Flandreau Santee Sioux Tribe v. Houdyshell, ___ F.4th ___, 2022 WL 4870417 (8th Cir. Oct. 4, 2022)

- **Holding:** State gross excise tax imposed on a nontribal general contractor supplying services and materials in connection with an on-reservation casino renovation was not preempted under the *Bracker* federal, tribal and state interest-balancing test by either the Indian Gaming Regulatory Act or the Indian Trader Statutes.
- **Summary:** This decision arises in an appeal from the judgment in *Flandreau Santee Sioux Tribe v. Terwilliger*, 496 F. Supp. 3d 1307 (D.S.D. 2020), summarized at https://docs.google.com/document/d/1uHM-6xovG92aw_ZzV6eIud_Da4QiAvAx/edit. The district court held there that a South Dakota gross excise tax imposed on nontribal general contractor supplying services and materials in connection with an on-reservation casino renovation, although not expressly preempted by the Indian Gaming Regulatory Act, was impliedly preempted under the interest-balancing test prescribed under *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980), expressly prohibited under the Indian Trader Statutes and, alternatively, impliedly preempted under the latter. Its decision, issued on remand after a prior reversal of a summary judgment ruling in the Plaintiff Tribe's favor (*Flandreau Santee Sioux Tribe v. Haeder*, 938 F.3d 941 (8th Cir. 2019), summarized at https://docs.google.com/document/d/118OVU-LiJgNYrjDsuqz4s99SDLljh1Yc/edit), followed a six-day trial and contained lengthy factual findings. The gross proceeds tax amount in question was $384,436 and was contractually passed through to the Tribe by Henry Carlson Company, the construction contractor. The State appealed, and a majority of an Eighth Circuit three-judge panel reversed. The majority opinion methodically applied the *Bracker* interest-balancing test, first with IGRA and then with the Trader Statutes.
  - IGRA. The majority found that, as to the federal interest, that
    > [t]he district court's conclusion was based in part on its reliance on a specific IGRA provision, 25 U.S.C. § 2710, which, in subsections (b)(2)(E), (d)(2)(A), and (d)(2)(B), provides that a tribe must adopt, and the National Indian Gaming Commission Chairman must approve, absent specified exceptions, an ordinance or resolution stating that "the construction and maintenance of the gaming facility, and the operation of that gaming is conducted in a manner which adequately protects the environment and the public health and safety."

  It distinguished this "single provision" from other cases in which the interest-balancing test resulted in preemption, *e.g.*, *Ramah Navajo School Board, Inc. v. Bureau of Revenue*, 458 U.S. 832, 837 (1982), where the involved federal regulation was "'comprehensive and pervasive.'" Nor did the general "purposes" provision in IGRA, 25 U.S.C. § 2702, add meaningful flesh to the federal-interest bone, because, "[a]lthough § 2702 undoubtedly describes the federal interests advanced by IGRA, the district court ignored the fact that the stated purposes are 'for the operation of gaming,' 'for the regulation of gaming,' and 'for gaming, not for all activities tangentially related to gaming" such as "tribal casino construction." Nor did the federal government's involvement in the construction process make a difference given that nothing established "it occurred due to the dictates of IGRA." No less unavailing was the Tribe's contention that the tax interfered with its economic development since the payment of the tax deprived it of the use of that amount to purchase additional slot machines. The majority opined that "the

connection between the tax and an increase in revenue from additional slot machines is too attenuated to conclude that the excise tax is not a one-time tax or that it 'substantially undermines the Tribe's ability to generate revenues from ... gaming.'"

Turning to the tribal interest, the majority disagreed with the district court that the tax's imposition embodied more than a de minimis financial burden on the Tribe. It characterized as "speculat[ive]" the lower court's conclusion "that, had the Tribe not been forced to pay the $384,436 excise tax to the State, it would have used its funds to purchase 19 additional slot machines, and the additional machines would have brought in revenue of approximately $1.24 million annually, representing a 10% increase in the Casino's earnings." Nevertheless, and "[m]ore significantly, even if it were a certainty that the Tribe would have used the amount of the excise tax to purchase 19 new slot machines, resulting in a $1.24 million revenue increase, this financial impact of the tax remains 'too indirect' and 'too insubstantial' to weigh in favor of preemption." Similarly unhelpful to the Tribe's cause was the district court's determination "that the excise tax interferes with the Tribe's Tax Act and thus the Tribe's right to self-governance." In the majority's view, "[t]he existence of a financial incentive for the Tribe to choose to enact an excise tax under its Tax Act does not interfere with the Tribe's interest in self-governance because the ultimate decision of whether to impose an excise tax, or any other tax, or refrain from imposing of a particular tax, belongs to the Tribe." The majority also found unpersuasive the determination "that the tax interfered with the Tribe's ability to self-govern by impeding the Tribe's performance of essential government functions because, due to other tribal buildings' state of disrepair, the Tribe needed to use the Casino administration building for tribal government meetings." Rather, it responded, "[t]his consequence of the tax is another indirect and downstream effect that cannot provide a basis for preemption."

