

**UNITED STATES DISTRICT COURT
STATE OF MINNESOTA
SIXTH DIVISION**
Civil Action No.: 0:11-CV-01070-DWF - LIB

Otter Tail Power Company, Minnkota Power Cooperative, Inc., ALLETE, Inc. d/b/a, Minnesota Power, Northern States Power Company, a Minnesota Corporation, and Great River Energy,

Plaintiffs,

v.

Leech Lake Band of Ojibwe, Its Reservation Business Council, and Reservation Business Council Members Arthur "Archie" LaRose, Eugene "Ribs" Whitebird, Robbie Howe-Bebeau, and Steve White in their Official Capacities as Reservation Business Council Members,

Defendants.

**DEFENDANTS' MEMORANDUM
OF LAW OPPOSING PLAINTIFFS'
RULE 65 MOTION FOR
TEMPORARY RESTRAINING
ORDER AND IMMEDIATE
PRELIMINARY INJUNCTIVE
RELIEF**

I. PROCEDURAL BACKGROUND

Plaintiffs (hereinafter referred to as Utilities) commenced this action on April 25, 2011, after being notified that the Defendants (hereinafter collectively referred to as Tribe) would seek legal remedies unless the Utilities agreed to meet and discuss a crossing agreement before April 26, 2011. (Z. Baer Affidavit Opposing Utilities" TRO, "Z. Baer Affd. II" Ex. 1). In response to the Complaint for Declaratory Judgment, the Tribe filed a Motion to Dismiss for Lack of Subject Matter Jurisdiction, Failure to State a

Claim Upon Which Relief Can Be Granted, and seeking dismissal for failure to exhaust tribal remedies. Hearing on the Motion to Dismiss was scheduled for the first available date, September 16, 2011.

Currently pending is the above Federal Court action wherein the Utilities are attempting to circumvent Tribal Court jurisdiction, even though treaty rights are being compromised and taken; a Tribal Court action seeking a declaratory judgment that a permit is required before the Utilities are authorized to cross the Tribe's Reservation boundaries; and a Petition filed with the Minnesota Public Utilities Commission to be heard before the Commission at a June 2, 2011 Commission meeting.¹

II. SUMMARY ARGUMENT

The Utilities have admitted in previous filings with the Public Utilities Commission that they must obtain the permission and compensate the Tribe for impacts to their treaty rights caused as a result of the construction of the power line. The Utilities in their Post-Hearing Response Brief before the ALJ, MPUC Docket No. E-017, E-015, ET-6/TL-07-1327, MN DOC e-filing No. 20106-51529-01 (Z. Baer Affd. II, Ex. 3), state that:

“[Utilities] explained that since the project avoids crossing on or over tribal trust land, no easement or other right-of-way approval from the Band is required for the project under federal or tribal laws and regulations, and

¹ The MPUC took no action until some direction was given by the Tribal or Federal Courts as to the Tribe's authority to require a permit or permission.

none have been requested. Applicants also explained that since **the LLBO has certain hunting and gathering treaty rights that extend beyond tribal trust land within the Reservation**, they have proposed to the Band that the two parties **enter into an agreement** that identifies and addresses any impacts the project may have on the exercise of those rights on non-LLBO jurisdictional lands.” (highlighting supplied)

(Id. Utilities Post-Hearing Response Brief at p. 10).

The Tribe resists the Utilities’ TRO Motion on the following grounds:

1. Tribal Jurisdiction.

The Tribe meets both of the *Montana* tests to exercise jurisdiction over the Utilities. *Montana v. U.S.*, 450 U.S. 544, 566, 67 (1981). The Utilities entered into a consensual relationship with the Tribe by executing a Settlement Agreement between the Leech Lake Band of Ojibwe in which they recognized the Band’s position “that it retains hunting and gathering rights pursuant to treaty on lands within the Chippewa National Forest (“CNF”) other than tribal trusts, allottee and private fee lands of the Band;” and further admitted that the “parties differ on what, if any, impacts the project would have on tribal trusts, allottee, and private fee lands of the Band, and on lands within the CNF on which the Band may retain hunting and gathering rights by treaty, and also differ on the value to place on any such impacts;”. (*Otter Tail Power v. Leech Lake Band of Ojibwe*, 0:11-CV-01070, Document #9, p. 54 of 82). Not only did the Utilities enter into a consensual relationship, they entered into a consensual relationship with the Tribe

compromising treaty rights, which by their very nature have a direct effect on the political integrity, the economic security or the health or welfare of the Tribe. *Montana v. United States*, 450 U.S. 544, 566 (1981); *Attorneys Process and Investigation Services, Inc. v. Sac & Fox Tribe of the Mississippi in Iowa*, 609 F.3d 927, 936 (8th Cir. 2010).

2. Tribal Exhaustion Doctrine.

Settled U.S. Supreme Court precedent requires the Utilities to first exhaust tribal remedies before the Federal District Court accepts jurisdiction. A Federal Court should stay its hand until after the Tribal Court has had a full opportunity to determine its own jurisdiction. The Tribal Exhaustion Doctrine is based on a policy of supporting tribal self-government and self-determination and it is prudential rather than jurisdictional.

