

was the funds' owner. Perhaps he was just a courier, making the buy on behalf of an undisclosed principal. If Torres lacked an interest in the cash, its forfeiture did not impose any penalty on *him*, and again the argument derived from *Kurth Ranch* fails. A non-"penalty" imposed in a civil proceeding does not amount to "jeopardy of life or limb" within the meaning of the fifth amendment. Torres is not entitled to escape time in prison just because the forfeiture may have penalized one of his confederates in crime, even his best friend.

AFFIRMED.

RIPPLE, Circuit Judge, concurring.

I agree that, because Mr. Torres did not make a claim in the civil forfeiture proceeding, he did not become a party to that proceeding and therefore could not have been placed in jeopardy. Therefore, I agree that the judgment ought to be affirmed on that ground.

The ink is hardly dry on the Supreme Court's decision in *Montana Department of Revenue v. Kurth Ranch*, — U.S. —, 114 S.Ct. 1937, 128 L.Ed.2d 767 (1994), and the government has not yet had the opportunity to brief fully its applicability to the federal civil forfeiture provisions. Upon reviewing the pre-*Kurth Ranch* decisions of the other circuits, *United States v. Millan*, 2 F.3d 17 (2d Cir.1993), and *United States v. 18755 North Bay Road*, 13 F.3d 1493, 1499 (11th Cir.1994), I believe that the preferable course is to refrain from expressing an opinion on their continued vitality until we have the assistance of counsel and perhaps further guidance from the Supreme Court. With this reservation, I am pleased to join the judgment and the opinion of the court.



BAKER ELECTRIC COOPERATIVE, INC., a North Dakota Rural Electric Cooperative Association, Appellant,

v.

Joseph CHASKE, member of the Devils Lake Sioux Tribe Tribal Utilities Commission; **Myra Pearson**, member of the Devils Lake Sioux Tribe Tribal Utilities Commission; **Oliver Gord, Sr.**, member of the Devils Lake Sioux Tribe Tribal Utilities Commission; **Dr. Merrill Berg**; **Harold McGowan**, President and member of the Devils Lake Sioux Tribe Tribal Utilities Commission, Appellees.

SHEYENNE VALLEY ELECTRIC COOPERATIVE, INC.,
Appellant,

v.

DEVILS LAKE SIOUX INDIAN TRIBE; **Joseph Chaske**; **Myra Pearson**; **Oliver Gord, Sr.**; **Dr. Merrill Berg**; **Harold McGowan**, President of the Devils Lake Sioux Tribe Tribal Utilities Commission, Appellees.

DEVILS LAKE SIOUX INDIAN TRIBE,
a federally recognized Indian tribe,
Appellant,

v.

NORTH DAKOTA PUBLIC SERVICE COMMISSION; **Leo M. Reinbold**, as member of the North Dakota Public Service Commission; **Dale V. Sandstrom**, as member of the North Dakota Public Service Commission; **Bruce Hagen**, as member of the North Dakota Public Service Commission; **State of North Dakota**, Appellees.

Otter Tail Power Company,
Amicus Curiae.

**OTTER TAIL POWER COMPANY, a
Minnesota corporation, Appellant,**

v.

Bruce HAGEN, member of the North Dakota Public Service Commission; Leo M. Reinbold, member of the North Dakota Public Service Commission; Dale V. Sandstrom, member of the North Dakota Public Service Commission, Appellees.

Nos. 93-1696, 93-1699, 93-1995 and 93-1701.

United States Court of Appeals,
Eighth Circuit.

Submitted Feb. 16, 1994.

Decided July 1, 1994.

In consolidated cases relating to dispute involving rights to buy, sell and regulate electric services on Indian reservation, the United States District Court for the District of North Dakota, Patrick A. Conmy, J., dismissed suits against members of Tribal Utilities Commission, rescinded preliminary injunction that prohibited North Dakota Public Service Commission (NDPSC) from interfering with Tribe's regulation of electric services on reservation, and dismissed rural electric cooperative's (REC) suit against NDPSC members to prevent them from interfering with REC's provision of electric services to tribal facility located on tribal trust land. Appeals were taken. The Court of Appeals, Magill, Circuit Judge, held that: (1) remand was required for district court to determine whether Tribe had authority to enact Tribal Utilities Code; (2) trial court erred in rescinding preliminary injunction; and (3) neither res judicata nor collateral estoppel barred REC's suit against NDPSC members.

Reversed and remanded with instructions.

1. Indians ⇨27(7)

Whether Tribe's sovereign immunity bars suit is issue of law that Court of Appeals determines de novo.

2. Federal Courts ⇨944

Indians ⇨27(6)

Remand to district court was required of rural electric cooperative's (REC) suit

against members of Tribal Utilities Commission for determination of whether Tribe had authority to enact Tribal Utilities Code; if yes, tribal officers were clothed with Tribe's sovereign immunity, and if no, then sovereign immunity defense would fail.

3. Federal Courts ⇨573

Injunction ⇨157

Order granting temporary restraining order (TRO) was appealable; although labeled TRO, order constituted preliminary injunction, as it was in effect for 30 months, and parties did not dispute that it was actually preliminary injunction. 28 U.S.C.A. § 1292(a)(1).

4. Injunction ⇨147

Burden of establishing propriety of preliminary injunction is on movant.

5. Injunction ⇨138.6

Party moving for preliminary injunction is required to show threat of irreparable harm.

6. Injunction ⇨161

District court abused its discretion by rescinding preliminary injunction that enjoined North Dakota Public Service Commission (NDPSC) from interfering with Tribe's relations with rural electric cooperative (REC), pending outcome of litigation concerning whether Tribe had right to purchase electricity from supplier of its choice; lack of preliminary injunction would disrupt electric services to vital tribal enterprise, NDPSC stated at oral argument that it would suffer no harm if preliminary injunction were reinstated so long as court did not decide merits of case, and if court did not reinstate injunction and Tribe ultimately prevailed on merits, additional construction costs borne by public would constitute wasted investment.

