

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

BRIEF OF APPELLANT
NORTH CENTRAL ELECTRIC COOPERATIVE, INC.

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I. STATEMENT OF THE ISSUES

- [¶1] 1. Was the PSC’s dismissal of North Central’s Complaint in accordance with the law?
- [¶2] 2. Were the PSC’s findings of fact supported by a preponderance of the evidence?
- [¶3] 3. Did the PSC’s findings sufficiently address the evidence provided by North Central?

II. STATEMENT OF THE CASE

[¶4] This is a case of a territorial dispute between a rural electric cooperative and an electric public utility. When Otter Tail Power Company (“Otter Tail”) unlawfully expanded its service into a rural area in violation of North Dakota’s Territorial Integrity Act (“TIA”) (N.D.C.C. ch. 49-03), North Central Electric Cooperative, Inc. (“North Central”) complained to the North Dakota Public Service Commission (“PSC” or “Commission”) pursuant to the procedures provided for under the TIA. The disputed area is the Sky Dancer Casino (“Casino” or “Sky Dancer”) located near Belcourt, North Dakota. The PSC dismissed North Central’s Formal Complaint claiming a lack of regulatory authority to hear the dispute because the Casino is a tribal business located on tribal trust land. *App.* 77–78. North Central appealed the PSC’s ruling to the Burleigh County District Court pursuant to N.D.C.C. § 28-32-46, and the district court affirmed the PSC’s determination. *App.* 84–86; 166–68. North Central now brings this appeal before the North Dakota Supreme Court, pursuant to N.D.C.C. § 28-32-49, from the district court’s Order and Judgment of Dismissal affirming the PSC’s decision to dismiss North Central’s Formal Complaint against Otter Tail.

III. STATEMENT OF FACTS

[¶5] Prior to the events leading up to the present dispute, North Central had been providing electric service to the Sky Dancer Casino since December 2, 1998. *App.* 7. North Central's longstanding provision of services to Sky Dancer included electric service to the Casino building itself, the separate hotel building, and other various facilities throughout the Sky Dancer campus. *App.* 7. The North Dakota Department of Transportation has an easement through the Turtle Mountain Reservation for North Dakota Highway 5. North Central has an easement from the Turtle Mountain Band of Chippewa Indians for its facilities on the Turtle Mountain Reservation. *App.* 8.

[¶6] In the fall of 2011, as part of its planned construction of a new Casino, Sky Dancer requested that North Central provide additional electric service in support of Sky Dancer's construction activities, along with security lighting. North Central provided those requested services. *App.* 7.

[¶7] On November 28, 2011, Sky Dancer requested that North Central install an additional 600-amp electric service line to service construction trailers to be located on the Sky Dancer construction site. *App.* 7. However, shortly after that request was made, North Central was contacted by Otter Tail, which stated that the Tribe had requested that Otter Tail, not North Central, provide electric service for the new Casino project. *App.* 7. On December 1, 2011, Tribal Chairman Merle St. Claire confirmed that the Tribe had requested electric service for the Casino from Otter Tail on November 23, 2011 by a resolution of the Tribal Council. *App.* 7; *App.* 69. On December 7, 2011, North Central received a request via North Dakota One-Call to locate its electrical lines around the Casino property to accommodate Otter Tail's construction and installation activities.

App. 8. The request indicated that the work was for the installation of electric main/poles and anchors at a location staked for the construction of the new Casino. *App. 8.* Two days later, on December 9, 2011, Otter Tail began construction to expand its public utility plant and system and its transmission and distribution lines for electrical service on the Sky Dancer campus. *App. 8.* Otter Tail did not receive a certificate of public convenience and necessity from the PSC for the extension of its plan and facilities prior to beginning its construction and installation activities on the Sky Dancer campus. *App. 8.*

[¶8] On December 12, 2011, North Central filed a Complaint and Affidavit with the PSC alleging that Otter Tail (1) threatened to and had begun the construction of an extension of its public utility plant and system and of its transmission and distribution lines to serve the Sky Dancer Casino, which is not located within the corporate limits of any municipality, without first obtaining from the Commission a certificate that public convenience and necessity requires or will require such construction and service in violation of N.D.C.C. ch. 49-03; (2) that the place to be served was within North Central's service area; (3) that North Central was already providing service to the Sky Dancer Casino; (4) that such service would unreasonably interfere with the service or system of North Central; and (5) that such service was a wasteful duplication of facilities. *App. 5–6.*

[¶9] On January 17, 2012, Otter Tail filed an Answer. Otter Tail admitted (1) it had begun construction of its public utility plant and system to provide electric service to the Turtle Mountain Band of Chippewa Indians ("Tribe") facility on the Turtle Mountain Reservation; and (2) that North Central was providing service to the facility.

