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## GREEN MEANS GO: TRIBES RUSH TO REGULATE CANNABIS IN INDIAN COUNTRY

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IN INDIAN COUNTRY

*By Sungeun Julie Kim and Jessica Roberts*

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*By Julie Sungeun Kim\* and Jessica Roberts\**

I. INTRODUCTION

Until recently, the federal government's policy towards states legalizing cannabis<sup>1</sup> was tacitly permissive. During President Obama's administration, the United States Department of Justice (DOJ) issued three memos in less than five years stating that the

\* J.D. Candidate, 2020, Seattle University School of Law. I am Korean-American and do not have a tribal affiliation. As a Black Studies minor at University of California, Santa Barbara, I learned that a commitment to promoting social justice for marginalized groups cannot, and must not, ignore American Indigenous communities. As the movement for federal legalization for recreational marijuana is surfacing for the 2020 Elections, the possibility of cultivating and selling marijuana on Indian Land should not be overlooked. Tribes should be given the same opportunity for economic growth from the marijuana business, although I am not commenting on whether each tribe should or should not take up on the opportunity. I am advocating that the tribes should, at the very least, have the economic opportunity as any other private business owner for upward mobility. Thank you Min T. Kim, Jum S. Kim, and Linda Kim for your endless love and support. You are the reasons why I am able to be here. Thanks to everyone who encourage me to seek the truth, show me love to carry on another day, and inspire me to give back what I have received.

\* J.D. Candidate, 2020, Seattle University School of Law. I am a member of the Cherokee Tribe, work with Seattle University's Indigenous People's Institute, and prior to law school volunteered at Fayetteville, North Carolina's Office of Indian Education. One of my career goals is to provide legal support to tribal and member-owned businesses. This paper is a holistic look at how some tribes are approaching cannabis in Indian Country. Although I am making arguments, I am not making judgments about the range of policies tribes enact in the name of protecting their members and their sovereignty. Thank you to Ben Roberts, Thomas Peyton, and Debora Peyton for your support, encouragement, and advice. You made law school possible for me. Thank you also to Olivia for giving me perspective. Thank you to Brooke Pinkham, Staff Director of the Center for Indian Law and Policy, for her support and guidance specific to Indian Law opportunities over the past years. I also appreciate Bree Black Horse's insight and feedback on a previous version of this work.

<sup>1</sup> Cannabis is a term referring to multiple psychoactive preparations of the cannabis plant. The plant is commonly used for marijuana, and herbal form of cannabis. Marijuana is prepared from the cannabis plant's dried flowering tops and leaves, where the cannabinoid delta-9-tetrahydrocannabinol (THC) is found. THC produces the psychoactive effects users seek. In this paper, the term "cannabis" will be used when describing the industry and broad range of products derived from cannabis. "Marijuana" is used when an individual, law, or policy refers to the substance specifically. World Health Organization, *The health and social effects of nonmedical cannabis* USE, 2-3 (2016).

federal government would not interfere with state laws legalizing cannabis. But where did the federal government’s position leave tribes? Arguably, if tribes are located in a state that legalizes the substance, then Native communities are also free to participate in the “Green Rush.”<sup>2</sup> Indeed, the DOJ issued a 2014 memo confirming precisely this position. However, the federal government has also consistently maintained that because tribes are subject to federal law, cannabis is illegal on tribal lands throughout the United States. Then, in January 2018, the DOJ rescinded the Obama-era memos and publicly recommitted itself to prosecuting the possession, cultivation, and distribution of marijuana. But by then, some tribes had already changed their own laws to legalize cannabis on their lands. Others had formed compacts with states allowing tribes to self-regulate cannabis in Indian Country and invested millions in opening tribally-owned cannabis dispensaries. The question of to what extent may tribes participate in the legal cannabis market has never been so complex, and also never so distillable to a single point: *now what?*<sup>3</sup>

Much of the scholarship that exists already on cannabis in Indian Country explores the answer to this jurisdictional puzzle through the lens of federalism and states’ rights.<sup>4</sup> While this discussion is critical to understanding what tribes stand to gain or lose by participating in the cannabis industry, it is also time to bring tribal perspectives to the forefront. This article considers how the inconsistent federal policy toward state legalization of cannabis creates an opportunity for tribes to assert their sovereignty. Additionally, this article highlights the central issues for tribes when deciding whether to legalize cannabis. Many tribes transitioned

<sup>2</sup> The “Green Rush” refers to widespread efforts among entrepreneurs and investors to capitalize on the legal cannabis industry.

<sup>3</sup> At the time this paper was undergoing the final stages of publication, the United States House Judiciary Committee passed a historic federal cannabis legalization bill on November 20, 2019. Ending Federal Marijuana Prohibition Act of 2019, H.R.1588, 116th Cong. (2019–2020). The bill would remove cannabis from the federal Controlled Substance Act. *Id.* at § 3. The full House will likely not consider the bill until 2020 before going on to the Senate. Given that the Republican Party currently controls the Senate, the authors predict this bill will face a long road of challenges and compromises. In the meantime, the issues addressed in this article will continue to exist for tribes.

<sup>4</sup> See Lauren Adornetto, *Indian Country Complexities and the Ambiguous State of Marijuana Policies in the United States*, 65 BUFF. L. REV. 329 (2017); Melinda Smith, *Native Americans and the Legalization of Marijuana: Can the Tribes Turn Another Addiction into Affluence?*, 39 AM. INDIAN L. REV. 507 (2015)

from being decidedly against cannabis in Indian Country to lobbying state and federal governments for their rights to enter the market. Alternatively, other tribes are fighting for their right to keep cannabis out of Indian Country, even if the state legalizes the substance.

What emerges from these examples of tribal decision-making about legalizing cannabis is a tribe-focused argument: tribes should approach “The Green Rush” as an exercise of their sovereignty. Regardless whether a tribe decides to legalize or criminalize cannabis on tribal lands, the very debate and decisions involved in doing so protects tribal sovereignty at the state and federal level. This, in turn, encourages the federal government to decisively clarify its cannabis policy in Indian Country. As some tribes’ experiences with legalization have already illustrated, tribes must restrict their sovereignty related to cannabis, or risk having state and federal governments limit tribal authority in this area.

In Part II, this paper will explain tribal sovereignty in relation to the federal and state governments, and the history of regulating marijuana in federal law, state law, and in Indian Country. Despite the progressive trend in legalizing marijuana in states, marijuana is still classified as a schedule I drug under federal law. Even with the issuance of the DOJ’s Cole and Wilkinson Memos, the status of marijuana activity on reservation land is unclear and has proven to be disastrous. Then, this paper will consider the unclear impact of the Cole Memo on the cultivation and use of cannabis in Indian Country. The DOJ responded to tribal leaders’ request for specific guidance a year later in the Wilkinson Statement, but the answer amounted to referring tribes to the Cole Memo. Subsequently, states and tribes alike relied on these DOJ policies to undertake changes in law, start businesses, and enact their own regulatory and enforcement schemes. Then, in 2018, the DOJ rescinded the guidance. The result was an even more confusing void in federal cannabis policy where states and tribes had legalized. It is against this nebulous policy backdrop that tribes began to make their own decisions about criminalizing or legalizing cannabis in Indian Country.

In Part III, the paper will shift to tribal perspectives about the relative advantages and disadvantages of tribes participating in the cannabis market. First, this article will analyze how states’ attitudes toward legalizing cannabis condition the possibility for tribal

cannabis activity in a specific state. Second, the article will explore intratribal and intertribal debate about legalizing cannabis as an exercise of tribal sovereignty, tracing the evolution of most tribal leader positions from against to in favor of legalization. The paper will outline the specific reasons tribes offer for banning cannabis, and then reasons for legalizing and claiming a piece of the market for Native enterprises. Finally, this section looks at specific case studies of two Washington state tribes who took different approaches to cannabis, but both for the purpose of protecting their sovereignty.