7. Federal Courts ⇨420

Res judicata and collateral estoppel are issues of substantive law requiring application of law of forum state.

8. Federal Courts ⇨420

Court of Appeals must give preclusive effect to state court judgments whenever state courts would do so.

9. Judgment ⇨958(2)

Under North Dakota law, applicability of *res judicata* or collateral estoppel is question of law.

10. Judgment ⇨724

North Dakota courts would not give preclusive effect to either of two determinations by court of first instance when each determination independently supports court's judgment. Restatement (Second) of Judgments § 27 comment.

11. Judgment ⇨828.16(4)

Under North Dakota law, doctrine of *res judicata* did not bar Rural Electric Cooperative's (REC) suit against members of North Dakota Public Service Commission (NDPSC) to prevent them from interfering with REC's provision of electric services to Indian Tribe's Headstart facility; that claim was not, and could not have been, raised in prior litigation that involved determination of whether NDPSC had regulatory authority over electric utilities competing for service point within Indian reservation, and North Dakota Supreme Court limited its supervisory review in prior action to whether NDPSC had jurisdiction to regulate electric service to industrial corporation chartered and owned by Tribe and located on tribal trust land.

12. Judgment ⇨828.16(2)

North Dakota Supreme Court's decision that North Dakota Public Service Commission (NDPSC) had regulatory authority over electric utilities competing for service point within Indian reservation did not collaterally estop one utility from suing NDPSC members in federal court to prevent them from interfering with utility's provision of electrical services to Tribe's Headstart facility, located on tribal trust land; North Dakota Supreme Court supported its holding on two distinct bases (first, that utility lacked standing to raise Tribe's rights, and, second, that Tribe had no right to regulate electric utilities on reservation), either of those two bases was alone sufficient to support result in that case, and, through application of its supervisory powers, Supreme Court asserted original jurisdiction and thus was "court of first instance" in that case.

13. Indians ⇨3(2)

Congress can abrogate Indian Tribe's treaty rights, but must do so explicitly.

14. Indians ⇨32(8)

Generally, inherent tribal authority does not extend to activities of nonmembers of Tribe on fee land, but inherent tribal authority generally does extend to civil jurisdiction over activities by nonmembers of Tribe on tribal land or on land held by United States in trust for Tribe.

Larry M. Baer, Cando, ND, argued, for appellant.

Mason Morisset, Seattle, WA, argued, for appellee.

Before McMILLIAN, WOLLMAN, and MAGILL, Circuit Judges.

MAGILL, Circuit Judge.

On appeal are four consolidated cases each relating to a dispute involving the rights to buy, sell, and regulate electric services on the Fort Totten Devils Lake Sioux Indian Reservation (Reservation). These appeals raise issues involving tribal sovereign immunity, the propriety of the district court's rescission of a temporary restraining order, and *res judicata*. We reverse and remand with instructions.

I. BACKGROUND**A. The Parties**

The parties to the dispute are: the Devils Lake Sioux Indian Tribe (the Tribe) and members of the Devils Lake Sioux Tribe Tribal Utilities Commission (Tribal Utilities Commission); Otter Tail Power Company (Otter Tail); the North Dakota Public Service Commission (NDPSC) and its members; and two rural electric cooperative associations (collectively the RECs)—namely, Baker Electric Cooperative, Inc. (Baker Electric), and Sheyenne Valley Cooperative, Inc. (Sheyenne Valley).

The Tribe consists of members of the Devils Lake Sioux Band who occupy the Reservation. The Reservation, which was established pursuant to the Treaty with the Sioux-Sisseton and Wahpeton Bands, 15 Stat. 505

(1867), reprinted in C. Kappler, II *Indian Affairs: Laws and Treaties* 956 (2d ed. 1904) (1867 Treaty), comprises over 240,000 acres of land in northeast North Dakota. Land on the reservation is owned in four ways: (1) by the United States Government in trust for the Tribe (tribal trust land), (2) by the Tribe, (3) in fee by members of the Tribe, and (4) in fee by nonmembers of the Tribe. The Tribal Council, whose members are elected by the Tribe, governs Tribal affairs on the Reservation. The members of the Tribal Utilities Commission enforce the Tribal Utilities Code. The Tribe seeks to assert exclusive regulatory jurisdiction over electric services to its facilities on tribal trust land and throughout the Reservation in general.

Otter Tail is an investor-owned electric utility that operates in North Dakota. Otter Tail, or its predecessor in interest, has provided electricity to the Reservation for over sixty years. Otter Tail owns both transmission and distribution facilities on the Reservation. Otter Tail does not dispute that its operations outside of the Reservation in North Dakota are subject to regulation by NDPSC. See N.D.Cent.Code § 49-02-01 (Supp.1993). Otter Tail presently provides electricity to Dakota Tribal Industries (DTI), a corporation chartered and owned by the Tribe and located on tribal trust land. Otter Tail seeks to provide electric services to the Reservation subject to the exclusive regulatory authority of the Tribe.

NDPSC is a state regulatory commission consisting of three constitutionally elected members, N.D. Const. art. V, § 12, who are authorized under Title 49 of the North Dakota Century Code to regulate investor-owned electric utilities such as Otter Tail. NDPSC seeks to subject Otter Tail to its regulatory jurisdiction on the Reservation and to prevent the Tribe from limiting its regulatory authority on the Reservation.

Baker Electric and Sheyenne Valley are rural electric cooperative associations that provide electric services to various portions of North Dakota. See N.D.Cent.Code §§ 10-13-01 to -05 (1985 & Supp.1993). Baker Electric and Sheyenne Valley serve both tribal and non-tribal members on the Reservation. The RECs seek to supply electric services to additional locations on the Reservation and to prevent the Tribe from

subjecting them to the Tribe's regulatory authority on the Reservation.

B. The Litigation

These appeals involve the interplay and possible overlap between the sovereign jurisdictions of the Tribe—acting through the members of the Tribal Utilities Commission—and the State of North Dakota—acting through the members of NDPSC—with respect to regulation of electric services on the Reservation. Both the Tribe and NDPSC seek to exercise exclusive regulatory authority over electric services on the Reservation. Otter Tail supports the Tribe and recognizes the Tribe as the exclusive regulatory authority on the Reservation. The RECs seek to prevent the Tribe from exercising regulatory authority on the Reservation. We turn to the specific facts underlying these appeals.

