UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
SIXTH DIVISION

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.	)	Civil File No. 0:11-cv-01070 (DWF-LIB)
Leech Lake Band of Ojibwe, Its Reservation Business Committee, and Reservation Business Committee Members Arthur "Archie" LaRose, Eugene "Ribs" Whitebird, Robbie Howe-Bebeau and Steve White in their Official Capacities as Reservation Committee Members	)	
Defendants.	)	

PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF RULE 65 MOTION FOR TEMPORARY RESTRAINING ORDER AND IMMEDIATE PRELIMINARY INJUNCTIVE RELIEF

I. Introduction

Plaintiffs (the "Utilities") commenced this action seeking declaratory relief that Defendants (collectively the "Tribe") lack jurisdiction to regulate or prohibit the Utilities' 230 kV high-voltage transmission line construction project from Bemidji to Grand Rapids, Minnesota (the "Project"). The Project has been fully permitted pursuant to applicable state and federal law and the Utilities have commenced construction.

While the Project crosses the historic exterior boundaries of the Leech Lake Reservation ("Reservation"), the Project does not touch upon, cross or otherwise impact upon any tribal-owned or tribal/allottee trust lands. The Tribe has moved to dismiss the Complaint, asserting prescriptive and permitting jurisdiction over the Project and claiming that the proper forum for adjudicating these claims is in the Tribal Court. That motion is scheduled for hearing before this Court on September 16, 2011. The Tribe simultaneously filed its own declaratory judgment complaint in Tribal Court. *See* Affidavit of Thomas Erik Bailey ("Bailey Aff."), Ex. A. Essentially, the Tribal Court action presents the identical issue presented in this case, namely, does the Tribe have prescriptive or permitting authority over the Project. The Utilities will be obligated to answer, move or otherwise respond to the Tribal Court action on or about May 31, 2011.

In addition, the Tribe has asserted prescriptive and permitting authority over the Project in a state regulatory proceeding before the Minnesota Public Utilities Commission ("MPUC"). The Tribe claims that the MPUC is required to revoke or suspend its lawfully-issued Route Permit authorizing the Utilities to construct the Project on lands that are wholly separate from any tribal lands. The hearing on the Tribe's claim before the MPUC is expected to be scheduled to be heard on June 2, 2011.

As a result of the immediacy of these upcoming actions in Tribal Court and before the MPUC, the Utilities request action on this temporary restraining order motion prior to May 31, 2011, with preliminary and permanent injunctive relief to follow in due course.

Specifically, the Utilities seek a temporary restraining order and immediate preliminary and permanent injunctive relief under under Fed. R. Civ. P. 65 requiring the Tribe (i) to cease and desist asserting that the Tribe has prescriptive or permitting authority over the Project, and (ii) to cease and desist from asserting any prescriptive or permitting authority over the Utilities or the Project in any forum, including before the MPUC.

The grounds for injunctive relief are that: (1) under federal law, Indian tribes have no inherent treaty rights over the activities of nonmembers on non-Indian fee lands located within the reservation (*Montana v. United States*, 450 U.S. 544, 565 (1981)); (2) therefore, "efforts by a tribe to regulate nonmembers . . . are presumptively invalid, [and] the Tribe bears the burden of showing that its assertion of jurisdiction falls within one of the *Montana* exceptions" (*Attorney's Process and Investigation Servs., Inc. v. Sac & Fox Tribe of the Mississippi in Iowa*, 609 F.3d 927, 936 (8th Cir.)(exceptions are narrow and cannot be construed in a manner that would swallow the rule)(emphasis added)); (3) the undisputed facts specific to this case clearly demonstrate that the Tribe cannot meet its burden of showing that the *Montana* exceptions are satisfied; (4) a Tribal Court's authority to adjudicate claims against a nonmember for nonmember activities on nonmember lands within the historic boundaries of a reservation is a federal question within the jurisdiction of the federal courts (*Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 330 (2008)); and (5) accordingly, immediate preliminary injunctive relief is necessary to prevent irreparable harm to the Utilities from the Tribe

continuing to assert jurisdiction over the Project that is outside its scope of authority (*Northern States Power Co. v. Prairie Island Mdewakanton Sioux Indian Cmty.*, 991 F.2d 458, 463-64 (8th Cir. 1993)(immediate injunctive relief ordering the tribe to cease enforcement of tribal ordinance against utility is warranted under the *Dataphase* test where tribal jurisdiction precluded by federal law)).

Immediate injunctive relief is imperative to avoid conflicting claims of jurisdiction between this Court and the Tribal Court on a matter of clear federal law. Immediate injunctive relief is also necessary to minimize the severe harm that could arise from the Tribe's unlawful and repeated assertions at the MPUC and to other permitting authorities that it has prescriptive and permitting authority over the Utilities and the Project that requires these authorities to suspend their permits of the Project. The Utilities have lawful and valid permits to construct the Project and the Tribe's false and injurious claims of authority over the Project is completely extra-jurisdictional and ultra vires. The Utilities, local electric customers, the State of Minnesota, and this Court will all suffer irreparable harm if the Tribe is allowed to improperly assert it has authority over the Project and thus prevent the Project from being timely completed to eliminate overloading and other reliability problems affecting the electric transmission system in the Bemidji-Cass Lake area of Minnesota. This Court should promptly enjoin the Tribe and confirm that the Tribe has no jurisdiction or other authority to interfere with the Project through the Tribal Court or before the MPUC.

