

# **EXHIBIT H**

IN THE FLANDREAU SANTEE SIOUX TRIBAL COURT  
FLANDREAU, SOUTH DAKOTA

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FLANDREAU SANTEE SIOUX TRIBE,	)	CIV. 2008-16
Plaintiff,	)	
	)	
-vs-	)	
	)	
SIOUX FALLS CONSTRUCTION	)	
COMPANY, a South Dakota Corporation,	)	
Defendant, Third-Party	)	DECISION AND ORDER
Plaintiff,	)	
	)	
-vs-	)	
	)	
FOX DRYWALL & PLASTERING, INC.,	)	
et al,	)	
Third-Party Defendants.	)	

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The Flandreau Santee Sioux Tribe (Tribe), a duly recognized federal Indian tribe entered into a contract with Sioux Falls Construction, a non-Indian South Dakota corporation, for the construction of a 60 room expansion of the Royal River Motel which is owned and operated by the Tribe. The motel is attached to the Royal River Casino and is located on trust land on the Flandreau Santee Sioux Reservation. Sioux Falls Construction entered into identical subcontracts with Fox Drywall and Plastering, Inc., Gene Rollinger Construction, Inc., S and S Builders, Inc., G&D Viking Glass, Inc., and H&R Roofing of South Dakota. (Hereinafter Subcontractors). The Subcontractors are non-Indian corporations organized under the laws of South Dakota. The Subcontractors are headquartered outside the exterior boundaries of the Flandreau Santee Sioux Reservation.

In March 2008 the Tribe filed a complaint against Sioux Falls Construction alleging breach of contract, breach of warranty, deceit, bad faith, and breach of independent duty of habitability. Sioux Falls Construction answered and counterclaimed. Sioux Falls Construction then filed a third-party complaint against the Subcontractors alleging breach of contract and for contribution and indemnity. S and S Builders moved to dismiss the third-party complaint alleging lack of subject matter jurisdiction pursuant to § 4-2-2(1) of the Flandreau Santee Sioux Tribe Law and Order Code. The other Subcontractors joined the motion. The Court denied the motion and Subcontractors filed a discretionary (interlocutory) appeal. The issue on appeal was whether the Tribal trial court has subject matter jurisdiction over the dispute between Sioux Falls Construction Company and the Subcontractors. The Appellate Court reversed the finding of the Court as to jurisdiction and remanded for a more complete evidentiary hearing on the issue of the Court's subject matter jurisdiction.

— The Court held the evidentiary hearing on April 29, 2010. No official of the Tribe was called to testify. No representative from Sioux Falls Construction was called to testify. Representatives from each of the Subcontractors were called to testify. Each representative testified that they signed the subcontract and agreed to its terms and conditions and agreed to be bound by the provisions. Each representative testified that they knew that the project was construction work on the casino and motel that they knew was owned by the Tribe. Each representative knew that the work to be performed was on land owned by the Tribe. Each representative testified that they or a representative actually performed the work on the project. Each representative testified that its employees traveled on Tribal land to perform the work. Each representative testified that it brought materials and supplies to the project which was stored on site. There were weekly project meetings were held on site. In addition to testimony

the contract between Sioux Falls Construction and the Tribe admitted into evidence. The contract identifies the Flandreau Santee Sioux Tribe as the Owner of the project. The project is identified as the Royal River Casino & Motel 60 Room Motel Expansion Project which is located on the Flandreau Santee Sioux Reservation. Article 2.3.12 of the contract provides that “[a] *Subcontractor* is a party or entity retained by the Design-Builder as an independent contractor to provide the on-site labor, materials, equipment and /or services necessary to complete a specific portion of the work. . . .” Article 5.3 provides “[t]he Design Builder agrees to bind every Subcontractor . . . to all the provisions of this Agreement and the Contract Document as they apply to the Subcontractor’s . . . portions of the work.” Article 5.5 requires the Design-Builder and Subcontractors to “put forward their best efforts to utilize local workers during construction.”

The contracts between Sioux Falls Construction and Subcontractors also identified the project as the Royal River Casino & Motel 60 Room Motel Expansion and the Flandreau Santee Sioux Tribe as the Owner. Article 2.1 of the subcontracts provides that the Subcontractor provide all labor, materials, equipment and services needed. Article 2.3. provides “[t]he Subcontract Documents include this Agreement [and] the Owner-Design-Builder agreement . . . .” Article 3.1 provides that the Subcontractors assume toward the Design-Builder all the same obligations, rights, duties, and remedies that the Design-Builder assumes toward the Owner. Article 3.2 required the Subcontractors to use their best efforts to hire local workers, i.e., tribal members. Articles 5 and 10 allow the Subcontractors to initiate claims against the Owner for like claims by the Design-Builder. Article 8.3.1 provides “[u]pon acceptance of the Subcontract Work by the Owner . . . [and evidence of fulfillment of the subcontract] the Design-Builder shall incorporate the Subcontractor’s application for final payment . . . .” Article 11.4 requires that

disputes between Design-Builder and Subcontractors that involve disputes between the Design-Builder and Owner shall be decided in the same forum. Article 12.1 provides “[t]his agreement shall be governed by the law in effect at the location of the project.”