National Farmers Union Ins. Co. v. Crow Tribe of Indians, 471 U.S. 845, 856-57, 105 S.Ct. 2447, 85 L.Ed.2d 818 (1985). Exhaustion of tribal remedies is mandatory when a case fits within the policy. *Duncan Energy Co. v. Three Affiliated Tribes*, 27 F.3d 1294, 1300 (8th Cir. 1994).

3. Unclean Hands.

The Utilities come to the Court with “unclean hands”. One who asks for equitable relief must have acted in good faith since the equitable powers of the Court can never be exerted on behalf of one who has acted fraudulently or who, by deceit or any unfair means, has gained an advantage. *Bein v. Heath*, 47 U.S. 228 (1848). The Doctrine of Unclean Hands will be invoked to deny equitable relief to a party whose conduct has been unconscionable by reason of bad faith or where the result induced by that party’s conduct

will be unconscionable either in benefit to that party or in injury to others. *Foy v.*

Klapmeier, 992 F.2d 774 (8th Cir. 1993).

4. Judicial Estoppel.

The Utilities are estopped by the application of the Doctrine of Judicial Estoppel from denying their need to obtain a permit or obtain permission from the Band to cross the Reservation with the power line project. Under the Doctrine of Judicial Estoppel, where a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by him. *New Hampshire v. Maine*, 532 U.S. 742, 749, 121 S.Ct. 1808 (2001). The Utilities have taken the position that some permit or permissions must be obtained from the Leech Lake Band of Ojibwe. The Utilities obtained a “Settlement Agreement” and drafted a letter submitted to the Minnesota Public Utilities Commission to obtain its “route permit”. The Utilities have long embraced the statements made in the scoping decision that some permission or permit was required to be obtained from the Tribe before the Utilities could cross the Reservation. Under such promise to deal with the Tribe, they obtained the “Route Permit” from the MPUC.

Now having obtained the “Route Permit” under the fraudulently obtained consent in the form of a “Settlement Agreement”, the Utilities seek to change their position and say that no permission from the Tribe was required, argue irreparable harm, and seek

protection from this Court. The Utilities should be judicially estopped from changing their position.

The Utilities have failed to make a case for injunctive relief. The Utilities are asking this Court to preemptively rule the Tribal Court has no jurisdiction to determine if the Utilities are required to obtain a permit or receive permission from the Band before they can cross the historic Reservation boundaries with a high voltage transmission line. The position of the Utilities violates Supreme Court precedent that Tribal Courts should be given the first opportunity to explore the contours of their jurisdiction. The impairment and compromise of inherent treaty rights, recognized to exist by the Utilities by entering a consensual agreement to resolve those differences, makes it highly unlikely that the Utilities will be able to succeed on the merits of their claim that the Tribe lacks jurisdiction. *Gaming World International Ltd. v. White Earth Band of Chippewa*, 317 F.3d 840, 849 (8th Cir. 2003) (citing *LaPlante*, 480 U.S. 9, 20 n. 14) (the Tribal Exhaustion Doctrine is based on a policy of supporting self-government and self-determination and although the rule is prudential rather than jurisdictional, exhaustion is mandatory when a case fits within the policy).

III. MATERIAL FACTS

The Utilities argue that the material facts are uncomplicated, undisputed, and demonstrate Utilities are entitled to an injunction. It is all perspective, however. The Tribe provides the following as material facts which are not in dispute.

1. The Utilities entered a consensual relationship with the Tribe or its members through commercial dealings, contracts, leases, or other arrangements by way of a Settlement Agreement to resolve issues concerning valuation and diminishment of inherent treaty rights it retains on lands within the Reservation and Chippewa National Forest. *Otter Tail Power Co. et al. v. Leech Lake Band of Ojibwe*, 0:11-CV-01070, Document #9, p. 54 of 82.

2. The Settlement Agreement executed by the Utilities with the Leech Lake Band of Ojibwe states

“WHEREAS, Utilities recognize the Band’s position that it retains hunting and gathering rights pursuant to treaty on lands within the Chippewa National Forest (“CNF”) other than tribal trust, allottee, and private fee lands of the Band;

WHEREAS, the parties differ on what, if any impact the project would have on tribal trust, allottee, and private fee lands of the Band, and on lands within the CNF on which the Band may retain hunting and gathering rights by treaty, and also differ on the value to place on any such impact;

WHEREAS, the parties recognize that the costs incurred by Utilities in connection with this agreement are reasonable and prudent costs of the project that are necessary to gain the Band’s voluntary agreement to the project’s construction, operation, and associated mitigation measures, and the parties seek through this agreement to avoid the considerable additional

cost in time and money involved in resolving their differences instead through litigation in regulatory and/or court proceedings.”

3. The Settlement Agreement was signed by the President and Chief Executive Officer of Minnkota Power Cooperative, Otter Tail Power Company, Northern States Power Company, Great River Energy, Inc., and Minnesota Power. The Settlement Agreement was an attempt by the Utilities to purchase crossing rights to cross the Reservation due to negative impacts on reserved Treaty Rights.