II. Statement of Material Facts

The material facts pertaining to the Utilities' motion are uncomplicated and undisputed, and demonstrate that the Utilities are entitled to an order enjoining the Tribe from asserting prescriptive or permitting authority over the Utilities or the Project in Tribal Court or in any other forum, including the MPUC. They are as follows:

1. The Leech Lake Band is part of the Minnesota Chippewa Tribe. This is a "federally constructed" Indian tribe comprised of six Minnesota Chippewa bands organized under the Wheeler-Howard Act of 1934, 25 U.S.C. § 261 *et seq.*[1] *State v. Forge*, 262 N.W.2d 341, 343 n.2 (Minn. 1977). The Tribe's reservation was initially established by the Treaty of February 22, 1855, and subsequently enlarged through a combination of treaties executed in the 1860s and Executive Orders issued in the 1870s.[2] *Leech Lake Band of Chippewa Indians v. Cass County, Minnesota*, 908 F.Supp. 689, 691 (D.Minn. 1995) (*Leech Lake I*).
2. Thirty years after execution of the initial treaty creating the Leech Lake Reservation, Congress changed its policy of setting aside lands under federal supervision for Indian tribes. In 1887, Congress passed the General Allotment Act (GAA), 25 U.S.C. §§ 331 *et seq*., with the intent to break up the reservations previously established by treaty. *Leech Lake Band of Chippewa Indians v. Cass County, Minnesota*, 108 F.3d 820, 822 (8th Cir. 1997) (*Leech Lake II*). The GAA authorized the federal government to allot parcels of reservation land to individual tribal members, which were initially held as trust deeds by the United States. *Id*. After a 25-year trust period during which the allotment could be devised but not conveyed, title to the allotted land was to be converted to fee simple held by the individual Indian allottee. *Id*. Reservation land that was not allotted became available for sale to the general public either as timberland or homestead land. *Id*. The purpose of this policy "was to open land to non-Indians and to assimilate the Indian people into the broader American society," and "[t]he overall effect was

[1] The five bands in addition to the Leech Lake Band are Bois Forte (Nett Lake), Fond du Lac, Grand Portage, Mille Lacs, and White Earth. Federally Recognized Indian Tribes, 67 Fed. Reg. 46,327- 46,333 (July 12, 2002).

[2] The Reservation was established by the Treaties of February 22, 1855, May 7, 1865 and March 19, 1867, and by Executive Orders of November 4, 1873 and May 26, 1874.

drastically to reduce the amount of land under Indian control." *Id*. (citations omitted). For Tribe and other Minnesota Chippewa bands, the allotment policy was carried out via the Nelson Act of 1889. *Forge*, 262 N.W.2d at 346.

3. In 1934, Congress executed another shift in policy after determining that the sale of reservation lands had not been beneficial to Indian tribes. The Indian Reconstruction Act of 1934 (IRA), 25 U.S.C. §§ 461 *et seq*., provided that 1) there would be no more allotments of reservation land to individual Indians; 2) allotted lands that had not been conveyed in fee to individual Indians would remain in trust status indefinitely for the benefit of those Indians and their heirs; 3) reservation land designated to be but not yet allotted would be restored to the Indian tribes; and 4) additional land within or without existing reservations could be acquired and held in trust by the federal government for the benefit of Indians. *Cass County, Minnesota v. Leech Lake Band of Chippewa Indians*, 524 U.S. 103, 108 (1998) (*Leech Lake III*).

4. By the time of the IRA's enactment, the vast majority of the lands within the Leech Lake Reservation had been conveyed out of tribal or individual Indian hands. As of the late 1970s, an estimated 27,000 acres (or just under 5%) of the approximately 588,685 acres of land within the borders of the Reservation was owned by the Tribe or individual Indians, with approximately 80% of the lands owned by federal, state, or county governments. *Forge*, 262 N.W.2d at 343 n.1. The Tribe continues to this day to own less than 5% of the lands within the Reservation. Bailey Aff., Exh. B at 1 of 2.

5. The MPUC has authority pursuant to Minn. Stat. 216B.243 to determine whether transmission lines such as the Project are needed in order for Minnesota's utilities to provide adequate and reliable service to their customers. In MPUC Docket No. 07-1222, the Commission found that the Project is needed to provide reliable utility service to the region because of overloading problems on the current system and continuing growth in demand for electricity. Bailey Aff., Ex. C at 4-6 (noting at 5 "the actual load for the area around Bemidji is already at the critical level at which reliable service cannot be provided").

6. The MPUC specifically found that the Project needs to be completed by the end of 2012 to meet the growing electric needs of customers in the vicinity. *Id*., Ex. C, Attachment B, Applicants' Reply Comments on Need (adopted by the MPUC) at 3-5 (explaining the operational procedures that will allow the electric transmission system in the Bemidji-Cass Lake area to continue to operate without load shedding despite isolated transmission line outages through 2012, but cannot do so after that due to the growth in demand for electricity).

7. The MPUC's order granting a certificate of need for the Project was not appealed and is final.

8. The MPUC has authority pursuant to Minn. Stat. 216E.04 to determine the location and route of transmission lines such as the Project. In MPUC Docket No. 07-1327, the MPUC issued a high voltage transmission line route permit for the placement of the Project ("Route Permit"). Bailey Aff., Ex. D. The Route Permit order was not appealed and is final.

9. The route approved in the MPUC's Route Permit proceeding will bisect the historical eastern and western exterior boundaries of the Reservation; however, the transmission line will not touch upon, cross over or impact any tribally-owned or tribal/allottee trust lands within the historic exterior boundaries of the Reservation. Bailey Aff., Ex. D at D-60 to D-61 (¶¶ 102-06). The route of the Project will therefore only cross on or over "non-Indian fee land" inside the historical exterior boundaries of the Reservation.

