

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

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

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

BRIEF OF APPELLEE
TURTLE MOUNTAIN BAND OF CHIPPEWA INDIANS

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STATEMENT OF THE ISSUES

- [1] Whether federal law preempts the regulatory authority of the North Dakota Public Service Commission over an electric utility company providing electric service to a tribal entity on tribal land at the request of a sovereign Indian tribe.

STATEMENT OF THE CASE

[2] This appeal is from a district court judgment affirming an order by the North Dakota Public Service Commission (“PSC”) in which the PSC determined it had no regulatory authority over a North Dakota public utility providing electric service to a tribal entity on tribal land located within the exterior boundaries of the Turtle Mountain Indian Reservation. The dispute arose out of a complaint made with the PSC on December 12, 2011, by North Central Electric Cooperative, Inc., (“North Central”) against Otter Tail Power Company (“Otter Tail”) after Otter Tail was requested by the Turtle Mountain Band of Chippewa Indians (“the Tribe”) to provide electric service to the Tribe’s gaming facility, the Sky Dancer Hotel & Casino.

[3] The Tribe was not a party to North Central’s complaint, but, after North Central noted its absence and complained Otter Tail lacked standing to rely on the Tribe’s choice of electric service provider, the Tribe made a special appearance on February 15, 2012. PSC Docket 7. The Tribal Chairman, on behalf of the Tribe, initially wrote, in relevant part:

“This letter is to inform the North Dakota Public Service Commission that the Turtle Mountain Band of Chippewa Indians is aware of the proceedings in the above referenced matter regarding the supply of electric service to the Sky Dancer Casino. To address any doubt that may have been raised by North Central Electric Cooperative in its filings, the Tribe confirms that it is exercising its inherent sovereignty to determine which utility will provide electric service to the Sky Dancer Casino 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).

...”

Tribe Appendix 1. A formal petition to intervene was thereafter made because North Central objected to the Tribal Chairman’s letter to the PSC. In support of the Tribe’s petition, the Tribal Chairman wrote, in relevant part:

“Enclosed for filing please find the Turtle Mountain Band of Chippewa Indians’ Petition to Intervene in this case. The Turtle Mountain Band of Chippewa Indians seeks to intervene in this action for the limited purpose of asserting its inherent sovereignty to determine which utility will provide electric service to the Sky Dancer Casino. We believed our letter filing of February 15, 2012, was sufficient to make the Commission aware of our position with respect to North Central Electric Cooperative’s Complaint. However, we have learned North Central may argue that the previous letter filing was not sufficient to assert Tribal jurisdiction over service to the Sky Dancer Casino. Accordingly, the Turtle Mountain Band of Chippewa Indians seeks to intervene in this case to remove any argument as to our jurisdiction over this matter.

...”

Id. at 2-4. Under its petition, the Tribe specially appeared “to object to the jurisdiction of the North Dakota Public Service Commission to determine which utility will provide electric service to the Sky Dancer Casino” and to assert its “inherent sovereignty to determine which utility will provide electric service to the Sky Dancer Casino.” *Id.* at 2-6. The petition was eventually granted. *Id.* at 7-9.

[4] A hearing was held before the PSC on May 7, 2012. (Transcript of Hearing). The Tribe appeared, again “solely for the purpose of contesting jurisdiction.” *Id.* p. 85, ll. 15-26; p. 86, l. 1. On June 14, 2012, the PSC issued its findings, conclusions and order, determining “it possesses no regulatory powers over Otter Tail’s activities” on tribal land to a tribal entity because federal law pre-empted state law. North Central Appendix 78, ¶5. This decision was affirmed by the district court. *Id.* at 166-68. This appeal followed. *Id.* at 169.

STATEMENT OF THE FACTS

[5] The Turtle Mountain Band of Chippewa Indians, a federally-recognized Indian tribe, reside at the Turtle Mountain Indian Reservation, which sits within Rolette County, North Dakota. The Tribe's governing body with its headquarters in Belcourt, North Dakota, is the Tribal Council, which includes a Tribal Chairman. Turtle Mtn. Const., Art. IV. Among other things, the Tribal Council is empowered to enact laws, to make contracts and "to manage, lease, permit, or otherwise deal with Tribal land" *Id.* Art. IX(a), Section 5; Art. IX(c), Section 10. The Turtle Mountain Tribal Code contains laws governing things like public utilities, sewer and sanitation, and water resources and services. Turtle Mtn. Tribal Code, Titles 16, 21 and 30.