App. 24–25. Otter Tail asserted that the Public Service Commission did not have regulatory authority over the Tribe’s determination of who will provide electric service to a Tribally-owned facility on Tribal land on the Turtle Mountain Indian Reservation. *App. 24–26.* Otter Tail denied that a certificate of public convenience and necessity was required to expand its facilities and to serve the Casino. *App. 24–26.* Otter Tail’s Answer also denied North Central’s interference and wasteful duplication of facilities claims. *App. 24–26; App. 68.*

[¶10] On January 17, 2012, Otter Tail filed a Motion to Dismiss asserting that the Public Service Commission lacked regulatory authority over the Turtle Mountain Band of Chippewa Indians’ Tribal Resolution permitting Otter Tail 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. *App. 27.* Otter Tail also asserted that the Turtle Mountain Band of Chippewa Indians has the inherent sovereignty to contract with whomever it wishes for electric service to its lands and businesses. *App. 27–29.*

[¶11] On February 2, 2012, North Central filed a Response Brief to Otter Tail’s Motion to Dismiss asserting that the Public Service Commission had jurisdiction and Otter Tail could not assert the rights of the Turtle Mountain Band of Chippewa Indians. *App. 39.* North Central also requested summary judgment against Otter Tail, as Otter Tail had admitted to construction of its public utility plant and system without a certificate of public convenience and necessity. *App. 51.*

[¶12] On May 3, 2012, the Turtle Mountain Band of Chippewa Indians (“The Tribe”) were allowed to intervene in the matter. *App. 57; App. 68.* The Tribe asserted

that it had the sovereign right to choose Otter Tail as its electric provider. *App. 57–58*. However, the Tribe did not produce any evidence that the PSC’s exercise of authority in the matter would threaten the political integrity, economic security, or health or welfare of the Tribe. *See App. 57–58*.

[¶13] The parties stipulated as to the evidence in the matter and a hearing was held on May 7, 2012. *App. 55–56; App. 61–63; App. 68–69*. The May 7, 2012 hearing was only for the purpose of oral arguments regarding Otter Tail’s Motion to Dismiss and North Central’s Motion for Summary Disposition on the Complaint. *App. 69*. The Tribe presented no evidence, no testimony, and no exhibits.

[¶14] On June 12, 2012, the PSC issued its Findings of Facts, Conclusions of Law, and Order (“PSC Order”). The PSC stated, “The Commission has jurisdiction over the parties and the subject matter of this proceeding.” *App. 76*. However, the PSC found and concluded that it did not have jurisdiction because the Sky Dancer Casino is a tribal business located on tribal trust land and ordered that Otter Tail’s motion to dismiss be granted and North Central’s motion for summary judgment be denied. *App. 77*. The PSC’s decision was 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. *App. 77*. The PSC also suggested that its jurisdiction may be preempted by the federal supremacy clause, although the PSC’s Order was unclear as to whether such preemption occurred in the context of the Tribe’s inherent sovereignty, or if the PSC’s jurisdiction in this matter was preempted by federal law in some other way. *App. 71; 77*. In deciding this matter, the PSC considered the factors applied by the North Dakota Supreme Court in the earlier, factually similar case of *Application of Otter Tail Power Co.*, 451 N.W.2d 95 (N.D.

1990). *App.* 72–76. Specifically, the PSC applied the factors set forth in *Brendale v. Confederated Tribes & Bands of Yakima Indian Nation*, 492 U.S. 408 (1989) and, by extension, *Montana v. United States*, 450 U.S. 544 (1981). *App.* 72–76. However, instead of applying the rules in those cases to the facts of the present case, the PSC erroneously applied those rules to the facts of the earlier, factually similar case of *Application of Otter Tail Power Co.*, 451 N.W.2d 95 (N.D. 1990) (“*Otter Tail 1990*”). *App.* 73–76.