In Part IV, this paper will conclude by presenting two arguments. First, this paper argues that the community that is hurt most by the federal government's failure to craft a stable marijuana policy is the tribes. Thus, Congress should establish a clear and viable policy to address the legality of marijuana activity in Indian country and to end a power struggle between the states and the federal government. Second, while other scholarship concludes that the federal government needs to clarify its policy for tribes, this paper goes further by examining how tribes themselves are legislating cannabis. This article argues that tribes can use the current indeterminate federal policy to their advantage in controlling and preserving their sovereignty vis-à-vis the federal and state governments. Indeed, whether tribes choose to legalize or ban cannabis is not the question. Rather, tribes' willingness to engage in these debates and make policies that are sometimes counter to those of the state or the federal government is an exercise of their tribal sovereignty. The Green Rush will not be the final economic frontier, but it is an opportunity for tribes to condition, rather than be subjected to, laws and policies governing cannabis in Indian Country.

## II. FEDERAL LAW ON THE CULTIVATION AND USE OF CANNABIS IN INDIAN COUNTRY

### A. *Tribal Sovereignty in Relation to Federal Cannabis Policy*

Federal courts have jurisdiction over all civil actions brought by any Indian tribe under 28 U.S.C. § 1362, wherein the action arises under the Constitution, laws, or treaties of the United States.<sup>5</sup> The

<sup>5</sup> 28 U.S.C § 1362 (1966).

federal government recognizes tribal nations as “domestic dependent nations,” and has a historical policy of encouraging Tribal self-government that allows tribes to retain their sovereignty over their members and lands.<sup>6</sup> However, tribal sovereignty has been, and continues to be, a weak force in the development of Native American policy because of the residual effects of being denied U.S. Citizenship under the Fourteenth Amendment up until the nineteenth century.<sup>7</sup>

The relationship and dynamic between the federal government and tribes has been, and still is, uniquely uncomfortable: Tribes cannot voluntarily relinquish their sovereign status on their own and cannot own their land.<sup>8</sup> Tribal lands are held “in trust” with the federal government, and any additional land acquired must also be held in trust with the approval of the federal government.<sup>9</sup> In short, Native Americans cannot own land, so they cannot build equity, which ultimately prohibits them from numerous opportunities and benefits.

In turn, the federal government has the sole power to extinguish a tribe’s possession,<sup>10</sup> and the exclusive authority to establish jurisdiction over tribes. Further, the U.S. Congress facilitates commerce between the states and the tribes,<sup>11</sup> limiting the tribes’ sovereign immunity.<sup>12</sup> The federal government’s one-sided control continues to affect court decisions regarding a conflict of sovereignty with federal laws,<sup>13</sup> and constitutional provisions and

<sup>6</sup> LONNIE E. GRIFFITH, JR., 41 AM. JUR. 2DAM. JUR. 2D *Indians* § 11 (2015) (2d ed. 2019).

<sup>7</sup> Charles F. Wilkinson, *American Indians, Time and the Law* (Yale Univ. Press 1987).

<sup>8</sup> Joseph P. Kalt & Joseph W. Singer, *Myths and Realities of Tribal Sovereignty: The Law and Economics of Indian Self-Rule* (March 18, 2004). KSG, Working Paper No. RWP04-16, March 18, 2004), [https://scholar.harvard.edu/files/jsinger/files/myths\\_realities.pdf](https://scholar.harvard.edu/files/jsinger/files/myths_realities.pdf) [<https://perma.cc/H24L-7TCP>].

<sup>9</sup> Natural Resources Conservation Service, United State Department of Agriculture, *Definition of “Indian Country”*, [https://www.nrcs.usda.gov/Internet/FSE\\_DOCUMENTS/nrcs141p2\\_024362.pdf](https://www.nrcs.usda.gov/Internet/FSE_DOCUMENTS/nrcs141p2_024362.pdf) [<https://perma.cc/DA64-2SR9>].

<sup>10</sup> *Johnson v. M’Intosh*, 21 U.S. 543 (1823).

<sup>11</sup> U.S. Const. art. I, § 8, cl. 3 (Congress has power to regulate commerce with the Indian Tribes).

<sup>12</sup> KALT & SINGER, *supra* note 8, at 18.

<sup>13</sup> Teresa Hawkinson Dawkins, *Can A Sioux Be Sued for Embracing Mary Jane: Tribal Sovereign Immunity Concerns Arising From the Legalized Marijuana Trade on Indian Land*, 3 ST. THOMAS J. OF COMPLEX LITIG., Fall 2017. [260](https://www.stu.edu/Portals/law/docs/academics/student-</a></p></div><div data-bbox=)

subsequent interpretations by the Supreme Court<sup>14</sup> are often summarized in three principles of U.S. Indian law: territorial sovereignty, plenary power doctrine, and trust relationship.<sup>15</sup> Under these longstanding principles, the courts determined the scope of inherent tribal authority rather than leaving Indian law matters to Congress, while Congress is capable of extinguishing tribal powers under the plenary power doctrine.<sup>16</sup>

### 1. Early Cannabis Prohibition in the United States

Medicinal preparations of cannabis became available in American pharmacies in the 1850s after an introduction in Western medicine in 1839.<sup>17</sup> Recreational cannabis was listed as a “fashionable narcotic” in 1853,<sup>18</sup> and in 1906 the U.S. Congress required that cannabis, among other drugs, be accurately labeled with contents under the Pure Food and Drug Act.<sup>19</sup> States began to form legislation to regulate pharmaceutical cannabis<sup>20</sup> and the Federal government imposed an excise tax on sales of hemp under the Marihuana Tax Act of 1937.<sup>21</sup> The Act effectively made possession or transfer of “marihuana”<sup>22</sup> illegal throughout the

orgs/jcl/volumes/3/DawkinsTeresaCanASiouxbySuedforEmbracingMaryJane.pdf [https://perma.cc/GC7P-SR7S].

<sup>14</sup> See, e.g., *Cherokee Nation v. State of Ga.*, 30 U.S. 1, 10 (1831) (holding the Cherokee nation dependent, with a relationship to the United States like that of a “ward of its guardian”); *Worcester v. State of Ga.*, 31 U.S. 515 (1832) (which laid out the relationship between tribes and the state and federal governments, stating that the federal government was the sole authority to deal with Indian nations), *abrogated by* *Nevada v. Hicks*, 533 U.S. 353 (2001).

<sup>15</sup> Michalyn Steel, *Plenary Power, Political Questions, and Sovereignty in Indian Affairs*, 63 UCLA L. REV. 666 (2016).

<sup>16</sup> *Id.* at 702.

<sup>17</sup> Dale H. Gieringer, *The Forgotten Origins of Cannabis Prohibition in California*, 26 *J. OF CONTEMP. DRUG PROBS.* 237, Summer 1999. (summarized online at <http://www.canorml.org/background/caloriginsmjproh.pdf> [https://perma.cc/9X6N-EPGE]).

<sup>18</sup> *Our Fashionable Narcotics*, <https://www.nytimes.com/1854/01/10/archives/our-fashionable-narcotics.html>.

<sup>19</sup> 21 U.S.C. Chp.1, Subch. 1, Federal Food and Drug Act of (1906). (Congress wanted to strengthen requirements of ale and remove loopholes in pisco law; Regulation of too lax pharmacy practice by the FDA.)

<sup>20</sup> Massachusetts (1911), Towns-Boylan Act in New York (1914), Maine (1914), The Poison Act (1907), Wyoming (1915); Texas (1919); Iowa (1923); Nevada (1923); Oregon (1923); Washington (1923); Arkansas (1923); Nebraska (1927); Louisiana (1927); and Colorado (1929).