The majority parted ways with the district court's test for assessing the state interest. The latter held that "that the State's interest in being reimbursed for the services it provided was minimal because the State failed to establish that sufficient State services, funded through the general fund, were used in connection with the construction project." The majority, however, defined the relevant state interest in substantially broader terms:

> "[F]or a generally-applicable tax, a court may credit the services provided by the State to the Tribe more generally as 'related' to the tax," ... and the evidence at trial demonstrated that the State's general fund provides various services throughout South Dakota, including Moody County where the Casino is located, that generally benefit the Tribe, its members, and Henry Carlson Company and its employees. Among these services is the funding of general operations of school districts, funding of nutritional programs for school breakfasts and lunches, and maintenance of the State's colleges and special schools. More significantly, the State uses money from the general fund to provide matching state aid for federal social services like health insurance for children and the administration of federal programs like Medicaid. These services are generally available to tribal members and employees of Henry Carlson Company, and while they are not directly related to the construction project, they nevertheless represent a strong state interest in implementing the tax.

Consequently, while "[w]e do not disagree with the district court that there was no clear nexus between the taxed activity and the government functions provided,] ... we disagree

with the district court that the State provided nothing of value in return for the tax because the State provided generally available benefits to its residents, which includes tribal members and employees of Henry Carlson Company." Lastly, the majority rejected the district court's conclusion that the fact South Dakota had entered into tax agreements with various tribes cut against the state interest "in uniformly applying its tax laws" because such agreements "do[] not undermine the State's interest in administering its tax code and applying taxes without additional case-by-case exceptions."

- Indian Trader Statutes. The majority found no need to address the State's argument that the Trader Statutes did not apply to the Carlson contract given the fact that the Tribe's preemption claim failed under *Bracker* analysis when applied against the Trader Statutes' regulatory backdrop. Its analysis tracked in large measure with that under IGRA. The majority began by holding that "there is simply no comprehensive and pervasive regulatory scheme governing casino construction projects that can be found in the Indian Trader Statutes." It later added that those Statutes "provide extensive regulation and control over just that: trading. That the Indian Trader Statutes may in some way touch upon casino construction by imposing certain licensing requirements on those who perform work on the project hardly demonstrates an extensive federal regulatory scheme to regulate casino construction." The majority saw the affected tribal interest as insignificant "[b]ecause the Tribe has failed to show that the financial burden of the excise tax is more than *de minimis*[.]" It mext quoted from *Haeder* for the proposition that "the State's legitimate interests in raising revenues for essential government programs that benefit the nonmember contractor-taxpayer in this case, as well as its interest in being able to apply its generally applicable contractor excise tax throughout the State" were "sufficient" to justify the excise tax.

The comparatively brief dissent walked through federal, tribal and state interests with an eye on IGRA as the background statute and found the district court's findings supported by the record. As it explained generally, "[o]n remand, the Tribe presented evidence demonstrating extensive federal involvement in the project and a substantial financial burden on the Tribe[,]" and "[t]he district court made sound findings based on that evidence in a thorough, lengthy opinion."

- **Relevant (2022) Deskbook Section:** 5:18 n.7; 11:10 nn.31-34; 12:50 n.1
- **Comment:** This decision breaks no doctrinal ground. However, it does reaffirm that, as an ordinary matter, *Bracker* interest balancing will leave intact generally applicable state taxation of nonmembers doing business with tribes or their members unless (1) the tax conflicts with a federal statutory scheme "comprehensively" regulating the activity at issue or (2) the State provides no governmental services that benefit the nonmember. Those services need not have an immediate connection to the nonmember's performance of the involved contract.