IV. SCOPE OF REVIEW

[¶15] “When a decision of an administrative agency is appealed from the district court to this Court, we review the decision of the agency.” *Berger v. N. Dakota Dep’t of Transp.*, 2011 ND 55, ¶ 5, 795 N.W.2d 707. The North Dakota Supreme Court’s review of this matter is governed by N.D.C.C. § 28-32-49, which provides in relevant part that “[t]he judgment of the district court in an appeal from an order . . . may be reviewed in the supreme court on appeal in the same manner as provided in section 28-32-46.” N.D.C.C. § 28-32-46 states in relevant part:

[T]he court must affirm the order of the agency unless it finds that any of the following are present:

1. The order is not in accordance with the law.
- ...
5. The findings of fact made by the agency are not supported by a preponderance of the evidence.
6. The conclusions of law and order of the agency are not supported by its findings of fact.
7. The findings of fact made by the agency do not sufficiently address the evidence presented to the agency by the appellant.

N.D.C.C. § 28-32-46.

[¶16] “An agency’s decisions on questions of law are fully reviewable.” *Huff v. N. Dakota State Bd. of Med. Examiners-Investigative Panel B*, 2004 ND 225, ¶ 8, 690 N.W.2d 221. The North Dakota Supreme Court gives deference to an agency’s findings, but will still review questions of law de novo. *Sayler v. N. Dakota Dep’t of Transp.*, 2007 ND 165, ¶ 7, 740 N.W.2d 94.

V. ARGUMENT

[¶17] Because the PSC’s Order was not in accordance with the law, and because the PSC’s Findings of Fact were not supported by a preponderance of the evidence and failed to sufficiently address North Central’s evidence in this matter, the PSC’s Order and Judgment should be reversed.

A. **The PSC’s Dismissal of North Central’s Complaint was not in accordance with the law.**

[¶18] The PSC’s conclusions that its authority was superseded by inherent tribal sovereignty or that its authority was preempted by federal law were not in accordance with the law, and the PSC’s dismissal of North Central’s Complaint on those grounds should be reversed. North Dakota law gives the PSC jurisdiction over such matters, and the PSC is required to follow North Dakota law. *See* N.D.C.C. ch. 49-03.

1. **The PSC has jurisdiction over the parties in this matter under North Dakota law.**

[¶19] Under North Dakota law, the PSC has the jurisdiction to grant relief to North Central under the TIA. *See* N.D.C.C. § 49-03-01. The TIA requires that, prior to commencing construction, a publicly owned utility must apply for and be granted a certificate of public convenience and necessity in rural areas. *Id.* The TIA’s intent is to

minimize wasteful duplication of investment, facilities, and service. *Cass County Elec. Co-op, Inc. v. Northern States Power*, 419 N.W.2d 181, 188 (N.D. 1988).

[¶20] In *Application of Otter Tail Power Co.*, 451 N.W.2d 95, 98 (N.D. 1990) (“*Otter Tail 1990*”), a case with facts nearly identical to those in the present case, the North Dakota Supreme Court concluded that “the PSC had jurisdiction in this case.” In that case, Otter Tail and Baker Electric had a dispute over serving a new manufacturing plant (DTI) on the Spirit Lake Reservation. *Id.* at 96–97. The manufacturing plant requested service from Baker Electric, while the Tribe requested power from Otter Tail. *Id.* at 96. Otter Tail filed a “Notice of Intent to Extend Service” to a customer on the Fort Totten Indian reservation. *Id.* at 96–97. In response, the PSC notified Otter Tail that the PSC had jurisdiction and Otter Tail should formally apply for a certificate of public convenience and necessity. *Id.* at 97. Otter Tail did apply for a certificate but before the PSC acted, Otter Tail extended service in defiance of the PSC’s jurisdiction. *Id.* Otter Tail asserted the PSC did not have jurisdiction because assumption of jurisdiction would unlawfully interfere with the Indian Tribe’s sovereign rights of self-government. *Id.* Otter Tail appealed the PSC’s decision that it had jurisdiction. The North Dakota Supreme Court concluded that the PSC did have jurisdiction, stating, “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.” *Id.* at 98.