<sup>21</sup> Marihuana Tax Act of 1937, Schaffer Library of Drug Policy. [https://perma.cc/4FMG-SWXQ].

<sup>22</sup> The spelling of marijuana has changed since then.



United States under federal law, excluding medical and industrial uses.<sup>23</sup> In 1969, the U.S. Supreme Court held the Marihuana Tax Act to be unconstitutional.<sup>24</sup> In response, Congress passed the Controlled Substances Act as Title II of the Comprehensive Drug Abuse Prevention and Control Act of 1970, which repealed the Marihuana Tax Act.<sup>25</sup>

Today, the Controlled Substances Act (CSA) establishes federal U.S. drug policy under which the manufacture, importation, possession, use and distribution of certain substances is regulated.<sup>26</sup> The legislation created five schedules (classifications) with varying qualifications for a substance to be included in each.<sup>27</sup> Two federal agencies, the Drug Enforcement Administration (DEA) and the Food and Drug Administration (FDA), determine which substances are added to or removed from various schedules.<sup>28</sup> Schedule I substances are labeled to have a high potential for abuse, have no currently accepted medical use in treatment in the country, and lack acceptable safety for use of the drug under medical supervision.<sup>29</sup> As of this article, marijuana remains illegal under federal law as a Schedule 1 drug.<sup>30</sup>

## 2. Changes and Current State Law for States

The CSA has become the main clash of state and federal laws, as it affected how policymakers, courts, and local states questioned the preemptive power of federal drug laws.<sup>31</sup> In November 2012, Washington State became the first state to pass by initiative the legal sale and possession of cannabis for both medical

<sup>23</sup> Marihuana Tax Act of 1937, *supra* note 21. *Id.*

<sup>24</sup> *Leary v. United States*, U.S., 395 U.S. 6, 12 (1969).

<sup>25</sup> Comprehensive Drug Prevention and Control Act of 1970, Pub. L. No. 91-513, 84 Stat. 1236.

<sup>26</sup> 21 U.S.C. §§ 801–904 (1971).

<sup>27</sup> U.S. Dep't of Justice, Drug Enforcement Administration (Dec. 12, 2019), <https://www.dea.gov/controlled-substances-act> [<https://perma.cc/QC66-AQ8S>], <https://www.dea.gov/drug-scheduling> [<https://perma.cc/U49Y-Q8FZ>].

<sup>28</sup> U.S. Dep't of Justice, Drug Enforcement Administration, Diversion Control Division, Controlled Substances Security Manual (Mar. 27, 2019, 9:29 PM), [https://www.deadiversion.usdoj.gov/pubs/manuals/sec/app\\_law.htm](https://www.deadiversion.usdoj.gov/pubs/manuals/sec/app_law.htm) [<https://perma.cc/6PHP-8ANK>].

<sup>29</sup> 21 U.S.C. § 812, <https://www.law.cornell.edu/uscode/text/21/812> [<https://perma.cc/HW2R-E8W3>].

<sup>30</sup> U.S. Dep't of Justice, *supra* note 27.

<sup>31</sup> U.S. Congressional Research Service. State Marijuana Legalization Initiatives: Implications for Federal Law Enforcement (R43164; Dec. 4, 2014), by Lisa N. Sacco & Kristin Finklea [<https://perma.cc/6HFF-58RP>].

and non-medical use.<sup>32</sup> In January 2014, Colorado legalized the use and possession of cannabis when Colorado Amendment 64 amended the state's constitution, outlining a statewide drug policy for cannabis.<sup>33</sup> Both states allowed for commercial cultivation and sales, subject to regulation and taxes.

In November 2014, other states followed suit: Alaska,<sup>34</sup> Oregon,<sup>35</sup> and Washington D.C.<sup>36</sup> legalized recreational use of cannabis. Two years later, California, Nevada, Massachusetts and Maine also legalized.<sup>37</sup> In January 2018, Vermont became the first state to legalize through a legislative act, as opposed to ballot initiatives with the previous states.<sup>38</sup> As of 2019, eleven states and Washington D.C. have legalized medical and recreational marijuana and thirty-three have legalized only medical marijuana, leaving seventeen states with fully illegal statuses.<sup>39</sup> With more than half of the states with some form of legalized status, the trend to full legalization seems like just a matter of time.

<sup>32</sup> WA Initiative 502, [https://sos.wa.gov/\\_assets/elections/initiatives/i502.pdf](https://sos.wa.gov/_assets/elections/initiatives/i502.pdf) [<https://perma.cc/98D6-JLMW>]; see voting results at <https://results.vote.wa.gov/results/20121106/Measures-All.html> [<https://perma.cc/MP7U-KZ7Z>]. WA Initiative 502

<sup>33</sup> Colorado Constitutional Amendment 6465, <https://www.fcgov.com/mmj/pdf/amendment64.pdf>.

<sup>34</sup> Alaska Marijuana Legislation, Ballot Measure 2, Ballotpedia (2014). [<https://perma.cc/AP4K-2RLX>].

<sup>35</sup> Oregon Legalized Marijuana Initiative, Measure 91, Ballotpedia (2014). [<https://perma.cc/CZ8N-9MNK>].

<sup>36</sup> Washington, D.C. Marijuana Legislation, Initiative 71, Ballotpedia (2014). [<https://perma.cc/GW5R-ZGR7>].

<sup>37</sup> Alicia Wallace, *A greener America: Marijuana's big statement in Election 2016*, THE CANNABIST (Nov. 8, 2016, 7:19 PM, updated Mar. 21, 2018, 11:46 AM), Alicia Wallace (November 15, 2016). <https://www.thecannabist.co/2016/11/08/election-2016-marijuana-results-states-recreational-medical/66994/> [<https://perma.cc/5MPP-MY74>].

<sup>38</sup> Alicia Wallace, *Vermont Gov. Phil Scott signs marijuana legalization bill "with mixed emotions"*, THE CANNABIST (Jan. 22, 2018, 12:47 PM, updated Jan. 25, 2018, 1:33 PM), <https://www.thecannabist.co/2018/01/22/vermont-marijuana-legalization-scott-signs/97283/> [<https://perma.cc/8XUG-QVRL>].

<sup>39</sup> *33 Legal Medical Marijuana States and D.C.*, PROCON.ORG, July 24, 2019 available at <https://medicalmarijuana.procon.org/legal-medical-marijuana-states-and-dc/> (providing a list of medical marijuana states with particulars of the laws in each state) [<https://perma.cc/GG9R-N64T>].

B. *The Cole Memo's Unclear Effect on Cannabis Policy in Indian Country*

1. The Cole Memo

On August 29, 2013 the DOJ issued the Cole Memo to all United States Attorneys. The memo updated the department's previous guidance to federal prosecutors regarding marijuana enforcement under the Controlled Substances Act (CSA). In response to some states legalizing the possession, production, and sale of marijuana for both medicinal and recreational use, Deputy Attorney General James M. Cole made three clarifications.<sup>40</sup>

First, Cole reiterated that the federal government considers marijuana to be a "dangerous drug."<sup>41</sup> He also characterized the illegal distribution and sale of marijuana as a "serious crime" funding criminal enterprises, gangs, and cartels.<sup>42</sup>

Second, Cole noted that the DOJ's limited resources necessitate that the federal government concentrate its efforts to enforce the CSA.<sup>43</sup> Specifically, he directed DOJ attorneys and law enforcement to focus their resources, including prosecution, on persons or organizations posing the most significant threats to the well-being of the United States and its citizens.<sup>44</sup>

Third, Cole listed eight activities that the DOJ would prioritize preventing: distribution of marijuana to minors; funding of criminal enterprises, gangs or cartels; the transfer of marijuana outside of states where it is legal; the use of state-legal marijuana sales as a cover for illegal activity; violence and use of firearms in growing or distributing marijuana; drugged driving or exacerbation of other adverse public health consequences associated with

<sup>40</sup> Memorandum from James M. Cole, U.S. Attorney General, on Guidance Regarding Marijuana Enforcement to all United States Attorneys (August 29, 2013) (on file with the U.S. Dep't of Justice). [<https://perma.cc/4BU8-ZQZ>]. The Cole Memo echoes the DOJ's policy previously outlined in the 2009 Ogden Memo, which Deputy Attorney General David W. Ogden issued in response to states enacting laws authorizing the medical use of marijuana. Memorandum from David W. Ogden, Deputy Attorney General, on Investigations and Prosecutions in States Authorizing the Medical Use of Marijuana to selected United States Attorneys (October 19, 2009) (on file with the U.S. Dep't of Justice). [<https://perma.cc/AUV4-VPDL>].

