate OTP. North Dakota Public Service Comm'n, 896 F.Supp. at 957. The Commission has no regulatory authority over the Tribe's determination of who provides electric service to the Sky Dancer Casino. Id. at 961. Accordingly, North Central's Complaint seeking to have the Commission exercise

regulatory authority over OTP's agreement with the Tribe for service to the Sky Dancer Casino should be dismissed. Id.

North Central's Complaint asserts North Dakota's Territorial Integrity Act, N.D.C.C. Ch. 49-03, grants the Commission jurisdiction and regulatory authority over the OTP's agreement with the Tribe for electric service to the Sky Dancer Casino as evidence by the Otter Tail 1990 case. However, as previously outlined above, the Otter Tail (1990) opinion was overruled by the subsequent appellate history and is no longer good law. North Dakota Public Service Comm'n, 896 F.Supp. at 961. North Central's reliance on legal precedent that has been overruled is erroneous. The Commission litigated the same issue following the Otter Tail (1990) case. The end result of the Commission's subsequent litigation is that the Commission does not have regulatory authority over a Tribe's resolution for electrical service for Tribal owned businesses located upon Tribal lands. Id. The Otter Tail (1990) case should not be considered as binding legal precedent in this case. Accordingly, North Central's reliance on the Otter Tail 1990 case is erroneous and its Complaint should be dismissed.

In addition, the Otter Tail 1990 case is factually distinguishable from the present case. In Otter Tail 1990, one of the key factors the court relied upon was that the Devils Lake Sioux Tribe had not enacted any regulations governing electric utilities and it was the first time the Tribe attempted any regulation of the electric utilities. 451 N.W.2d at 101. However, prior to commencing an action against the Commission, the Devils Lake Sioux Tribe adopted a comprehensive set of electric utility regulatory ordinances which regulate the rates and service within the exterior boundaries of the Reservation. See North Dakota

Public Service Comm'n, 896 F.Supp. at 958-59.

In the present case, 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). The Tribe's enactment of the Turtle Mountain Tribal Utility Code to regulate electric service on the Reservation is factually analogous to the North Dakota Public Service Comm'n case and distinguishable from the Otter Tail (1990) case. Because the Tribe has adopted its own regulatory code governing electric service on the Turtle Mountain Reservation, North Central's Complaint should be dismissed as the Commission has no regulatory authority over the Tribe's resolution permitting OTP to provide electric service to a Tribal facility located on Tribal land. See North Dakota Public Service Comm'n, 896 F.Supp. at 961.

CONCLUSION

Otter Tail Power Company respectfully requests the North Dakota Public Service Commission grant its Motion to Dismiss North Central Electric Cooperative, Inc.'s, Complaint because the Commission has no regulatory authority over the Turtle Mountain Band of Chippewa Indians' Tribal Resolution permitting Otter Tail Power Company to supply electric service to the Tribally-owned Sky Dancer Casino located on Tribal Trust land within the exterior boundaries of the Turtle Mountain Reservation. The Turtle Mountain Band of Chippewa Indians has the inherent sovereignty to contract with

whomever it will for the provisions of electric service to its lands and businesses. North Central's reliance on legal precedent that has been subsequently overruled provides no support for its Complaint.

Dated this 16th day of January, 2012.

By: /s/ Bruce Gerhardson
Bruce Gerhardson
Associate General Counsel
Otter Tail Power Company
215 S Cascade St.
Fergus Falls, MN 56538-0496
Telephone: 218-739-8475

By: 
Paul R. Sanderson (ID# 05830)
ZUGER KIRMIS & SMITH
Attorneys for Otter Tail Power Company
P.O. Box 1695
Bismarck, ND 58502
Telephone (701) 223-2711

This Indenture, Made this 21st day of FEBRUARY in the year of our Lord One Thousand Nine Hundred and Forty-one between Walter John Charlton, Unmarried

Apr 19 1941 2028

6096

whose postoffice address is 30 South Ninth Street, Minneapolis, Minn. part Y of the first part, and United States of America in trust for the Indians of the Turtle Mountain Reservation whose postoffice address is Washington, D. C. part Y of the second part;

WITNESSETH, That the said part Y of the first part, in consideration of the sum of Five Hundred and no/100 DOLLARS to him in hand paid by the said part Y of the second part, the receipt whereof is hereby acknowledged, do hereby GRANT, BARGAIN, SELL AND CONVEY unto the said part Y of the second part and assigns, FOREVER, all that tract or parcel of land lying and being in the County of Bolette and State of North Dakota, to-wit: North Half of the Southwest Quarter of Section Thirty-four in Township One Hundred Sixty-two North of Range Seventy-one West of the Fifth Principal Meridian, North Dakota, containing eighty acres, more or less, according to the United States Government Survey thereof. (N 1/2 of SW 1/4 Sec. 34, Twp. 162, Rgs. 71)

TO HAVE AND TO HOLD THE SAME, Together with all the hereditaments and appurtenances thereunto belonging or in anywise appertaining to the said part Y of the second part, its successors and assigns, FOREVER. And the said Walter John Charlton part Y of the first part, for HIMSELF, his heirs, executors and administrators do hereby covenant with the said part Y of the second part, its successors and assigns that he is well seized in fee of the lands and premises aforesaid, and has good right to sell and convey the same in the manner aforesaid, that the same are free from all incumbrances.

RECORDED BY AUGUST 25 1941

and the above bargained and granted lands and premises in the quiet and peaceable possession of the said part Y of the second part its successors and assigns, against all persons lawfully claiming or to claim the whole or any part thereof, the said part Y of the first part will Warrant and Defend.

IN TESTIMONY WHEREOF, the said part Y of the first part has hereunto set his hand and seal the day and year next above written.

Signed, Sealed and Delivered in Presence of Patricia Ellis E. A. Leasilla Walter John Charlton (SEAL) (SEAL) (SEAL)

MINNESOTA STATE OF MINNESOTA County of Hennepin On this 21st day of FEBRUARY A. D. 1941 before me personally appeared Walter John Charlton, Unmarried

known to me to be the person who is described in and who executed the within instrument, and acknowledged to me that he executed the same.

F. L. Durand Notary Public, Hennepin County, Minn. My commission expires August 11 1943

Delinquent taxes payable on and interest on (taxes and special assessments, or installments of special assessments paid) and transfer entered AUG 27 1941

By V.C.J. Deputy Auditor, Bolette County, North Dakota. Jas. H. Penny

Filed for record this 27th day of August A. D. 1941 at 4:10 o'clock P. M. and recorded in Deed Record 28, on page 370 By Deputy Register of Deeds.

RESOLUTION NUMBER TMBC598-11-11 (*Revised) ELECTED AND CERTIFIED GOVERNING BODY OF THE TURTLE MOUNTAIN BAND OF CHIPPEWA INDIANS

WHEREAS, the Turtle Mountain Band of Chippewa Indians, hereinafter referred to as the Tribe, is an unincorporated Band acting under a revised Constitution and By-Laws approved by the Secretary of the Interior on June 16th, 1959 and amendments thereto approved; and

WHEREAS, Article IX (a) Section 1 of the Turtle Mountain Constitution and By-Laws empowers the Tribal Council with the authority to represent the Band and to negotiate with Federal, State, and Local Governments and with private persons; and

WHEREAS, Article IX (C) Section 10 of the Turtle Mountain Band Constitution and By-Laws as amended May 14th, 1990, and approved by the Secretary of the Interior on October 25th, 1990, empowers the Tribal Council with the authority to manage, lease, permit, or otherwise deal with Tribal land, interest in lands and other assets under Tribal Jurisdiction and to purchase or otherwise acquire lands, or interest in lands within and outside the boundaries of the Turtle Mountain Reservation in accordance with law, or dispose of any such lands or interest in lands authorized by law; and

WHEREAS, Otter Tail is proposing to be the electric service provider at the Sky Dancer Casino and anything built or residing on the casino grounds; and

WHEREAS, the start-up date for the Electric Service Agreement is June, 2012 and construction power would generally be obtained from existing facility, with one (1) meter; and

WHEREAS, current cost savings/future cost savings, will be greater when new facility is up and running because of rate structure; now

THEREFORE BE IT RESOLVED that the Tribe is entering into a ten (10) *year Electric Service Agreement with Otter Tail Power Company to provide electric service to the Sky Dancer Casino and anything built or residing on the casino grounds and is hereby authorizing the Tribal Chairman to sign the agreement, with a starting date of June 1, 2012.

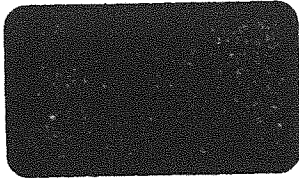
CERTIFICATION

I, the undersigned Tribal Secretary of the Turtle Mountain Band Chippewa Indians, do hereby certify that the Tribal Council is composed of nine (9) members of whom nine (9) constituting a quorum were present at a meeting duly called, convened and held on the 8th day of November, 2011, that the foregoing resolution was adopted by an affirmative vote of five (5) in favor - Representatives Curtis L. Poitra, Cindy Malaterre, Larry DeCoteau, Jeff 'BJ' Delorme and Zelma Peltier, three (3) absent-Representatives Mike Malaterre, Lorne Jay and Elmer Davis, Jr.; with the Chairman not voting.

Jolean A. Morin
Jolean A. Morin, Tribal Secretary 11/22/11

SIGNED INTO LAW/Dated this 23 day of November, 2011
 VETOED/Dated this ___ day of _____, 2011

Merle St. Claire
Merle St. Claire, Chairman



under N.D.C.C. §§ 49-03-01.4 and 49-03-05 that Otter Tail Power Company (herein Otter Tail) began construction of an extension of its public utility plant and system without having first obtained a certificate of public convenience and necessity.

Procedural Background

On December 12, 2011, North Central filed a complaint and affidavit alleging that Otter Tail threatens to and has begun the construction of an extension of its public utility plant and system to serve a customer at a place to be served not located within the corporate limits of any municipality in Rolette County without first obtaining from the Commission a certificate that public convenience and necessity require or will require such construction and that construction by Otter Tail is a violation of N.D.C.C. §§ 49-03-01 through 49-03-01.5. The customer at the place to be served is the Sky Dancer Hotel and Casino. The complaint also alleges Otter Tail's construction interferes with North Central's service and system.

On December 21, 2011, the Commission found that North Central's complaint stated a prima facie case.

On January 16, 2012, Otter Tail filed an answer to North Central's complaint admitting the allegation about construction but "...specifically denies that a certificate of public convenience and necessity is required to supply electric service to the Turtle Mountain Band of Chippewa Indians' (Tribe) facility located on the Turtle Mountain Indian Reservation...." and the Public Service Commission does not have regulatory authority over the Tribe's determination of who will provide electric service to a Tribally owned facility on Tribal land located on the Turtle Mountain Reservation...." Otter Tail's answer also denied North Central's interference claim. Answer ¶¶ IV and XI.

On January 16, 2012, Otter Tail filed a motion to dismiss the complaint in and a brief in support of the motion.