[¶21] The North Dakota Supreme Court’s decision in *Otter Tail 1990* reflects the current state of the law as it pertains to the PSC’s jurisdiction in cases brought under the TIA. Therefore, unless there is some controlling authority that preempts or otherwise

proscribes the PSC's jurisdiction, the PSC should be held to have jurisdiction in this matter, and the PSC's Order dismissing North Central's Complaint should be reversed.

[¶22] It is also worth noting that, in its Conclusions of Law, the PSC stated, "The Commission has jurisdiction over the parties and the subject matter of this proceeding." *App.* 76. This statement is consistent with North Dakota law, which does give the Commission jurisdiction over the parties in this case; however, it is inconsistent with the PSC's ultimate conclusion in this matter, and for that reason the PSC's Order dismissing North Central's Complaint should be reversed.

2. The rule applied in the *Devils Lake Sioux Indian Tribe* case is not consistent with Eighth Circuit or U.S. Supreme Court law, and should therefore not control the outcome of this case.

[¶23] In dismissing North Central's Complaint, the PSC stated in its Conclusions of Law:

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.

App. 77.

[¶24] As is clear from the PSC Order, the chief basis for the PSC's conclusion that it did not possess regulatory authority in this matter was its application of the rule set forth in *Devils Lake Sioux Indian Tribe v. North Dakota Public Service Comm'n*, 896 F.Supp. 955 (D.N.D. 1995) ("*Devils Lake Sioux Indian Tribe* case"). In that case, the Federal District Court for the District of North Dakota was considering facts similar to those at issue in the present case. *See Devils Lake Sioux Indian Tribe*, 896 F.Supp. at

957–960. In order to resolve the question of whether the Tribe or the PSC had regulatory authority over the provision of electric service to a tribally-owned manufacturing plant, the Federal District Court weighed the facts in that case against the rule set out in *Montana v. United States*, 450 U.S. 544, 566 (1981) as well as that rule’s two exceptions. *See id.* at 960–61.

[¶25] Despite the court’s finding that “[t]he facts of this case present no justification for the exercise of regulatory authority [by the Tribe] over the provision of electrical service within the exterior boundaries of the reservation” and that “[n]o showing has been made, and by inference at least, can be made, that the health, welfare or safety of any Tribal Member is in any way threatened under the present system,” the court nevertheless concluded 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.” *Id.* at 961. In so ruling, the Federal District Court ignored its own sound analysis regarding the *Montana* rule and its exceptions, opting instead to apply a novel test concerning Tribal businesses located on Trust land. *See id.* However, a review of the rule in *Montana*, the rule’s two exceptions, and the case law that has governed the application of the rule and its exceptions, all show that the rule set forth by the Federal District Court in that case did not reflect the true state of the law with regard to inherent tribal sovereignty at that time, nor does that rule reflect the state of the law as it has developed in the years following the *Devils Lake Sioux Indian Tribe* case. In fact, the Federal District Court’s holding in the *Devils Lake Sioux Indian Tribe* case was at that time, and is currently, plainly contradicted by controlling Eighth Circuit and U.S.

Supreme Court law, and should not be cited as dispositive authority in questions of inherent tribal sovereignty.

[¶26] The general rule expressed in *Montana* is that “the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe.” 450 U.S. at 565. However, there are two exceptions to this general rule whereby tribes “retain inherent sovereign authority to exercise some forms of civil jurisdiction over non-Indians on their reservations.” *Id.* These exceptions arise: (1) when nonmembers “enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements” or (2) when a nonmember’s “conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.” *Id.* at 565–66.