10. The Utilities have complied with all state/federal environmental review requirements for the transmission line routing and construction, have obtained the required state and federal permits for the transmission line, have completed surveying and begun clear cutting the transmission line route, and have begun ordering and taking delivery of materials of all the material necessary for construction of the Project. Project Construction is scheduled to begin in June/July 2011. Bailey Aff. at ¶¶ 4-5.

11. The total construction cost of the Project is estimated to be approximately $66 million. Bailey Aff., Ex. D at D-59 (¶¶ 97-98).

12. In early 2011, the Tribe began an effort to revoke or suspend the various permits and authorizations that had been obtained by the Utilities in support of the Project.

    a. In January 2011, the Tribe sought the aid of the United States Bureau of Indian Affairs ("BIA") to determine whether the Project crossed on or over or otherwise impacted on any tribal trust lands that would require the Tribe's consent. The BIA (the Federal agency primarily charged with protecting American Indian interests) reconfirmed that the Project is "not affecting an[y] Tribal/Allotted Trust Lands within the exterior Boundaries of the Leech Lake Reservation." Bailey Aff., Ex. E. As a result, the BIA declined to interfere with or intervene in the Project.

b. In February 2011, the Tribe requested the United States Rural Utilities Service ("RUS") to cease any further action to fund the transmission loan application associated with the Project. By letter dated March 15, 2011, RUS rejected the Tribe's request stating that "RUS has engaged in early and meaningful consultation since 2001." Bailey Aff., Ex. F.

c. In February 2011, the Tribe requested that the United States Department of Agriculture, Forest Service, Chippewa National Forest office ("CNF") revoke the easement it had granted to the Utilities. Bailey Aff., Ex. G. The CNF confirmed that there is no legal basis to rescind the easement.

d. In March 2011, the Tribe filed a petition with the Minnesota Public Utilities Commission ("MPUC") to revoke the Route Permit the MPUC issued for the transmission line, claiming that the Tribe has regulatory authority over the Utilities and the Utilities are required to obtain the Tribe's consent to locate the transmission line within the historic boundaries of the Reservation. See Document 10 in this case- Exhibit E of the Affidavit of Zenas Baer in Support of Motion to Dismiss at 000079- 000125. The petition to revoke or suspend the MPUC Route Permit is currently pending and is scheduled for hearing before the MPUC on June 2, 2011.

13. In response to the Tribe's petition to revoke the MPUC issued Route Permit, the Utilities commenced this action requesting that this Court declare that, under the specific facts presented here regarding the routing and construction of the transmission line, the Tribe has no prescriptive or permitting regulatory jurisdiction over the Utilities and the Tribe's attempt to require the Utilities consent to locate the transmission line within the historic exterior boundaries of the Reservation is beyond the limited scope of its authority over non-Indian activities on nonmember lands permitted by federal law under *Montana* and its progeny.

14. The Tribe filed a motion to dismiss in this action on May 6, 2011, claiming that, under *Montana* and its progeny, the Tribe has "regulatory" power over the Utilities and the transmission line, and that the Tribal Court has adjudicatory jurisdiction over the Utilities to hear and decide the Tribe's claim that it retains "inherent" civil authority over the Utilities.

15. Subsequent to filing its motion to dismiss in this action on May 6, 2011, the Tribe served the Utilities with a Tribal Court complaint in which the Tribe seeks to have the Tribal Court (1) assert adjudicatory jurisdiction over the Utilities pursuant to

Montana and its progeny, and (2) declare that the Tribe has regulatory authority over the Utilities and the transmission line. Bailey Aff., Ex. A.

16. If the Utilities are forced to respond to the Tribe's Tribal Court action, the Utilities will unnecessarily be subject to extra-judicial and unlawful proceedings, may be subject to extra-judicial orders preventing the timely and orderly construction of the Project, resulting in delays of the 2012 completion contemplated by the MPUC in its certificate of need order.

17. If the Tribe succeeds in blocking the MPUC's Route Permit despite no legal authority to do so, the Utilities will be subject to unnecessary MPUC action and the Utilities' construction of the Project will be delayed, creating the substantial risk of the Bemidji-Cass Lake transmission system overloading if there is a single line failure, which in turn would trigger more outages on the system and thus impact a substantial number of the area's residents and businesses.

III. Argument

A. STANDARD FOR ORDERING INJUNCTIVE RELIEF

Whether the requested injunction should be granted involves the flexible consideration of (1) the threat of irreparable harm to the movant; (2) the balance between this harm and the injury granting the injunction will inflict on other parties; (3) the likelihood of success on the merits; and (4) the public interest. *See Dataphase Sys., Inc. v. C L Sys., Inc.*, 640 F.2d 109, 113 (8th Cir. 1981)(*en banc*). Here, the balance of circumstances weighs heavily in favor of the Utilities; and a temporary restraining order should be granted to maintain the status quo followed by injunctive relief.

B. THE UTILITIES WILL SUCCEED ON THE MERITS.

Under the law and facts here, the Utilities will prevail on their claim that the Tribe has no regulatory jurisdiction over the Project. Federal law under *Montana* and its

progeny precludes the Tribe from asserting regulatory authority over the Project.

1. Federal Law Limits Indian Jurisdiction

Historically, tribes could exercise some power over non-Indians and non-member Indians who entered tribal-controlled lands. However, starting in 1978, the U.S. Supreme Court has substantially limited tribal powers over nonmembers on non-tribal lands, particularly with the advent of the "implicit divestiture" of tribal sovereignty theory. *See United States v. Wheeler*, 435 U.S. 313, 326 (1978). The Supreme Court has frequently noted that the "sovereignty that the Indian tribes retain is of a unique and limited character," *id*. at 323, and it centers on the land held by the tribe and on tribal members within the reservation. *Nevada v. Hicks*, 533 U.S. 353, 392 (2001) ("[T]ribes retain sovereign interests in activities that occur on land owned and controlled by tribes"). Without land held by the Tribe, there is generally no basis to assert tribal jurisdiction.