<sup>41</sup> *Id.* at 1.

<sup>42</sup> *Id.* at 1.

<sup>43</sup> *Id.* at 1-2.

<sup>44</sup> *Id.*

marijuana use; growing marijuana on public lands; and marijuana possession or use on federal property.<sup>45</sup>

Finally, Cole suggested how the traditional federal-state approach to enforcing the CSA could be recalibrated in the wake of the legalization of marijuana in certain states. Specifically, for those states that have designed and implemented a “robust system” of regulatory and enforcement schemes to control the cultivation, distribution, sale, and possession of marijuana, the federal government would not interfere.<sup>46</sup> However, when state systems fail to adequately prevent any one of the enumerated eight enforcement priorities, the federal government reserves the right to bring individual enforcement actions, as well as to challenge the state’s regulatory structure itself.<sup>47</sup>

## 2. The Wilkinson Statement

However, the Cole Memo never directly addressed if the federal government would grant tribes a similar opportunity to develop their own sufficiently robust marijuana regulation system. Consequently, some tribes requested that the DOJ give specific guidance to United States Attorneys about enforcing the CSA on tribal lands. The DOJ responded on October 28, 2014 with the Wilkinson Statement, which stated: “[n]othing in the Cole Memorandum alters the authority or jurisdiction of the United States to enforce federal law in Indian Country.”<sup>48</sup>

More specifically, the statement affirmed the United States Attorneys’ responsibility to enforce the Cole Memo’s eight priorities, including when a tribe seeks to legalize cannabis in some capacity on its land. The DOJ also directed its attorneys to engage in government-to-government consultations with tribes when evaluating the need for federal marijuana enforcement activities in Indian Country.<sup>49</sup> Accordingly, until 2018 the federal government’s

<sup>45</sup> *Id.* at 1–3.

<sup>46</sup> *Id.* at 3.

<sup>47</sup> *Id.*

<sup>48</sup> Memorandum from Monty Wilkinson, Policy Statement Regarding Marijuana Issues in Indian Country, at 2. (October 28, 2014) (on file with the U.S. Dep’t of Justice) [<https://perma.cc/65QH-CJTR>]. This document is often referred to as the “Wilkinson Statement.”

<sup>49</sup> *Id.* at 2–3. This directive is a continuation of the federal government’s policy outlined in the Attorney General’s 2010 Indian Country Initiative. (*See* Memorandum from David W. Ogden on Indian Country Law Enforcement Initiative to All United States Attorneys With Districts Containing Indian

position was that it would not interfere with states and tribes legalizing marijuana. If a state or tribe implemented a regulatory scheme that kept marijuana out of the hands of minors and felons, it was unlikely the federal government would use its resources to prosecute individuals or entities within the jurisdiction.

### 3. The DOJ rescinds the Cole and Wilkinson Memos

However, on January 4, 2018, Attorney General Jeff Sessions<sup>50</sup> rescinded all nationwide guidance the DOJ provided under the Obama administration, including the Cole and Wilkinson memos. Instead, Sessions stated the DOJ already had well-established principles for governing the federal government's enforcement of the CSA. Broadly, the principles require federal prosecutors considering whether to prosecute a person or entity to weigh the following factors: the seriousness of the crime; the potential deterrent effect on further criminal activity; the impact of similar crimes on a community; and the priorities set by the Attorney General at certain times. Consequently, any previous guidance is "unnecessary" and "is not intended to, does not, and may not be relied upon to create any rights, substantive or procedural, enforceable at law by any party in any matter civil or criminal."<sup>51</sup>

It remains unclear how Attorney General Sessions' rescission of the Cole and Wilkinson memos will affect either states or tribes. On the one hand, this policy shift suggests that the federal

Country (Jan. 11, 2010) (on file with the Dep't of Justice) [<https://perma.cc/5TU8-43U3>].

<sup>50</sup> Jeff Sessions resigned on November 7, 2018 at President Donald Trump's request. The president's attorney general nominee, William (Bill) Barr, told the Senate during his confirmation hearing that he does not want "to upset settled expectations and the reliance interests that have arisen as a result of the Cole Memo." *Confirmation Hearing of William Pelham Barr Before the Committee on the Judiciary*, 116th Cong. (Jan. 15, 2019) (statement of William P. Barr, Att'y Gen. of the U.S. Nominee) [<https://perma.cc/JPZ5-8MKC>]. He does, however, want the government to choose between either enforcing the federal law outlawing marijuana everywhere (which Barr himself favors) or allowing states to legalize in a systematic way. Ben Curren, *The Next Attorney General May Not Bar Progress On Cannabis Policy After All*, FORBES, Jan. 22, 2019, <https://www.forbes.com/sites/bencurren/2019/01/22/the-next-attorney-general-may-not-bar-progress-on-cannabis-policy-after-all/#4daae50f3c39> [<https://perma.cc/E6VJ-YDYX>].

<sup>51</sup> Memorandum from Jefferson B. Sessions on Marijuana Enforcement to All United States Attorneys, 1 (Jan. 4, 2018) (on file with the Dep't of Justice) [<https://perma.cc/8ZNP-MUNL>]. The principles Attorney General Sessions refers to are those first set out by former Attorney General Benjamin Civiletti in 1980, which became part of the United States Attorneys' Manual.

government intends to renew its efforts to prosecute marijuana-related offenses, regardless of whether the offense takes place in a jurisdiction where cannabis is legal. On the other hand, perhaps nothing has changed. In this case, the federal government retains the right to prosecute marijuana-related offenses but will not necessarily overextend the DOJ's limited resources to do so. Either way, the federal government has reasserted its power to prosecute people and businesses for the cultivation, distribution, sale, and possession of marijuana, even if their actions are legal under state law.<sup>52</sup>

Ultimately, states and tribes must now decide how they want to respond to the DOJ's reinvigorated policy. Tribes have a particularly complex set of considerations when deciding whether to legalize cannabis on their lands. Even if a tribe is located within a state that has legalized cannabis, the tribe remains under federal, not state, jurisdiction. While the Wilkinson Memo indicated that the federal government would treat tribes who legalized marijuana as it would a state government, Sessions was silent as to how the federal government would address Indian Country specifically.

The current absence of express policy for the DOJ's regulation of cannabis in Indian Country has caused immense confusion and uncertainty for tribal governments. However, this policy vacuum has also created opportunities for enhanced tribal autonomy. Tribes are making their own laws and policies related to the legalization of cannabis after determining their tribe-specific economic priorities and social concerns. It is to these tribal perspectives the discussion now moves to explore the arguments tribes themselves put forth to their members, against the backdrop of the DOJ's unclear policies, either against or in favor of legalizing marijuana.