[¶27] In the *Devils Lake Sioux Indian Tribe* case, the Federal District Court performed a brief analysis of the general principle in *Montana* and the rule’s two exceptions and concluded that neither exception to the general rule applied. *See* 896 F.Supp. at 960–61. However, despite its conclusion that neither exception was met, the court went ahead with its own novel test and found that PSC authority in that case was a violation of the Tribe’s inherent sovereignty. *See id.* at 961. As a result, the court’s holding in the *Devils Lake Sioux Indian Tribe* case is an outlier and is not consistent with Eighth Circuit or U.S. Supreme Court law in existence at the time that case was decided or that has developed since. The court’s holding in the *Devils Lake Sioux Indian Tribe* case would not survive appeal today, and therefore the PSC’s dismissal of North Central’s Complaint was predicated on the holding of a case that is at odds with the overwhelming weight of controlling legal authority.

[¶28] The second exception to the *Montana* rule has been applied very narrowly since it was first announced in 1981. *Montana*'s second exception is concerned with non-Indian activity that directly affects a Tribe's political integrity, economic security, or health and welfare. *See Montana*, 450 U.S. at 565–66. “The burden rests on the tribe to establish one of the exceptions to *Montana*'s general rule that would allow an extension of tribal authority to regulate nonmembers on non-Indian fee land.” *Plains Commerce Bank v. Long Family Land and Cattle Co.*, 554 U.S. 316, 330 (2008). “Read in isolation, the *Montana* rule's second exception can be misperceived.” *A-1 Contractors v. Strate*, 520 U.S. 438, 459 (1997). The key to understanding and applying this second *Montana* exception is to look at the Court's introduction to the exception: “Indian tribes retain their inherent power [to punish tribal offenders,] to determine tribal membership, to regulate domestic relations among members, and to prescribe the rules of inheritance for members. . . . But [a tribe's inherent power does not reach] beyond what is necessary to protect tribal self-government or to control internal relations.” *Id.* (quoting *Montana*, 450 U.S. at 564). In order to be regulated by a Tribe, the nonmember conduct “must do more than injure the tribe, it must imperil the subsistence of the tribal community.” *Plains Commerce Bank*, 554 U.S. at 341 (internal quotations omitted). Applying the second exception broadly would cause the exception to “severely shrink” the general rule. *See id.* at 330; *Strate*, 520 U.S. at 458. Tribal sovereignty is limited to those matters that are “necessary to protect tribal self-government or to control internal relations” as is consistent with the tribe's dependent status. *Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 650–51 (2001). “[T]he exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent

status of the tribes, and so cannot survive without express congressional delegation.” *South Dakota v. Bourland*, 508 U.S. 679, 694–95 (1993) (emphasis added).

[¶29] In *Nevada v. Hicks*, 533 U.S. 353, 356–57 (2001), the United States Supreme Court reviewed a claim against a Nevada state official for the execution of a state search warrant on reservation land. The United States Supreme Court used the *Montana* analysis to determine the scope of the Fallon Paiute-Shoshone Tribe’s regulatory jurisdiction over a state game warden. *See id.* at 359–60. Tribal sovereignty does not prevent state regulatory authority on the reservation. *Id.* at 361. A reservation is part of the state’s territory. *Id.* at 362. Where state interests “outside the reservation are implicated,” the State can exercise its regulatory authority for activities on tribal land. *Id.* at 362. In *Hicks*, the United States Supreme Court ultimately determined that the service of state process by a state officer on tribal land did not affect the tribe’s right to self-government. *See id.* at 364.

[¶30] The state and tribe can have concurrent jurisdiction over a matter. *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 333 (1983). A State’s regulatory interest will be particularly substantial if the State can point to off-reservation effects that necessitate State intervention. *Id.* at 336.

[¶31] The case law cited above clearly establishes the appropriate test for determining whether the second *Montana* exception has been met. It is abundantly clear that the extremely relaxed application of the rule by the Federal District Court in the *Devils Lake Sioux Indian Tribe* case simply cannot be reconciled with the extraordinarily narrow application of that exception that is required by the case law cited above. *See Plains Commerce Bank*, 554 U.S. at 341; *Atkinson Trading Co.*, 532 U.S. at 650–51;