In September 1988, the Tribal Council selected Otter Tail to provide electricity for DTI. Otter Tail filed notice with NDPSC that it intended to extend electric services to DTI. NDPSC notified Otter Tail that it alone had jurisdiction and that Otter Tail should formally apply to NDPSC for a certificate of public convenience and necessity.

Baker Electric, which also sought to provide electricity to DTI, discovered that Otter Tail had begun to provide electric services to DTI before NDPSC had issued Otter Tail a certificate of public convenience and necessity. In November 1988, Baker Electric filed a protest with NDPSC and requested that NDPSC hold Otter Tail in contempt. In April 1989, NDPSC issued Otter Tail a show cause order and scheduled a hearing for later in that month. In response, Otter Tail petitioned the state district court for a writ of prohibition against any proposed action by NDPSC. The state district court granted the writ of prohibition. The North Dakota Supreme Court lifted the writ of prohibition and assumed supervisory jurisdiction over whether NDPSC had jurisdiction over electric services to DTI. See *In re Application of Otter Tail Power Co.*, 451 N.W.2d 95, 97 (N.D.1990). In May 1989, after the North Dakota Supreme Court lifted the writ of prohibition, NDPSC determined that it had

jurisdiction to regulate electric service to DTI.

The North Dakota Supreme Court then analyzed NDPSC's jurisdictional determination and, in January 1990, held that Otter Tail lacked standing to raise the rights of the Tribe. *Id.* at 98. After deciding jurisdictionally that Otter Tail lacked third-party standing to raise the Tribe's rights, the North Dakota Supreme Court nevertheless proceeded to decide on the merits that the Tribe had no sovereign right to regulate electricity use on the Reservation. *Id.* at 98-107. Justice Levine concurred in the majority's result based on Otter Tail's lack of standing to raise the rights of the Tribe, *id.* at 107-08, and noted that the majority had "ranged far and wide in answering broad questions about the authority of the Tribe" that were not before the court, *id.* at 108.

Thereafter, in July 1990, the Tribal Council enacted the Tribal Utilities Code, which asserts extensive regulatory authority over electric services within the historic exterior boundaries of the Reservation. In response to the Tribal Council's enactment of the Tribal Utilities Code, Baker Electric and Sheyenne Valley brought suit against the members of the Tribal Utilities Commission. Nos. 93-1696, 93-1699 *Baker Electric Coop. v. Joseph Chaske* (Suits 1 & 2, Nos. 93-1696, 93-1699, *Baker Electric v. Chaske*). The RECs argue that the Tribe lacks regulatory jurisdiction over electric utilities doing business within the exterior boundaries of the Reservation. The RECs sought prospective injunctive relief against the individual members of the Tribal Utilities Commission to prevent them from exercising the authority invested in them by the Tribal Utilities Code. The district court dismissed the RECs' suits because the sovereign Tribe had not consented to the suits, and therefore the district court lacked jurisdiction.

In August 1990, NDPSC ordered Otter Tail to discontinue service to DTI. The Tribe filed suit against NDPSC and its individual members alleging that the Tribe had the right to purchase electricity from the

supplier of its choice. No. 93-1995 *Devils Lake Sioux Indian Tribe v. North Dakota Pub. Serv. Comm'n* (Suit 3, No. 93-1995, *Tribe v. NDPSC*). The Tribe requested and, on September 4, 1990, was granted injunctive relief that prevented NDPSC from interfering with its choice of suppliers. See Tribe's App. No. 93-1995, at 23-24 (Sept. 4, 1990 order). The district court later rescinded the September 4, 1990 temporary restraining order (TRO) that prohibited NDPSC from interfering with the Tribe's regulation of electric services on the Reservation.

Meanwhile, Otter Tail also brought suit against the members of NDPSC with respect to Otter Tail's intention to provide electric services to the Tribe's new Headstart facility which, like DTI, is a tribal facility located on tribal trust land. No. 93-1701 *Otter Tail Power Co. v. Bruce Hagen* (Suit 4, No. 93-1701, *Otter Tail v. Hagen*). Otter Tail sought to prevent NDPSC from interfering with its relationship with the Tribe based on the Supremacy Clause of the Constitution. Specifically, Otter Tail alleged that the Tribe's sovereign rights prohibit NDPSC from interfering with the Tribe's choice of electricity suppliers. The district court dismissed Otter Tail's suit because it was barred by res judicata.

II. DISCUSSION

Although arising from the same factual core, the consolidated appeals resulting from the district court's February 3, 1993 order raise three separate issues.¹ In Suits 1 & 2, Nos. 93-1696, 93-1699, *Baker Electric v. Chaske*, the RECs appeal the dismissal of their cases based on the Tribe's sovereign immunity. In Suit 3, No. 93-1995, *Tribe v. NDPSC*, the Tribe seeks review of the district court's rescission of the TRO that had enjoined NDPSC from interfering with the Tribe's relations with Otter Tail. Finally, in Suit 4, No. 93-1701, *Otter Tail v. Hagen*, Otter Tail appeals the district court's dismissal of its case based on res judicata. We examine these cases in turn.

1. *Devils Lake Sioux Indian Tribe v. North Dakota Pub. Serv. Comm'n*, No. 90-179, slip op. at 7 (D.N.D. Feb. 3, 1993) (hereinafter, "Dist. Ct. Op.

at — (Feb. 3, 1993)"). The district court also granted partial summary judgment to the Tribe. That decision is not on appeal before us.

A. Suits 1 & 2, Nos. 93-1696, 93-1699, *Baker Electric v. Chaske*

The RECs appeal the district court's dismissal of their suits against the members of the Tribal Utilities Commission.² The RECs argue that the tribal officers are not protected by the Tribe's sovereign immunity when they act pursuant to an unconstitutional tribal statute. The Tribe argues that an officer suit is not appropriate because the Tribe had authority to promulgate its Tribal Utilities Code and because the tribal officers have not acted.³ Because the district court's analysis in support of its dismissal is inconsistent with our precedent, we reverse and remand to the district court.