The question of how far a tribe's "civil legislative jurisdiction" extends in regard to regulating the activities of non-Indians on non-Indian owned reservation fee lands was first addressed by the "path marking" case of *Montana v.United States*, 450 U.S. 544 (1981). In finding that the hunting/fishing regulation of "nonmembers on non-Indian fee lands" at issue in the case bore "no clear relationship to tribal self-government or internal relations," the *Montana* Court first set forth the general proposition that Indian tribes have no inherent authority over the activities of non-members on non-Indian fee owned lands within the reservation and then laid out two possible exceptions to this general

proposition:

> (1) A tribe may regulate through taxation, licensing, or other means, the activities of nonmembers who enter into consensual relationships with the tribe or its members through commercial dealing, contracts, leases or other arrangements,
>
> and
>
> (2) A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when the conduct threatens or has some direct effect upon the political integrity, economic security, or health or welfare of the tribe.

Id. at 565-66.

Subsequent decisions have further refined and narrowed the application of the *Montana* exceptions. *See Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982) (tribal severance taxes on the production of oil and gas from tribal trust lands within the reservation permissible where (1) the company challenging the tax had developed a commercial relationship with the tribe, and (2) the production of oil and gas took place on tribal trust lands within the tribe's reservation; neither factor was present in the *Montana* case); *Brendale v. Confederated Tribes and Bands of Yakima Indian Nation*, 492 U.S. 408 (1989) (held that the Yakima Nation possessed inherent zoning authority over non-member-owned lands located in an area of the reservation closed to the general public and dominated by tribally owned and member-owned parcels, but lacked authority over nonmember-owned lands in an area in which nearly half the acreage was owned in fee by nonmembers); *South Dakota v. Bourland*, 508 U.S. 679 (1993)(pursuant to *Montana* and

Brendale, when an Indian tribe conveys ownership of its lands to non-Indians it loses the exclusive use and occupancy of those lands; thus, the tribe had no inherent authority to regulate hunting and fishing on such lands); *Atkinson Trading Co. v. Shirley*, 532 U.S. 645 (2001) (invalidated a tribal hotel occupancy tax imposed upon guests of a non-member lodging business located on fee lands within the tribe's reservation, holding that a tribe's power over non-members on non-Indian fee land is "sharply circumscribed")[3].

In addition to the foregoing decisions dealing with tribal civil legislative jurisdiction, the U.S. Supreme Court has also recently decided two cases rejecting tribal civil adjudicative jurisdiction under the *Montana* analysis. These cases imposed new limitations on the power of Indian tribes over the conduct of nonmembers in Indian country. *See Strate v. A-1 Contractors*, 520 U.S. 438, 445-46 (1997) (citing *Montana* as setting forth the general rule that absent an act of Congress "tribes lack civil authority over the conduct of non-members on non-Indian land within a reservation," the Court took a very narrow view of the *Montana* exceptions and concluded that neither exception justified Tribal Court jurisdiction over an auto accident between two nonmembers on a state highway going through the reservation); *Nevada v. Hicks*, 533 U.S. 353 (2001) (if a

[3] This line of cases demonstrates a clear trend disfavoring tribal regulation of activities by non-members on non-Indian fee lands located within a reservation. *See Cohen's Handbook of Federal Indian Law*, §4.02[3][c] at p. 230 (2005 ed.) ("Subsequent decisions by the Supreme court have offered a narrower understanding of *Montana's* two exceptions.",; and Conference of Western Attorney Generals, *American Indian Law Deskbook*, at p. 158 (3d ed. 2004) ("the 'general rule' against tribal jurisdiction over non-members with respect to non-tribal land activities is strong and, absent consent, rebutted only when the tribal regulation is essential to internal governance"); *see also* Banker & Grgurich, "The *Plains Commerce Bank* Decision and its Further Narrowing of the *Montana* Exceptions as Applied to Tribal Court Jurisdiction Over Non-Member Defendants", 36:2 William Mitchell Law Review 565 (2010).

Montana analysis determines regulatory jurisdiction does not exist, adjudicatory jurisdiction also does not exist).

In its most recent decision on the extent of a tribe's civil authority over a nonmember's activities on non-Indian fee land, the Supreme Court reiterated that:

> Our cases have made clear that once tribal land is converted into fee simple, the tribe loses plenary jurisdiction over it. Among the powers lost is the authority to prevent the land's sale, not surprisingly, as "free alienability' by the holder is a core attribute of the fee simple. Moreover, when the tribe or tribal members convey a parcel of fee land to non-Indians, the tribe loses any former right of absolute and exclusive use and occupation of the conveyed lands. This necessarily entails the loss of regulatory jurisdiction over the use of the land by others. As a general rule, then, the tribe has no authority itself, by way of tribal ordinance or actions in the Tribal Courts, to regulate the use of fee land.

Plains Commerce Bank, 554 U.S. at 328-330 (citations and internal quotation marks omitted; emphasis added).

While *Montana* identified two exceptions to the general rule precluding tribal regulatory authority over activities of nonmembers on non-Indian lands within a reservation, the *Plains Commerce Bank* decision noted that "[t]ellingly, with only one minor exception, we have **never** upheld under *Montana* the extension of tribal civil authority over nonmembers on non-Indian land." *Id*. at 333 (citations and quotation/emendation marks omitted; emphasis in original). The Court explained:

> Given *Montana's* general proposition that the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe, efforts by a tribe to regulate nonmembers, especially on non-Indian fee land, are presumptively invalid. 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. These exceptions are limited ones, and cannot be construed in a manner that would swallow the rule or severely shrink it.