[6] The Tribe owns and operates the Sky Dancer Hotel & Casino (the "Sky Dancer"), a gaming enterprise authorized under the federal Indian Gaming Regulatory Act. North Central Appendix 55. The Sky Dancer is located on Tribal trust property. *Id.*

[7] On November 23, 2011, the Tribal Council passed a Tribal Resolution approving "Otter Tail Power Company to provide electric services to the Sky Dancer Casino and anything built or residing on the casino grounds " and authorizing the Tribal Chairman to sign a contract for the services. *Id.* at 38. The Resolution recited, among other things, "current cost savings/future cost savings will be greater when new facility is up and running because of rate structure. . . ." *Id.*

LAW AND ARGUMENT

I. The power to choose and regulate electric service is an inherent and essential part of the sovereign authority of the Turtle Mountain Band of Chippewa Indians.

[8] The Tribe is governed by federal and tribal law, not state law. Turtle Mtn. Const. Art. IX. “Within Indian country state jurisdiction is preempted both by federal protection of tribal self-government and by federal statutes on other subjects relating to Indians, tribes, their property and federal programs.” See *Winer v. Penny Enterprises, Inc.*, 2004 ND 21, ¶ 10, 674 N.W.2d 9; see also *Williams v. Lee*, 358 U.S. 217 (1959) (“Congress has also acted consistently upon the assumption that the States have no power to regulate the affairs of Indians on a reservation.”); Cohen’s Handbook of Federal Indian Law, Ch. 6, § 6.03 (“A state ordinarily may not regulate the property or conduct of tribes or tribal-member Indians in Indian country.”) Federal law, and Turtle Mountain tribal law, recognize the inherent sovereign power of the Tribe. *E.g. Montana v. U. S.*, 450 U.S. 544 (1981). This is the basis upon which the Tribe specially appeared in this matter, objecting to the PSC’s jurisdiction, a position squarely on point with a North Dakota federal court decision, *Devils Lake Sioux Indian Tribe v. N.D. Pub. Svc. Comm.*, 896 F. Supp. 955 (D. N.D. 1995).

[9] *Devils Lake Sioux* involved a long dispute between the Devils Lake Sioux Indian Tribe and the North Dakota Public Service Commission over the PSC’s authority to regulate electric services on the reservation. *Baker Electric Coop. Inc. v. Chaske*, 28 F.3d 1466, 1469-1471 (8th Cir. 1994). “Both the Tribe and NDPSC [sought] to exercise regulatory authority over electric services on the Reservation.” *Id.* at 1469. The dispute arose out of an earlier North Dakota Supreme Court case in 1990, *In Re Application of Otter Tail Power Co.*, 451 N.W.2d 95 (N.D. 1990), in which the court determined the

PSC had jurisdiction to regulate “electric utilities competing for a service point within an Indian reservation.” *Id.* at 96. It was a case decided without an appearance or participation by the Indian tribe and in which the court determined an Indian tribe’s inherent sovereignty did not extend to regulating electric service on the reservation, explaining:

“ . . . it is not clear from [*Montana*] that [a tribe’s power to regulate tribal land] derived from the tribe’s inherent sovereignty. Rather, it appears more probable to us that the tribe’s power over trust lands identified in *Montana* and *Brendale* derived from express congressional delegation, or more specifically, from express pre-emption of state authority by federal law.”

Id. at 102. In 1995, the *Devils Lake Sioux* federal district court determined otherwise on remand from the Eighth Circuit in *Baker Electric*.

[10] The Eighth Circuit had directed the federal district court to determine “the core issue in this dispute: whether the Tribe has the sovereign authority to regulate electric services on the Reservation, and whether the Tribe’s authority preempts that of NDPS.”

28 F.3d at 1476. On remand, the court held, in relevant part:

“ . . . the Tribe may by resolution or contract determine who is to supply electrical service to Tribal owned businesses located upon Indian owned or trust land, 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. . . .”

Devils Lake Sioux, 896 F. Supp. at 961. The legal basis supporting the court’s holding was the “inherent sovereignty” of Indian tribes. *Id.* at 961. Citing *Montana*, the court explained:

“ . . . 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 n.6.

[11] It is a decision consistent with federal law in 1995 and that has since further explained and developed the scope and nature of an Indian tribe's inherent sovereignty. For example, in 2008, in *Plains Commerce Bank v. Long Family Land & Cattle Co., Inc.*, 554 U.S. 316 (2008), the United States Supreme Court pointed out: "Our cases since *Montana* have followed the same pattern, permitting regulation [by Indian tribes] of certain forms of nonmember conduct on tribal land[.]" the source of which is tribal sovereignty. *Id.* at 333. The Court observed: "The regulations we have approved under *Montana* all flow directly from these limited sovereign interests" and "[t]ellingly, with only 'one minor exception' turn on "[t]he tribe's 'traditional and undisputed power to exclude persons' from tribal land" *Id.* at 333-35 (and cases cited therein). The "sovereignty that the Indian tribes retain . . . centers on the land held by the tribe and on tribal members within the reservation." *Id.* at 327. *Plains Commerce Bank*, therefore, supports that an Indian tribe's power to regulate tribal land indeed derives from the tribe's inherent sovereignty.