Facts of the Case

The pleadings and Otter Tail's motion establish the following facts:

1. North Central is a "rural electric cooperative" under N.D.C.C. § 49-03-01.5(6). North Central is an interested electric cooperative corporation under ND.C.C. § 49-03-05. Complaint, ¶ 1.
2. Otter Tail is an "electric public utility" under N.D.C.C. 49-03-01.5(2). Complaint, ¶ 2; Answer ¶ III.
3. Otter Tail threatens to and has begun the construction of an extension of its public utility plant and system and of its transmission and distribution lines to serve a customer in the SW ¼ of Section 34, Township 162N, Range 71W, Rolette County, North Dakota (the place to be served), without first obtaining from the Commission a certificate that public convenience and necessity require or will require such construction and service. The customer at the place to be served is the Sky Dancer Hotel and Casino. Complaint, ¶ 3; Answer ¶ IV; Martian Affidavit, ¶ 6-9.
4. The place to be served is not located within the corporate limits of any municipality. Complaint ¶ 4; Answer ¶ V.
5. The place to be served is located in North Central's service area. Complaint ¶ 5.
6. The place to be served is presently served by North Central. Complaint ¶ 6; Answer ¶ V.

Otter Tail admitted the central fact alleged by North Central, that Otter Tail threatens to and has begun the construction of an extension of its public utility plant and

system at the place to be served without first obtaining from the Commission a certificate that public convenience and necessity require or will require such construction. Complaint, ¶ 3; Answer ¶ IV. Otter Tail's denials (Answer ¶¶ II and VI) of other allegations of fact are meaningless in the context of Otter Tail's motion to dismiss, because all North Central's allegations are deemed admitted for purposes of Otter Tail's motion to dismiss. "We construe the complaint in the light most favorable to the plaintiff, taking as true the well-pleaded allegations in the complaint." Ziegelmann v. DaimlerChrysler Corp. 2002 N.D. 134, ¶ 5; 649 N.W.2d 556. Otter Tail's brief (p. 3-4) cites and quotes this same case and paragraph regarding principles applied on a motion to dismiss.

As a result of presenting matters outside the pleadings, motion exhibits A and B, Otter Tail's motion for dismissal under N.D.R.Civ.P. Rule 12(b)(6) must be treated as a motion for summary judgment under Rule 56. See N.D.R.Civ.P. Rule 12 (d); see also Zutz v Kamrowski, 2010 ND 155, ¶ 8, cited in Otter Tail's brief, p. 4. If there are no genuine issues as to material facts, judgment may be entered as a matter of a law. N.D.R.Civ.P. Rule 56(c).

Otter Tail's motion exhibits A and B appear to show as matters of fact that the place to be served is a Tribal owned business located on land owned by the United States as "trust land." Exhibit A lacks appropriate foundation and is inadmissible. Both exhibits are inadmissible for the more important reason that the facts asserted are not material facts affecting the issues of law under North Central's complaint and Otter Tail's answer and motion. Not material because Otter Tail lacks "standing."

The Territorial Integrity Act

S.L. 1965, Ch. 319, codified as N.D.C.C. §§ 49-03-01 through 49-03-01.5 provides ". . . limitations on electric public utilities serving customers in designated areas. The designated areas are those areas "beyond or outside of the corporate limits of any municipality." N.D.C.C. § 49-03-01.1. The "electric public utilities" limited by the 1965 law are privately owned suppliers of electricity, such as Otter Tail. N.D.C.C. § 49-03-01.5. This statute is commonly called the Territorial Integrity Act. Montana-Dakota Utilities Co. v. Johanneson, 153 N.W.2d 414, 418 (N.D. 1967).

The Territorial Integrity Act provides two limitations on electric public utilities, a limitation on construction and a limitation on service. Under the Act, an electric public utility may not construct an extension of its plant, system, transmission or distribution lines and may not serve any customer outside the limits of any municipality without first obtaining from the Commission an order authorizing such extension and service and a certificate that public convenience and necessity require that permission be given to extend such lines to serve such customer. N.D.C.C § 49-03-01.1.

Otter Tail denies that a Certificate of Public Convenience and Necessity is required to extend its facilities to supply electric service to a customer in a rural area. Otter Tail asserts it is immune from the Commission's jurisdiction under the Act, immune because "the Public Service Commission does not have regulatory authority over the Tribe's determination of who will provide electric service to a Tribally owned facility on Tribal land located on the Turtle Mountain Reservation...." Answer ¶ XI. This theory is repeated in slightly different words in Otter Tail's motion.

Customer Preference

"Customer preference" is a factor in cases under the Territorial Integrity Act.

Before adoption of the Territorial Integrity Act, territorial disputes were usually settled by the customer's choice. See Capital Elec. Coop., Inc. v. Public Service Commission of State of North Dakota, 534 N.W.2d 587, 589 (N.D. 1995) and Cass County Elec. Coop. v. Otter Tail Power Co., 93 N.W.2d 47, 50 (N.D. 1958) ("... since it is in the territory served by both, the customer could choose which service he wanted.").

After adoption of the Territorial Integrity Act, customer choice or preference has a different status in cases where a customer requests an electric public utility to extend its service into a rural area served by a rural electric cooperative.

"... [C]ustomer preference does not govern the Commission in its decision but subjects the customer's preference for a regulated public utility service to an inquiry and decision by the Commission on the question of public convenience and necessity."

Application of Montana-Dakota Utilities Co., 219 N.W.2d 174, 181 (N.D. 1974).

In the electric public utilities' constitutional challenge to the Territorial Integrity Act in 1963, they argued that the potential of customers' preference for regulated utilities' service in rural areas had status as a constitutional right. The Supreme Court's answer was:

"... the contention that the law disregards customer preference is without merit."

Montana-Dakota Utilities Co. v. Johanneson, 153 N.W.2d at 423.

The claimed constitutional status of customer preference was also considered in 1974 in Application of Montana-Dakota Utilities Co., 219 N.W.2d 174. In that case, the customer took an active role as a party, claiming "a constitutional right to receive electric

power from a regulated public utility when he so chooses." 219 N.W.2d at 179. The Court reiterated there is no such constitutional right.

In another of the early cases under the new Territorial Integrity Act, Otter Tail argued the customer's preference to be served by it should determine that a certificate of public convenience and necessity should be granted. The Court said:

"While under circumstances as here presented customer preference should be considered, there are a number of other factors which also must be considered in determining whether the application of Otter Tail for a certificate of public convenience and necessity should be granted."

Application of Otter Tail Power Co., 169 N.W.2d 415, 418 (N.D. 1969). The status of customer preference was further explained in another Otter Tail case:

"While we have previously said that customer preference should be considered, we never have held that it is controlling In rural areas, our decisions indicate, customer preference is a minor consideration Customer preference, therefore, invokes consideration by the Public Service Commission, but it is not to be a controlling factor It is the *public* convenience and necessity, after all, with which the Commission is concerned, not private preference."

Tri-County Elect. Coop., Inc. v Elkin, 224 N.W.2d 785, 792 (N.D. 1974).

The most recent Supreme Court case under the Territorial Integrity Act involving Otter Tail reiterated and reinforced the Public Service Commission's prominent authority to control an electric public utility's construction of an extension of its plant and system and the minor status of customer preference.

"[T]he Territorial Integrity Act implicitly gives preference to the interests of the public in general over the preference of a particular electric customer to have a certain supplier furnish it with electricity."

Application of Otter Tail Power Co., 451 N.W.2d 95, 105 (N.D. 1990) (herein referred to as "Otter Tail 1990").

Otter Tail's Affirmative Defense and Motion to Dismiss

Otter Tail asserts that the Turtle Mountain Band of Chippewa Indians ("the Tribe") has a controlling customer preference for electric service at the Sky Dancer Casino to be furnished by Otter Tail. Otter Tail does not assert the Tribe's preference is a controlling factor in the Public Service Commission's determination of public convenience and necessity under the Territorial Integrity Act. Otter Tail makes a different assertion, that the Tribe's preference immunizes Otter Tail from the Public Service Commission's jurisdiction under the Territorial Integrity Act. ". . . OTP specifically denies that a certificate of public convenience and necessity is required to supply electric service to the Tribe's facility located on Tribal Trust land on the Turtle Mountain Reservation." and "OTP affirmatively asserts the Public Service Commission does not have regulatory authority over the Tribe's determination of who will provide electric service to a Tribally owned facility on Tribal land located on the Turtle Mountain Reservation...." Answer ¶¶ IV and XI. Otter Tail cites Devils Lake Sioux Indian Tribe v. North Dakota Public Service Commission, 896 F.Supp. 955 (D.N.D. 1995) in support of its position. That case is referred to as Devils Lake Sioux v PSC.

Otter Tail Lacks Standing to Assert the Sovereign Immunity Defense

The sovereign immunity defense was asserted and rejected in Otter Tail 1990. In that case, Otter Tail filed a "Notice of Intent to Extend Service" to a customer on the Fort Totten Indian reservation. In response, the Commission notified Otter Tail that the Commission had jurisdiction and Otter Tail should formally apply for a certificate of public convenience and necessity. Otter Tail did apply for a certificate but before the Commission acted Otter Tail extended service in defiance of the Commission's

jurisdiction. In its 1990 case, Otter Tail asserted the Commission did not have jurisdiction because assumption of jurisdiction would unlawfully interfere with the Indian tribe's sovereign rights of self-government. Otter Tail appealed the Commission's decision that it had jurisdiction. The North Dakota Supreme Court decided that Otter Tail did not have "standing" to defeat the PSC's authority over Otter Tail's activities. Assuming Otter Tail had standing to assert the immunity defense, the court addressed the immunity defense and concluded that the Commission did have jurisdiction.

"Otter Tail asserted that assumption of jurisdiction by the PSC would unlawfully interfere with the Tribe's sovereign rights of self-government. However, because the Tribe (which did not appear) was the proper party to press the potential of harm to its governmental interests, we conclude that Otter Tail had no standing to advance the Tribe's self-government interests.

...

"We conclude Otter Tail could not assert the self-government interests of the Tribe to defeat the PSC's authority over Otter Tail's activities.

...

"Even assuming that Otter Tail had standing to assert the self-government interests of the Tribe, we nevertheless conclude that the PSC had jurisdiction in this case." Otter Tail 1990, 451 N.W.2d at 97-98.

Otter Tail attempts to avoid the Otter Tail 1990 precedent that rejected the same defense it now asserts in 2011 by arguing "...the Otter Tail (1990) opinion was overruled by the subsequent appellate history and is no longer good law." (Otter Tail Brief, p.7). Otter Tail 1990 was decided by the highest court of North Dakota and was not appealed to the only court with appellate jurisdiction, the United States Supreme Court. Otter Tail 1990 was the subject of collateral attack litigation in Federal District Court, litigation incompletely described in Otter Tail's brief.