Id. at 330 (citations and internal quotation marks omitted; emphasis added). Thus, as one legal commentator has stated,

> Viewed from any angle, the "general rule" precluding tribal jurisdiction over non-members is broad and the land ownership component is critical. Since deciding *Montana*, the absence of tribal ownership over non-member lands inside a reservation "has been virtually conclusive of the absence of tribal civil jurisdiction" over a non-member.

See Banker & Grgurich, "The *Plains Commerce Bank* Decision and its Further Narrowing of the *Montana* Exceptions as Applied to Tribal Court Jurisdiction Over Non-Member Defendants", 36:2 William Mitchell Law Review 565 (2010)(citing *Nevada v. Hicks*, 533 U.S. 353, 360 (2001).[4]

[4] In addition to the *Montana* line of cases, a few federal district court decisions have considered directly the issue of the extent of an Indian tribe's powers to regulate electrical utilities on non-Indian fee lands located within the boundaries of a reservation. In *Devils Lake Sioux Indian Tribe v. North Dakota Pub. Serv. Comm'n*, 896 F. Supp. 955 (D. N.D. 1995), the tribe "created an electrical regulatory body which purports to have the authority to regulate rates and the provision of service to all customers within the exterior boundaries of the Reservation, without regard to the racial status of the customer or the nature of the land ownership of the premises served." The district court found that there was no specific statutory or treaty authority granting the tribe power to regulate electrical utilities and concluded there was no "justification for the exercise of regulatory authority over the provision of electrical service within the exterior boundaries of the reservation." *Id*. at 961. In *Big Horn Cnty Elec. Coop v. Adams*, 219 F.3d 944 (9th Cir. 2000), the Crow Tribe attempted to assess a 3% tax on the fair market value of all "utility property" wherever located within the exterior boundaries of the reservation. The court first had to determine the nature of the land which the tribe sought to tax. The utility property was located on an easement obtained from the BIA pursuant to 25 U.S.C. §§ 323-28 (similar to *Strate*). The court concluded "Big Horn's rights-of-way are the equivalent of non-Indian fee land for the purpose of considering the limits of the Tribe's

2. Eighth Circuit Recently Implements *Montana* Analysis

The Eighth Circuit Court of Appeals recently issued a decision extensively discussing *Montana*, explaining the contours or extent of the *Montana* exceptions relating to "retained" tribal jurisdictional powers over nonmembers. *See Attorney's Process and Investigation Servs.,*609 F.3d at 936 ("*Montana's* analytic framework now sets the outer limits of tribal civil jurisdiction – both regulatory and adjudicatory – over nonmember activities on non-Indian land"). At the outset the circuit court stated that:

> Because "efforts by a tribe to regulate nonmembers . . . are presumptively invalid," the tribe bears the burden of showing that its assertion of jurisdiction falls within one of the Montana exceptions. Those exceptions are narrow ones and "cannot be construed in a manner that would 'swallow the rule.'"

Id. (internal citations omitted)(emphasis added). In applying the *Montana* analysis, the 8th Circuit first agreed that the second *Montana* exception permitted tribal regulation of the nonmember conduct at issue (i.e. via tort claims) because "by attempting to seize control of the casino and government offices during an intra-tribal governance dispute, API directly affected both the political integrity and the economic security of the Tribe." *Id*. at 937. The circuit court then stated:

> Finally, there remains "the critical importance of land status" to the questions of tribal jurisdiction under *Montana*. Here, the Tribe does not seek to assert jurisdiction over non Indian fee land. The facilities API raided are on tribal land. . . . Tribal civil authority is at its zenith when the tribe seeks to enforce regulations stemming from its traditional powers as a landowner.

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regulatory jurisdiction." *Id.* At 950. The Court then rejected the tribe's claim that either or both of the *Montana* exceptions applied and struck down the tax.

Id. at 940 (internal citations omitted).

Clearly, the type of internal insurrection found in the 8th Circuit case is wholly absent here. There is no question of the Utilities attempting to interfere with the Tribal government or to seize control of the Tribe or its property. To the contrary, in this case, like that discussed by the 8th Circuit, the "critical importance of land status" is the entire underpinning of this case. Unlike that case, here the Tribe is seeking to implement and enforce non-existent regulations over the land itself – i.e., prescriptive and permitting authority over non-Indian lands within the historic boundaries of the Reservation. The facts presented here clearly establish that the Tribe is asserting authority over land over which it has no such authority.

3. First Montana Exception Does Not Apply

Given the "narrow" application of the two *Montana* exceptions by the line of federal court decisions disfavoring tribal regulation of activities by non-members on non-Indian fee lands located within an Indian reservation, the Tribe can not meet its burden of demonstrating that in connection with their routing and construction of the transmission line the Utilities have established a "consensual relationship" with the Tribe "through commercial dealings, contract, leases or other arrangements." The "consensual relationship" exception is clearly lacking here in that there is no evidence that the Utilities have directly entered into any commercial dealings or contracts with the Tribe in connection with the transmission line. *See, e.g. Atkinson Trading Co. 532*U.S. at 656;

Strate, 520 U.S. at 457-58. In this respect, the easement right agreements, construction contracts and other agreements related to the routing and construction of the transmission line are between the Utilities and either private land owners holding fee title to non-Indian lands within the transmission line corridor or federal/state government agencies.