<sup>52</sup> Press Release, U.S. Dep't of Justice, Office of Pub. Affairs, Attorney General Announces Crime Reduction and Public Safety Task Force (Feb. 28, 2017), <https://www.justice.gov/opa/pr/attorney-general-announces-crime-reduction-and-public-safety-task-force> [<https://perma.cc/E4HD-RYUD>]; AG Sessions rescinds Cole Memo Roiling Marijuana Industry, MARIJUANA BUS. DAILY, Jan. 4, 2018 *available at* <https://mjbizdaily.com/report-sessions-rescind-cole-memocreating-cloud-uncertainty-marijuana-businesses/> [<https://perma.cc/R5YK-22T7>].

### III. TRIBAL PERSPECTIVES ON LEGALIZING CANNABIS IN INDIAN COUNTRY

#### A. *Intratribal and Intertribal Debate About Legalizing Cannabis in Indian Country*

##### 1. The Ambiguous State of “Legalization” in Indian Country as an Intimidation Tactic

Despite the progressive decriminalization and legalization of medical marijuana use among the states<sup>53</sup>, marijuana remains an illegal substance under federal law.<sup>54</sup> The staunch prohibition against the cultivation, possession, and circulation of cannabis under Federal law discouraged public discussions of cannabis on reservation land until the 2013 issuance of the Cole Memorandum and the subsequent 2014 Wilkinson Memo.

After Washington and Colorado legalized marijuana, the Cole and Wilkinson memos opened discussion on tribal sovereignty as pertaining to cannabis legalization and the federal government’s non-interference policies on Indian reservations.<sup>55</sup> The DOJ told Indian tribes that they could grow and sell marijuana on their lands as long they followed the same federal conditions laid out for states that have legalized the drug.<sup>56</sup> However, the Wilkinson Memo still maintained that the federal government had authority and discretion to prosecute a tribe or its member criminally.

Upon the release of the Wilkinson memo, the Flandreau Santee Sioux Tribe was the first to announce plans to grow and sell both commercial and recreational marijuana on its South Dakota reservation.<sup>57</sup> Following a vote of tribal council, deciding 5-1 in

<sup>53</sup> Thirty-three states legalized medical marijuana. *See 33 Legal Medical Marijuana States and D.C.*, PROCON.ORG, *supra* note 39.

<sup>54</sup> Controlled Substances Act, 21 U.S.C. § 801–904.

<sup>55</sup> Cary Aspinwall, *Justice Department Memo Not Likely to Change Pot Laws on Tribal Land Soon*, TULSA WORLD Dec. 13, 2014, *available at* [https://www.tulsaworld.com/news/courts/justice-department-memo-not-likely-to-change-pot-laws-on/article\\_c18f9b8c-cb33-5c8c-9ca3-88a11f4526aa.html](https://www.tulsaworld.com/news/courts/justice-department-memo-not-likely-to-change-pot-laws-on/article_c18f9b8c-cb33-5c8c-9ca3-88a11f4526aa.html) [<https://perma.cc/LSH5-7396>].

<sup>56</sup> *American Indian tribes free to grow and sell pot*, THE GUARDIAN Dec. 12, 2014, *available at* <https://www.theguardian.com/us-news/2014/dec/11/indian-tribes-can-grow-and-sell-marijuana-on-lands> [<https://perma.cc/NB78-VH77>].

<sup>57</sup> Regina Garcia Cano, *South Dakota Indian tribe plans to sell marijuana by Jan. 1*, THE CANNABIST June 17, 2015, *available at* <https://www.thecannabist.co/2015/06/17/south-dakota-marijuana-indian-tribe-flandreau-santee-sioux/36247/> [<https://perma.cc/A3TV-HVS6>].

favor of legalizing cannabis, the tribe established a limited liability company with the purpose of opening the nation's first marijuana resort in May 2015.<sup>58</sup> The tribe planned to open a facility to grow marijuana, and visitors would be allowed on the reservation to buy and consume at a designated area.<sup>59</sup> The tribe was already operating a casino on its land, but it saw the new business operation as an opportunity to increase the welfare of the tribe.

As a federally-recognized tribe of the Santee Dakota people in a non-legalized state, the President of the Flandreau Santee, Tony Reider, acknowledged that the tribe would have to take cautious steps in moving forward with the grow operation.<sup>60</sup> The potential for economic growth and stability incentive inspired Reider to take the risk because the revenue and economic development were expected to be at least two million dollars.<sup>61</sup> This revenue would allow the community to develop housing, build a drug and alcohol addiction treatment center, and improve the local clinic.<sup>62</sup> Subsequently, the business operations would create jobs and increase economic stability for the tribe itself and its members.<sup>63</sup>

However, South Dakota Attorney General Marty Jackley pushed back on the tribe's plan and used extensive tactics to not only intimidate the tribe, but non-Indians as well. In June 2015, the tribe hired Monarch America, a Denver-based cannabis development firm to be responsible for the design, construction, and development of the growing site.<sup>64</sup> In the same month, Jackley claimed that non-

<sup>58</sup> Kelley Smith, *Flandreau Santee Sioux Tribe steps closer to legalizing marijuana*, KSFY May 12, 2015, available at <https://www.ksfy.com/home/headlines/Flandreau-Santee-Sioux-Tribe-steps-closer-to-legalizing-marijuana-303531911.html> [https://perma.cc/N6R6-63MS]

<sup>59</sup> *Flandreau Santee Sioux Tribe moves forward with legal marijuana*, INDIANZ.COM June 16, 2015, available at <https://www.indianz.com/News/2015/06/16/flandreau-santee-sioux-tribe-m.asp> [https://perma.cc/4JQW-2Y97]

<sup>60</sup> *Flandreau Santee Sioux Tribe to launch marijuana business*, INDIANZ.COM May 12, 2015, available at <http://www.indianz.com/News/2015/017447.asp> [https://perma.cc/8CKW-9RU9].

<sup>61</sup> Garcia Cano, *supra* note 57.

<sup>62</sup> *Id.*

<sup>63</sup> *Flandreau Santee Sioux Tribe Shares Details of Marijuana Grow*, INDIANZ.COM June 24, 2015, available at <http://www.indianz.com/News/2015/017962.asp> [https://perma.cc/7WUB-FTLH].

<sup>64</sup> *South Dakota Indian tribe signs deal with Colorado company to grow pot*, THE CANNABIST June 25, 2015, available at <https://www.thecannabist.co/2015/06/25/monarch-america-colorado-south-dakota-indian-tribe-marijuana-grow/36746/> [https://perma.cc/9XXE-UZFR].



Indians would not be able to use marijuana on Indian Country on a local radio station.<sup>65</sup> He warned that because marijuana was still illegal under federal and South Dakota laws, non-Indians would not be able to consume on the reservation because they were subject to both federal and state law.<sup>66</sup> Jackley even pointed out that federal authorities still raided marijuana operations on two reservations in California, a legalized state.<sup>67</sup> Three months later, federal agents took hemp plants from the Menominee Nation in Wisconsin because non-Indians were operating the tribe's cannabis business.<sup>68</sup>

In November 2015, after three weeks of discussions with the state and federal attorney generals, the Flandreau Santee Tribe ultimately burned one million dollars' worth of cannabis crop after federal officials signaled a potential raid on its reservation.<sup>69</sup> President Reider said the tribe made the decision to avoid possible damage to the equipment and the facility from the raid, but also to demonstrate good faith as it continues conversations with officials in hopes of resuming the project.<sup>70</sup>

But Jackley was not satisfied with the tribe's losses. In June 2016, Jackley announced that state would investigate whether the tribe actually destroyed all of its marijuana crop. In a media interview Jackley said, "I don't think for a minute that [the tribe] destroyed \$1 million worth of marijuana. I don't know where that went and it's an open case. We never shut that case ... We never got an opportunity to check what was destroyed."<sup>71</sup> Tribe President

<sup>65</sup> *South Dakota official claims non-indians can't use marijuana*, INDIANZ.COM June 23, 2015, available at <http://www.indianz.com/News/2015/017942.asp> [<https://perma.cc/YC5D-U427>].