After the Otter Tail 1990 decision, the Devils Lake Sioux Tribe enacted a Tribal

Utilities Code purporting to install a comprehensive utility regulation regime on the reservation including the regulation of electric service areas and 4 related actions were commenced in federal district court. 1) Baker Electric Cooperative challenged the Devils Lake Sioux Tribe's jurisdiction to regulate electric service on the reservation and sought an injunction against enforcement of the Tribal Utilities Code; 2) Sheyenne Valley Electric Cooperative commenced a separate action like Baker's because Sheyenne had similar interests in parts of the Fort Totten Reservation; 3) the Devils Lake Sioux Tribe sought an injunction against the PSC's interference with the Tribe's choice of electric suppliers; 4) Otter Tail sought an injunction action against the PSC's interference with the Tribe's choice of electric suppliers. The district court's actions on the several cases are unpublished but were described in a subsequent published opinion, Devils Lake Sioux v PSC, 896 F.Supp at 956. The four district court cases were consolidated and appealed. The 8th Circuit Court remanded "with instructions to the district court to make detailed factual determinations and set out its analysis in support of its legal determinations." Baker Electric Cooperative, Inc. v Chaske, 28 F.3d 1466, 1476. (8th Cir. 1994.) The district court did so. The final decision was "... 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 promulgation and enforcement of a reservation wide utility regulation scheme, without regard to land ownership, occupancy or use is beyond the sovereign authority of the tribe – under the fact specific situation present here." Devils Lake Sioux v PSC, 896 F. Supp. at 961-62. That decision was not appealed by any of the several parties.

In the collateral litigation in federal court, the Tribe had standing and asserted – successfully - the sovereignty issue that Otter Tail lacked standing to assert. The name of the litigation makes it plain; the party with standing, the Tribe, asserted its sovereignty. The federal court litigation did not “overrule” the North Dakota Supreme Court’s decision quoted above and repeated here, that Otter Tail lacks standing.

“Otter Tail asserted that assumption of jurisdiction by the PSC would unlawfully interfere with the Tribe’s sovereign rights of self-government. However, because the Tribe (which did not appear) was the proper party to press the potential of harm to its governmental interests, we conclude that Otter Tail had no standing to advance the Tribe’s self-government interests.

...

“Otter Tail could not assert the self-government interests of the Tribe to defeat the PSC’s authority over Otter Tail’s activities.” Otter Tail 1990, 451 N.W.2d at 97-98.

In this case, Otter Tail lacks standing to assert the Public Service Commission lacks jurisdiction over service to the Sky Dancer Casino under sovereign immunity concepts. Otter Tail has no sovereign immunity and it is not the Tribe’s surrogate to assert sovereign immunity on behalf of either Otter Tail or the Tribe. Sovereign immunity may be asserted only by the Tribe, not by Otter Tail.

Standing is a threshold issue. Otter Tail cannot pass the threshold. The Turtle Mountain Band might assert sovereign immunity, but Otter Tail cannot assert the Tribe’s interests to defeat the Public Service Commission’s authority over Otter Tail’s activities. Otter Tail 1990.

The Tribe is not a party to this action asserting immunity on its own behalf or on behalf of Otter Tail. The Tribe’s resolution, Otter Tail’s motion exhibit B, does not amount to an appearance. Otter Tail 1990, 451 N.W.2d at 97. The Tribe has not

asserted a power to immunize Otter Tail or to supersede the Public Service Commission's exercise of its jurisdiction over Otter Tail's activities.

The standing argument might appear to be a legal technicality. It is. It is an important technicality. Parties to litigation may present their claims and defenses, not the claims and defenses of non-parties. This fundamental principle is particularly important in cases involving issues of Constitutional Law such as are involved in Otter Tail's assertions of Tribal sovereignty. Whatever words are used to describe the Tribe's status vis-à-vis the North Dakota Public Service Commission – sovereignty, pre-emption, exemption, limitation, immunity, privilege, self government, or any other label – the Tribe's special status is founded in the supremacy clause of Article VI of the United States Constitution, a fundamental principle infusing both North Dakota's Supreme Court's decision in Otter Tail 1990 and all the federal courts' opinions in the collateral litigation post Otter Tail 1990. The special status is the Tribe's, not Otter Tail's. Otter Tail has no special status under Article VI vis-à-vis the North Dakota Public Service Commission and the Territorial Integrity Act. Another principle is involved. Courts (and agencies) abstain from addressing constitutional questions that are unnecessary to be addressed. The two principles coalesce in a single expression: A litigant may assert only its own constitutional rights. See Bismarck v Materi, 177 N.W. 2d. 530, 545 (N.D. 1970). See also N.D.C.C. 28-32-46(2); if Otter Tail were to appeal an adverse decision of the Commission, Otter Tail could assert only "its" constitutional rights.

Otter Tail cannot pass the standing threshold. Absent the Tribe's intervention in this proceeding to assert the Commission lacks jurisdiction over the Tribe's preference for electric service from Otter Tail - despite issues of public convenience and necessity

and despite Otter Tail's interference with North Central's service - Otter Tail's motion to dismiss should be denied.

Summary Judgment Should Be Entered Against Otter Tail

Otter Tail's motion to dismiss under N.D.R. Civ. Proc. Rule 12(b) must be treated as a motion for summary judgment under Rule 56 as a result of Otter Tail's presenting materials outside the pleadings. Rule 12 (d). Under Rule 56(c), "The judgment sought shall be rendered if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Summary judgment, when appropriate, may be entered against the moving party."

Otter Tail's only basis for its affirmative defense and motion to dismiss is a theory of sovereign immunity, a theory that Otter Tail lacks standing to assert under Otter Tail 1990. Under the Territorial Integrity Act, all the precedents and particularly Otter Tail 1990, the moving party is not entitled to judgment as a matter of law to dismiss the complaint.

Otter Tail admitted the central fact alleged by North Central, that Otter Tail threatens to and has begun the construction of an extension of its public utility plant and system at the place to be served without first obtaining from the Commission a certificate that public convenience and necessity require or will require such construction. Complaint, ¶ 3; Answer ¶ IV. That admission shows there is no genuine issue as to the central material fact. Because material facts are undisputed, it is appropriate for summary judgment to be entered against Otter Tail under Rule 56(c). See Spier v. Power Concrete, 304 N.W.2d 68, 72 (N.D. 1981).

If The Tribe Were To Intervene The Case Cannot Be Resolved Under Rule 56

If the Tribe were to intervene, there would be material issues of fact. The Tribe and Otter Tail would need to successfully perform “the fact specific tap dance that is required whenever Tribal sovereignty issues are raised.” Devils Lake Sioux v PSC, 896 F.Supp at 960. The Tribe’s sovereign power to contract with whomever it will for the provision of electric service to its lands and businesses “may be an illusory power as any supplier must cross non-reservation areas to get power to the reservation, and must therefore be under North Dakota Public Service Commission jurisdiction until either the reservation boundary or the actual facility is reached.” Devils Lake Sioux v PSC, 896 F.Supp. at 957.

North Central’s Complaint and affidavit to establish a prima facie case include information that OTP’s construction crossed North Dakota’s Highway 5. North Dakota’s highway right of way must be under North Dakota Public Service Commission jurisdiction over OTP’s construction. See Martian affidavit § 9, and exhibit A attached to this brief. OTP’s construction to get power to the Sky Dancer Casino would be material facts if the Tribe were to intervene.

If the Tribe were to intervene, the particular business of the Sky Dancer Casino would be a material issue of fact affecting the Tribe’s assertion of sovereign immunity to contract with whomever it will for the provision of electric service to this particular location and business. Under the Gaming Compact between the Tribe and the State of North Dakota, the sovereign immunity issue is addressed, including the State’s retention of its jurisdiction. See exhibit B attached to this brief, § 17.2.

(As noted above, in Otter Tail 1990 the North Dakota Supreme Court assumed Otter Tail had standing to assert the immunity defense, addressed the immunity defense and concluded that the Commission did have jurisdiction. If it were to be assumed in this case that Otter Tail has standing to assert the immunity defense, the case cannot be resolved under Rule 56 because of these material issues, "the fact specific tap dance that is required whenever Tribal sovereignty issues are raised." Devils Lake Sioux v PSC, 896 F.Supp at 960.)

CONCLUSION

Under precedents of the Commission and of the North Dakota Supreme Court, the Public Service Commission does not take a narrow view of its jurisdiction under the Territorial Integrity Act. See Capital Elect. Coop.v. Montana-Dakota Utilities Co., PSC Case No. PU-05-551, Order ¶ 10, affirmed at Capital Elec. Coop. v. City of Bismarck, 2007 N.D. 128, 736 N.W.2d 788. Under the Territorial Integrity Act, the Commission has jurisdiction and authority over Otter Tail's activities alleged in North Central's complaint and admitted in Otter Tail's answer.

Under Otter Tail's admission (Answer ¶ IV), Otter Tail's construction of an extension of its public utility plant and system to serve the Sky Dancer Hotel and Casino without first obtaining from the Commission an order authorizing such extension and service and a certificate that public convenience and necessity require that permission be given to extend such lines to serve such customer is a violation of North Dakota Century Code Section 49-03-01.1.

Otter Tail lacks standing to assert the Public Service Commission lacks jurisdiction over service to the Sky Dancer Casino under sovereign immunity concepts.

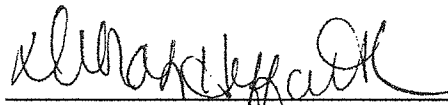
Otter Tail has no sovereign immunity and it is not the Tribe's surrogate to assert sovereign immunity on behalf of either Otter Tail or the Tribe. Sovereign immunity may be asserted only by the Tribe, not by Otter Tail. Otter Tail has no standing to assert the Tribe's sovereignty to defeat the PSC's authority over Otter Tail's activities. Otter Tail 1990, 451 N.W.2d at 98. If the Tribe were to intervene, the case cannot be resolved under Otter Tail's motion.

The Commission should assert and exercise its jurisdiction over Otter Tail's activities under the Territorial Integrity Act and all the precedents from Montana-Dakota v. Johanneson in 1967 through Capital v. Bismarck in 2007, and particularly Otter Tail 1990.

The Commission should deny Otter Tail's motion to dismiss and enter its order under N.D.C.C. §§ 49-03-01.4 and 49-03-05 and N.D.R.Civ.P. Rule 56 restraining Otter Tail from serving the Sky Dancer Casino in Rolette County and enjoining it to dismantle its extension of its electric public utility plant and system that it constructed without first obtaining an order from the Commission authorizing such extension and service.

Dated this 2nd day of February, 2012.

PRINGLE & HERIGSTAD, P.C.



Debra L. Hoffarth
Attorneys for North Central Electric Cooperative, Inc.
P.O. Box 1000
Minot, ND 58702
701-852-0381

BEFORE THE PUBLIC SERVICE COMMISSION OF NORTH DAKOTA

RECEIVED

APR 24 2012

North Central Electric Cooperative, Inc.)
)
Complainant)
vs.)
)
Otter Tail Power Company)
)
Respondent.)

**PUBLIC SERVICE COMMISSION
PREHEARING CONFERENCE
SUMMARY AND STIPULATIONS**

Case No. PU-11-701
OAH File No. 20120087

.....
A prehearing conference regarding the above titled administrative matter was held on April 23, 2012, attended by the procedural hearing officer, ALJ Hoberg, counsel for the parties, Ms. Hoffarth, Mr. Sanderson, and Mr. Gerhardson, counsel for the Public Service Commission ("Commission"), Mr. Gruman, and two other Otter Tail employees who did not materially participate. No one appeared representing the Turtle Mountain Band of Chippewa Indians (the "Tribe" or "Tribal").