[1] Whether a suit is barred by a Tribe's sovereign immunity is an issue of law that we determine de novo. See *Burlington N. R.R. v. Blackfeet Tribe*, 924 F.2d 899, 901 (9th Cir.1991). "Indian tribes and their governing bodies possess common-law immunity from suit. They may not be sued absent express and unequivocal waiver of immunity by the tribe or abrogation of tribal immunity by Congress." *Id.*; accord *Tenneco Oil Co. v. Sac & Fox Tribe of Indians*, 725 F.2d 572, 574 (10th Cir.1984). The Tribe's sovereign immunity, however, is subject to the well-established exception described in *Ex parte Young*, 209 U.S. 123, 159-60, 28 S.Ct. 441, 454, 52 L.Ed. 714 (1908). See *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 514, 111 S.Ct. 905, 912, 112 L.Ed.2d 1112 (1991); *Northern States Power Co. v. Prairie Island Mdewakanton Sioux Indian Community*, 991 F.2d 458, 460 (8th Cir.1993). In *Ex parte Young*, the Supreme Court held that "a suit challenging the constitutionality of a state official's action is not one against the State." *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 102, 104 S.Ct. 900, 909, 79 L.Ed.2d 67 (analyzing *Ex parte Young*); see also *Nix v. Norman*,

879 F.2d 429, 432 (8th Cir.1989). Thus, when a complaint alleges that

"the named officer defendants have acted outside the amount of authority that the sovereign is capable of bestowing, an exception to the doctrine of sovereign immunity is invoked. . . . If the sovereign did not have the power to make a law, then the official by necessity acted outside the scope of his authority in enforcing it, making him liable to suit."

Northern States Power, 991 F.2d at 460 (quoting *Tenneco Oil*, 725 F.2d at 574 (citations omitted)). Therefore, "[i]f the tribe did not have the power to enact this ordinance, then the tribal officers were not clothed with the tribe's sovereign immunity." *Id.*

[2] Applying *Northern States Power*, the dispositive issue before this court is whether the Tribe had the authority to enact the Tribal Utilities Code: If yes, the tribal officers are clothed with the Tribe's sovereign immunity; if no, then the sovereign immunity defense must fail. See *id.* We decline, however, to decide in the first instance whether the Tribe had this authority. See *Tenneco*, 725 F.2d at 576 (remanding case back to district court to give Tribe an opportunity to prove that it had authority to enact an ordinance). Further, we reject the Tribe's contention that officer suits are inappropriate where the officers have not acted. Tribe's Br. Nos. 93-1696, 93-1699, at 3-5. The RECs seek to enjoin the members of the Tribal Utilities Commission from enforcing the Tribal Utilities Code, and therefore their suits are squarely of the type recognized and approved of by this court in *Northern States Power*. See 991 F.2d at 460 (approving of suit that sought to enjoin tribal officers from enforcing tribal ordinance); see also *South Dakota v. Bourland*, 949 F.2d 984, 989 (8th Cir.1991) (upholding propriety of suit seeking

2. The district court stated that "the Tribe has not consented to suit against it in this court by Baker and Sheyenne Valley cooperatives, and therefore [those cases] are hereby DISMISSED . . . as this court has no jurisdiction over the tribal entity without its consent." Dist.Ct.Op. at 7 (Feb. 3, 1993). The district court gave no further reasoning in support of its decision.

3. An officer suit constitutes a limited exception to the doctrine of sovereign immunity whereby plaintiffs may vindicate rights infringed by the sovereign. *Nix v. Norman*, 879 F.2d 429, 432 (8th Cir.1989) (describing officer suits against state officials). If an officer acts pursuant to a sovereign enactment that violates federal law, the officer acts without the sovereign's authority and therefore is subject to suit for prospective injunctive relief. *Id.* at 432.

injunctive relief against tribal officers), *rev'd on other grounds*, — U.S. —, 113 S.Ct. 2309, 124 L.Ed.2d 606 (1993).

Therefore, we reverse the dismissal of the RECs' suits, and we remand to the district court to evaluate the Tribe's sovereign immunity under the analysis set out in *Northern States Power*.

B. Suit 3, No. 93-1995, *Tribe v. NDPSC*

[3] The Tribe appeals the district court's rescission of the TRO that enjoined NDPSC from interfering with the Tribe's relations with Otter Tail. Although labeled a *temporary* restraining order, the district court's TRO was in effect for thirty months. In addition, proper notice and a hearing preceded the district court's clarification of the TRO in July 1992. The parties do not dispute that although labeled a TRO, the district court's order constituted a preliminary injunction.⁴ Therefore, this court has jurisdiction, pursuant to 28 U.S.C. § 1292(a)(1) (1988), to review the district court's rescission of the preliminary injunction. See *Nordin v. Nutri/System, Inc.*, 897 F.2d 339, 343 (8th Cir.1990) (temporary restraining order that exceeded ten days and had no expiration date "must be treated as a preliminary injunction and therefore is appealable"); see also Wright & Miller, *Federal Practice and Procedure: Civil* § 2962, at 619-20 & nn. 1-2 (1982).

[4, 5] The burden of establishing the propriety of a preliminary injunction is on the movant. *Modern Computer Sys., Inc. v. Modern Banking Sys., Inc.*, 871 F.2d 734, 737 (8th Cir.1989) (en banc). Whether a preliminary injunction should issue "involves consideration of (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." *Dataphase Sys., Inc. v. C L Sys., Inc.*, 640 F.2d 109, 114 (8th Cir.1981) (en banc). "No single factor in itself is dispositive; in each case all of the factors must be

considered to determine whether on balance they weigh towards granting the injunction." *Calvin Klein Cosmetics Corp. v. Lenox Lab.*, 815 F.2d 500, 503 (8th Cir.1987); *Dataphase*, 640 F.2d at 114. However, a party moving for a preliminary injunction is required to show the threat of irreparable harm. *Modern Computer Sys.*, 871 F.2d at 738; *Dataphase*, 640 F.2d at 114.