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> *Native American Tribes Consider Entering Marijuana Market*, VOA Aug. 27, 2017, available at <https://learningenglish.voanews.com/a/native-american-tribes-consider-entering-marijuana-market/3996454.html> [<https://perma.cc/LDP7-WC46>].

<sup>69</sup> Regina Garcia Cano, *Flandreau Santee Sioux Tribe Burned Pot Crop*, ARGUS LEADER Nov. 9, 2015, available at <https://www.argusleader.com/story/news/2015/11/09/flandreau-santee-sioux-tribe-burned-pot-crop-fear-federal-raid/75479902/> [<https://perma.cc/5642-4RN8>].

<sup>70</sup> *Id.*

<sup>71</sup> Corey Allen Heidelberger, *A.G. Jackley Suspects Flandreau Indians Didn't Really Burn the Tribal Marijuana Crop*, DAKOTA FREE PRESS Apr. 12, 2016, available at <https://dakotafreepress.com/2016/04/12/a-g-jackley-suspects-flandreau-indians-didnt-really-burn-the-tribal-marijuana-crop/> [<https://perma.cc/Z4XX-5UNT>].

Reider confirmed that “[t]he cannabis was all destroyed.”<sup>72</sup> This statement suggests that the state was never interested in working with the tribes under the Wilkinson Memo in the first place.

To add insult to injury, Jackley sentenced two non-Indian consultants for their role in helping the Flandreau Tribe grow marijuana. One of the consultants was prosecuted for conspiracy to possess, possession, and attempted possession of more than ten pounds of marijuana.<sup>73</sup> A jury cleared him after just a couple of hours of deliberations.<sup>74</sup> The other consultant was charged with one count of conspiracy to possess more than one-half pound of marijuana.<sup>75</sup> Jackley said that “A marijuana resort is a violation of both and state and federal law that would create public health and safety issues across South Dakota.”<sup>76</sup> After pleading guilty, the consultant only had to pay a \$500 fine and court costs, served no jail time, and the record of his case is sealed.

This relatively light sentence for an act that is supposedly a threat to public health and safety sheds light on Jackley’s true purpose: to flex his political muscles to push back on the DOJ’s policy. Knowing that he could not charge anyone from the tribe because it would raise sovereignty issues, Jackley sought to charge the only two individuals he could. He wanted to go to trial because the “[state had] jurisdiction.”<sup>77</sup> In what the Flandreau Tribe saw as an opportunity for economy growth, Jackley used the Wilkinson Memo’s discretionary guidance and the plenary power of the federal government to scare not only the tribe, but non-Indians from entering Indian country.

<sup>72</sup> *Flandreau Santee Sioux Tribe Refutes Claims about Marijuana Crop*, INDIANZ.COM Apr. 20, 2016, available at <http://www.indianz.com/News/2016/04/20/flandreau-santee-sioux-tribe-r-2.asp> [<https://perma.cc/S8PN-SLJV>].

<sup>73</sup> *Flandreau Santee Sioux Tribe Cannabis Consultant Found Not Guilty*, INDIANZ.COM May 25, 2017, available at <https://www.indianz.com/News/2017/05/25/flandreau-santee-sioux-tribe-cannabis-co.asp>.

<sup>74</sup> *Id.*

<sup>75</sup> *Colorado Man Sentenced For his Role in Flandreau Marijuana Grow Case*, S.D. Att’y Gen. Press Release, available at <https://atg.sd.gov/OurOffice/Media/pressreleasesdetail.aspx?id=1912> [<https://perma.cc/V7WZ-2KPP>].

<sup>76</sup> *Id.*

<sup>77</sup> *Supra*, note 75.

## 2. How States' Cannabis Policies Condition Tribal Cannabis Activities

A state's policy about cannabis stands to condition, and in some cases limit, a given tribe's ability to legalize and conduct cannabis activities on its land.<sup>78</sup>

### a. Wisconsin

In 2015, federal agents seized 30,000 hemp plants belonging to the Menominee Indian Tribe of Wisconsin. The tribe had legalized growing "low THC, non-psychoactive" hemp under an agreement with the College of the Menominee Nation to study industrial hemp. However, federal prosecutors characterized its intervention as a raid on an unlawful marijuana grow operation. Prior to the raid, the Menominee were also discussing the possibility of legalizing medicinal and recreational marijuana on their reservation.<sup>79</sup>

The Tribe brought suit against the government, arguing its crops were grown legally and in accordance with the 2014 federal Farm Bill that permitted hemp cultivation. While Wisconsin did not allow hemp cultivation, the Menominee claimed the Tribe had the authority to legalize hemp under its own ordinance within the reservation. The court ruled in favor of the federal government, agreeing with its argument that because Wisconsin does not allow the growing and cultivation of hemp, the Tribe may not independently legalize the crop on its reservation.<sup>80</sup>

Today, Wisconsin State lawmakers continue to resist voters' call to legalize marijuana and regulate marijuana like alcohol.<sup>81</sup> The

<sup>78</sup> See Katherine J. Florey, *Budding Conflicts: Marijuana 's Impact on Unsettled Questions of Tribal-State Relations*, 58 B.C. L. Rev. 991 (2017) (Providing background on jurisdictional conflicts between tribes, states, and the federal government).

<sup>79</sup> Hilary Bricken, *Menominee Hemp Lawsuit Goes Up In Smoke*, CANNA LAW BLOG (June 2, 2016), <https://www.cannalawblog.com/menominee-hemp-lawsuit-goes-up-in-smoke/> [<https://perma.cc/VC26-TLDU>].

<sup>80</sup> *Menominee Indian Tribe of Wisconsin v. D.E.A.*, 190 F.Supp.3d 843, 854–55 (E.D. Wis. 2016).

<sup>81</sup> Charles Franklin, *New Marquette Law School Poll Finds Tight Races For Wisconsin Governor, U.S. Senate Seat*, LAW MARQUETTE.EDU, Aug. 22, 2018, <https://law.marquette.edu/poll/2018/08/22/mlsp47release/> [<https://perma.cc/423G-EQ9E>]. (According to a Marquette University Law School poll taken over August 15–19, 2018, 61% of respondents were in favor of Wisconsin legalizing and regulating marijuana like alcohol.)

Tribe has yet to pursue its interests in hemp, medicinal marijuana, and recreational marijuana industries.<sup>82</sup>

b. California

Even if a state legalizes cannabis, it does not necessarily support the tribes within its borders participating in the market. For example, California has the largest and most profitable marijuana market in the country but is hostile to local tribes developing their own marijuana rules and regulations.<sup>83</sup> In California, tribal cannabis businesses can only obtain their state licenses if tribes grant all licensing power to the state.<sup>84</sup> The California Cannabis Cultivation Program, Section 8102 requires a tribe applying for a state cannabis license to waive its sovereign immunity and to comply with all state and local laws, as well as to allow state inspectors on tribal lands.<sup>85</sup> In other words, tribes are not allowed to issue licenses and regulate tribal cannabis enterprises, despite their status as sovereign nations.<sup>86</sup>

Consequently, nineteen tribes rejected what they saw as the state's overreach into tribal autonomy and founded the California Native American Cannabis Association. This organization pursued to pass legislation AB 924, the Cannabis Regulatory Enforcement Act for Tribal Entities (CREATE) Act, but the proposed legislation was unable to proceed through the state legislature.<sup>87</sup> This legislation would have given tribes the authority to regulate and license their members' cannabis activities.<sup>88</sup>

<sup>82</sup> Garcia Cano, *supra* note 69. (Following the federal raid on the Menominee reservation, the Flandreau Santee Sioux destroyed their own crops in South Dakota to avoid federal prosecution).