After the hearing officer summarized the status of the case, the parties agreed to the following stipulations:

1. Sky Dancer Casino is a Tribal owned facility.
2. Sky Dancer Casino is located on Tribal trust property.
3. The Tribe passed a resolution on November 23, 2011, stating that the Tribe wants Otter Tail Power Company to provide electric service to the Sky Dancer Casino facility.
4. The Tribe has a long-standing tribal utility code.
5. The Tribe filed a letter with the Commission through its tribal chairman on February 15, 2012, stating that the Tribe is aware of this proceeding and the Tribe "confirms that it is exercising its inherent sovereignty to determine which utility will provide electric service to Sky Dancer Casino pursuant to the legal precedent set forth in Devils Lake Sioux Tribe v. North Dakota Public Service Comm'n, 896 F.Supp. 955 (D.N.D. 1995)."

The parties agreed that the above facts are true but reserve the right to argue the relevancy of any of the stipulated facts in oral argument.

The parties agreed that unless a request for an evidentiary hearing is specifically made, the hearing scheduled for May 7, 2012, will be held only for the purpose of oral argument on a motion to dismiss and argument for summary disposition of the Complaint. If a request for an evidentiary hearing is made, and an evidentiary hearing is held on May 7, 2012, or otherwise, only parties, including any interveners, will be allowed to present evidence. If no request for an evidentiary hearing is made, only parties, including any interveners, will be allowed to make oral argument at the hearing on May 7, 2012. A request for an evidentiary hearing must be made prior to 5:00 p.m. on May 4, 2012.

The parties agreed that they are likely to waive the 45 day notice requirement of N.D.C.C. section 28-32-21 and N.D. Admin. Code section 69-02-02-02(5), and they will shortly be filing such a wavier with the Commission.

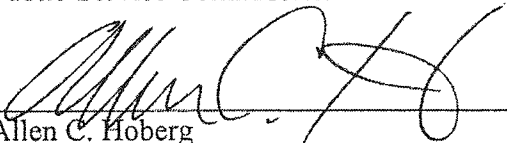
The parties agreed that the Commission's statement of the issues made by Commission Counsel at the prehearing conference are the issues for this matter. Commission counsel will notice the hearing and the issues for the hearing shortly and counsel agreed to state prior to the hearing if they object to the Commission's statement of the issues.

The parties acknowledged that the Tribe may file a petition to intervene. If the Tribe does file a petition to intervene, the parties agreed that if any party has an objection to the Tribe's intervention, the party will file the objection as soon as possible to expedite a ruling on the petition so that the May 7, 2012, hearing may be held as scheduled. Any petition to intervene must be filed at least 10 days prior to the hearing. See N.D. Admin. Code section 69-02-02-05.

Dated at Bismarck, North Dakota, this 23rd day of April, 2012.

State of North Dakota
Public Service Commission

By: _____


Allen C. Hoberg
Administrative Law Judge
Procedural Hearing Officer
Office of Administrative Hearings
2911 North 14th Street – Suite 303
Bismarck, North Dakota 58503
Telephone: (701) 328-3200

BEFORE THE PUBLIC SERVICE COMMISSION OF NORTH DAKOTA

North Central Electric Cooperative, Inc.,

Complainant,

vs.

Otter Tail Power Company,

Respondent.

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ORDER GRANTING INTERVENTION

PUBLIC SERVICE COMMISSION No. PU-11-701
OAH File No. 20120087

The petitioner to intervene in this matter is the Turtle Mountain Band of Chippewa Indians (the "Tribe"). On May 1, 2012, the Tribe filed its petition to intervene. The Tribe seeks to intervene in this matter by making a special appearance to object to the jurisdiction of the Commission to determine which utility will provide electric service to the Sky Dancer Casino. The Tribe states it has a legal interest which may be substantially affected by this proceeding. The Tribe states its position is in opposition to the relief sought by North Central in its Complaint. The Tribe states its petition is only to contest jurisdiction and should not be construed as voluntary general appearance under N.D.R. Civ. P. 4(b)(4).

North Central filed an objection to both the Tribe's May 1 petition and the initial petition filed by the Tribe on April 26, 2012, which the hearing officer determined was void. The petitions' contents were virtually identical. North Central states in its initial objection that the Tribe's participation is not necessary because customer preference is only one of many factors that the Commission will consider in determining the merits of this matter. In its later objection North Central appears to state that customer preference is not a factor in determining the merits of this matter. North Central also appears to state that the issues will be unduly broadened if the Tribe intervenes.

Otter Tail does not object to the Tribe's intervention.

On February 15, 2012, the Tribe filed a letter with the Commission stating that the Tribe is aware of this proceeding and the Tribe "confirms that it is exercising its inherent sovereignty to determine which utility will provide electric service to Sky Dancer Casino pursuant to the legal precedent set forth in 896 F. Supp 955..." That letter was part of the stipulations agreed upon by the parties at prehearing conference.

The Complaint and Answer in this matter, and the subsequently filed briefs, show that this matter is about the Commission's jurisdiction to determine which utility will provide electric service to Sky Dancer Casino, *i.e.*, the regulatory authority of the Commission *vis-à-vis* Otter Tail and North Central as it concerns Otter Tail's actions pursuant to the Tribe's resolution that Otter Tail will provide electric service to Sky Dancer Casino, and what is the result if the Commission does or does not have jurisdiction in this matter through its regulatory authority.

Under N.D. Admin. Code section 69-02-02-05, the Tribe has a legal interest that may be substantially affected by the proceeding. North Central apparently agrees that customer preference is or might be one of the factors that the Commission will consider in determining the merits of this matter. The issue of jurisdiction over the Tribe is there either directly or indirectly because of the facts not in dispute, including the stipulations. The Tribe's petition will not be unduly broadening the issues. This matter is now about arguing facts which are not in dispute. Thus, the Tribe should be allowed to participate as an intervener in the May 7, 2012, hearing, which will restrict the Tribe, North Central, and Otter Tail to argument on the motion to dismiss and argument for summary disposition.

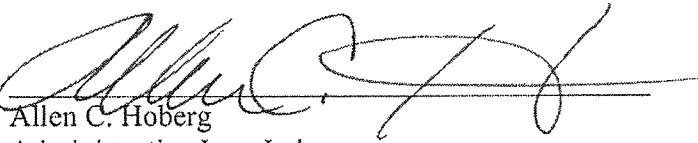
The Tribe's petition to intervene is **granted**.

It appears from the *Wallwork* case that a party may make other than a general appearance (a special appearance) just to object to the jurisdiction of the court (the tribunal, *i.e.*, the Commission). *See* 398 N.W. 2d 127, 129. It appears that is what the Tribe has done in this matter; it has made a special appearance. However, as noted in North Central's objections, North Central's complaint is against Otter Tail, not against the Tribe. Otter Tail and North Central, and perhaps indirectly the Tribe, will be bound by the Commission's decision regarding the motion to dismiss and any summary disposition of this matter, or other final disposition.

Dated at Bismarck, North Dakota, this 3rd day of May, 2012.

State of North Dakota
Public Service Commission

By:


Allen C. Hoberg
Administrative Law Judge
Procedural Hearing Officer
Office of Administrative Hearings
2911 North 14th Street – Suite 303
Bismarck, North Dakota 58503
Telephone: (701) 328-3200

BEFORE THE PUBLIC SERVICE COMMISSION OF NORTH DAKOTA

North Central Electric Cooperative, Inc.,)
)
Complainant,)
vs.)
)
Otter Tail Power Company,)
)
Respondent.)

CERTIFICATE
OF SERVICE

Case No. PU-11-701
OAH File No. 20120087

.....
The undersigned certifies that true and correct copies of the **ORDER GRANTING INTERVENTION** were mailed, regular mail, on the 3rd day of May, 2012, to:

Debra L. Hoffarth
Pringle & Herigstad
PO Box 1000
Minot, ND 58702-1000

Paul Sanderson
Zuger Kirmis & Smith
PO Box 1695
Bismarck, ND 58502-1695

Bruce Gerhardson
Otter Tail Power Company
215 South Cascade Street
Fergus Falls, MN 56538-0496

Tracy Vigness Kolb
Zuger Kirmis & Smith
PO Box 1695
Bismarck, ND 58502-1695

and that a true and correct copy of the above document was mailed, inside mail, at the State Capitol on the 3rd day of May, 2012, to:

Mark Gruman
Public Service Commission
State Capitol
600 East Boulevard Avenue
Bismarck, ND 58505

OFFICE OF ADMINISTRATIVE HEARINGS
Allen C. Hoberg, Administrative Law Judge



Frances Zuther

BEFORE THE PUBLIC SERVICE COMMISSION OF NORTH DAKOTA

North Central Electric Cooperative, Inc.)	
)	
Complainant,)	
)	Case No. PU-11-701
vs.)	OAH File No. 20120087
)	
Otter Tail Power Company,)	
)	
Respondent,)	
)	
and)	
)	
Turtle Mountain Band of Chippewa Indians,)	
)	
Intervenor.)	

STIPULATION

COMES NOW the Complainant North Central Electric Cooperative, Inc., by and through its attorney, Debra L. Hoffarth, of Pringle & Herigstad, PC, Minot, North Dakota; Respondent Otter Tail Power Company, by and through its attorney, Paul Sanderson, Bismarck, North Dakota hereby agree and stipulate to the following stipulations and exhibits in addition to those as part of the Prehearing Stipulations dated April 23, 2012:

1. December 12, 2011 Affidavit of Wayne Martian (Docket #1), with the exception of Paragraph 10 to the extent that it calls for a legal conclusion;
2. Request to Locate (Docket #1 - Exhibit 1 to Wayne Martian's Affidavit);
3. Photographs of Otter Tail Staking (Docket #1 - Exhibit 2 to Wayne Martian's Affidavit);
4. Photographs of Otter Tail Construction (Docket #1 - Exhibit 3 to Wayne Martian's Affidavit);

5. Grant of Easement for Right of Way to NDDOT from BIA (Docket # 7 - Exhibit A to North Central Electric Cooperative, Inc. Responding to Otter Tail's Motion to Dismiss);
6. Right of Way Plat for NDDOT (Docket #7 – Exhibit A1 to North Central Electric Cooperative, Inc. Responding to Otter Tail's Motion to Dismiss);
7. Amended Gaming Compact Between the Turtle Mountain Band of Chippewa Indians and the State of North Dakota (Docket #7 - Exhibit B to North Central Electric Cooperative, Inc. Responding to Otter Tail's Motion to Dismiss);
8. October 29, 1975 Underground Easements to North Central Electric Cooperative, Inc. from Turtle Mountain Tribe (Attached hereto as Exhibit 1);
9. Map Showing State Highway 5 Running Adjacent to Casino (Attached hereto as Exhibit 2); and
10. Otter Tail Power Company's Distribution Lines Cross North Dakota Highway 5 and North Central's Distribution line and Central Power Electric Cooperative Inc.'s Transmission Lines, from which North Central purchases its electricity.