In both its motion to dismiss and Tribal Court complaint, the Tribe does not, because it cannot, identify any specific contract, lease or other agreement it has entered into directly with the Utilities in connection with the transmission line. Rather, the Tribe merely engages in a completely circular argument as its sole basis for allegedly satisfying *Montana's* "consensual relationship" exception. The Tribe claims the first exception is met because the "construction of the [transmission line] requires a consensual relationship between the Utilities and the [Tribe] since it crosses the historic boundary of the reservation on which the [Tribe] retains jurisdiction." *See* Defendants' Memorandum in Support of Motion to Dismiss at 16 (emphasis added). Apparently, the only basis for saying the construction of the transmission line "requires" a consensual relationship between the Utilities and the Tribe is the Tribe's claim, meritless under *Montana* and its progeny, that its consent is required for the transmission line[5]. No matter how fast the

[5] In this respect, the best the Tribe offers as evidence on this issue is to baldly assert that the "Utilities entered into a consensual relationship with the [Tribe] by requesting a Route Permit" from the MPUC. *See* Defendants' Memorandum in Support of Motion to Dismiss at p. 13 (emphasis added). Likewise, in its Tribal Court complaint the Tribe "contends that it has the authority to require the Utilities to obtain a 'Use Permit' before crossing the Reservation with its [transmission line]," and that a "condition of issuance of the Route Permit by the [MPUC] was permission being granted

Tribe spins this circular argument it still does not lead, given the "narrow" scope of the first *Montana* exception, to the conclusion that the Utilities have established a "consensual relationship" with the Tribe in connection with the transmission line.[6]

The only document the Tribe can point to as a possible basis for establishing a consensual relationship with the Utilities relating to the transmission line is the document dated September 14, 2010 and captioned "Settlement Agreement." Bailey Aff., Ex. T. This argument is completely fallacious. First, this document expressly declares that it cannot serve as the basis for a consensual relationship between the Tribe and the Utilities. *Id.* at ¶ 7 on p. 4 ("the Parties acknowledge and agree . . . that this Agreement is a settlement of potential claims that the Utilities dispute and therefore does not establish a consensual relationship between the [Tribe] and [the] Utilities").

Second and more importantly, however, is that the Tribe claims this document is null and void and completely of no effect. *See* Defendants Tribal Court complaint at ¶¶67-69 on p. 16-17. Accordingly, by the Tribe's repeated and clear admission, this

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by the [Tribe]." See Defendants' Tribal Court complaint at ¶¶ 17 & 32 at pp. 5 & 8. This despite the fact that route Permit only requires the Utilities to comply with all "applicable" federal, tribal and state rules and statutes; and to obtain only those local, state, tribal and federal permits "required". See MPUC Route Permit at ¶4.8.2 on p. 13. Since under *Montana* and its progeny the Tribe has no regulatory jurisdiction over the Utilities' activities on non-Indian lands, there are no "applicable" tribal regulations or "required" tribal permits for the project.

[6] As the Supreme Court reiterated in *Plains Commerce Bank*, when considering the first *Montana* exception regarding establishment of a consensual relationship, "we have emphasized repeatedly in this context, when it comes to tribal regulatory authority, it is not 'in for a penny, in for a Pound.'" 554 U.S. at 338.

document cannot serve as evidence of the establishment of a consensual relationship between the Tribe and the Utilities concerning the transmission line. To the contrary, according to the Tribe, this document is a nullity and provides no evidence of anything.

In sum, the Tribe has not, because it cannot, demonstrate the Utilities have entered into a consensual relationship directly with the Tribe in connection with the transmission. line. Therefore, the *Montana* first exception does not apply to the Utilities and the transmission line.

4. Second Montana Exception Does Not Apply

The Tribe cannot meet its burden of demonstrating that the Utilities' conduct on non-Indian lands in connection with the routing and construction of the transmission line rises to the level necessary to satisfy the second *Montana* exception. The Supreme Court has made plain that a nonmember's conduct on non-Indian lands that merely results, even if permanently, in some limited "impairment," "diminishment" or "degradation" of a tribe's reservation assets or rights, like that herein alleged by the Tribe, is not enough to satisfy the second *Montana* exception.

> The second exception authorizes the tribe to exercise civil jurisdiction when non-Indians' 'conduct' menaces the 'political integrity, the economic security, or the health or welfare of the tribe.' *Montana,* 450 U.S., at 566. The conduct must do more that injure the tribe, it must 'imperil the subsistence' of the tribal community. *Id*. One commentator has noted that 'th[e] elevated threshold for the application of the second Montana exception suggests that tribal power must be necessary to avert catastrophic consequences.' Cohen 4.04[3][c], at 232, n. 220.

Plains Commerce Bank, 554 U.S. at 341 (emphasis added).

Here, all the Tribe has alleged in its motion to dismiss this case and in the Tribal Court action as potential harm to its tribal community is the loose claim that the Utilities' conduct on non-Indian land in the transmission line corridor will "permanently disrupt" its reserved hunting, fishing and gathering rights. As proof thereof, the Tribe points to two amended findings made by the MPUC as part of its decision to issue under state law the Route Permit to the Utilities. But even these findings of "impairment" of the Tribe's retained hunting, fishing and gathering rights are on their face insufficient to show that the tribal community's very existence is "imperiled". First, Amended MPUC Finding No. 120 makes plain that any impact on the tribal community's hunting, fishing and gathering rights is mostly limited in duration and scope[7]. Second, the reference in Amended MPUC Finding No. 199 to "the loss of treaty trust resources" as a principal impact of the transmission line project is merely referring back to the description in Amended MPUC Finding No. 120 of the limited "impairment" of the tribal community's

[7] In this respect, Amended MPUC Finding No. 120 notes:

> While access and use of traditional hunting and gathering areas would not be restricted on a long-term basis, some temporary and long-term impact to the uses of those areas would result. . . . Long-term impacts on wild rice harvesting or berry picking are not expected. . . .The Project would permanently convert approximately 575 acres of forested land.