<sup>83</sup> In 2017, California's market was the most lucrative in the United States at \$3 billion, followed by Colorado at \$1.5 billion, and Arizona at \$1.2 billion. Bethan Jenkins, *What Are the Largest Cannabis Markets in the United States?*, CANNABISFN, Aug. 3, 2018, <https://www.cannabisfn.com/largest-cannabis-markets-united-states/> [<https://perma.cc/YC7W-ANGZ>].

<sup>84</sup> CAL. CODE REGS. tit. 3, § 8102 (2019).

<sup>85</sup> CAL. CODE REGS. tit. 3, § 8501 (2016).

<sup>86</sup> Amanda Chicago Lewis, *How California Is Blocking Native Americans From the Weed Business*, ROLLING STONE, Feb. 14, 2018, <https://www.rollingstone.com/culture/culture-features/how-california-is-blocking-native-americans-from-the-weed-business-253651/> [<https://perma.cc/4LSK-4DAF>].

<sup>87</sup> Assem. Bill 924, 2017–2018 Reg. Sess. (Cal. 2017).

<sup>88</sup> *Id.*

c. Washington, Oregon, and Nevada

Indeed, despite California’s concern about losing money to tribes, other states are proving that states and tribes can mutually profit through compacts. In 2015, Washington passed a bill authorizing its governor to enter into agreements with tribes, underscoring the government-to-government relationship.<sup>89</sup> Under this legislation, Washington became the first state to adopt a compacting system for tribes to regulate tribal cannabis activities in partnership with, but not under, the State’s licensing authority. The State’s compact with the Suquamish Tribe explains “the State and the Tribe have recognized the need for cooperation and collaboration with regard to marijuana in Indian Country.”<sup>90</sup> Washington’s compacting system, which Part III discusses in detail, has since served as a model for other states coordinating cannabis regulation and sales with their own tribes.

Similarly, in 2015 Oregon’s Confederated Tribes of Warm Springs struck a deal with the State to grow, process, and sell marijuana on the recreational market. The tribe created Warm Springs Cannabis, the first vertically integrated Native marijuana operation that grows on-site and sells off-site.<sup>91</sup> Notably, it is still illegal to use or possess marijuana on the reservation.<sup>92</sup>

A few years later, Nevada’s Senate passed a bill authorizing the state to enter into marijuana regulation and sales agreements with the State’s tribes.<sup>93</sup> The Las Vegas Paiute Tribe swiftly constructed the NuWu Cannabis Marketplace, designed to be largest cannabis dispensary in the world. The dispensary also includes drive-thru service (the first of its kind in the United States), online order and pick-up service, and cannabinoid-infused products for dogs.<sup>94</sup> As a result, NuWu is receiving a lot of attention – and the

<sup>89</sup> H.B. 2000, 64th Leg., 1st Spec. Sess. (Wa. 2015).

<sup>90</sup> *Marijuana Compact Between the Suquamish Tribe and the State of Washington, Suquamish Tribe-WA*, WASH. STATE LIQUOR AND CANNABIS BOARD, <https://lcb.wa.gov/publications/Marijuana/Compact-9-14-15.pdf> [<https://perma.cc/JR82-RNYU>].

<sup>91</sup> Kurtis Lee, ‘*We can’t let this pass us by*’: *Here’s how a Native American Tribe in Oregon sees hope with marijuana*, LOS ANGELES TIMES, Mar. 6, 2018, <https://www.latimes.com/nation/la-na-warm-springs-reservation-marijuana-20180306-story.html> [<https://perma.cc/UXB4-K2EJ>].

<sup>92</sup> *Id.*

<sup>93</sup> S.B. 375, 79th Leg., Reg. Sess. (Nev. 2017).

<sup>94</sup> NUWU CANNABIS MARKETPLACE, <https://www.nuwucannabis.com/> [<https://perma.cc/TP7Q-743A>] (last visited Feb. 1, 2019).

Paiute Tribe is generating much-needed revenue to provide services to its members.<sup>95</sup>

d. *Takeaways*

Ultimately, state-level policies toward legalizing cannabis stand to impact tribes, and more specifically, tribal sovereignty, in significant ways. Where states continue to classify marijuana as an illegal drug, tribes are deterred from participating in the cannabis market out of fear that federal prosecutors will become involved. Moreover, in states where cannabis is legal, like California, a tribe may be asked to cede its sovereignty in exchange for the state-granted tribal operating licenses that allow the tribe to operate cannabis enterprises. Finally, and where the discussion now turns, even when tribes enjoy compact relationships with a state, there remains intratribal and intertribal debate about what the tribe stands to gain – and lose – by participating in the marijuana industry.

B. *Tribal Debates Against and For Cannabis in Indian Country*

In 1971, Russell Bryan and Helen Charwood, enrolled members of the Minnesota Chippewa Tribe, purchased a mobile home for their family. They lived on the Greater Leech Lake Indian Reservation located in Itasca County, Minnesota. The following year, the county sent a bill to the Bryans for personal property taxes levied on the mobile home for \$147.95. The Bryans brought suit seeking a declaratory judgment that the state and county lacked authority to levy a personal property tax on Indians living on the reservation. In 1976, the Supreme Court agreed with the Bryans and held that states cannot tax Indians living on reservations or regulate their on-reservation activities. The court reasoned that taxing was part of the Tribe's sovereign power and therefore permissible without Congress expressly declaring otherwise.<sup>96</sup> This ruling paved

<sup>95</sup> Rob Sabo, *Nevada's Indian tribes deal with the business of selling pot*, NORTHERN NEVADA BUSINESS, Jan. 7, 2018, <https://www.nnbusinessview.com/news/nevadas-indian-tribes-deal-with-the-business-of-selling-pot/> [https://perma.cc/DF2R-7FJG].

<sup>96</sup> *Bryan v. Itasca County*, 426 U.S. 373 (1976). The trial court and Minnesota Supreme Court ruled in favor of the State, holding that Public Law 280's grant of civil jurisdiction to the State included taxing authority, to include personal property. Conversely, the Supreme Court held that Public Law 280 did not,

the way for modern tribal gaming establishments to operate without being subject to state or federal income taxes on their earnings.<sup>97</sup>

Given the success of reservation casinos and legal gambling, tribes have been actively weighing the benefits of operating cannabis reservations on tribal lands as well. As of 2015, 84% of federally recognized tribes were in states where medical marijuana was legal, but most tribes continued to criminalize marijuana possession and trafficking in Indian Country.<sup>98</sup> Opponents wanted to avoid antagonizing the federal government, and cited the statistics about the high rates of drug use among American Indians starting when they were young. Yet only a year later the National Congress of American Indians (NCAI) issued a statement affirming tribal sovereignty for cannabis regulation.<sup>99</sup> The following section will explore the tribal arguments against and for legalizing cannabis in Indian Country, and why the majority opinion has shifted in favor of legalization over a relatively short period of time.

### 1. Tribal Arguments Against Legalizing Cannabis in Indian Country

Some tribal members agree that the Green Rush is an undeniable opportunity for economic development, but not for Native populations. In 2015, the NCAI sent tribal leaders information about federal marijuana policy, combined with statistics about the high rate of marijuana use among tribal youth and marijuana's negative impacts on memory and motor skills. For example, the statement quoted a study that found people who used

absent an express declaration from Congress, grant States the authority to impose taxes on reservation Indians.

<sup>97</sup> In 1987, the Supreme Court further clarified that tribes can conduct gaming on tribal lands in states where gambling is legal. *See* California v. Cabazon Band of Mission Indians, 480 U.S. 202 (1987). Congress passed the Indian Gaming Regulatory Act a year later, establishing a regulatory framework for gaming on tribal lands.