The parties agree that the above facts are true but reserve the right to argue the relevancy of any of the stipulated facts in oral argument.

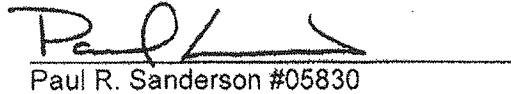
Dated this 4th day of May, 2012.

Dated this 4th day of May, 2012.

PRINGLE & HERIGSTAD, PC

ZUGER KIRMIS & SMITH





Debra L. Hoffarth #05668
Attorneys for North Central Electric Cooperative, Inc.
2525 Elk Drive, PO Box 1000
Minot ND 58702-1000
(701) 838-8752

Paul R. Sanderson #05830
Attorneys for Otter Tail Power Company
PO Box 1695
Bismarck ND 58502
(701) 223-2711

THIS STIPULATION IS HEREBY APPROVED:

Dated this ____ day of May, 2012.

State of North Dakota
Public Service Commission

Allen C. Hoberg
Administrative Law Judge
Procedural Hearing Officer
Office of Administrative Hearings
2911 North 14th Street – Suite 303
Bismarck, ND 58503
(701) 328-3200

UNDERGROUND EASEMENT

KNOW ALL MEN BY THESE PRESENTS, THAT 112, the undersigned _____
(I or We)

Trustee of the Board of Chippewa Indians
(Designate whether single, widow, widower, husband and wife, or corporation)

of the post office address of Bellefleur, ND
in consideration of their mutual covenants and for other valuable consideration, the receipt whereof is hereby acknowledged, do hereby grant unto NORTH CENTRAL ELECTRIC COOPERATIVE, INC., whose post office address is Bottineau, North Dakota and to its successors or assigns, the right to enter upon the lands of the undersigned, situated in the County of Bellevue, State of North Dakota, and more particularly described as follows:

NW 1/4, Sec. 35 Twp. 162 Rge. 71
SE 1/4, Sec. 34 Twp. 162 Rge. 71
N 1/2, SW 1/4, Sec. 34 Twp. 162 Rge. 71

and to place, construct, operate, repair, maintain, relocate, and replace a _____

15 KV line on said above described lands and in or upon, etc., together with the right to excavate and refill trenches for the location of the said underground rural distribution line and the further right to remove trees, bushes, undergrowth and other obstructions interfering with the location, construction, and maintenance of said underground electric distribution line and the Cooperative is herewith further afforded the right and privilege to construct, place, and locate surface cable markers along the route of the said underground distribution line as required, along with the right to repair and maintain same.

The undersigned covenant that they are the owners of the above described lands and that the said lands are free and clear of encumbrances and liens of whatsoever character except those held by the following persons:

and except taxes and assessments not yet due.

IN WITNESS WHEREOF, the undersigned has set their hand and seal _____
this 29th day of October, 1925.

WITNESSES:
Arthur A. Olson _____
John J. Agnew _____

ACKNOWLEDGMENT FOR INDIVIDUALS

STATE OF NORTH DAKOTA

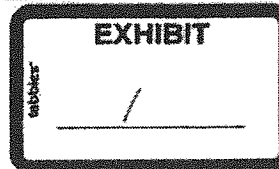
County of Bottineau

On this 29th day of October, 1925, before me, a Notary Public, appeared Arthur J. Agnew - Trustee of the Board of Chippewa Indians known to me to be the person who is described in and who executed the within and foregoing instrument and acknowledged to me that _____ he _____ executed the same.

CLAYTON LIDER
Notary Public, BOTTINEAU CO. N. DAK.
My Commission Expires _____

Clayton Lider
Notary Public

My Commission expires _____
_____, North Dakota
(County)



UNDERGROUND EASEMENT

KNOW ALL MEN BY THESE PRESENTS, THAT we, the undersigned _____
(I or We)

Trustee Mtn Band of Chippewa Indians
(Designate whether single, widow, widower, husband and wife, or corporation)

of the post office address of Belmont, N. Dak.
in consideration of their mutual covenants and for other valuable consideration, the receipt whereof is hereby acknowledged, do hereby grant unto NORTH CENTRAL ELECTRIC COOPERATIVE, INC., whose post office address is Bottineau, North Dakota and to its successors or assigns, the right to enter upon the lands of the undersigned, situated in the County of Bellevue, State of North Dakota, and more particularly described as follows:

NW 1/4, Sec. 35 Twp. 162 Rge. 71
SE 1/4, Sec. 34 Twp. 162 Rge. 71
N 1/2, SW 1/4, Sec. 34 Twp. 162 Rge. 71

and to place, construct, operate, repair, maintain, relocate, and replace a _____

15 KV. line on said above described lands and in or upon, etc., together with the right to excavate and refill trenches for the location of the said underground rural distribution line and the further right to remove trees, bushes, undergrowth and other obstructions interfering with the location, construction, and maintenance of said underground electric distribution line and the Cooperative is herewith further afforded the right and privilege to construct, place, and locate surface cable markers along the route of the said underground distribution line as required, along with the right to repair and maintain same.

The undersigned covenant that They are the owners of the above described lands and that the said lands are free and clear of encumbrances and liens of whatsoever character except those held by the following persons:

and except taxes and assessments not yet due.

IN WITNESS WHEREOF, the undersigned has set their hand and seal _____
this 29th day of October, 1975.

WITNES:
Curtis A. Plouffe _____
Peter J. Agnew _____

ACKNOWLEDGMENT FOR INDIVIDUALS

STATE OF NORTH DAKOTA
County of Bottineau

On this 29th day of October, 1975, before me, a Notary Public, appeared Peter J. Agnew - Trustee Mtn Band of Chippewa Indians known to me to be the person who is described in and who executed the within and foregoing instrument and acknowledged to me that _____ he _____ executed the same.

CLAYTON HODGE
Notary Public, BOTTINEAU CO., N. DAK.
My Commission Expires DEC 15, 1976

Clayton Hodge
Notary Public

My Commission expires _____
_____, North Dakota
(County)



EXHIBIT

2

1000

**STATE OF NORTH DAKOTA
PUBLIC SERVICE COMMISSION**

**North Central Electric Cooperative, Incorporated
Complainant**

Case No. PU-11-701

v.

**Otter Tail Power Company
Respondent**

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

June 14, 2012

Appearances

Commissioners Tony Clark, Kevin Cramer and Brian P. Kalk.

Debra L. Hoffarth, Attorney at Law, P.O. Box 1000, Minot, ND, 58702, on behalf of Complainant North Central Electric Cooperative, Inc.

Bruce Gerhardson, Associate General Counsel, Otter Tail Power Company, 215 S. Cascade St., Fergus Falls, MN, 56538, and Paul R. Sanderson, P.O. Box 1695, Bismarck, ND 58501, on behalf of Respondent Otter Tail Power Company.

Rjay J. Brunkow, Attorney at Law, P.O. Box 900, Belcourt, ND 58316, and Tracy Vigness Kolb, P.O. Box 1695, Bismarck, ND 58501, on behalf of Intervenor Turtle Mountain Band of Chippewa Indians.

Mark Gruman, North Dakota Public Service Commission Counsel, State Capitol, 600 E Boulevard Ave., Bismarck, North Dakota 58505, on behalf of the Public Service Commission.

Allen C. Hoberg, Administrative Law Judge, Office of Administrative Hearings, 2911 North 14th Street, Bismarck, ND 58503, as Procedural Hearing Officer.

Preliminary Statement

On December 12, 2011 North Central Electric Cooperative, Inc. (North Central) filed a Complaint and Affidavit in Support of Complaint (Formal Complaint) with the North Dakota Public Service Commission (Commission), alleging that the Otter Tail Power Company (Otter Tail) had engaged in the construction of an extension of its public utility plant and system and of its transmission and distribution lines (activities)

into their (North Central's) service territory without first obtaining from the Commission a certificate of public convenience and necessity (CPC&N), as required under North Dakota Century Code Chapter 49-03 (Territorial Integrity Act). Specifically, North Central alleged that Otter Tail had begun construction on the extension of their public utility plant and system to provide electric service to the Turtle Mountain Band of Chippewa Indians (Tribe). North Central requested that the Commission make its order restraining, enjoining and requiring Otter Tail to cease and desist from such activities.

On December 21, 2011 the Commission found that the Formal Complaint stated a prima facie case.

On January 16, 2012 Otter Tail filed an Answer with the Commission, admitting to such activities but denying that a CPC&N was required from the Commission before their initiation, citing *Devils Lake Sioux Indian Tribe v. North Dakota Public Service Comm'n*, 896 F.Supp. 955 (D.N.D. 1995) and its premise that the Commission is without regulatory authority over Tribal property located on the reservation. Contemporaneous with their Answer, Otter Tail filed a Notice of Motion and Motion to Dismiss the Formal Complaint.

On April 23, 2012 Administrative Law Judge Alan Hoberg (Judge Hoberg) held a Prehearing Conference, issuing a "Prehearing Conference Summary and Stipulations" setting forth a scheduling order and stipulations. Judge Hoberg also ordered that the Hearing (later set for May 7, 2012) was to be held only for the purpose of oral argument on Otter Tail's motion to dismiss and North Central's motion for summary disposition of their Formal Complaint. Various stipulations to fact were agreed upon by North Central and Otter Tail.

On April 25, 2012 Chairman Merle St. Claire, on behalf of the Turtle Mountain Band of Chippewa Indians, served a Petition to Intervene for Special Appearance to Object to Jurisdiction.

On April 27, 2012, Rjay Brunkow, Tribal Attorney filed a Notice of Appearance of Counsel for the Turtle Mountain Bank of Chippewa Indians.

On May 3, 2012, Judge Hoberg granted the Turtle Mountain Band of Chippewa Indians Intervention.

On May 4, 2012, Rjay Brunkow moved for Admission Pro Hoc Vice. Judge Hoberg granted this motion on May 7, 2012.

On May 4, 2012 the parties filed, and on May 7, 2012, Judge Hoberg approved a Stipulation between North Central and Otter Tail, setting forth additional factual stipulations and exhibits as evidence.

On May 7, 2012 North Central, Otter Tail, and the Tribe presented oral arguments on the Motion to Dismiss and for Summary Disposition of the Formal Complaint.

Having allowed all interested persons an opportunity to be heard and having heard, reviewed and considered this matter, the Commission makes its:

Findings of Fact

1. On December 9, 2011 Otter Tail began construction of an extension of its public utility plant and system and of its transmission and distribution lines for electrical service on the Sky Dancer campus. Through these efforts Otter Tail will be required to bore under Highway 5 and cross over two of North Central's main three phase underground feeders (distribution lines), one which serves the Sky Dancer campus with an overhead distribution line. Otter Tail will also be required to cross under one of Central Power Electric Cooperative, Inc.'s transmission line (which provides electrical service to North Central's facilities).
2. Highway 5 runs adjacent to the Sky Dancer Casino property. The North Dakota Department of Transportation has a Grant of Easement for Right of Way from the Bureau of Indian Affairs for North Dakota Highway 5.
3. The Sky Dancer Casino is a tribal owned facility.
4. The Sky Dancer Casino is located on tribal trust property on the Turtle Mountain Reservation.
5. The Tribe is a federally recognized Indian tribe.
6. The Tribe has a long-standing tribal utility code.
7. The Tribe passed a resolution on November 23, 2011, determining that Otter Tail shall provide electric service to the Sky Dancer Casino.
8. The Sky Dancer Casino is located in North Central's service area.
9. North Central has provided electric service to Sky Dancer at the place to be served since December 2, 1998. Service is provided to separate hotel and casino buildings and other facilities on the Sky Dancer campus. North Central was requested to and has provided electric service for the construction of a new casino building and security lighting on the campus since the fall of 2011. North Central serves a total of 7 separately metered service entrances on the Sky Dancer campus. The construction is serviced by a separate meter.