Bourland, 508 U.S. at 694–95; *Strate*, 520 U.S. at 458. In essence, the rule set forth in the *Devils Lake Sioux Indian Tribe* case is not just a broader, more relaxed iteration of the same rule that is so narrowly applied in all of the other case law; it is a different and contradictory rule altogether. For instance, what test governs when the nonmember conduct relates to conduct on Tribal land, but when such conduct has no demonstrable impact on the Tribe’s political integrity or economic security? Despite the holding in the *Devils Lake Sioux Indian Tribe* case, the United State Supreme Court has indicated that the impact on the Tribe’s political integrity or economic security is the dispositive test. See *Hicks*, 533 U.S. at 356–57. That is precisely the situation in this case. The United States Supreme Court requires a showing that the nonmember conduct would not merely injure but would “imperil the subsistence of the tribal community.” *Plains Commerce Bank*, 554 U.S. at 341. However, Otter Tail offers no proof of such impending peril, but instead contends that it is exempted from the United States Supreme Court’s law because the PSC’s regulatory authority in this case would pertain to a Tribal business on Trust land, and the Federal District Court says that is all that is required.

[¶32] When weighing the facts of the present case against the U.S. Supreme Court’s exceedingly narrow application of *Montana*’s second exception, it is clear that the PSC’s exercise of authority under the TIA does not threaten the Tribe’s health, welfare, political integrity, or economic security. In fact, there is no evidence in the record detailing how any such conduct would threaten the Tribe’s ability to govern itself. Nor would a finding of such a threat logically follow from the facts of this case. Neither the Casino, nor the Tribe would be deprived of electric service if the PSC exercised jurisdiction over this case. Nor would the Tribe or its members be prejudiced with

materially higher rates if the PSC were allowed to exercise jurisdiction. *See App. 77*. The PSC has an interest in the off-reservation effects of the provision of electrical service, which warrants state jurisdiction over such service. *See Mescalero Apache Tribe*, 462 U.S. at 336. The PSC even recognized the off-reservation effects of Otter Tail's rates and kept authority over the rate matter. *See App. 77*. If the PSC has no authority to regulate under the TIA, how does it have authority to address rates as a result of the facilities built on the Turtle Mountain Indian Reservation? The off-reservation effects of Otter Tail's activities are significant. These off-reservation effects allow for PSC authority over this matter.

[¶33] Although the PSC based much of its decision in this matter on the fact that the nonmember conduct related to tribally-owned Trust land, it also must be acknowledged that much of North Central's presence on the reservation for the provision of services to the Casino takes place on land that the Tribe does not control, including the North Dakota Department of Transportation's easement for North Dakota Highway 5 and North Central's easement for its plant and facilities. *App. 8*. The Tribe has no authority over non-Indian conduct on state highways because it is a stranger to the property and has "retained no gatekeeping right . . . [and] the Tribes cannot assert a landowner's right to occupy and exclude." *Strate*, 520 U.S. at 456. The highway right of way and the easements take away the Tribe's gatekeeping rights and result in a corresponding loss of jurisdiction and sovereignty. *See id.* Without utilization of that state right of way and North Central's easement, electric service from Otter tail could not reach the Casino. *See App. 8*. The PSC has the jurisdiction to regulate under the circumstances, and it was error for it to dismiss North Central's Complaint due to a lack of authority.

[¶34] This line of reasoning should be familiar to the North Dakota Supreme Court. In *Otter Tail 1990*, the North Dakota Supreme Court weighed nearly identical facts, discussed earlier in this brief at ¶¶ 20–21, the Court concluded that “the PSC had jurisdiction in this case.” 451 N.W.2d at 98. The Court discussed the jurisdiction of the PSC over Otter Tail on the reservation in the context of the Spirit Lake Tribe’s inherent sovereignty. *See id.* at 101–07. The North Dakota Supreme Court discussed extensively the authority of the Tribe and found that the Tribe did not derive the power to regulate an electric service on the reservation under either of the *Montana* exceptions. *Id.* at 104–06. The Court reasoned:

Infringement of the Tribe's right to make its own laws and be ruled by them is difficult to comprehend because, as the PSC found, the Tribe has not developed a regimen for regulating electric suppliers. Even assuming that the tribal resolution, which, after the fact and unilaterally, directed Otter Tail to be the supplier of electricity to DTI, was a valid governmental exercise, ‘minimal’ burdens on tribal self-government are allowable.”