We review a district court's decision to grant or rescind a preliminary injunction for an abuse of discretion. *Id.* at 114 n. 8.

An abuse of discretion occurs when a relevant factor that should have been given significant weight is not considered, when an irrelevant or improper factor is considered and given significant weight, or when all proper and no improper factors are considered, but the court in weighing those factors commits a clear error of judgment.

United States v. Kramer, 827 F.2d 1174, 1179 (8th Cir.1987). Our review is made substantially more difficult because there is no indication in its opinion that the district court applied the *Dataphase* factors when it granted the preliminary injunction or when it later rescinded the preliminary injunction. Thus, we must analyze the four *Dataphase* factors without the benefit of the district court's insight.

1. Irreparable Harm

[6] The Tribe argues that without the preliminary injunction, it suffers a threat of irreparable harm because NDPSC will interfere with the Tribe's right to self government and will disrupt electric services to DTI, a vital tribal enterprise. We reject the first argument, but we accept the second.

The threat of irreparable harm to the Tribe's right to self government assumes that NDPSC has no authority to regulate Otter Tail on the Reservation. This issue remains before the district court, and we decline to resolve it in the first instance. The Tribe, however, has demonstrated a threat of irreparable harm in that rescission of the preliminary injunction threatens to

junction."

4. Hereinafter, we will refer to the district court's September 4, 1990 TRO as "the preliminary in-

disrupt electric services to the DTI facility. Presently, Otter Tail provides power to DTI. If the preliminary injunction is not reinstated, NDPSC could disrupt electric services to DTI by forcing Otter Tail to cease providing power to that tribal facility. This threatened disruption of electric services could hinder the productivity of DTI and result in economic harm to the Tribe. Further, the Tribe would be unable to recover any damages resulting from this disruption as NDPSC has Eleventh Amendment sovereign immunity in federal court in suits requesting money damages. See *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 102-03, 104 S.Ct. 900, 909-10, 79 L.Ed.2d 67 (1984) (“[W]hen a plaintiff sues a state official alleging a violation of federal law, the federal court may . . . not . . . award[] retroactive monetary relief.”); see also *Leadbetter v. Rose*, 467 N.W.2d 431, 432 (N.D.1991) (“When an action is essentially against the state to recover money, the state is the real party in interest and is entitled to invoke sovereign immunity. . . .”). Even if the Tribe prevails on the merits, it nevertheless will lack an adequate remedy at law against NDPSC. Cf. *Modern Computer Sys.*, 871 F.2d at 738 (rejecting claim of irreparable harm because party had adequate remedy at law if it prevailed on the merits). The Tribe has demonstrated a threat of irreparable harm if the preliminary injunction is not reinstated.⁵

2. Balance Between Irreparable Harm to Tribe and Injury to NDPSC

The balance between the threat of irreparable harm to the Tribe and injury to NDPSC if the preliminary injunction is reinstated weighs in favor of the Tribe. Both the Tribe and NDPSC argue that their respective sovereign authorities are threatened. NDPSC, however, stated at oral argument

5. We note that the Tribe also faces a threat of irreparable harm because Otter Tail apparently provides less expensive electric services than Baker Electric. See NDPSC’s App. No. 93-1995, at 559 (discussing differences in electric services prices). If the Tribe is forced to purchase the more expensive services during the pendency of the litigation, the increased cost threatens the revenues of the Tribe.

6. “[NDPSC]: [Reinstatement of the preliminary injunction] doesn’t harm [NDPSC] so long as it is

that so long as this court did not decide the merits of the case, it would suffer no harm if the preliminary injunction were reinstated. Tape of Oral Arg., No. 93-1995.⁶ Since the district court’s rescission of the preliminary injunction on February 3, 1993, NDPSC has chosen not to exercise its claimed authority over Otter Tail. *Id.* Further, unlike the Tribe, NDPSC is not threatened with any potential economic harm if this court reinstates the preliminary injunction. The balance of the irreparable harm to the Tribe and injury to NDPSC weighs in favor of reinstatement of the preliminary injunction.

3. Likelihood of Success on the Merits

The Tribe argues that because the district court already has granted partial summary judgment in its favor on the Tribe’s sovereign right to regulate electric services to tribal industries on tribal land and on tribal trust land, its likelihood of success on the merits is certain. NDPSC, however, interprets the district court’s statements as indicating that NDPSC will prevail on the merits. We examine the district court’s opinion.

In its opinion of February 3, 1993, which granted partial summary judgment to the Tribe, the district court held:

[T]he sovereignty of the Devils Lake Sioux Tribe requires that the Tribe may contract for the provision of electrical and other regulated services to tribal operated industries or facilities located upon tribal owned or trust lands, *without regard to the regulations of the North Dakota Public Service Commission* in attempted enforcement of the so called Territorial Integrity Act.

Dist.Ct.Op. at 7 (Feb. 3, 1993) (emphasis added). The district court also stated:

very carefully drawn so that . . . the tribe will [not] be able to argue that it is somehow the final or advisory ruling from this court on the jurisdictional issue.” *Id.* “[COURT]: [W]hy shouldn’t we retain the preliminary injunction until the final and ultimate resolution in this issue? [NDPSC]: So long as that decision does not indirectly or directly deal with the regulatory issue, with the jurisdictional issue, I don’t have a great problem with that.” *Id.*

Obviously, the regulation of electrical service within the reservation is a meaningless gesture if the electrical service cannot get to the reservation, and while the court is willing to acknowledge tribal sovereignty, *it is not willing to try to curtail the exercise of state sovereignty which may well frustrate the tribal government.* . . .

The Court is hopeful that good will and common sense will prevail, and in their absence believes the solution is one for Congress rather than this Court.