10. Otter Tail's nearest pre-existing facility to the Sky Dancer campus is a transmission line approximately 1000 feet away. Otter Tail's nearest retail consumer is approximately 3 miles distant from the Sky Dancer campus.
11. Otter Tail's distribution lines cross North Dakota Highway 5, North Central's distribution line and Central Power Electric Cooperative Inc.'s transmission lines (from which North Central purchases its electricity).
12. There is an Amended Gaming Compact between the Tribe and the State of North Dakota, wherein the State of North Dakota retains its jurisdiction.
13. North Central has October 29, 1975 Underground Easements from the Tribe.
14. Otter Tail submits their motion for dismissal pursuant to North Dakota Rule of Civil Procedure 12(b)(vi) and *Devils Lake Sioux Indian Tribe v. North Dakota Public Service Comm'n*, 896 F.Supp. 955 (D.N.D. 1995). Otter Tail's motion to dismiss under North Dakota Rules of Civil Procedure Rule 12(b) must be treated as a motion to dismiss under North Dakota Rules of Civil Procedure 56 as a result of additional evidence presented outside of the pleadings and not excluded by the Court, pursuant to North Dakota Rule of Civil Procedure 12(d). Otter Tail's motion "shall be rendered if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *Id.* North Central's motion for summary disposition is subject to the same standard.
15. Otter Tail, as the movant for summary judgment, bears the burden to prove that there is no genuine issue of material fact and North Central, as the party opposing the motion, will be given all favorable inferences which may reasonably be drawn from the evidence. *Wolff v. Light*, 156 N.W.2d 175 (N.D. 1968). North Central's motion for summary disposition is subject to the same standard.
16. "An electric public utility may not begin construction or operation of a public utility plant or system, or of an extension of a plant or system, without first obtaining from the commission a certificate that public convenience and necessity require or will require the construction and operation. ... If any electric public utility is constructing or extending its line, plant or system, unreasonably interferes with or is about to interfere unreasonably with the service or system of any other electric public utility, or any electric cooperative corporation, the commission, on complaint of the electric public utility or the electric cooperative corporation claiming to be injuriously affected, after notice and hearing as provided in this title, may order enforcement of this section with respect to the offending electric public utility and prescribe just and reasonable terms and conditions". N.D.C.C. § 49-03-01(01).
17. Pre-emption is a "principle (derived from the Supremacy Clause [of the United States Constitution]) that a federal law can supersede or supplant any inconsistent state

law or regulation.” *Black’s Law Dictionary* 1197 (Bryan A. Garner ed., 7th ed, West 1999).

18. The issue of whether the Territorial Integrity Act is pre-empted, under these circumstances, is dispositive regarding both parties’ respective motions.

19. The Territorial Integrity Act can be pre-empted in either of two general ways. *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 248 (1984). First, if “Congress evidences an intent to occupy a given field, any state law falling within that field is pre-empted.” *Id.* Second, “[i]f Congress has not entirely displaced state regulation over the matter in question, state law is still pre-empted to the extent it actually conflicts with federal law, that is, when it is impossible to comply with both state and federal law ... or where the state law stands as an obstacle to the accomplishment of the full purposes and objectives of Congress” *Id.*

20. North Central asserts that the North Dakota Supreme Court decision of *Application of Otter Tail Power Co.*, 451 N.W.2d 95 (N.D. 1990) is mandatory authority concerning the pre-emption issue. Otter Tail disagrees, advocating that a Federal District Court decision issued approximately five years later, *Devils Lake Sioux Indian Tribe v. North Dakota Public Service Comm’n*, 896 F.Supp. 955 (D.N.D. 1995), is proper precedent. Although both matters reviewed their pre-emption analysis utilizing *Brendale v. Confederated Tribes & Bands of Yakima Indian Nation*, 492 U.S. 408 (1989) and *Montana v. United States*, 450 U.S. 544 (1981) as their primary, guiding precedent, their ultimate conclusions diverge as to whether the Commission possesses jurisdiction over a Tribal business located on Tribal land.

21. “The *Rooker-Feldman* doctrine prevents the lower federal courts from exercising jurisdiction over cases brought by state-court losers challenging state-court judgments rendered before the district court proceedings commenced.” *Lance v. Dennis*, 546 U.S. 459, 460 (2006). *Rooker-Feldman* “includes three requirements: (1) The party against whom the doctrine is invoked must have actually been a party to the prior state-court judgment or have been in privity with such a party; (2) the claim raised in the federal suit must have been actually raised or inextricably intertwined with the state-court judgment; and (3) the federal claim must not be parallel to the state-court claim (i.e. both the State and Federal action cannot run simultaneously).” Otter Tail was a party in the *Application of Otter Tail Power Co.*, 451 N.W.2d 95 (N.D. 1990) and *Devils Lake Sioux Indian Tribe v. North Dakota Public Service Comm’n*, 896 F.Supp. 955 (D.N.D. 1995). Both suits concerned the federal pre-emption of the Territorial Integrity Act, and neither of the decisions at issue ran simultaneously. Because the three requirements have been met, *Application of Otter Tail Power Co.*, 451 N.W.2d 95 (N.D. 1990) would normally be deemed mandatory authority and *Devils Lake Sioux Indian Tribe v. North Dakota Public Service Comm’n*, 896 F.Supp. 955 (D.N.D. 1995) would constitute as only persuasive. However, *Verizon Maryland, Inc. v. Public Service Com’n of Maryland*, 535 U.S. 635, 644, n.3 (2002) determined that *Rooker-Feldman* “has no application to judicial review of executive action, including determinations made by a state administrative agency.” Therefore, *Devils Lake Sioux Indian Tribe v. North Dakota*

Public Service Comm'n, 896 F.Supp. 955 (D.N.D. 1995) is the proper, mandatory precedent applicable to this proceeding. Nevertheless, because *Application of Otter Tail Power Co.*, 451 N.W.2d 95 (N.D. 1990) is an excellent medium for the Commission's analysis of the issues before it, its central findings shall be reiterated below.

22. In *Application of Otter Tail Power Co.*, 451 N.W.2d 95 (N.D. 1990), Otter Tail requested a CPC&N to extend its electric service to a manufacturing building of Dakota Tribal Industries (DTI), a business wholly owned by the Devils Lake Sioux Tribe (Devils Lake Sioux) and whose manufacturing building was located on Devils Lake Sioux land. *Id.* at 96. Baker Electric Cooperative, Inc., whose service territory not only included DTI but who was currently supplying power to the manufacturing building in question, objected. *Id.* Before a determination was made by the Commission concerning the CPC&N, Otter Tail began providing power to the manufacturing building. *Id.* at 97. The Commission initiated contempt proceedings against Otter Tail, which were stayed pursuant to a successful petition by Otter Tail for a writ of prohibition. *Id.* After further Court proceedings, the Commission ultimately was allowed to rule upon the CPC&N, finding in favor of Baker. *Id.* On appeal, the North Dakota Supreme Court reviewed whether the North Dakota Territorial Act was federally pre-empted. *Id.*

23. In its consideration of the claims before it, the North Dakota Supreme Court cited *Brendale v. Confederated Tribes & Bands of Yakima Indian Nation*, 492 U.S. 408 (1989) and, by extension, *Brendale's* interpretation of *Montana v. United States*, 450 U.S. 544 (1981), as mandatory authority. *Id.* "In *Brendale* the [United States Supreme] Court considered whether the Yakima Indian Nation or the county of Yakima in Washington had the authority to zone lands owned in fee by nonmembers of the tribe located within the boundaries of the Yakima Reservation." *Id.* at 99. In *Montana*, "the Court held that the Crow Tribe had no authority to regulate non-Indian hunting and fishing on fee land within the reservation." *Id.*

24. In *Brendale* "Justice White, joined by three other justices (White), began ... [their federal pre-emption analysis] by [first] examining ... whether the Yakima nation" had either been invested by Congress with express authority to zone lands within the reservation held in fee by non-Yakima nation members" or derived such powers pursuant to inherent sovereignty. *Id.* In construing the Yakima's treaty with the United States, White rejected "the land retained by the Yakima nation shall be set apart ... for the exclusive use and benefit of [the Yakima nation]" and "no [non-Yakima nation members], excepting those in the employment of the Indian Department, shall be permitted to reside upon the said reservation without permission of the [Yakima nation]" as evidence of such express, Congressional authority.

25. White likewise rejected the inherent sovereignty argument. "Such sovereignty generally extends only to what is necessary to protect tribal self-government or to control internal relations, and is divested to the extent it is inconsistent with a tribe's dependent status – *i.e.*, to the extent it involves the tribe's external relations with nonmembers – unless there has been an express congressional delegation of tribal

power to the contrary." *Brendale v. Confederated Tribes & Bands of Yakima Indian Nation*, 492 U.S. 408, 409 (1989). *Id.* White then recognized the two exceptions to this rule as so formulated in *Montana*, namely: (1) Whether "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; and (2) whether "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." *Application of Otter Tail Power Co.*, 451 N.W.2d 95, 99 (N.D. 1990). The parties in *Brendale* agreed that the first exception was inapplicable regarding their circumstances. *Id.* at 100. Proceeding on to his analysis of the second factor, White concluded that the "tribe could not complain or obtain relief against every use of fee land that has some adverse effect on the tribe. *Id.* "The impact must be demonstrably serious and must imperil the political integrity, economic security or the health and welfare of the tribe." *Id.*

26. "White concluded that the county's zoning of the open area of the reservation imperiled no interests of the tribe and therefore the tribe had no authority to zone fee land in that area. With regard to the closed area, [White] would have remanded to the lower court to determine if county zoning in that area imperiled any protectable tribal interests. ... White's opinion for the plurality gave wide sway to state regulatory authority, in the form of county zoning, on that reservation." *Id.*

27. Justice Stevens, joined by one other Justice, concluded that the tribe had authority to zone in the closed area of the reservation, "reasoning that ... [n]otwithstanding the transfer of a small percentage of allotted land the Tribe retains its legitimate interest in the preservation of the character of the reservation." *Id.* "The Tribe's power to control the use of discrete, fee parcels of the land is simply incidental to its power to preserve the character of what remains almost entirely a region reserved for the exclusive benefit of the Tribe." *Id.* However, Justice Stevens "concluded that the tribe had no authority to zone fee land in the open area ... [w]here the Tribe's power to exclude had been diminished or surrendered, the state's regulatory power in the form of county zoning was sustained." *Id.*

28. Justice Blackmun, joined by two other justices, "concluded that the tribe had zoning authority over all the lands within its reservation." Blackmun also noted, however, that "a state can exercise concurrent jurisdiction over non-Indian activities on a reservation unless its authority is pre-empted by federal law or unless it infringes on the tribe's right to make their own laws and be ruled by them." *Id.*

29. The North Dakota Supreme Court noted that, "[a]lthough there was no majority consensus on the rationale to support the result reached in *Brendale*, the decision underscores the importance of particular facts in determining whether a state may regulate non-Indian activities within an Indian reservation." *Id.* at 101 (emphasis added).