4. Approximately 90% of the Leech Lake Reservation is contained in the Chippewa National Forest, on which the Tribe retains inherent treaty rights. The power line project impacts hunting, fishing and gathering activities that are inherent treaty rights reserved to the Tribe. Treaty rights are at the heart of what Ojibwe people hold sacred and spiritual. *Id.*, (Affidavit of Chairman Arthur “Archie” Larose, *Id.*, Document #10, p. 33 of 51).

5. The Utilities have consistently taken the position that because the project avoids crossing on or over tribal trust land, no easement or other right-of-way approval from the Tribe is required. However, the Utilities recognize that the Tribe has hunting and gathering treaty rights that extend beyond tribal trust land within the Reservation. The Settlement Agreement was negotiated to compensate the Tribe for harm caused by the project on the exercise of the hunting, fishing and gathering rights. (Utilities’ Post-Hearing Response Brief, OAH Docket No. 8-2500-20825-2, Z. Baer Affd. II, Ex. 3).

6. The Minnesota Department of Commerce, Energy Facility Permitting Staff, observed that if the allegations of the Leech Lake Band of Ojibwe are true, a violation of the route permit is shown. Any action to suspend or revoke the permit would require the Commission to provide due process by way of a contested case hearing before an Administrative Law Judge. The Department of Commerce, Energy Facility Permitting Staff, doubts that the Administrative Law Judge is an appropriate venue for addressing the type of permission required to cross the Reservation. Observing that the Leech Lake Band is a federally recognized Indian tribe enjoying tribal sovereignty. The recommendation of the Energy Facility Permitting Staff is that the Leech Lake Band must determine what permissions or permits are required to cross the Reservation. The Utilities have failed to obtain a proper permit or permission from the Tribe and therefore has not complied with the conditions of the route permit which require all tribal permits and permissions be obtained before commencing the project. (Comments of the Department of Commerce Energy Facility Permitting Staff, Z. Baer Affd. II, Ex. 2).

7. The route of the power line crosses over, impacts and touches upon tribally owned or tribal member owned lands and trust lands within the historic exterior boundaries of the Reservation. (L. Brown Affidavit, ¶8).

8. By Resolution No. 2009-181, the Tribe adopted a Utility Ordinance. (Utility Service and Rights-of-Way Trespass Ordinance of the Leech Lake Band of Ojibwe, L. Brown Affd., Ex. A).

9. The Tribe's Utility Ordinance applies to the Utilities' project inasmuch as it is a project seeking a right-of-way across the Reservation. (Id. 1.03(3)) The Utilities' project crosses land held in restricted status or trust by the United States for the benefit of the Tribe or one or more individual Indians. (L. Brown Affd., ¶8, Ex. B-F). A permit for a utility power line is required pursuant to Chapter 8 of the Leech Lake Utility Ordinance. (Id.)

10. The construction of the power line will permanently convert 575 acres of forested land to non-forested land, causing a loss of treaty trust resources.

(Administrative Law Judge Finding Nos. 120, 199, *Otter Tail Power v. Leech Lake Band of Ojibwe*, 11-CV-01070, Docket #11, pp. 41, 45 of 66).

11. Approximately 40 percent of the Chippewa National Forest ("CNF") is located within the boundaries of the Leech Lake Reservation. Likewise, approximately 90 percent of the Leech Lake Reservation overlaps the Chippewa National Forest. Beginning in the mid 19th Century, the United States made Treaties with the Ojibwe that created the Reservation and ceded areas of land in Northern Minnesota to the Federal Government. Our Treaties also reserve the right of the Ojibwe Bands to hunt, fish and gather within the Treaty area. (*Otter Tail Power, et al. v. Leech Lake Band of Ojibwe*, 11-CV-01070, Document #10, p. 27 of 51).

12. "Ishkonigan" is the Ojibwe language term for "the reserved rights our ancestors saved for us". They are at the heart of what we hold sacred and spiritual using

them to hunt, fish, and gather. Ishkonigan is very dear to our people. (Affidavit of Michael "Mike" Smith, ¶6, Z. Baer Affd., Ex. 4).

III. LEGAL ANALYSIS

A. THE LEECH LAKE BAND OF OJIBWE IS A SOVEREIGN NATION

The LLBO is one of the six member constituent Bands of the Minnesota Chippewa Tribe, a federally recognized tribe. 25 U.S.C. § 479a-1. The District Court is permitted to hear only those cases Congress has authorized it to adjudicate. Every Court has limits on the cases it can hear. Every government, tribal, state and federal, enjoys sovereign immunity from suit. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58, 98 S.Ct. 1670, 56 L.Ed.2d. 106 (1978) (tribal sovereignty), *Adelman v. Jordan*, 415 U.S. 651 (1974) (state sovereignty), *U.S. v. Sherwood*, 312 U.S. 584 (1941) (federal government). Immunity from suit means that a government may not be sued without its permission.

The LLBO has not consented to this suit and therefore it must be dismissed for failure to state a claim upon which relief can be granted and for lack of subject matter jurisdiction.

B. THE UTILITIES MUST EXHAUST TRIBAL REMEDIES BEFORE FILING SUIT IN DISTRICT COURT

The issue of tribal exhaustion is a threshold one because it determines the appropriate forum. *Gaming World International, Ltd. v. White Earth Band of Chippewa Indians*, 317 F.3d 840, 849 (8th Cir. 2003). A Federal Court should stay its hand until after the Tribal Court has had a full opportunity to determine its own jurisdiction.