Id. at 107 (citations omitted). This reasoning mirrors perfectly the U.S. Supreme Court’s rulings in the case law cited above. *See Plains Commerce Bank*, 554 U.S. at 341; *Atkinson Trading Co.*, 532 U.S. at 650–51; *Hicks*, 533 U.S. at 364; *Bourland*, 508 U.S. at 694–95; *Strate*, 520 U.S. at 458.

[¶35] The Court also noted the important fact that the electric supply systems in that case were not confined to the reservation and thus could impact non-reservation customers. *Otter Tail 1990*, 451 N.W.2d at 105, 107. The same is true in this case, as North Central also provides service to the areas surrounding the reservation. The Court viewed the Tribe’s request for power from Otter Tail as “the Tribe reaching outside the reservation to regulate a public utility, rather than a ‘reaching in’ by a non-Indian

business entity.” *Id.* at 105. The North Dakota Supreme Court went on to state that, “[b]ecause there is no tradition of sovereignty by the Tribe over electric service, and because there is a potential economic impact on consumers beyond reservation boundaries, [the Court could] accord little if any weight to any asserted interest in tribal sovereignty.” *Id.* (citation omitted). The Court ultimately concluded “that the State’s interest in regulating a public utility outweighed the minimal burden on tribal self-government.” *Id.*

[¶36] The North Dakota Supreme Court’s reasoning in *Otter Tail 1990* is as valid today as it was then. The Tribe has the burden of proof to establish that one of the *Montana* exceptions allows it to maintain jurisdiction through its inherent sovereignty. *See Plains Commerce Bank*, 554 U.S. at 330. However, the Tribe has presented no testimony, no evidence, and no exhibits tending to prove that PSC jurisdiction in this matter would threaten or have any sort of demonstrably serious impact on the Tribes ability to govern itself. Otter Tail’s argument in favor of inherent tribal sovereignty in this matter is not based on evidence that the PSC’s jurisdiction would threaten the Tribe, but is based solely on the standard set forth in the *Devils Lake Sioux Indian Tribe* case, which contradicts the standard used by the Eighth Circuit and the United States Supreme Court for resolving these matters. *See Plains Commerce Bank*, 554 U.S. at 341; *Atkinson Trading Co.*, 532 U.S. at 650–51; *Bourland*, 508 U.S. at 694–95; *Strate*, 520 U.S. at 458. Because the holding in the *Devils Lake Sioux Indian Tribe* case is superseded by Eighth Circuit and Supreme Court law, and because no evidence has been presented by the Tribe or otherwise that the PSC’s authority in this matter would directly threaten the tribe, the

PSC's dismissal of North Central's Complaint was not in accordance with the law and should be reversed.

3. To the extent that the PSC's Order holds that the PSC's authority has been preempted by federal law, there has been no preemption of the PSC's authority, and such holding is error.

[¶36A] The PSC's Order is unclear about whether the PSC believes that its authority has been preempted by federal law. In its Findings of Fact, the PSC discussed the general principles surrounding preemption, citing *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 248 (1984). *Silkwood* holds that state law can be preempted in either of two general ways. *Id.* First, “[i]f Congress evidences an intent to occupy a given field, any state law falling within that field is preempted.” *Id.* Second, “If Congress has not entirely displaced state regulation over the matter in question, state law is still preempted 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.* In its Conclusions of Law, the PSC stated, “The Commission recognizes the Supremacy Clause of the Constitution and, by extension, the interplay between the States’ rights and that of the Federal Government. . . . Essentially, although limited to specific circumstances, North Dakota has been deregulated by compulsion rather than by action of its Legislature and Governor.” *App.* 77.

[¶37] To the extent that the PSC relied on *Silkwood* as determinative that the PSC's authority in this matter has been preempted, that reliance was misplaced. First, *Silkwood* involved preemption of state law under the Atomic Energy Act and did not address the issue of inherent sovereignty of a Tribe. *See Silkwood*, 464 U.S. at 241–46.