In its opinion the Appellate Court commented that the precise relationship of the Subcontractors and the Flandreau Santee Sioux Tribe is “the bedrock inquiry which is necessary to determine whether the jurisdictional test established in the ‘pathmarking’ (citation omitted) case of *Montana v. United States*, 450 U.S. 544 (1981) is satisfied.” The Appellate Court further noted the test articulated in *Montana*:

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.

The Appellate Court further opined:

[T]he 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. App. 2009-02 at 4.

The Appellate Court noted in its opinion this is a case of first impression and there are no federal, state, or tribal cases that are on point on the issue whether there is tribal 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. The Appellate Court cited

*Gustafson v. Granite Re, Inc.*, Turtle Mtn. Ct. of Appeals #07-004, 2007 as potentially relevant to the issue at hand and urges its discussion. The Court of Appeals in *Gustafson* noted that it is critical to understand the role each party played in the case. In *Gustafson* Defendant Turtle Mountain Indian Tribe was joined in the case as the governmental entity that provided the funding for a road project on the reservation. The general contractor, Martin & Son Construction, a non-party to the case, is or was an Indian owned business located on the Turtle Mountain Reservation. Plaintiff Gustafson (d/b/a Gustafson Oil and Propane) is a non-Indian merchant doing business on the Turtle Mountain Indian reservation. Gustafson provided petroleum products for the general contractor on the road project and alleged it was not paid for the products. Defendants Granite Re and Pate Bonding are Oklahoma Corporations that provided surety bonds for construction projects and in that capacity provided a surety bond to the general contractor for the project on the reservation. Gustafson also claimed that Granite Re insured the Tribe on the project by providing a Subcontract Labor and Material Payment Bond on the project. Defendants Goldleaf Financial and Jack Anderson were the guarantors of the bonds acquired by Granite Re to insure the project. Granite Re and Goldleaf are non-Indians with their principal places of business outside the reservation. When Gustafson was unable to collect from the general contractor it commenced an action in Tribal Court. The Defendants, with the exception of the Tribe, moved to dismiss on the grounds that the court did not have jurisdiction. Granite Re portrayed the litigation as a contract dispute between two non-Indians. The Court affirmed the lower court's denial of the motion as to Granite Re and Pate Bonding. The Court opined that "[a] non-Indian business entity that knowingly engages in business on an Indian reservation is not beyond the jurisdiction of the Tribal Court to enforce business promises." *Id* at P. 5. The Court went on to note Granite Re had knowingly bonded an Indian

tribe for a project to be carried out exclusively on an Indian reservation. The Court dismissed the action against Goldleaf Financial and Jack Anderson. The Court opined:

Nothing in the record reveals that Goldleaf guaranteed the performance of a bond issued by Granite Re knowing that the work to be performed was on an Indian reservation. Goldleaf's contacts with the Tribe and its members are too attenuated to warrant the exercise of jurisdiction over it and its cohort, Mr. Anderson. Even were there proof that Goldleaf was aware of the extent of the guarantee and the projects it guaranteed, its promises are too indirect to justify the Court's exercise of jurisdiction over it. *See MacArthur v. San Juan County*, 497 F.3d 1057 (9<sup>th</sup> Cir. 2007) (Tribe lacked jurisdiction over dispute involving a Clinic because there was no direct tribal relationship). *Gustafson* at 7.

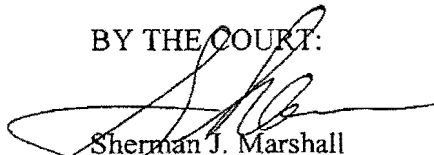
The Subcontractors liken their position to the guarantors in *Gustafson*: their relationship with the Tribe is too indirect to confer tribal jurisdiction. However, in this case the Subcontractors contacts with the Tribe are not too attenuated. They knew the work to be performed was on an Indian reservation. They in fact came onto the reservation and performed the work. In addition, the testimony and the contracts between the Tribe and Sioux Falls Construction and Sioux Falls Construction and the Subcontractors supports a finding that there is sufficient "commercial dealing" between the Tribe and the Subcontractors to support an affirmative conclusion of "consensual relations" on which to rest a finding of tribal court jurisdiction under *Montana*.

Based upon the foregoing it is hereby

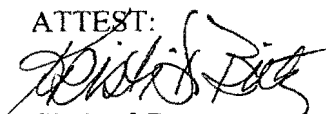
ORDERED, ADJUDGED AND DECREED that Defendants' motion to dismiss is DENIED.

Dated this 29<sup>th</sup> day of September, 2010.

BY THE COURT:

  
Sherman J. Marshall  
Tribal Court Judge

ATTEST:

  
Clerk of Court

FLANDREAU SANTI...  
FLANDREAU SANTI...  
I HEREBY CERTIFY THAT I HAVE...  
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:

BY:

FSST COURT CLERK

  
October 13, 2010