National Farmers Union Ins. Co. v. Crow Tribe of Indians, 471 U.S. 845, 857, 105 S.Ct. 2447, 85 L.Ed.2d 818 (1985). The Tribal Exhaustion Doctrine is based on a policy of supporting tribal self-government and self-determination and it is prudential rather than jurisdictional. *National Farmers Union Ins. Co.*, 471 U.S. at 856, *see Iowa Mutual Ins. Co.*, 480 U.S. at 20, n. 14. Exhaustion is mandatory, however, when a case fits within the policy. *Duncan Energy Co. v. Three Affiliated Tribes*, 27 F.3d 1294, 1300 (8th Cir. 1994).

The Supreme Court and Eighth Circuit have emphasized that Tribal Courts play a vital role in tribal self-governance and that because a Federal Court's exercise of jurisdiction over matters relating to Reservation affairs can impair the authority of Tribal Courts, as a matter of comity, the examination of tribal sovereignty and jurisdiction should be conducted in the first instance by the Tribal Court itself. *Duncan Energy*, 27 F.3d at 1299. The exhaustion requirement applies irrespective of proceedings actually pending in Tribal Court. *Crawford v. Genuine Parts Co.*, 947 F.2d 1405, 1407 (9th Cir. 1991), cert. den. 502 U.S. 1096, 12 S.Ct. 1174, 117 L.Ed.2d 419 (1992).

The Utilities have for years been aware that the Tribe asserted that a crossing permit was required because the power line would impair, diminish and permanently remove certain hunting, fishing and gathering rights enjoyed by the Tribe. Throughout the environmental review, the participating parties repeatedly acknowledged the Tribe's right to determine if a crossing permit would be granted.

- Final EIS Bemidji-Grand Rapids Transmission Line September 2010, 6. Regulatory and Permit Requirements discloses the requirement for a permit

to cross the Leech Lake Reservation in the form of a Tribal Resolution.

Otter Tail Power et al. v. Leech Lake Band et al., 11-CV-01070, Document #9, p. 66 of 82.

- The Utilities have requested that the Leech Lake Reservation Tribal Council (RTC) permit the project to cross the proclamation boundaries of the Leech Lake Reservation. The applicants have designed all the route and segment alternatives to avoid crossing on or over tribal trust land. The Tribe retains treaty rights for all lands regardless of land ownership or management within the LLR boundaries. (Final EIS, Bemidji-Grand Rapids Transmission Line September 2010, p. 12, *Otter Tail Power et al. v. Leech Lake Band et al.*, 11-CV-01070, Document #9, p. 67 of 82)
- The Utilities recognized the Band's position that it retains hunting and gathering rights pursuant to treaty on lands within the Chippewa National Forest other than tribal trust, allottee, and private fee lands and that the parties differ on what, if any, impacts the project would have on tribal lands and their retained rights of hunting and gathering by treaty, and what value those rights have. (Settlement Agreement between LLBO and Utilities, *Id.* Document #9, p. 54 of 82)
- The Leech Lake Band of Ojibwe is responsible for issuing the appropriate approval and authorizations for activities to cross lands upon which it retains treaty rights or easements or authorizations for activities on lands

under its jurisdiction. (12-2-2009 Final Scoping Decision/Report, *Id.*

Document #10, p. 17 of 51)

- The Utilities were required to comply with all applicable federal, tribal and state rules and statutes and obtain all required local, state, tribal and federal permits and permissions for the project and comply with the conditions of those permits and permissions. A list of the required permits is included in the Environmental Impact Statement. (MPUC Route Permit, ¶ 4.8.2, p. 13, *Id.* Document #11, p. 17 of 66)
- The Utilities explained that since the project avoided tribal trust lands, no easements or right-of-way approval from the Band was required and none was requested. However, the Utilities acknowledged that the Tribe retained hunting and gathering treaty rights that extend beyond tribal trust land within the Reservation and proposed a Settlement Agreement that identifies and addresses the impacts on those rights. (Utilities Post-Hearing Response Brief, OAH Docket No. 8-2500-20825-2, MPUC Docket No. E-017, E-015, ET-6/TL-07-1327, p. 10, Z. Baer Affd. II, Ex. 3)

Even in the “Settlement Agreement”, the Utilities acknowledged that the Band’s position to regulate its retained hunting, fishing and gathering rights was worthy of a negotiated settlement.

The Utilities allege that the Tribal Council has “repudiated its September 2010 Settlement Agreement with the Utilities and now claims the Project is in violation of its

permit conditions because there is no LLBO approval of the Project's location within the Reservation." (*Otter Tail Power Company et al. v. Leech Lake Band of Ojibwe et al.*, 11-CV-01070, Document #1, p. 6 of 13, ¶ 25). If true, the "Settlement Agreement" must be viewed as reflective of the parties' bargained rights. LLBO granted permission in exchange for monetary compensation to the Utilities to cross their historic boundaries. It is disingenuous at best, outright deceitful at worst, for the Utilities to now argue that no consent was required.

The Utilities entered into a consensual relationship with the Leech Lake Band of Ojibwe by requesting a Route Permit, which would permanently impair treaty rights, and signed an agreement to permit such crossing of its treaty lands.