30. In beginning their analysis of the Devil's Lake Sioux Tribe's claims, the North Dakota Supreme Court first analyzed the characterization of non-Indian ownership and activities on the reservation. *Id.* The North Dakota Supreme Court noted the disposition of acreage within the Fort Totten Reservation to be 473 acres owned by the Devil's Lake Sioux Tribe, 47,640 owned by individual tribal members and 192,794 acres owned by non-tribal members. *Id.* Applying the *Brendale* characterization, the North Dakota Supreme Court found that most of the reservation fell within the "open" category. *Id.* (The DTI building is located either on property owned by the Tribe, or property held in trust by the United States government on behalf of the Tribe). *Id.* (DTI is owned and operated by the Tribe). *Id.* at 96.

31. As in *Brendale* the North Dakota Supreme Court first determined the extent of the treaty powers bestowed upon the Tribe in relation to electric power regulation. *Id.* at 102. The Court noted that "[a]lthough the treaty granted the Tribe the authority to adopt rules and regulations for the general security of life and property, we do not view the treaty as granting the Tribe the right to regulate electric services on the reservation." *Id.*

32. Next, the North Dakota Supreme Court analyzed whether the "Tribe's power to regulate electric services derives from its inherent sovereignty." *Id.* The "inherent sovereignty" analysis by the North Dakota Supreme Court was split between the respective White and Steven's analysis in *Brendale*. *Id.*

33. Reiterating, Justice White in *Brendale* determined that "an Indian tribe's inherent sovereignty is generally divested as to all external relations with non-tribal members absent express congressional delegation." *Id.* The Supreme Court found no such "express congressional delegation." *Id.* Unlike in *Brennan* the Secretary of the Interior had not promulgated a rule which expressly denied State powers on "closed" property. *Id.* Please see 25 C.F.R. § 1.4(a) "[N]one of the laws rules or other regulations of any State or political subdivision thereof limiting, zoning or otherwise governing, regulating, or controlling the use or development of any real or personal property, including water rights, shall be applicable to any such property leased from or held or used under agreement with and belonging to any Indian or Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States." The North Dakota Supreme determined that the North Dakota Territorial Act's allocation of "electric services between competing utilities" does not constitute "a law governing, regulating, or controlling the use or development of trust property." *Id.* "State regulation of the electric suppliers to the property does not preclude the Tribe's use or development of this property." *Id.* "[S]tate regulation is not expressly pre-empted by federal law, and, more specifically, that there is no express congressional grant of authority for the Tribe to regulate in this manner." *Id.*

34. The North Dakota Supreme Court next applied the Justice Stevens analysis in *Brennan* concerning "inherent sovereignty", which proposed that a "tribe's inherent power to exclude nonmembers from the reservation includes the lesser power to regulate on the reservation and that any divestment of that power depends on whether it

has been either diminished by federal statute or voluntarily surrendered by the tribe itself." *Id.* at 103. The North Dakota Supreme Court noted that "[t]he 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." *Id.* "There is no tribal regulation of rates, service and safety standards or service territory generally." *Id.* "The tribe does not employ engineers, accountants and other professionals or technicians to regulate utilities." *Id.* The North Dakota Supreme Court further noted that "[t]he Tribe has traditionally accommodated, if not acquiesced in, the State's exclusive and long-standing regulation of electric power suppliers." *Id.* "The Tribe's failure to assert jurisdiction over electric utility investment in the past has permitted, if not induced, substantial investments within the reservation which will probably not be recovered if services are duplicated." *Id.* The North Dakota Supreme Court further noted that, because of the "reduced amount of trust and tribal-owned lands, it is doubtful that the Tribe retains, in Justice Stevens' words in *Brennan*, the power to define the essential character of the territory." *Id.* at 104. The Supreme Court therefore concluded "that, under the circumstances, the Tribe does not derive power from its inherent sovereignty to regulate the choice of electric suppliers to the DIT area." *Id.*

35. The North Dakota Supreme Court next considered the two *Montana* exceptions to the general principle of federal pre-emption (as discussed by Justice White in *Brendale*), namely: (1) Whether "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; and (2) whether "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.*

36. Concerning the first exception, the North Dakota Supreme Court indicated that "[v]iewing the relationship between a supplier and consumer of electricity as merely a consensual relationship undifferentiated from other types of commercial transactions ignores the nature of the electric utility business." *Id.* The Supreme Court then reiterated the Commission's "broad" and "extensive" authority over electric utilities, including specifically those powers enumerated under the Territorial Integrity Act whose "primary purpose" ... is "to keep to a minimum wasteful duplication of capital-intensive utility services and conflicts between suppliers of electricity." *Id.* "[C]ustomer preference", although a factor for a CPC&N, was defined by the North Dakota Supreme Court as a "minor consideration which cannot prevail where economic factors, such as relative costs and wasteful duplication, provide other criteria for choice." *Id.* "Construction of a supply line affects the entire system of an electric utility." *Id.* A typical electric supply system "is generally not confined to particular parcels of property, but spans across reservation boundaries as well as state borders." *Id.* The North Dakota Supreme Court therefore ruled that a consensual contractual relationship, for the purposes of the first *Montana* exception, does not exist. *Id.* at 105. "Because an individual has no organic, economic or political right to service by a particular utility

merely because he deems it advantageous to himself ... it is inaccurate to view a request for service by a potential electric customer from an electric supplier as forming a consensual relationship similar to that which occurs in other commercial contexts." *Id.* The Supreme Court also reasoned that no "[i]mplicit consent" of a contractual relationship existed between Otter Tail and the Tribe, citing language within their contract indicating that electricity will be provided by Otter Tail to the Tribe "in conformance with the rules and regulations of the Public Service Commission of the State of North Dakota", including electricity rates. *Id.*

37. As to the second exception, the North Dakota Supreme Court likewise ruled in the Commission's favor, rejecting electric service as a "quintessential act of the Tribe's right of self-government". *Id.* at 106. The Court noted Otter Tail's assertions that DTI's competitive position in the marketplace would be undercut by being forced to pay the cooperative's higher electric rates, but found the argument unpersuasive because "the rate structure for permanent electric service to DTI had not yet been established". *Id.* The North Dakota Supreme Court found no factors which would be deemed "demonstrably serious", as *Brennan* required. *Id.*

38. The Federal District Court in *Devils Lake Sioux Indian Tribe v. North Dakota Public Service Comm'n*, 896 F.Supp. 955 (D.N.D. 1995) only diverges with the North Dakota Supreme Court's analysis in *Application of Otter Tail Power Co.*, 451 N.W.2d 95, 99 (N.D. 1990) in one, yet material, finding. "The Court does feel however, that where the service sought is to a Tribal business located upon Trust land, the necessary nexus between Tribal Interests and inherent sovereignty is present." *Devils Lake Sioux Indian Tribe v. North Dakota Public Service Comm'n*, 896 F.Supp. 955, 961 (D.N.D. 1995).

From the foregoing Findings of Fact, the Commission now makes its:

Conclusions of Law

1. The Commission has jurisdiction over the parties and the subject matter of this proceeding.
2. Otter Tail is an "electric public utility" pursuant to N.D.C.C. § 49-03-01.5(2).
3. The Sky Dancer Casino is tribally owned, and located on tribal trust property. Although part of Otter Tail's proposed plant will be located on non-tribal land, the Commission classifies the relevant "area" as "closed", in light of *Application of Otter Tail Power Co.*, 451 N.W.2d 95 (N.D. 1990), *Brendale v. Confederated Tribes & Bands of Yakima Indian Nation*, 492 U.S. 408 (1989) and *Montana v. United States*, 450 U.S. 544 (1981).
4. The Commission can find no evidence of Congress expressly bestowing upon the Tribe such exclusive powers to preclude the Commission from exercising regulatory authority over Tribal owned property located on the reservation.

5. However, because the Sky Dancer Casino is a Tribal business, located upon Trust land, and because the mandatory authority of *Devils Lake Sioux Indian Tribe v. North Dakota Public Service Comm'n*, 896 F.Supp. 955 (D.N.D. 1995) deems our execution of the Territorial Integrity Act, under these circumstances, a violation of the Tribe's "inherent sovereignty", the Commission concludes that it possesses no regulatory powers as it relates to Otter Tail's activities.

6. Neither the North Dakota Department of Transportation Grant of Easement for Right of Way from the Bureau of Indian Affairs for North Dakota Highway 5, the requirement of Otter Tail plant crossing the property of North Central and Central Power Electric Cooperative, Inc., the Amended Gaming Compact between the Tribe and the State of North Dakota, nor the underground easements granted to North Central by the Tribe constitute as sufficient "divestment" to change the Commission's "inherent sovereignty" conclusion so stated above. *Application of Otter Tail Power Co.*, 451 N.W.2d 95, 99 (N.D. 1990).

7. Because the Commission finds that it possesses no regulatory powers over Otter Tail's activities, and because such issue is dispositive regarding both parties' respective motions, the Commission concludes that there is no genuine issue of material fact remaining for determination. Otter Tail is therefore entitled to judgment as a matter of law.

8. The Commission recognizes the Supremacy Clause of the Constitution and, by extension, the interplay between States' rights and that of the Federal Government. The Commission is less concerned with this ruling's affect upon its own jurisdiction than that regarding the abrogation of the Territorial Integrity Act. North Central's assertions that Otter Tail's activities are a wasteful duplication of resources, and unreasonably interfere with their plant and facilities may be correct. Essentially, although limited to specific circumstances, North Dakota has been deregulated by compulsion rather than by action of its Legislature and Governor. The Commission may be without power to remedy such actions. However, the United States Congress is not. Additionally, it remains uncertain how these activities will be reflected in Otter Tail's rate base, a question which the Commission anticipates addressing at Otter Tail's next rate hearing. For the above-mentioned reasons, the Commission advises all parties to exhibit discretion.

From the foregoing Findings of Fact and Conclusions of Law, the Commission makes the following:

Order

The Commission Orders:

1. Otter Tail's Motion to Dismiss North Central's Formal Complaint is GRANTED.


2. North Central's Motion for Summary Disposition of North Central's Formal Complaint is DENIED.

3. Otter Tail shall provide with its next rate application a comparison of cost of service and revenues received from this load.