<sup>98</sup> National Congress of American Indians, *Marijuana Policy in the U.S.: Information for Tribal Leaders* (Jan. 20, 2015), available at [http://www.ncai.org/Marijuana\\_Policy\\_in\\_the\\_U.S.-\\_Information\\_for\\_Tribal\\_Leaders.pdf](http://www.ncai.org/Marijuana_Policy_in_the_U.S.-_Information_for_Tribal_Leaders.pdf) [https://perma.cc/3LMD-6N8A]. The National Congress of American Indians is a nonprofit organization founded in 1944.

<sup>99</sup> Resolution #PHX-16-002, National Congress of American Indians, Affirming Tribal Sovereignty for Cannabis Regulation (adopted over Oct. 9–14, 2016), available at <http://www.ncai.org/resources/resolutions/affirming-tribal-sovereignty-for-cannabis-regulation> [https://perma.cc/22C5-9BYP].

marijuana heavily from their teens into adulthood experienced an average drop in IQ of eight points.<sup>100</sup> Taken together, the NCAI was sending a message to tribal leaders, cautioning them against the potential consequences of legalization on tribal sovereignty and their members' health and wellness.

a. Threat to Sovereignty

The primary consequence of legalization is the threat to self-rule by inviting unwanted federal attention. In 2015, the federal government expressly forbade Native communities from participating in the cannabis market in its Keeping out Illegal Drugs (KIDS) Act. The act prohibited any Indian tribe or tribal organization from cultivating, manufacturing, or distributing marijuana on Indian lands, as well as anyone knowingly or intentionally permitting such activities to occur. It also required tribes to prosecute persons who had knowledge of marijuana activities on Indian lands but failed to report such knowledge, or alternatively, to notify federal authorities. Any tribe that violated the act would lose federal funding until it complied again.<sup>101</sup> Thus, tribes who pursued the cannabis market were opening themselves up to federal prosecution, as well as to losing the very funding that enabled tribal governments to operate semi-autonomously.

Moreover, the U.S. Attorney General's decision to rescind the Cole and Wilkinson memos has added to the current confusion among tribes regarding how DOJ enforcement policies apply in Indian Country. On the one hand, the Attorney General has been vocal about his personal opposition to legalizing marijuana anywhere, stating in 2016 that "we need grown-ups in charge in Washington to say marijuana is not the kind of thing that ought to be legalized, it ought not to be minimized, that it's in fact a very real danger."<sup>102</sup> On the other hand, the Attorney General has more

<sup>100</sup> Nat'l Cong. Of American Indians, *Marijuana Policy in the U.S.: Information for Tribal Leaders* (citing M.H. Meier et al., *Persistent cannabis users show neuropsychological decline from childhood to midlife*, 109 Proc. Nat'l Acad. Sci U.S.A. 2657 (2012)), [http://www.ncai.org/Marijuana\\_Policy\\_in\\_the\\_U.S.-\\_Information\\_for\\_Tribal\\_Leaders.pdf](http://www.ncai.org/Marijuana_Policy_in_the_U.S.-_Information_for_Tribal_Leaders.pdf) [<https://perma.cc/75LD-E55A>].

<sup>101</sup> Keeping out Illegal Drugs Act of 2015 or the KIDs Act of 2015, S.1984, 114th Congress (2015), *available at* <https://www.congress.gov/bill/114th-congress/senate-bill/1984> [<https://perma.cc/8W7C-N9XF>].

<sup>102</sup> Christopher Ingraham, *Trump's Pick for Attorney General: "Good People Don't Smoke Marijuana"*, Wash. Post (Nov. 18,



recently reassured lawmakers there is no “imminent crackdown” planned against states looking to legalize. However, his assurances were directed at states only, and gave no indication that the federal policy would look the other way when tribes take steps toward legalizing marijuana.<sup>103</sup>

b. Predatory Outsiders

The second consequence is that although great potential for economic development exists, so too does the potential for predatory non-tribal enterprises to use Indian Country for their own gain. Even prior to some states legalizing marijuana, non-Indians targeted the remote outskirts of tribal lands as cultivation sites because the areas were not heavily policed. Growers are often looking for some kind of jurisdictional loophole and they want to set up shop near their markets to reduce the risk of being caught. The traffickers harm the land, using chemicals on the plants, clearing forests, poaching animals, and leaving behind trash and human waste. Moreover, some traffickers bring guns to their grow sites, introducing otherwise-illegal weapons into Indian Country.<sup>104</sup>

Now tribes face an additional threat from legal marijuana ventures that want to cash in by using tribal resources. Tribal lands can provide sites for cultivation and host dispensaries, all while avoiding state and local taxes. There is a risk that outside investors could use tribal partners as a shield against taxes or against complying with certain state regulations that do not apply in Indian Country. Tribal attorney, Lael Echo-Hawk, warned tribes:

A word of caution - be careful who you work with – the sharks are circling and while they can leave and change their name, we are tribal people and members of our tribal nations from the beginning of time to the end of time and these businesses will remain part of our tribal history forever. Make sure that history tells

2016), [https://www.washingtonpost.com/news/wonk/wp/2016/11/18/trumps-pick-for-attorney-general-good-people-dont-smoke-marijuana/?utm\\_term=.e8b6216098f3](https://www.washingtonpost.com/news/wonk/wp/2016/11/18/trumps-pick-for-attorney-general-good-people-dont-smoke-marijuana/?utm_term=.e8b6216098f3) [<https://perma.cc/33HW-V3E5>].

<sup>103</sup> *Id.*

<sup>104</sup> Amy Harris, *Marijuana growers find cover on tribal lands*, SEATTLE TIMES, Aug. 23, 2011, available at <https://www.seattletimes.com/seattle-news/marijuana-growers-find-cover-on-tribal-lands/> [<https://perma.cc/8MM3-XPV4>].

a good story of developing cutting edge industries in  
a good way.<sup>105</sup>

Tribes and their members will have to choose. They can accept outside investments, and risk tribal priorities being subsumed by those of non-Indian growers. Conversely, tribes can corner the cannabis market in Indian Country, but must then shoulder the startup costs alone. Additionally, the tribal governments would also need to cover the expenses associated with increased policing to protect their own grow sites and keep trespassers from illegally cultivating on the outskirts of tribal lands. Ultimately, tribes stand to face unique federal penalties that could devastate Indian Country, including losing federal funding for their people.

### c. History of Substance Abuse

The third consequence of tribal communities participating in the cannabis industry is the primary concern for many: legalizing a drug among a population with the highest rates of substance abuse and addiction in the country. According to the 2013 National Survey on Drug Use and Health, 14.9 percent of American Indians or Alaska Natives aged twelve or older had substance dependence or abuse issues.<sup>106</sup> Furthermore, addiction can start young; a study monitoring adolescent Native students over 2009–2012 reported that the highest lifetime marijuana use rate for eighth graders was 56.2 percent, followed by alcohol at 52.8 percent. Over 10 percent were already using narcotics.<sup>107</sup> Comparatively, 16.4 percent of non-

<sup>105</sup> Lael Echo-Hawk, *Cannabis in Indian Country – A Year Later...*, GARVEY SCHUBERT BARER CANNABIS BUSINESS BLOG (Jan. 28, 2016), <https://www.gsblaw.com/>, [<https://perma.cc/EU9N-A6LX>].

<sup>106</sup> Compare with: 4.6 percent among Asians, 7.4 percent among Blacks, 8.4 percent among Whites, 8.6 percent among Hispanics, 10.9 percent among persons reporting two or more races, and 11.3 percent among Native Hawaiians or Other Pacific Islanders. Substance Abuse & