

EXHIBIT G

**IN THE FLANDREAU SANTEE SIOUX TRIBAL COURT OF APPEALS
FLANDREAU, SOUTH DAKOTA**

FLANDREAU SANTEE SIOUX TRIBE,)

Plaintiff/Appellee)

v.)

SIOUX FALLS CONSTRUCTION)

COMPANY,)

Defendant/Third Party Plaintiff/)

Appellee)

v.)

FOX DRYWALL AND PLASTERY,)

INC.; GENE POLLINGER)

CONSTRUCTION, INC.; S AND S)

BUILDERS, INC.; G&D VIKING)

GLASS, INC.; H&R ROOFING OF)

SOUTH DAKOTA, INC.)

Third Party Defendants/Appellants))

**MEMORANDUM OPINION
AND ORDER**

Per Curiam (Chief Justice Patrick Lee, Associate Justice B.J. Jones and Associate Justice Frank Pommersheim)

I. Introduction

The Flandreau Santee Sioux Tribe entered into a written contract with Sioux Falls Construction to build an addition to the Tribe's Royal River Casino and Motel located on tribal trust land within the boundaries of the Flandreau Santee Sioux Reservation. Sioux Falls Construction entered into numerous subcontracts with various local businesses to perform much of the work contained in the master contract between the Flandreau Santee Sioux Tribe and Sioux Falls Construction Company.

In March 2008, the Flandreau Santee Sioux Tribe brought an action against Sioux Falls Construction Company in the Flandreau Santee Sioux Tribal Court arguing breach of contract and deficient performance. Sioux Falls Construction Company filed its timely answer in May

2008 and also asserted a counterclaim against the Tribe. Sioux Falls Construction Company did not contest the jurisdiction of the Tribal Court and in fact, in August 2008, it filed third-party complaints alleging breach of contract and contribution and indemnity against several subcontractors including: G&D Viking Glass, Inc.; Fox Drywall and Plastery, Inc.; H& R Roofing of South Dakota; Gene Pollinger Construction, Inc.; and S & S Builders, Inc. (referred to as the subcontractors).

In March 2009, the subcontractors filed a motion to dismiss the action against them asserting that the Tribal Court lacked subject matter jurisdiction. This motion was resisted by both Sioux Falls Construction Company and the Flandreau Santee Sioux Tribe. A hearing was held before the Honorable Sherman Marshall and an order and memorandum opinion was issued in July 2009. Judge Marshall's order denied the motion to dismiss and set the case for trial.

The subcontractors subsequently filed for a discretionary (interlocutory) appeal with the Court on the issue of the Tribal Court's subject matter jurisdiction over them. This Court granted the discretionary appeal and oral argument was heard on September 14, 2009.

II. Issues

This appeal raises a single issue, namely whether the Tribal trial court has subject matter jurisdiction over the dispute between Sioux Falls Construction Company and the subcontractors.

III. Discussion

In the course of the quite able oral argument presented to the Court, it became clear that there was an insufficient record developed in the trial court from which to confidently ascertain the precise relationship of the subcontractors to the Flandreau Santee Sioux Tribe. The nature of that relationship is, of course, the bedrock inquiry which is necessary to determine whether the

jurisdictional test established in the ‘pathmarking’¹ case of *Montana v. United States*, 450 U.S. 544 (1981) is satisfied.

In *Montana*, the Supreme Court articulated its now classic analytical framework for determining whether a tribal court might have jurisdiction over non-Indians:

To be sure, Indian Tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands. A tribe may regulate through taxation, licensing, or other means the activities of non-members who enter into consensual relationships with the tribes or its members, through commercial dealing, contracts, leases, or other arrangements. 450 U.S. at 565.

This test has remained at the core of jurisdictional analysis in Indian law. Twenty-five years of subsequent Supreme Court adjudication in this area has, unfortunately, proved rather unilluminating. Every significant case – *Strait v. A-1 Contractors*, 520 U.S. 438 (1997); *Nevada v. Hicks*, 538 U.S. 353 (2001); *Atkinson Trading Co. v. Shirley*, 532 U.S. 645 (2001); and most recently *Plains Commerce Bank v. Long Family Land and Cattle Company, Inc.*, 128 S.Ct. 2709 (2008) – appears to turn on the *unique* mix in each case of the nature of the parties – *i.e.*, whether Indian or non-Indian, the nature of the land involved, whether on trust or non-trust land, and the nature of contact between the parties involved. No reliable rule has emerged from the intense, case specific jurisprudence of the Supreme Court. This Court nevertheless distills from relevant precedent an analytical rubric that requires the trial court to develop a complete record as possible relative to the identity of the parties, the legal classification of the relevant landscape, and the nature of interaction between the pertinent parties.

Before proceeding to the actual analysis, a number of clarifying points are in order. All parties agree that this case is a case of first impression and there are no cases from any court – federal, state, or tribal – that are on point to the situation at hand namely whether there is tribal

¹ *Strait v. A-1 Contractors*, 520 U.S. 438, 445 (1997).

court jurisdiction in a dispute between a non-Indian contractor and non-Indian subcontractor for work performed for the Tribe on trust land within the reservation.² The relevant *Montana* test – by its text and interpretation by the United States Supreme Court – does not require consent, much less express consent, by the parties to tribal court jurisdiction. The relevant *Montana* language states:

A tribe may regulate through taxation, licensing, or other means the activities of non-members who enter consensual relations with the tribe or its members, through *commercial dealing*, contracts, leases, or other arrangements. 450 U.S. at 565 (emphasis added).

Thus in the case before us, the key inquiry is whether there is sufficient “commercial dealing” between the Flandreau Santee Sioux Tribe and the subcontractors to support an affirmative conclusion of “consensual relations” on which to rest a finding of tribal court jurisdiction. Such an undertaking can only be determined through an evaluation of the Tribe’s regulatory structure (*e.g.*, business license, building code requirements), relevant contract (and subcontract) provisions, and perhaps, most importantly, the testimony of officials of the Tribe, Sioux Falls Construction Company, and the various subcontractors as to their understanding of the “commercial dealing” relationship of the Tribe to the subcontractors in particular, which in turn, may be affected by these individuals and/or their mutual relationship to Sioux Falls Construction.

A few additional clarifications are in order. The single forum clause, which is standard in subcontracts between the prime contractor and the subcontractors, does not and cannot confer subject matter jurisdiction that does not otherwise exist. *Ninigret Development Corp. v. Narragansett Indian Wetuomuck Housing Authority*, 207 F.3d 21, 33 (5th Cir. 2000). Yet such a

² There is, perhaps, a single tribal court decision that is relevant. See *Gustafson v. Granite Re, Inc.* (Turtle Mtn. Ct. of Appeals #07-004, 2007). Since none of the parties cited or discussed this case, it is attached as Appendix A, and ought to be discussed by the parties on remand.

clause is potentially relevant in discerning the nature of the pertinent “commercial dealing” between the Flandreau Santee Sioux Tribe and the subcontractors. Insofar as Judge Marshall found the “single forum clause” to provide the *sole* basis for finding the necessary “consensual relations” to support tribal jurisdiction, he was incorrect as a matter of law.³

In sum, the Court finds that the relevant parties are to be identified for jurisdictional purposes as follows: The Flandreau Santee Sioux Tribe is (obviously) Indian and Sioux Falls Construction Company as well as *all* the subcontractors are non-Indian owned corporations organized under the state law of South Dakota. In addition, all the work to be performed under the actual contract and all the subcontracts was to be performed on trust land and was in the nature of building an addition to the Royal River Casino, which is owned and operated by the Flandreau Santee Sioux Tribe and is located within the exterior boundaries of the Flandreau Santee Sioux Reservation.

³ The trial court’s opinion states:

Article 3, Subparagraph 3.1 of the subcontracts provides in relevant part:

The Design-Builder and Subcontractor are mutually bound by the terms of this subcontract. To the extent the terms of the agreement between the Owner and Designer-Builder apply to the work of the Subcontractor, then the Design-Builder hereby assumes toward the Subcontractor all the obligations, rights, duties and remedies that the Owner assumes toward the Design-Builder. In an identical way, the Subcontractor assumes toward the Design-Builder all the same obligations, rights, duties and remedies that the Design-Builder assumes toward the Owner. ...

In addition, Article 11, Subparagraph 11.4, entitled Multiparty Proceeding provides:

The parties agree that to the extent permitted by Subcontract Document all parties necessary to resolve a claim shall be parties to the same dispute resolution proceeding. To the extent disputes between the Design-Builder and Subcontractor involve in whole or in part disputes between the Design-Builder and the Owner, disputes between the Subcontractor and Design-Builder shall be decided by the *same tribunal and in the same forum* as disputes between the Design-Builder and the Owner.

The Court finds these provisions in the subcontracts create a true and private consensual relationship between the Subcontractors and the Tribe. This consensual relationship, created by contract, is one of the two recognized exceptions in Montana in which the Tribe may exercise civil jurisdiction over the Subcontractors. Slip Opinion at 5.

Note also, in this regard, the problem created by the use of an industry wide form contract that fails to take into account essential Indian law principles. Such practice provides unfortunate proof of lawyers creating, rather than solving, problems.

What is not adequately present in the current record before this Court, as noted elsewhere, is sufficient evidence – documentary and testimonial – with which to reach a reliable conclusion as to the nature and extent of “commercial dealing” between the parties, especially between the Flandreau Santee Sioux Tribe and the subcontractors. It is this deficiency, which provides the basis of this remand to the trial court to conduct the necessary evidentiary hearing in accordance with the guidelines described above.

It is further to be understood that in light of the remand in this matter that no exhaustion of tribal court remedies has taken place as required by *National Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845 (1985) and *Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9 (1987). Thus there is *no* basis for an appeal to a federal court at this time, which would challenge this Court’s decision and remand. As noted in the *National Farmers Union* case:

We believe that examination should be conducted in the first instance in the Tribal Court itself. Our cases has often recognized that Congress is committed to a policy supporting tribal self-government and self-determination. That policy favors a rule that will provide the forum where jurisdiction is being challenged the first opportunity to evaluate the *factual* and *legal* bases for the challenge. 471 U.S. 856 (emphasis added).

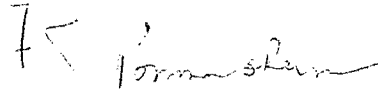
IV. Conclusion

For all of the above-stated reasons, this Court finds that the interlocutory appeal in this matter was improvidently granted, and in addition, reverses the finding of the trial court as to jurisdiction and remands for a more complete evidentiary hearing on the issue of the trial court’s subject matter jurisdiction.

IT IS SO ORDERED.

Dated this 2 day of October, 2009.

FOR THE COURT:



Frank Pommersheim, Associate Justice

FLANDREAU SANTEE SIOUX TRIBE
FLANDREAU SANTEE SIOUX TRIBAL COURT:
I HEREBY CERTIFY THAT I HAVE CAREFULLY
COMPARED THE WITHIN INSTRUMENT WITH THE
RECORD IN MY OFFICE AND THAT IT IS A TRUE
AND CORRECT COPY OF THE SAME AND THE
WHOLE THEREOF, AND THAT THE ABOVE IS
A TRUE AND CORRECT COPY OF THE FILING
THEREON;
DATED: November 13, 2009
BY: [Signature]
FSST COURT CLERK