PUBLIC SERVICE COMMISSION



**Kevin Cramer
Commissioner**



**Tony Clark
Chairman**



**Brian P. Kalk
Commissioner**

STATE OF NORTH DAKOTA
PUBLIC SERVICE COMMISSION

North Central Electric Cooperative, Incorporated
vs. Otter Tail Power Company
Complaint

Case No. PU-11-701

AFFIDAVIT OF SERVICE CERTIFIED MAIL

STATE OF NORTH DAKOTA
COUNTY OF BURLEIGH

Cara DeSaye deposes and says that:

she is over the age of 18 years and not a party to this action and, on the 20th day of June, 2012, she deposited in the United States Mail, at Bismarck, North Dakota, three envelopes with certified postage, return receipt requested, fully prepaid, securely sealed and containing photocopy of:

Order

The envelopes were addressed as follows:

Debra Hoffarth
Pringle & Herigstad, P.C.
PO Box 1000
Minot ND 58702

Bruce Gerhardson
Otter Tail Power Company
215 S. Cascade St.
Fergus Falls MN 56538

Cert. No. 7011 2000 0002 0363 3394

Cert. No. 7011 2000 0002 0363 3400

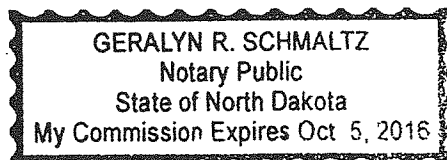
RJ Brunkow
PO Box 900
Highway 5 West
Belcourt ND 58316

Cert. No. 7011 2000 0002 0363 3417

Each address shown is the respective addressee's last reasonably ascertainable mailing address.

Subscribed and sworn to before me
this 20th day of June, 2012.

SEAL



Cara DeSaye

Geraldine Schmaltz

Notary Public

APPROVED

DATE: 6-14-12

[Signature]

MOTION

June 14, 2012

**North Central Electric Cooperative,
Incorporated
vs. Otter Tail Power Company
Formal Complaint**

Case No. PU-11-701

I move the Commission adopt the Order granting Otter Tail Power Company's Motion for Dismissal of North Central Electric Cooperative, Inc.'s Formal Complaint and denying North Central Electric Cooperative, Inc.'s motion for Summary Disposition of North Central Electric Cooperative, Inc.'s Formal Complaint, Case No. PU-11-701.

MG

07/06/2012	Civil Filing	Doc ID# 3	
	<i>Undertaking on Appeal to District Court</i>		
08/06/2012	Service Document	Doc ID# 4	
	<i>George A. Koeck, Registered agent; Paul Sanderson; Bruce Gerhardson; Rjay Brunkow, Tracy Vigness Kolb</i>		
08/06/2012	Notice of Assignment and Case Number	Doc ID# 5	
08/15/2012	Service Document	Doc ID# 6	
	<i>Ryan Brankon</i>		
08/15/2012	Service Document	Doc ID# 7	
	<i>Paul Sanderson</i>		
08/15/2012	Service Document	Doc ID# 8	
	<i>Bruce Gerhardson</i>		
08/15/2012	Service Document	Doc ID# 9	
	<i>George A Kueck</i>		
08/15/2012	Service Document	Doc ID# 10	
	<i>Tracy Vigness Kolb</i>		
08/15/2012	Service Document	Doc ID# 11	
	<i>Sheriff Return</i>		
08/21/2012	Service Document	Doc ID# 12	
	<i>Affidavit of Service by Regular Mail</i>		
08/21/2012	Notice	Doc ID# 13	
	<i>Notice to appellant of Actual Costs</i>		
08/21/2012	Certificate	Doc ID# 14	
	<i>Certificate of Record on Appeal with CD attached (in Cupboard)</i>		
08/29/2012	Service Document	Doc ID# 15	
08/29/2012	Notice	Doc ID# 16	
	<i>of Appearance</i>		
09/21/2012	Service Document	Doc ID# 17	
	<i>Affidavit of Service by Mail</i>		
09/21/2012	Stipulation / Agreement	Doc ID# 18	
	<i>Stipulated Briefing Schedule</i>		
09/21/2012	Proposed Order	Doc ID# 19	
	<i>Proposed Order</i>		
09/25/2012	Order	Doc ID# 20	
	<i>Order Approving Stipulated Briefing Schedule</i>		
10/05/2012	Service Document	Doc ID# 21	
	<i>Affidavit of Service by Mail</i>		
10/05/2012	Brief	Doc ID# 22	
	<i>Brief of Appellant North Central Electric Cooperative, Inc.</i>		
11/01/2012	Service Document	Doc ID# 23	
	<i>Affidavit of Service by Certified Mail and Hand Delivery</i>		
11/01/2012	Brief	Doc ID# 24	
	<i>Appellee, ND Public Service Commission Response Brief</i>		
11/05/2012	Service Document	Doc ID# 25	
11/05/2012	Brief	Doc ID# 26	
	<i>Otter Tail Power Company's Appellee Brief</i>		
11/05/2012	Service Document	Doc ID# 27	
11/05/2012	Brief	Doc ID# 28	
	<i>Turtle Mountain Band of Chippewa Indians' Appellee Brief</i>		
11/16/2012	Service Document	Doc ID# 29	
	<i>Certificate of Service</i>		
11/16/2012	Brief	Doc ID# 30	
	<i>Appellant NCEC Reply Brief</i>		
12/06/2012	Service Document	Doc ID# 31	
12/06/2012	Substitution of Attorneys	Doc ID# 32	
	<i>Substitution of Counsel</i>		
01/02/2013	Letter	Doc ID# 33	
	<i>from Atty. Hoffarth on status of case</i>		
01/22/2013	Order	Doc ID# 34	
02/25/2013	Judgment	Doc ID# 35	
	<i>Judgment of Dismissal</i>		
02/27/2013	Service Document	Doc ID# 36	
02/27/2013	Notice of Entry of Judgment	Doc ID# 37	
	<i>Notice of Entry of Judgment of Dismissal</i>		
03/06/2013	Notice	Doc ID# 38	
	<i>Notice of Appeal</i>		
03/06/2013	Service Document	Doc ID# 39	
	<i>Certificate of Service</i>		
03/08/2013	Notice of Filing the Notice of Appeal	Doc ID# 40	
03/11/2013	Letter	Doc ID# 41	
	<i>Email from North Dakota Supreme Court</i>		
04/04/2013	Clerk's Certificate on Appeal	Doc ID# 42	

FINANCIAL INFORMATION

Appellant North Central Electric Cooperative, Inc.	
Total Financial Assessment	80.00
Total Payments and Credits	80.00

	Balance Due as of 04/08/2013		0.00
08/06/2012	Transaction Assessment		80.00
08/06/2012	Mail Payment	Receipt # 08-2012-12627	(80.00)
		Hoffarth, Debra Lynn	

STATE OF NORTH DAKOTA

IN DISTRICT COURT

COUNTY OF BURLEIGH

SOUTH CENTRAL JUDICIAL DISTRICT

North Central Electric Cooperative, Inc.)

Appellant,)

vs.)

North Dakota Public Service Commission,)

Otter Tail Power Company, and)

Turtle Mountain Band of Chippewa Indians,)

Appellees.)

**NOTICE OF APPEAL
AND SPECIFICATIONS
OF ERROR**

TO: NORTH DAKOTA PUBLIC SERVICE COMMISSION, OTTER TAIL POWER COMPANY, AND TURTLE MOUNTAIN BAND OF CHIPPEWA INDIANS.

PLEASE TAKE NOTICE that North Central Electric Cooperative, Inc. ("North Central") appeals to the District Court for Burleigh County, South Central Judicial District, from an order of the North Dakota Public Service Commission ("Commission") issued June 14, 2012 and served June 20, 2012, and the Request for Reconsideration being denied due to no action by the Commission on July 28, 2012, determining that it did not have jurisdiction to hear the dispute regarding electric service facilities to the Sky Dancer Casino because it is a tribal business located on tribal trust land and thereby dismissed North Central's Formal Complaint and denied North Central's Motion for Summary Disposition. The Public Service Commission's Decision is based upon Devils Lake Sioux Indian Tribe v. North Dakota Public Service Comm'n, 896 F.Supp. 955 (D.N.D. 1995), a federal court case. Conclusions of Law, ¶ 5.

North Central specifies the following errors as grounds for the appeal:

1. The Order is not in accordance with the law in at least the following respects:
 - a. In Paragraph 1 of the Conclusions of Law, the Commission determined it had "jurisdiction over the parties and the subject matter of this proceeding." Conclusions of Law, ¶ 1. This conclusion is inconsistent with the remainder of the Commission opinion where it concluded that it did not have jurisdiction to regulate Otter Tail's activities. If the Commission has jurisdiction over the parties and subject matter of the proceeding, it should proceed to determine the matter on the merits.
 - b. The Order is based upon the interpretation of federal case law, without recognition of State law that is binding on the Public Service Commission.
 - c. The Order is not in accordance with judicial precedent and state law that the Public Service Commission has jurisdiction under the Territorial Integrity Act. The Commission is a state agency obliged to follow North Dakota's laws, its statutes and the North Dakota Supreme Court precedents under The Territorial Integrity Act (TIA). N.D.CENT.CODE § 49-03-01 through 49-03-01.5.
 - d. The Order results in an unlawful delegation of authority to the Turtle Mountain Tribe based upon an interpretation of federal law, not State law. The Tribe does not have the inherent sovereignty to regulate the utilities. Devils Lake Sioux Tribe v. PSC, 896 F.Supp. 955, 961-62 (DND 1995). A Tribe cannot reach outside the reservation to regulate a public utility and " 'minimal' burdens on tribal self-government are allowable." In re Application of Otter Tail Power Co., 451 N.W.2d 95, 105 (ND 1990).
 - e. The Commission's determination that it did not have jurisdiction over the matter is not in accordance with the law and long established precedent under Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 98 S.Ct. 1011 (1978) and Montana v. United States, 450 U.S. 544, 101 S.Ct. 1245 (1981) and its progeny.
 - f. The Order errs in where it concluded "that the North Dakota Department of Transportation Grant of Easement for Right of Way from the Bureau of Indian Affairs for North Dakota Highway 5, the requirement of Otter Tail plant crossing the property of North Central and Central Power Electric Cooperative, Inc., the Amended Gaming Compact between the Tribe and the State of North Dakota, nor the underground easements granted to North Central by the Tribe" did not divest the Tribe of its sovereignty. Conclusions of Law, ¶ 6. All of these entities or property rights involve non-Indians,

over which the Turtle Mountain Tribe lacks authority and over which the Commission has the authority to regulate under the circumstances.

- g. The Order does not make a proper evaluation of the issues under the law and evidence.
 - h. The Order is not in accordance with N.D. Const. Art. VI, § 2 in that the Commission made a determination under federal law, when its jurisdiction is limited to state jurisdiction issues.
2. The Findings of Fact made by the Commission are not supported by a preponderance of the evidence in at least the following respects:
- a. The Commission's use of facts from another proceeding, instead of making findings based upon the evidence in the record is error.
 - b. The Findings of Fact in paragraphs 22-38, relating to any alleged harm to the Tribe are error as no evidence was presented to show that the authority of the Commission will somehow harm or imperil the Turtle Mountain Band of Chippewa Indians.
3. The provisions of N.D.C.C. Chapter 28-32 were not complied with in at least the following respects:
- a. The Order was not decided on the claims and facts presented in the North Central's Formal Complaint but based upon the facts from a federal court case.

Dated this 2nd day of August, 2012.

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