The Utilities are seeking to shirk their previously acknowledged responsibility to obtain a crossing permit by now alleging they really did not need one in the first instance. This is a case where the actions of the Utilities speak louder than their words. The LLBO was assured through public filings that their permission was required before final approval. The Utilities, employing divide and conquer tactics, privately negotiated with a single member of the Tribal Council who affixed his signature to a "Settlement Agreement", giving the permission they needed. The MPUC issued the Route Permit on the strength of the Settlement Agreement and the October 13, 2010 letter drafted by the Utilities, indicating tribal support for the Power Line. (*Otter Tail Power Co., et al. v. Leech Lake Band of Ojibwe*, 11-CV-1070, Document #11, p. 27 of 66).

Chairman Arthur “Archie” LaRose, did not become aware of the Settlement Agreement, nor the October 13, 2010 letter, until a public meeting held on November 22, 2010, when the October 13 letter was shared by Resource Management Staff. (*Id.* Document #10, p. 30 of 51) The Utilities were acutely aware of the need for a Resolution of the Tribe before a Settlement Agreement could be approved. In the Settlement Agreement drafted by the Utilities, they acknowledge that “upon execution and delivery of the agreement as authorized by Resolution No. 2011-28, this agreement shall be a valid and binding obligation of the Band, enforceable in accordance with its terms.” (*Id.* Document #9, p. 56, 57 of 82) The Utilities were apparently unaware that the Resolution cited had no relationship to the power line agreement, but rather was a Resolution in support of the urgent need to replace the Bug-O-Nay-Ge-Shig school in Cass Lake, Minnesota. (*Id.* Document #9, p. 71 of 82)

This case presents the classic factual background for the application of the Tribal Exhaustion Doctrine. *Bruce H. Lien, Co. v. Three Affiliated Tribes*, 93 F.3d 1412, 1419 (8th Cir. 1996) (citing *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 16, 107 S.Ct. 971, 94 L.Ed2d 10 (1987)). “[T]he examination of Tribal sovereignty and jurisdiction should be conducted in the first instance by the Tribal Court itself.”

This case is very similar to *Duncan Energy Company v. Three Affiliated Tribes*, 27 F.3d 1294 (8th Cir. 1994). In *Duncan Energy*, the 8th Circuit addressed the issue of the Tribe’s right to tax a utility crossing the Fort Barthold Reservation. The 8th Circuit found that based on the *Montana* factors, the Tribal Exhaustion Doctrine mandated the matter to

be resolved in Tribal Court first before bringing the issue in Federal Court. The 8th Circuit ruled “the examination of Tribal sovereignty and jurisdiction should be conducted in the first instance by the Tribal Court itself.” *Duncan Energy*, 27 F.3d at 1299. (Cited with approval *Attorney’s Process and Investigation Services v. Sac and Fox Tribe*, 401 F.Supp.2d 952, 958 (N.D.IA 2005).

The Utilities voluntarily entered into a consensual relationship with the Tribe to obtain rights to cross the Reservation boundaries with a high tension power line. The power line impairs, diminishes and takes certain hunting, fishing and gathering rights reserved to the Tribe. The parties now disagree as to the scope of permission required. These facts fully meet both the first and second *Montana* tests. The Settlement Agreement is a consensual relationship and the treaty rights bargained away and purchased in the Settlement Agreement are such rights that threaten or directly affect the Tribe’s political integrity, economic security, health or welfare.

The Tribe has commenced a declaratory judgment action seeking Tribal Court determination of its rights to regulate the impairment of its reserved hunting, fishing and gathering rights amongst other treaty rights. (*Otter Tail Power, et al., v. Leech Lake Band of Ojibwe*, 11-CV-1070, Document #11, P. 46 of 66). The Tribal Court must be allowed the first opportunity to examine the issues of tribal sovereignty and jurisdiction over such crucial, fundamental rights as reserved treaty rights and the validity of the actions of several Tribal Council members who signed a “Settlement Agreement” ostensibly granting the Utilities the permit/permission to cross the Reservation in return for

monetary compensation. Both the validity of the “Settlement Agreement” and the impairment of Treaty Rights are issues that first must be decided by the Tribal Court.

In many respects, the issues framed in the above dispute are reflective of the facts in *Attorneys Process Investigation Services v. Sac & Fox Tribe of Mississippi*, 609 F.3d 927 (8th Cir. 2010). In *API*, an issue was raised as to which of the Tribal Council members properly spoke for the Tribal Council. Similarly in the instant case, an issue of the authority of a Secretary-Treasurer of the Tribe is placed into question. The Eighth Circuit cited with approval the following:

“[t]ribal election disputes, like tribal elections, are key facets of internal tribal governance and are governed by tribal constitutions, statutes, or regulations. *Cohen*, Sec. 4.06[1][b][i]. We have reaffirmed this rule in relation to the very governance dispute underlying this case. (citation omitted) Because tribal governance disputes are controlled by tribal law, they fall within the exclusive jurisdiction of tribal institutions. . .”