Id. at 6–8 (emphasis added). Upon a motion by NDPSC, the district court later clarified its opinion by stating

[t]he court's previous decision, while granting partial summary judgment to the [Tribe], may have been an illusory victory. *The court does not have jurisdiction over [NDPSC] and does not pretend [to] know how the tribal government can guarantee electrical service to its tribally owned property within the reservation. . . . The court made no decision as to the power of [NDPSC].*

Dist.Ct.Op. at 2 (Mar. 15, 1993) (emphasis added). Thus, the parties' contradictory conclusions both find support in the district court's opinion. We decline to resolve the ambiguity in the district court's statements because to do so could resolve indirectly what we lack jurisdiction to resolve directly. *See supra* note 1. Because both parties rely upon the district court's opinion to support their arguments that they are likely to prevail on the merits, we conclude that neither the Tribe nor NDPSC has demonstrated a likelihood of success on the merits.

4. Public Interest

The final *Dataphase* factor is the public interest. The Tribe argues that rescission of the preliminary injunction is against the public interest because it results in uncertainty and will force the Tribe to pay a premium for electric services. On balance, we conclude that the public interest weighs in favor of reinstatement of the preliminary injunction.

First, we must reject the Tribe's uncertainty argument. Regardless of the resolution of the preliminary injunction issue, uncertainty will exist until the district court

decides this dispute on the merits. We conclude, however, that the public interest favors reinstatement of the preliminary injunction during the pendency of the litigation. Presently, Otter Tail provides electricity to DTI. Before Baker Electric could provide service to DTI, it would need to construct 250 feet of underground lines. The public ultimately would bear the cost of this construction. If this court does not reinstate the temporary restraining order and the Tribe ultimately prevails on the merits, the additional construction costs borne by the public would constitute a wasted investment. Conversely, if we reinstate the temporary restraining order and NDPSC ultimately prevails on the merits, the public will have suffered no additional cost because Otter Tail already has expended the resources necessary to build lines to DTI. Thus, the public's interest in minimizing unnecessary cost weighs in favor of reinstatement of the preliminary injunction. *Cf. James River Flood Control Ass'n v. Watt*, 680 F.2d 543, 544–45 (8th Cir.1982) (per curiam) (public interest served by avoiding "greater expenditures from the public treasury").

5. Conclusion

We hold that the Tribe has carried its burden of demonstrating that the district court abused its discretion when it rescinded the preliminary injunction. The Tribe has demonstrated that: it faces a threat of irreparable harm; the potential harm to NDPSC, in light of its concession at oral argument, is outweighed by the threat of irreparable harm to the Tribe; and the public interest weighs in favor of reinstatement. Therefore, we reverse and remand to the district court with instructions to reinstate the preliminary injunction during the pendency of the litigation.

C. Suit 4, No. 93–1701, *Otter Tail v. Hagen*

Otter Tail appeals the district court's dismissal of its suit against the members of NDPSC based on *res judicata*. To support this determination, the district court relied upon the North Dakota Supreme Court's decision in *In re Application of Otter Tail*

Power Co., 451 N.W.2d 95 (N.D.1990). Un-
sure of the basis for the district court's deci-
sion, the parties have briefed and argued
both *res judicata* and collateral estoppel.⁷

[7-9] *Res judicata* and collateral estoppel
are issues of substantive law requiring the
application of the law of the forum state.
Kuehn v. Garcia, 608 F.2d 1143, 1147 (8th
Cir.1979), *cert. denied*, 445 U.S. 943, 100
S.Ct. 1340, 63 L.Ed.2d 777 (1980). This
court must give preclusive effect to state
court judgments whenever the courts of the
state court would do so. *Newman Signs,
Inc. v. Sinner*, 796 F.2d 247, 249 (8th Cir.
1986). Under North Dakota law, the applica-
bility of *res judicata* or collateral estoppel is
a question of law. *Hofsommer v. Hofsom-
mer Excavating, Inc.*, 488 N.W.2d 380, 383
(N.D.1992).

"*Res judicata* is a term often used to de-
scribe such doctrines as merger, bar, and
collateral estoppel." *Id.* (internal quotation
marks omitted). "*Res judicata*, or claim pre-
clusion, is the more sweeping doctrine that
prohibits the relitigation of claims . . . that
[1] were raised or could have been raised in a
prior action [2] between the same parties or
their privies and [3] which w[ere] resolved by
final judgment in a court of competent juris-
diction." *Id.*

[10] "[C]ollateral estoppel, or issue pre-
clusion, generally forecloses the relitigation
. . . of particular issues of either fact or law
which were . . . litigated and determined in
the prior suit." *Id.* Under North Dakota
law, a litigant must satisfy four tests before
collateral estoppel will bar relitigation of a
fact or issue from an earlier lawsuit:

- (1) Was the issue decided in the prior
adjudication identical to the one presented
in the action in question?;
- (2) Was there a
final judgment on the merits?;
- (3) Was the
party against whom the plea is asserted a
party or in privity with a party to the prior
adjudication?;
- and (4) Was the party

7. The district court held that "the action by Otter
Tail is barred by the doctrine of *res judicata*, the
judgment of the North Dakota Supreme having
become a final judgment." *Dist.Ct.Op.* at 7 (Feb.
3, 1993). Earlier in its opinion, the district court
stated that "Otter Tail did not seek certiorari for
review of the decision of the North Dakota Su-

preme Court which determined that Otter Tail
was not excused from the jurisdiction of the
[NDPSC] by virtue of the Tribal Council Resolu-
tion. That judgment is final, whether Justice
Meschke's analysis is dicta or not." *Id.* at 6.
The district court provided no further analysis in
support of its decision.

against whom the plea is asserted given a
fair opportunity to be heard on the issue?
Id. at 384. In addition, North Dakota has
adopted comment i to the *Restatement (Sec-
ond) of Judgments* § 27. See *Vanover v.
Kansas City Life Ins. Co.*, 438 N.W.2d 524,
526 (N.D.1989). Comment i to § 27 states:
"If a judgment of a court of first instance is
based on determinations of two issues, either
of which standing independently would be
sufficient to support the result, the judgment
is not conclusive with respect to either issue
standing alone." *Restatement (Second) of
Judgments* § 27, cmt. i (1982). Thus, the
courts of North Dakota would not give pre-
clusive effect to either of two determinations
by a court of first instance when each deter-
mination independently supports the court's
judgment. See *Vanover*, 438 N.W.2d at 526.
We now turn to apply these doctrines.