[12] Although *Plains Commerce Bank* determined a tribal court did not have jurisdiction over a matter involving a non-Indian and non-Indian land, it supports that the Court continues to recognize, and remains steadfast in "consistently guard[ing,] the authority of Indian governments over their reservations." *Williams v. Lee*, 358 U.S. 217, 222 (1959); *Attorney's Process & Investigation Svcs., Inc. v. Sac & Fox Tribe of the Mississippi in Iowa*, 609 F.3d 927 ("Tribal civil authority is at its zenith when the tribe seeks to enforce regulations stemming from its traditional powers as a landowner."). Likewise, when addressing the reach of state regulatory authority onto an Indian reservation, the Court has disapproved such regulation when it is preempted by federal law or, against the backdrop of Indian sovereignty, it "unlawfully infringe[s] 'on the right

of reservation Indians to make their own laws and be ruled by them.” *E.g.*, *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 143 (1980). The “tradition of Indian sovereignty” is reflected by federal policy that has firmly promoted “Indian self-government, including its ‘overriding goal of encouraging tribal self-sufficiency and economic development[.]’” the central idea of which is that tribes can serve as government units that provide services to their members and reservation. *Id.*n. 10; *e.g.*, 25 U.S.C. § 450 *et seq.* (“Indian Self-Determination and Education Assistance Act”); *see* Cohen’s, Ch. 6, § 6.03 (discussing the general rule of no state authority in Indian country).

[13] Energy is among the areas that Congress has encouraged Indian self-government, most recently in 2005 when it passed the Indian Tribal Energy Development and Self-Determination Act of 2005, as promulgated in Title V of the Energy Policy Act of 2005. 25 USC §§ 3501-3506. It is an Act that “advances the federal interests . . . and provides some tribes a method to achieve economic diversification, promote tribal sovereignty and self-determination, and provide employment and other economic assistance to tribal members.” Kronk, Elizabeth Ann, “*Tribal Energy Resource Agreements: The Unintended ‘Great Mischief for Indian Energy Development’ and the Resulting Need for Reform,*” 29 *Pace Envtl. L. Rev.* 811, 816 (2012) (discussing the “long history of energy development” by Indian tribes and their “demonstrated record” in doing so). It is directed at the continued development by Indian tribes of renewable and nonrenewable energies on tribal lands, including “bring[ing] electrical power and service to Indian land and the homes of tribal members located on Indian lands” and authorizes “leases, business agreements, and rights-of-way” for “construction or operation of an electric generation,

transmission, or distribution facility located on tribal land.” 42 U.S.C. § 7144e(b)(4); 25 U.S.C. § 3504(a)(1)(b)(i).

[14] Here, there is no dispute about the regulatory authority of the state on the Turtle Mountain reservation because the PSC is not asserting jurisdiction. North Central Appendix 77. It agrees applying state law would violate the Tribe’s inherent sovereignty and, therefore, it has “no regulatory powers over Otter Tail’s activities” to a tribal entity located on tribal land. *Id.* The Tribe likewise agrees federal law governs and, based on federal law and policy, it is well within the Tribe’s inherent sovereignty to choose and regulate the electric provider that will serve a tribal entity on tribal land. The Tribe’s choice was influenced by economic considerations and current and future cost savings because of a less expensive rate structure. *Id.* at 38. It is usually impermissible for a state, in attempting to regulate on a reservation, to impose a burden on tribal resources and thereby undermine federal policy of promoting tribal self-sufficiency and economic development. *E.g., White Mountain Apache Tribe*, 448 U.S. at 148-151.

CONCLUSION

[15] For the foregoing reasons, the Turtle Mountain Band of Chippewa Indians respectfully requests the court affirm the district court judgment.

Dated this 28th day of May 2013

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CERTIFICATE OF COMPLIANCE

[16] The undersigned, as attorneys for the Appellee Turtle Mountain Band of Chippewa Indians in the above matter, hereby certify, in compliance with Rule 32(a) of the North Dakota Rules of Appellate Procedure, that the above brief was prepared with proportional type face and that the total number of words in the above brief, excluding words in the table of contents, table of authorities, signature block, certificate of service and certificate of compliance totals 2,349.

Dated this 28th day of May, 2013

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