

Practice Update

New Eighth Circuit Decision Benefits Tribal Tax Codes

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Tribal Tax Codes are typically designed to impose tax on only those on-reservation transactions that the state is constitutionally prohibited from taxing. That way, a nonmember customer is not subjected to both tribal and state taxes on his on-reservation purchases. Determining which on-reservation transactions may be taxed by the state can be challenging.

However, the Eighth Circuit's recent decision in *Flandreau Santee Sioux Tribe v. Noem*, 938 F.3d 928 (8th Cir. 2019), simplifies that determination for tribes engaged in gaming. While state taxation of alcohol, food, hotel rooms, and merchandise sold at the tribe's casino is not expressly prohibited by the Indian Gaming Regulatory Act (IGRA), 25 U.S.C. §§ 2701-2721, the Eighth Circuit held that IGRA represents a comprehensive, exclusive, and pervasive regulation of Indian gaming, and a state tax on the sale of amenities that contribute to the economic success of the gaming activities is preempted under *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980).

In determining whether the state can apply its tax to an on-reservation transaction, *Bracker* requires the court to balance the competing federal, state, and tribal interests. However, where the federal regulation of an activity is comprehensive, exclusive,

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and pervasive, the state's intrusion into the federal regulatory scheme cannot be justified by the state's generalized interest in raising revenues. According to *Bracker*, a state tax that interferes or is incompatible with the goals of such comprehensive, exclusive, and pervasive regulation is preempted unless it serves a "specific, legitimate regulatory interest" or is "narrowly tailored" to compensate the state for "governmental functions" it performs for those "upon whom the taxes fall" in connection with the activity being taxed. A state tax of general application, such as a state sales or use tax, cannot satisfy the "narrowly tailored" requirement because it funds off-reservation services, such as law enforcement, the state provides for its residents in general.

In *Flandreau*, the court held that a state tax on sales of amenities that contribute to the success of the gaming activities is preempted because it interferes with the goals of IGRA (i.e., promoting economic development, self-sufficiency, and strong tribal governments) by increasing the costs to the tribe's casino patrons or reducing the tribe's revenues from the sales of these items.

The *Flandreau* decision stands in stark contrast to the Second Circuit's holding in *Mashantucket Pequot Tribe v. Town of Ledyard*, 722 F.3d 457 (2nd Cir. 2013). That case involved a state and local property tax on lessors of slot machines used for Indian gaming. Although the legal incidence of this tax rests with the lessors, it burdened the tribe's gaming activities because the lessors had the right to pass it through to the tribe. The Second Circuit upheld the tax after balancing the competing federal, state, and tribal interests under a test that *Bracker* prescribes only when the tax burdens an activity that is not comprehensively, exclusively, and pervasively regulated by federal law. In holding that the state's interest in maintaining a uniform taxing system outweighs the economic impact of the tax on the tribe's gaming activities, the Second Circuit ruled that IGRA's regulation of Indian gaming is not

comprehensive, exclusive, and pervasive. Under *Mashantucket Pequot*, the state may tax the tribe's sales of goods (at least goods such as beer, wine, soda, and merchandise to which the tribe has not added value) that contribute to the success of the tribe's gaming activities. Under *Flandreau*, it may not.

There is now a conflict between the Second and Eighth Circuits on the issue of whether IGRA represents a comprehensive, exclusive, and pervasive regulation of Indian gaming. Hopefully, the Supreme Court will resolve that conflict based on the Eighth Circuit's reasoning.

Akerman maintains a comprehensive guide on the states' rights to tax on-reservation transactions. For more information on this resource, please contact [Glen Stankee](#).

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