Id. at p. 943. In the instant case, we have a Settlement Agreement that was ostensibly signed by the Tribe which approved and consented to the crossing. The Settlement Agreement was, however, not approved by formal Tribal Council action. There has never been a discussion about the crossing permit. The crossing permit is a matter of internal tribal law. The Tribal Court has jurisdiction to hear the case and must be allowed the first opportunity to develop the record.

The Utilities have failed to obtain a proper permit for such crossing as required by the Utility Ordinance adopted by Leech Lake in 2009. While it is true the Utilities contend that the Band's Ordinance does not apply to their Project, that issue is uniquely within the jurisdiction of the Tribal Court. The Utilities were aware of the Leech Lake Utility Ordinance but concluded, erroneously, Leech Lake contends, that it did not apply. The Utilities stated "applicants explained that since the Project avoids crossing on or over Tribal trust land, no easement or other right-of-way approval from the Band is required for the Project under Federal or Tribal laws and regulations and none had been requested.²²." Applicant's Post Hearing Response Brief, OAH Docket No. 8-2500-20825-2, Z. Baer Affd. II, Ex. 3, p. 10).

In their footnote to explain how they derived at this erroneous statement, the Utilities argue "the LLBO has recently adopted a Utility Service and Rights-of-Way Trespass Ordinance ("Utility Service/ROW Ord.") that pertains to obtaining a right-of-way, easement, or other real property interest for electric service facilities. Similar to all other LLBO Ordinances and regulations, the new ordinance applies to "land held in restricted status or trust by the United States for the benefit of the Tribe or one or more individual Indians, or Tribe fee-owned land." Utility Service/ROW Ord. at §8.03." *Id.* This is simply not true or, at least, contested by the Leech Lake Band of Ojibwe. (L. Brown Affd., ¶5, 8).

In addition to the Indian-owned land affected by the Power Line, the Chippewa National Forest has a special and unique history with the Ojibwe people. The Chippewa

National Forest was largely carved out of lands located within the Leech Lake Reservation. 225,000 acres of land were initially dedicated to National Forest status. (L. Brown Affd., ¶9, Ex. G).

The Tribal Court has jurisdiction to hear this case which involves Treaty Rights springing from the land.

C. TRIBAL COURT HAS JURISDICTION OVER UTILITIES CROSSING THE RESERVATION

Civil jurisdiction over the activities of non-Indians on Reservation lands is an important part of tribal sovereignty that presumptively lies in the Tribal Courts unless affirmatively limited by a specific treaty provision or by federal statute. *Iowa Mutual Ins. Co. v. La Plante*, 480 U.S. 9, 18, 107 S.Ct. 971, 977-78, 94 L.Ed.2d 10 (1987). The Supreme Court and the Eighth Circuit have emphasized that Tribal Courts play a “vital role” in tribal self-governance, and that “because a Federal Court’s exercise of jurisdiction over matters relating to Reservation affairs can impair the authority of Tribal Courts, as a matter of comity, the examination of tribal sovereignty and jurisdiction should be conducted in the first instance by the Tribal Court itself.” *Duncan Energy Co., v. Three Affiliated Tribes*, 27 F.3d 1294, 1299 (8th Cir. 1994) (citing *National Farmers’ Union Ins., Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 856, 105 S.Ct. 2447, 2453-54, 85 L.Ed.2d 818 (1985)), cert. den., 513 U.S. 1103, 115 S.Ct. 779, 130 L.Ed.2d 673 (1995). The exhaustion requirement applies in both diversity and federal question cases. *Iowa Mutual*, 480 U.S. at 16, 107 S.Ct. 976. Whether proceedings are actually pending in

Tribal Court is not relevant to determining whether exhaustion will be required.

Crawford v. Genuine Parts, Co., 947 F.2d 1405, 1407 (9th Cir. 1991), cert. den. 502 U.S. 1096, 12 S.Ct. 1174, 117 L.Ed.2d 419 (1992). The requirement of exhaustion of tribal remedies is not discretionary; it is mandatory. *Burlington N.R.R. Co. v. V. Crow Tribal Council*, 940 F.2d 1239, 1245 (9th Cir. 1991). See also *Prescott v. Little Six, Inc.*, 897 F.Supp. 1217 (D. Minn. 1995).

Indian Tribes retain civil authority over the conduct of non-members on non-Indian land within a Reservation if the action is related to (1) the activities of non-members who enter consensual relationships with the Tribe or its members and (2) non-member conduct that threatens or directly affects the Tribe's political integrity, economic security, health, or welfare. *Montana v. United States*, 450 U.S. 544, 564-67, 101 S.Ct. 1245, 67 L.Ed.2d 493, reaffirmed *Plains Commerce Bank v. Long Family Land & Cattle Co., Inc.*, 554 U.S. 316, 330, 128 S.Ct. 2709 (2008).

The Utilities take a broad, sweeping view of the Supreme Court's holding in *Plains Commerce Bank*. According to the Utilities' read, *Plains Commerce Bank* overruled *Montana*. *Plains Commerce Bank* reaffirmed the *Montana* criteria for determining Tribal Court jurisdiction over non-tribal members. Clearly, the Utilities entered into a consensual relationship with the Tribe to compromise and buy a right to permanently impair the hunting, fishing and gathering rights owned by the Tribe.