With regard to this Amended MPUC Finding, it is important to note that the transmission line will run adjacent to existing transmission, pipeline and road corridors, in an area of the Reservation that is predominantly non-Indian fee lands, and the 575 acres of forested

hunting, fishing and gathering rights. There is absolutely nothing in the MPUC record, nor has the Tribe presented any other evidence, demonstrating that constructing the transmission line on non-Indian lands will imperil the existence of the tribal community and lead to "catastrophic consequences." In the words of the *Plains Commerce Bank* decision, while the limited disruption of the Tribe's hunting, fishing and gathering rights described by the MPUC – i.e. the "experience" of these activities in the converted forest land area would be altered and the potential harvest levels "could" also be altered as result of shifting or lost species – may be "quite possibly disappointing to the Tribe, [it] cannot fairly be called 'catastrophic' for tribal self-government." *See Plains Commerce Bank*, 554 U.S. at 341.

Indeed such limited impact hardly "imperils" the tribal community and, therefore, the second *Montana* exception is inapplicable in this case. *See Atkinson Trading Company*, 532 U.S. at 657 n.12 (second exception is only triggered by nonmember conduct that "is so severe that it actually 'imperil[s]' the political integrity of the Indian tribe"); *cf. Attorney's Process and Investigation Servs.*, 609 F.3d at 939 and n.6 (tribal jurisdiction over nonmember permitted under second *Montana* exception because the nonmember directly "threatened the political integrity and economic security of the Tribe", given that its raid on the tribal community center was an attempt to "seize control

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land to be permanently converted is all non-Indian lands and accounts for less than one-tenth of one percent of the Reservation's acreage.

of the tribal government and economy by force"; such conduct fitting the "dictionary definition of an attempted coup d'état").

To conclude otherwise would require the Court to ignore the fact that there has been a substantial change in land ownership and demographic patterns since the time the Reservation was established, which means the Tribe is no longer able to "establish the essential character of the region," and therefore, lacks authority over non-member owned lands within the exterior boundaries of the Reservation. *See Brendale*, 492 U.S. at 442-47 (1989)[8]. It would also require the Court to ignore the fact that any damages to the Tribe's retained "inherent" treaty rights arising from the Utilities' activities permitted by federal law on non-Indian land inside the Reservation were actually "caused" by the allotment acts and subsequent federal court decisions, and not by the Utilities receiving their Route Permit for the transmission line in compliance with state and federal law. *See Montana*, 450 U.S. at 558-561 (in view of the passage of the allotment legislation the tribe lacked treaty-based and statutory rights to regulate hunting and fishing by non-Indians on non-Indian-owned reservation fee lands); *South Dakota v. Bourland*, 580 U.S. at 688 (holding that by operation of the General Allottment Act of 1887, the Act of 1889

[8] In this respect, tribal jurisdiction does not "run with the land." Thus where, as here, the land at issue has been converted from trust lands to fee lands, any assertion of tribal law (whether by regulation or tort law) that operates as a restraint on alienation of such lands is impermissible. *See Plains Commerce Bank,* 554 U.S. at 337 (once tribal land is converted into fee simple, the tribe loses plenary jurisdiction over it because "it 'defies common sense to suppose' that Congress meant to subject non-Indians to tribal jurisdiction simply by virtue of the nonmember's purchase of the land in fee simple").

and the Act of 1908, the tribe gave up its right to regulate nonmembers on non-Indian-owned land inside the reservation).

5. Real Complaint May Be Against Federal Government, Not Utilities

Further, if there has been any cognizable and measurable harm to the Tribe's "inherent treaty rights" from the permitting the construction of the Project, the Tribe's complaint lies not with the Utilities but with the federal government as the counterparty on the treaties with the Tribe (and as trustee of the Tribe's retained treaty rights). The Tribe has no action against the Utilities for any alleged "damage" to its "inherent treaty rights"[9]. Indeed, in issuing its Route Permit, the MPUC specifically noted:

> The United States entered into a number of treaties with the [Tribe] under which the [Tribe] retained rights to many of the resources on the [reservation]. All Federal agencies have trust obligations to assure the Project does not infringe or negate the [Tribe's] ability to exercise these retained treaty rights.

Bailey Aff. Ex. D (emphasis added). The Tribe itself recognizes its real complaint is centered on the actions of the federal agencies, particularly the Chippewa National Forest, involved in permitting the transmission line construction. *See* Defendants' Tribal Court complaint at ¶ 50 on p. 13 ("the Chippewa national Forest issued a Special Use Permit and granted an easement for the Utilities to begin clear-cutting the right-of-way across the [Reservation's] proclamation boundaries on which the [Tribe] retain[s]

[9] As the Supreme Court noted in *Montana*, the federal trespass statute, 18 U.S.C. §1165, "does not reach fee-patented lands within the boundaries of an Indian

Inherent Treaty rights. . .") and at ¶ 53 on p. 14 (the Tribe "has not been in consultation with any of the Federal Agencies on the loss of the [Tribe's] Treaty Rights. The Federal Agencies . . . did not consult with the [Tribe] on the loss of Treaty Rights").