[11] First, we hold that the doctrine of
res judicata, or claim preclusion, does not bar
Otter Tail's suit against the members of
NDPSC because the present case involves a
claim that was not, and could not have been,
raised in the prior litigation. *Application of
Otter Tail* involved a determination of wheth-
er NDPSC "ha[d] regulatory authority over
electric utilities competing for a *service point*
within an Indian reservation." 451 N.W.2d
at 96 (emphasis added). The North Dakota
Supreme Court limited its supervisory re-
view to whether NDPSC "had jurisdiction to
regulate electric service to the DTI building
on the reservation." *Id.* at 97.

In contrast, Suit 4, No. 93-1701, *Otter Tail
v. Hagan*, involves Otter Tail's attempt to
prevent the members of NDPSC from inter-
fering with its provision of electric services to
the Tribe's Headstart facility. The Tribe
authorized Otter Tail to provide electric ser-
vices to the Headstart facility in October
1991, Otter Tail's App. No. 93-1701, at 31,
well over a year after the North Dakota
Supreme Court issued its opinion in *Applica-
tion of Otter Tail*. See 451 N.W.2d at 95

preme Court which determined that Otter Tail
was not excused from the jurisdiction of the
[NDPSC] by virtue of the Tribal Council Resolu-
tion. That judgment is final, whether Justice
Meschke's analysis is dicta or not." *Id.* at 6.
The district court provided no further analysis in
support of its decision.

(opinion filed Jan. 25, 1990). Otter Tail's claim arises from a separate cause of action that Otter Tail could not have raised in the prior litigation. See *Hofsommer*, 488 N.W.2d at 383. We hold that claim preclusion does not bar Otter Tail's claim.

[12] Second, we conclude that the doctrine of collateral estoppel does not preclude Otter Tail's suit. In *Application of Otter Tail*, the North Dakota Supreme Court decided that NDPSC had regulatory authority over electric utilities competing for a service point within the Reservation. 451 N.W.2d at 96. The North Dakota Supreme Court supported this holding on two distinct bases: (1) Otter Tail lacked standing to raise the rights of the Tribe, *id.* at 98, and (2) assuming that Otter Tail had standing to assert the self-government rights of the Tribe, the Tribe had no right to regulate electric utilities on the Reservation, *id.* at 101-07.

Either of the two bases relied upon by the North Dakota Supreme Court standing alone was sufficient to support the result in that case. See *id.* at 107-08 (Levine, J., concurring in result based solely on third-party standing determination). Further, through application of its supervisory powers, the North Dakota Supreme Court asserted original jurisdiction and thus was the "court of first instance" in that case. See *id.* at 97; see also *Vanover*, 438 N.W.2d at 526 (holding that neither of two alternative bases by a court of first instance could be used to preclude relitigation of either issue).⁸ We conclude that collateral estoppel does not preclude Otter Tail's claim in this case. See *id.*

NDPSC also raises numerous other arguments for affirmance upon which the district court has not yet ruled. The district court should analyze these arguments in the first instance. Therefore, we reverse the district

8. Although administrative agencies are not courts, some of their decisions may have preclusive effect. *Westman v. Dessellier*, 459 N.W.2d 545, 547 (N.D.1990). North Dakota courts, however, are more cautious to give preclusive effect to administrative determinations. *United Hosp. v. D'Annunzio*, 466 N.W.2d 595, 599 (N.D.1991). NDPSC was one of the parties appearing before the North Dakota Supreme Court in *Application of Otter Tail*, 451 N.W.2d at 95. Cf. *id.* (declining to give preclusive effect to county commission determination where commission acted as agent

court's dismissal of Otter Tail's suit based on *res judicata*).

III. DIRECTIONS ON REMAND

We remand with instructions that the district court make detailed factual determinations and set out its analysis in support of its legal determinations. On remand, the district court should consider the factors set out in *Montana v. United States*, 450 U.S. 544, 101 S.Ct. 1245, 67 L.Ed.2d 493 (1981), and its progeny, to settle the core issue in this dispute: whether the Tribe has the sovereign authority to regulate electric services on the Reservation, and whether the Tribe's authority preempts that of NDPSC. The district court should determine: first, whether Congress has granted the Tribe the authority to regulate electric services through the 1867 Treaty or through subsequent congressional legislation; second, if Congress has granted the Tribe regulatory authority over electric services, whether Congress later has abrogated that regulatory authority; third, if Congress has abrogated the Tribe's express regulatory authority over electric services, whether the Tribe retains inherent authority to regulate electric services on the Reservation; fourth, and finally, if the Tribe retains regulatory authority over electric services, whether that authority preempts NDPSC's authority.⁹

A. Express Authority of the Tribe

To determine whether the Tribe has express authority to regulate electric services utilities on the Reservation, the district court should first look to the Tribe's 1867 Treaty with the United States, which states:

The chiefs and head-men located upon either of the reservations set apart for said

for county and decided for its principal). Thus, we conclude that the North Dakota Supreme Court was the court of first instance.

9. In its Clarifying Order, the district court stated that "[t]he court does not have jurisdiction over [NDPSC]." Dist.Ct.Op. at 2 (Mar. 15, 1993). That statement is incorrect because the court has jurisdiction over NDPSC through the suits against NDPSC's members. See *Ex parte Young*, 209 U.S. at 159-60, 28 S.Ct. at 454.

bands are authorized to adopt such rules, regulations, or laws for the security of life and property, the advancement of civilization, and the agricultural prosperity of the members of said bands . . . shall have authority, under the direction of the agent, and without expense to the Government, to organize a force sufficient to carry out all such rules, regulations, or laws.