Second, even if *Silkwood* did apply in this case, unless there is express preemption, there is a basic assumption that Congress did not displace state law. See *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 654 (1995) (“despite the variety of these opportunities for federal preeminence, we have never assumed lightly that Congress has derogated state regulation, but instead have addressed claims of pre-emption with the starting presumption that Congress does not intend to supplant state law”). Third, both of the options under *Silkwood* require Congress to have acted. The present case does not concern reconciling state law with a competing act of Congress. The PSC did not cite any statute or regulation from Congress that has preempted the PSC’s authority in this case. This case is purely concerned with the question of inherent tribal sovereignty, and therefore the issue of preemption is not applicable in the resolution of this case. For that reason, to the extent that the PSC dismissed North Central’s Complaint based on federal preemption, that conclusion of law was erroneous and it should be reversed.

B. The PSC’s Findings of Fact were not supported by a preponderance of the evidence and do not sufficiently address North Central’s evidence.

[¶38] The PSC Order cannot be affirmed on appeal if the findings of fact underlying the order are not supported by a preponderance of the evidence. N.D.C.C. § 28-32-46(5). The PSC order also should not be affirmed if its findings of fact do not adequately address the evidence offered by the appellant or adequately explain the inconsistency between the evidence the its findings of fact. N.D.C.C. § 28-32-46 (7).

[¶39] The hearing on this matter was held to determine whether the PSC had jurisdiction and whether Otter Tail should be retrained and enjoined from constructing or extending its lines into North Central’s service area without first receiving a Certificate of

Public Convenience and Necessity. *App.* 69. North Central provided evidence and Otter Tail admitted that construction was ongoing without the Certificate of Public Convenience and Necessity. *App.* 24–25. The PSC made a finding that Otter Tail had begun construction of infrastructure to serve the Casino. *App.* 69. North Central also provided evidence regarding the crossing of North Central facilities, use of North Central’s easements, and utilization of the state road right-of-way *App.* 7–8; *App.* 70; *App.* 77. The PSC failed to sufficiently address the evidence that clearly established Otter Tail’s blatant disregard of the law.

[¶40] In Paragraph 29 of the Findings of Fact, the PSC noted “the importance of the particular facts in determining whether a state may regulate non-Indian activities within an Indian reservation.” *App.* 73 (*PSC’s emphasis*). The PSC then discussed the *Brendale* and *Montana* factors. *App.* 72–76. However, bizarrely, the PSC utilized the facts from *Otter Tail 1990* as a basis for its own Findings of Fact, rather than the facts of record in the present action. *App.* 72–76. No analysis of the particular facts in this case was done by the PSC. *See App.* 72–76. Since the analysis of the *Brendale* and *Montana* factors is particular to each factual situation, it was clearly erroneous to use the facts from the *Otter Tail 1990* case and not utilize the facts from this particular case. In this case, there was no evidence presented to show that jurisdiction of the PSC will somehow harm or imperil the Turtle Mountain Band of Chippewa Indians. Without evidence relating to the harm of the Tribe, there can be no finding that there is harm to the Tribe. It was error to make such a finding without evidentiary support.

[¶41] The undisputed facts show a blatant case of wasteful duplication such that Otter Tail would almost certainly be ordered to remove its extension of service, were it

not for the tribal sovereignty issue in this case. *See App. 77.* Otter Tail cannot support its action and it lacks standing to assert the Tribe's interests. The tribal authority issue can save Otter Tail's extension of service only if the Tribe shows facts to support its claim. The Tribe failed to show facts to support its claim, therefore the entire record of facts does not support the PSC's decision.

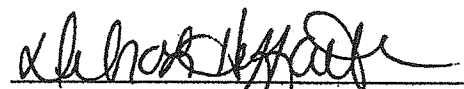
[¶42] Because the PSC's Findings of Fact were not supported by a preponderance of the evidence and do not sufficiently address North Central's evidence, The PSC's order dismissing North Central's Complaint should be dismissed.

CONCLUSION

[¶43] Based on the arguments above, it is clear that the PSC's conclusions of law in this matter were not in accordance with the law, and that its findings of fact simply were not based on a preponderance of the evidence and failed to sufficiently address the evidence before it. North Central respectfully requests that the PSC's order be reversed and the matter remanded to the PSC for summary disposition in favor of North Central.

Dated this 22nd day of April, 2013.

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