The Utilities contend that although they signed the "Settlement Agreement" the Settlement Agreement cannot form the basis of a "consensual relationship" because they

were creative in drafting the Agreement to include a provision that the Agreement “does not establish a consensual relationship between the [Tribe] and [the] Utilities”. *Otter Tail Power Co., et al., v. Leech Lake Band of Ojibwe*, 11-CV-1070, Document #15, p. 18 of 28. Such a circular argument cannot succeed in overturning Supreme Court precedent on the development of Tribal sovereignty. The Utilities continue that since the Tribe takes the position that the Settlement Agreement is null and void, the Tribal Court is divested of jurisdiction on this consensual relationship. It is, in fact, the Tribal Court that needs to determine whether the Agreement is null and void. The Tribe certainly understands why the Utilities are seeking to soft-peddle the “Settlement Agreement”. This Settlement Agreement is not unlike the agreements which the 8th Circuit has deferred to the Tribal Court in the first instance to determine their validity. See *Bruce H. Lien, Co., v. Three Affiliated Tribes*, 93 F.3d 1412, 1419 (8th Cir. 1996) (Tribal Gaming Contract) *Gaming World International Ltd. v. White Earth Band of Chippewa Indians*, 317 F.3d 840 (8th Cir. 2003) (Gaming Management Contract including Arbitration Clause deferred to Tribal Court to determine validity). The “Settlement Agreement” forms, in and of itself, an adequate and completely sufficient basis to meet the *Montana* tests irrespective of any property rights that may be impaired.

Under the *Montana* analysis, the Supreme Court has prescribed a prudential, non-jurisdictional exhaustion rule requiring a Federal Court in which Tribal-Court jurisdiction is challenged to stay its hand, as a matter of comity, until after the Tribal Court has had an initial and full opportunity to determine its own jurisdiction. *Strate v. A-1 Constructors*,

520 U.S. 438, 439, 117 S.Ct. 1404, 137 L.Ed.2d. 661 (1997). The Eighth Circuit has interpreted *National Farmers Union*, and *Iowa Mutual* “to require exhaustion of tribal remedies before a case may be considered by a Federal Court. *Duncan Energy*, 27 F.3d at 1300. This Court must defer to the Tribal Court for initial inquiry on the merits of the dispute.

D. JUDICIAL ESTOPPEL

The Utilities have continuously, throughout the course of the environmental process agreed that Tribal permission was required. The Department of Commerce, Energy Facility Permitting Staff summarize the need for tribal approval as follows:

“There appears to be general agreement in the record that some type of agreement between the Utilities and the LLBO is anticipated, although the nature and status of such an agreement is in dispute. LLBO, through LLDRM involvement in the EIS, has maintained that a tribal Resolution is required to cross the proclamation boundaries of the Leech Lake Reservation. Comments from the LLDRM to ALJ Lipman state that the LLDRM anticipates issuing a record of decision for the project, and that by participating in the joint EIS, the LLDRM hopes to make a decision consistent and complimentary with those of the other agencies. The Utilities, on the other hand, have stated that no easement or other right-of-way approval from the Band is required for the project so long as the project avoids tribal trust land. In their reply comments to the ALJ, the

Utilities acknowledged that they have proposed to enter into an agreement with the LLBO to identify and address impacts the project may have on the Band's exercise of hunting and gathering treaty rights on non-LLBO jurisdictional lands."

(Z. Baer Affd. II, Ex. 2, p. 5)

One of the conditions placed in the HVTL permit issued to the Utilities is that the Utilities obtain "all required local, state, tribal and federal permits and permissions for the project". (Id. p. 5) The permit further identifies the required permits as being those included in the "Environmental Impact Statement". *Id.* Those permits required in the Environmental Impact Statement include a Resolution from the Leech Lake Reservation Tribal Council to permit the crossing of the Leech Lake Reservation. (*Otter Tail Power Co., et al., v. Leech Lake Band of Ojibwe*, 11-CV-1070, Document # 9, p. 66 of 82).

The Utilities now argue that no permit is required. The Utilities should be prevented from making such argument under the Doctrine of Judicial Estoppel. Judicial estoppel prohibits a party from prevailing in one phase of a case on an argument and then relying on a contradictory argument to prevail in another phase. *New Hampshire v. Maine*, 532 U.S. 742, 749, 121 S.Ct. 1808, 149 L.Ed.2d 968 (2001). In the absence of a good explanation, a party should not be allowed to gain an advantage by litigation on one theory, and then seek an inconsistent advantage by pursuing an incompatible theory. 18 C. Wright, A. Miller, and E. Cooper, Federal Practice and Procedure § 4477, p. 782 (1981). The Doctrine of Judicial Estoppel prevents a party from taking a position during

litigation which is contrary to one taken in a prior judicial or *quasi* judicial proceeding. The underlying purpose is to protect the judicial process. *Amtrust, Inc. v. Larson*, 388 F.3d 594 (8th Cir. 2004). The Doctrine of Judicial Estoppel is not reducible to a pat formula, but is intended to protect the Courts from being manipulated by chameleonic litigants who seek to prevail, twice, on opposite theories. *State v. Pendleton*, 706 N.W.2d 500 (Minn. 2005).

The Utilities should not be rewarded by the abrupt change in heart to suit their own purpose.