Tribe's App. No. 93-1995, at 58. The 1867 Treaty also states that the Tribe "hereby ced[e]s to the United States the right to construct wagon-roads, railroads, mail stations, telegraph lines, and such other public improvements as the interest of the Government may require." *Id.* at 56. The district court should determine whether the 1867 Treaty authorizes the Tribe to regulate electric services on the Reservation. The district court also should consider whether subsequent congressional acts grant the Tribe authority to regulate electric services on the Reservation. *See, e.g.*, 28 U.S.C. § 1360(b) (1988); 25 C.F.R. § 1.4(a) (1993).

B. Congress's Abrogation of the Tribe's Rights

[13] If the district court determines that the 1867 Treaty or subsequent congressional acts have invested the Tribe with the authority to regulate electric services on the Reservation, the district court should then determine whether later congressional action has abrogated that authority. The district court should keep in mind that Congress can abrogate the Tribe's treaty rights, but must do so explicitly. *See South Dakota v. Bourland*, — U.S. —, — — —, 113 S.Ct. 2309, 2315-16, 124 L.Ed.2d 606 (1993); *cf. Montana v. United States*, 450 U.S. 544, 560-61, 101 S.Ct. 1245, 1256, 67 L.Ed.2d 493 (1981) (examining effect of subsequent alienation of land on "exclusive use" language of prior treaty).

C. Tribe's Inherent Sovereignty

If the district court determines that the Tribe does not have express authority to regulate electric services on the Reservation, the district court should then determine whether the Tribe retains inherent authority to do so. "Indian tribes possess the inher-

ent powers of a limited sovereignty which has never been extinguished.'" *EEOC v. Fond du Lac Heavy Equip. & Constr. Co.*, 986 F.2d 246, 248 (8th Cir.1993) (quoting *United States v. Wheeler*, 435 U.S. 313, 322, 98 S.Ct. 1079, 1085-86, 55 L.Ed.2d 303 (1978)). "[T]he 'exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation.'" *Bourland*, — U.S. at —, 113 S.Ct. at 2319 (quoting *Montana*, 450 U.S. at 564, 101 S.Ct. at 1257).

[14] The district court should determine whether regulation of electric services is necessary to protect the Tribe's self-government rights or to control the internal relations within the Tribe. Generally, inherent tribal authority does not extend to the activities of nonmembers of the Tribe on fee land, *id.*, but inherent tribal authority generally does extend to civil jurisdiction over activities by nonmembers of the Tribe on tribal land or on land held by the United States in trust for the Tribe. *See Montana*, 450 U.S. at 557, 565, 101 S.Ct. at 1254, 1258. Further, the district court should distinguish its inherent-authority determinations with reference to the character of the land at issue, *i.e.*, tribal trust land, tribal land, or fee land.

The district court also should address the limitation on the regulatory power of the Tribe over nonmembers. That general limitation has two exceptions. First, "a tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealings, contracts, leases, or other arrangements." *Id.* at 565, 101 S.Ct. at 1258. The district court should determine whether providing electricity to the Reservation involves a consensual relationship. Second, "a tribe may . . . retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." *Id.* at 566, 101 S.Ct. at 1258 (emphasis added). The district court should deter-

mine whether provision of electric services to DTI, the Tribe's Headstart facility, or other locations on the Reservation has a direct effect on the political integrity, economic security, or the health and welfare of the Tribe.

D. Preemption of State Law

Finally, if it determines that the Tribe has the authority to regulate electric services on the Reservation, the district court should analyze whether the Tribe's authority preempts the authority of NDPSC. The district court should keep in mind that "tribal sovereignty is dependent on, and subordinate to, only the Federal Government, not the States," *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 207, 107 S.Ct. 1083, 1087, 94 L.Ed.2d 244 (1987) (quoting *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 154, 100 S.Ct. 2069, 2081, 65 L.Ed.2d 10 (1980)). "[S]tate laws may be applied to tribal Indians on their reservations if Congress has expressly so provided." *Id.* Further, state jurisdiction is preempted "if it interferes or is incompatible with federal and tribal interests reflected in federal law, unless the state interests at stake are sufficient to justify the assertion of state authority." *Id.* 480 U.S. at 216, 107 S.Ct. at 1092 (quoting *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 334, 103 S.Ct. 2378, 2386, 76 L.Ed.2d 611 (1983)). The district court should conduct this inquiry "in light of traditional notions of Indian sovereignty and the congressional goal of Indian self-government, including its 'overriding goal' of encouraging tribal self-sufficiency and economic development." *Id.*

IV. CONCLUSION

For these reasons we reverse the district court's judgment, and we remand to the district court with instructions.



Donna Jayne SIMMONS, Appellant,

v.

STATE OF IOWA, Appellee.

No. 93-2695.

United States Court of Appeals,
Eighth Circuit.

Submitted Jan. 11, 1994.

Decided July 11, 1994.

Following affirmance on appeal of conviction for first-degree kidnapping, 454 N.W.2d 866, and denial of postconviction relief in state court, federal petition for writ of habeas corpus was filed. The United States District Court for the Southern District of Iowa, Charles R. Wolle, Chief Judge, denied petition. Petitioner appealed. The Court of Appeals, Bowman, Circuit Judge, held that: (1) trial counsel's decision not to pursue diminished-capacity defense was within range of professionally reasonable judgments and, thus, petitioner was not denied effective assistance of counsel, and (2) sentence of life imprisonment without parole for first-degree kidnapping, involving petitioner aiding and abetting her live-in boyfriend's restraint and torture of her seven-year-old child, was not grossly disproportionate to her crime so as to violate Eighth Amendment prohibition against cruel and unusual punishment.

Affirmed.

Bright, Senior Circuit Judge, dissented and filed opinion.

1. Criminal Law ⇨641.13(2.1)

Trial counsel's decision not to pursue diminished-capacity defense was within range of professionally reasonable judgments and, thus, first-degree kidnapping defendant was not denied effective assistance of counsel, where counsel thoroughly investigated defense, and then made carefully reasoned decision not to pursue defense on basis that costs of that strategy outweighed its advantages. U.S.C.A. Const.Amend. 6.