

SOUTH DAKOTA

Eighth Circuit: South Dakota Contractor's Tax Not Preempted

by Andrea Muse

Federal law does not preempt South Dakota from imposing its contractor's excise tax on work performed on an on-reservation casino by a non-tribal contractor, the Eighth Circuit held.

In its October 4 opinion in *Flandreau Santee Sioux Tribe v. Houdyshell*, the court held that neither the federal Indian Gaming Regulatory Act (IGRA) nor the Indian Trader statutes preempted South Dakota from imposing an excise tax on a contractor's gross receipts from the casino renovation and expansion, reversing a federal district court judge's October 2020 decision.

"It is incredible to see federal courts jump through analysis labyrinths to conclude state jurisdiction in Indian Country, whether it be through the confused and blatantly incorrect musings of [Supreme Court] Justice [Brett] Kavanaugh in [*Oklahoma v. Castro-Huerta*] or here with the Eighth Circuit," Derek Red Arrow Frank of Stokes Lawrence PS told *Tax Notes* in an October 4 email.

Red Arrow Frank added that a non-Indian entering the boundaries of a tribe's territory must be considered subject to the jurisdiction of the sovereign Indian Nation that resides there. "Here, the tax imposed should be collected at the discretion of the tribe to be used by the tribe, as the construction took place in the tribe's territory," Red Arrow Frank said. "Any other result is a continuation of a paternalistic dialogue shaped to deteriorate tribal sovereignty."

In an October 4 emailed release, the Flandreau Santee Sioux Tribe said that the decision was contrary to long-existing federal precedent and it ignored critical evidentiary findings made by the district court.

"The Tribe is concerned about the impact this decision will have on tribal sovereignty and self-sufficiency," the release said. "The decision today continues to perpetuate the anti-tribal policies and practices of the State of South Dakota, and directly impacts the ability of the Tribe to provide economic development on its Reservation."

The tribe's executive committee is considering appealing to the U.S. Supreme Court, according to the release.

The South Dakota attorney general's office declined to comment on the case.

The Flandreau Santee Sioux Tribe, which owns and operates a casino on the Flandreau Indian Reservation in South Dakota, contracted with Henry Carlson Co. as the general contractor and construction manager for a \$24 million renovation and expansion project.

The Carlson company requested an exemption from the state's 2 percent contractor's excise tax, which the Department of Revenue denied. The tribe submitted a second exemption request, which was also denied. Carlson remitted tax under protest and asked that the state grant a refund to the tribe as the entity that bore the cost of the tax. The refund request was denied, and the tribe filed suit.

Judge Karen E. Schreier of the U.S. District Court for the District of South Dakota concluded in 2018 that the tax was expressly exempted by the IGRA. The Eighth Circuit reversed and remanded the case in a September 2019 decision, finding that the IGRA did not expressly preempt tax. The court also concluded that the tax was not preempted under the balancing test in the U.S. Supreme Court's 1980 decision in *White Mountain Apache Tribe v. Bracker*.

On remand, Schreier held that the tax was preempted, after concluding that the state's interest in imposing the tax did not outweigh the tribal and federal interests reflected in the IGRA and the Indian Trader statutes under the balancing test in *Bracker*.

Schreier also concluded that the tax was expressly preempted by the Indian Trader statutes because Congress has not said otherwise.

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But in its current ruling, the Eighth Circuit concluded that the relevant federal and tribal interests under the IGRA or the Indian Trader statutes did not outweigh the state's interest in imposing the tax. The court agreed with South Dakota that the extent of federal regulation and control of the construction and maintenance of gaming facilities in the IGRA provisions was minimal.

Saying that a “single sentence regarding the construction and maintenance of a gaming facility can hardly be said to constitute extensive regulation over casino construction,” the court added that the IGRA’s stated purposes are for the operation and regulation of gaming, “not for all activities tangentially related to gaming.”

The court also found that the “state has a significant interest in raising revenues for essential government services” and the tribal interests are minimal. The court said there was no evidence that the imposition of the tax would impede the tribe’s ability to conduct its gaming activities. It added that the revenue impact the tribe claimed from the additional slot machines that it could have purchased if it were not required to pay the tax was too indirect and insubstantial to warrant preemption.

Concluding that the Indian Trader statutes did not expressly preempt the tax, the court found that the statutes “are not a comprehensive federal regulatory authority on casino construction projects” and that the excise tax is a nondiscriminatory tax applied to “all gross receipts of contractors who perform construction work across South Dakota.”

The court found that the federal and tribal interests reflected in the Indian Trader statutes were minimal for the same reasons it found under the IGRA analysis, saying that the tribe had failed to show that the one-time contractor’s tax would have more than a de minimis impact.

Judge Jane Kelly said in a dissenting opinion that she saw “no clear error in the district court’s factual findings or error in its legal conclusions,” noting that the district court undertook a particularized examination of the issue and heard evidence from both sides during a six-day bench trial.

Countering the majority’s conclusion that the evidence of extensive federal involvement in the renovation project did not show that the involvement occurred because of the IGRA, Kelly argued that the act “allowed for that involvement by requiring federal oversight through resolution approvals.”

“By facilitating federal involvement and encouraging tribal management, IGRA’s statutory scheme promotes federal interests in both public safety as well as tribal self-sufficiency,” Kelly said.

She also noted that the district court found that the tax impaired the tribe’s ability to remain competitive with a newer, larger casino in the area by reducing the number of slot machines it could buy.

In *Flandreau Santee Sioux Tribe v. Houdyshell* (No. 20-3441), the tribe is represented by attorneys with Johnson, Janklow, Abdallah & Reiter LLP; Peebles Kidder; and the Flandreau Santee Sioux Tribe. ■