E. UNCLEAN HANDS

A person who asks for relief in equity must have acted in good faith, since the equitable powers can never be exerted on behalf of one who has acted fraudulently, or who, by deceit or any unfair means, has gained an advantage. *Bein v. Heath*, 47 U.S. 228 (1848). The Doctrine of Unclean Hands is not applied by way of punishment for the unclean litigant, but for the advancement of right and justice. *Johnson v. Yellow Cab Transit Co.*, 64 S.Ct. 622 (1944). Unclean hands is an equitable defense which prevents a party from maintaining a suit in equity. *EEOC v. Hibbing Tachinite Co.*, 266 F.R.D. 260 (D. Minn. 2009). Any willful act concerning the cause of action which rightfully can be said to transgress equitable standards of conduct is sufficient for refusing equitable relief. *Precision Instrument Mfg. Co. v. Automotive Maintenance Machinery Co.*, 65 S.Ct. 993 (U.S. 1945). To apply the Doctrine of Clean Hands, it is not required that the alleged wrong by a person seeking such relief be actually fraudulent or sufficient to constitute a

basis for a legal action. It is only necessary that such conduct be unconscionable by reason of the motive or result induced by the conduct which is unconscionable either in benefit to themselves or injury to others. *Earle R. Hanson & Assoc. v. Farmers Co-op Creamery Co. of Clearlake, Wisconsin*, 403 F.2d 65 (8th Cir. 1968).

The simple fact that the Utilities have long been aware of the requirement for a Tribal Council Resolution to obtain permission to cross the Reservation should set the bar on the condition of their hands. They acquiesced in the unanimous understanding that some permission was required by entering into a “Settlement Agreement” to purchase the rights. The Utilities cannot now claim that they had no obligation to obtain permission to cross the Reservation boundaries. If permission is required by the Utilities, jurisdiction to determine such issue must be deferred to the Tribal Court.

F. PRELIMINARY INJUNCTIVE RELIEF

The Utilities are seeking a Temporary Restraining Order which requires an analysis of the *Data Phase* criteria, which are (1) the threat of irreparable harm to the movant, (2) the state of balance between this harm and the injury that granting the injunction will inflict on other parties litigant, (3) the probability that movant will succeed on the merits, and (4) the public interest. *Data Phase Systems, Inc. v. C.L. Systems, Inc.*, 640 F.2d 109 (8th Cir. 1990).

1. Threat of Irreparable Harm to the Movant.

The Utilities cannot sustain their burden of proving irreparable harm. Rather, the harm was self-inflicted. The Utilities, knowing that a formal Tribal Council Resolution

was required before the Tribe could commit to a crossing permit, failed to obtain a permit. Their attempt to acquire a permit was through the Settlement Agreement which is now challenged. The Utilities were represented in the negotiations by Roger Moe, an experienced consultant. Roger Moe is very familiar with the operation of tribal government and would know that a tribal Resolution was required. (Affidavit of Chairman Arthur "Archie" LaRose, *Otter Tail Power v. Leech Lake Band*, 11-CV-01070, Document 10, p. 29 of 51) The Utilities' harm, if any, is caused by their failure to obtain proper permitting, not by any act of the Tribe.

The first element of the *Data Phase* test is therefore not sustainable by the Utilities.

2. The Balance of Harm.

The harm to the Tribe is the permanent, irrevocable loss of treaty rights without compensation. *Id.* p. 28 of 51 (Treaty rights once given or bargained away are irreversible and irretrievable resources that the Band members have.) On the one hand you have the Utilities who sought a bargained-for-exchange of a crossing permit through a Settlement Agreement, the validity of which has now been challenged, against the harm caused to the Tribe by the permanent loss of treaty rights without compensation. The balance of harm and the equities fall on the Tribe's side.

3. Probability of Success on the Merits.

Clearly, the weight of Supreme Court precedent requires the District Court to stay its hand and allow the Tribal Court to develop a full and complete record of its

jurisdiction over the Utilities regarding the Settlement Agreement executed by the Utilities and the Tribe. This is a classic case for application of the Exhaustion Doctrine.

4. Public Interest.

Although the Utilities argue that the public interest in insuring reliable power to the public, a greater public interest must be to honor and respect tribal sovereignty, tribal rights, and treaty obligations. The inequitable conduct of the Utilities in negotiating a Settlement Agreement which was the key to the issuance of various permits, and now take the position that no Settlement Agreement was unnecessary seems morally wrong. The public has an interest in insuring that the Tribe is treated fairly and that the Utilities must obtain the necessary permits or permission to cross the Reservation.

IV. CONCLUSION

The Utilities entered into a consensual relationship with the Tribe to bargain for a right to cross the Reservation boundaries with a high voltage transmission line. The crossing of the Reservation with the power line permanently impairs, alters and diminishes the reserved treaty rights, including hunting, fishing and gathering. An action is pending in Tribal Court to address the permit or permissions required to cross the Reservation. The equities weigh against issuance of a Temporary Restraining Order, and mitigate in favor of the Tribe. This action should be dismissed and deferred to the Tribal Court without ruling on the Temporary Restraining Order. Any action on a Temporary Restraining Order should be in the Tribal Court.

Dated: June 3, 2011

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By

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