In essence, the Tribe's argument that it can regulate the Utilities' activities on non-Indian lands via its "treaty rights" in order to protect its hunting and fishing resources on the Reservation is just a mirror image of the argument presented by the tribes, and rejected by the Supreme Court, in *Montana* and *Bourland*. In those two cases, the tribes tried to regulate and limit the hunting and fishing activities of nonmembers on non-Indian lands in order to ensure that fish and game generally stayed available to their tribal members on reservation territory. Here, the Tribe seeks to regulate and limit the non-hunting and fishing activities of nonmembers on non-Indian lands purportedly in order to advance the hunting and fishing activities of its members on reservation territory. In either case, federal law now holds that, whatever rights the Tribe may have had to do so when it first entered into treaties with the United States, the Tribe may no longer restrict the activities of a nonmember on non-Indian lands inside the Reservation either through its hunting and fishing "treaty rights" or its "inherent" sovereignty. *See e. g. Montana*, 450 U.S. at 557-566.

6. Conclusion On Likelihood of Success

Based upon the foregoing, it is clear that applicable federal law precludes the

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reservation." *Montana*,. 450 U.S. at 563.

Tribe from asserting any civil authority over the Utilities and the Project. Accordingly, it is highly likely that the Utilities will succeed on the merits of their claim for declaratory relief that the Tribe has no regulatory jurisdiction over the Utilities' transmission line activities on non-Indian lands inside the Reservation.

C. UTILITIES WILL SUFFER IRREPARABLE HARM IF TRIBE NOT ENJOINED

The construction of the Project is a time sensitive matter. Any delays or stoppages caused by subjecting the Utilities to Tribal Court proceedings or by the Tribe's unlawful assertion of prescriptive and permitting authority in other forums, such as the MPUC, will interfere with timely implementation of the Project. Such unlawful interference and the delays that could result could preclude the Project from meeting its 2012 deadline for completion. The Utilities have an obligation to serve their customers in the region and the MPUC's certificate of need order recognizes that the Project is an important system element that is necessary to allow the utilities to meet their obligations to provide reliable electric service to the Utilities' customers in the area. Moreover, permitting the Tribal Court proceedings to continue when federal law precludes such civil authority to the Tribe will interfere with and delay completing the Utilities' negotiations and purchase of right-of-way easements with private non-Indian landowners.

The Ninth Circuit's case of *Burlington Northern Railroad Co v. Red Wolf*, 196 F.3d 1059 (1999) is instructive. In that case, a tribe brought an action in tribal court for damages arising out of a train accident occurring on alienated non-Indian lands on a

reservation. Recognizing the applicability of *Montana* and *Strate* to that case, federal courts enjoined the tribe from proceeding in tribal court. While the tribe is free to seek redress "in either state or federal courts, as appropriate" (*id*. at 1065), the tribe was precluded and thus enjoined from asserting any claims in tribal court. The Ninth Circuit specifically rejected any claim of abstention or exhaustion of remedies, recognizing that exhaustion is not required when tribal court jurisdiction is fundamentally lacking. *Id*. at 1066, citing *Strate*, 520 U.S. at 459, n.14.

D. BALANCE OF HARMS IN FAVOR OF UTILITIES

As described above in Section III B above, the Tribe has no civil authority over the Utilities and the transmission line under federal law. Thus, there will be no harm to the Tribe if it is stopped from trying to assert regulatory powers it has no authority to assert in the first place. In other words, the Tribe's attempt to use the Tribal Courts and MPUC to assert its manufactured "inherent treaty rights," to regulate the Utilities activities on non-Indian land "is not a legitimate exercise of the tribe's sovereign powers." *Northern States Power Co.* 991 F.2d at 463-64.

Conversely, the potential harm to the Utilities in not granting its requested injunctive relief far outweighs any purported harm to the Tribe's regulatory powers or retained hunting, fishing and gathering rights. Granting the injunctive relief requested by the Utilities would also be consistent with federal law which states that Tribal Court exhaustion is unnecessary where, as here, it would serve no purpose except delay and the

tribe's jurisdiction is clearly precluded. *See Strate*, 520 U.S. at 459, n.14; *Nevada v. Hicks*, 533 U.S. 353, 369 (2001); *Nat'l Farmers Union Ins. Co., v. Crow Tribe of Indians*, 471 U.S. 845, 856 n.21 (1985)(Court describes other exceptions to exhaustion doctrine indicating that exhaustion is not an unyielding requirement).

E. PUBLIC INTEREST SUPPORTS IMMEDIATE INJUNCTIVE RELIEF

Granting the requested injunctive relief would also serve the public interest. There is a strong public interest in upholding established federal law concerning the lack of tribal civil authority over nonmembers' activities on non-Indian lands inside tribal reservations unless the tribe first meets it burden to demonstrate one of the narrow *Montana* exceptions applies. There is also a strong public interest in ensuring uniformity in the state and federal regulatory process for approving utility lines not located on tribal lands but solely on non-tribal lands, whether located inside or outside a reservation. Last, the public interest is best served by granting the injunctive relief requested so that the Utilities will not be improperly delayed or otherwise hindered in timely completing the construction of the transmission line so greatly needed to provide reliable and adequate electric service to the Utilities' rural customers in the Bemidji-Cass Lake area.

IV. Conclusion

Based upon the foregoing, the Utilities request that the Court grant in its entirety their Rule 65 motion for immediate injunctive relief ordering the Tribe to cease and desist from asserting its claims that it has prescriptive and permitting jurisdiction over the

Project in any forum, including the MPUC and to discontinue with any Tribal Court claim asserting prescriptive or permitting authority over the Project, and to cease and desist from its repeated unlawful assertions to the MPUC that it has prescriptive and permitting authority over the Utilities and Project which requires the MPUC to suspend the Project's Route Permit authorizing the Utilities to construct the Project along a route within the historic exterior boundaries of the Reservation.

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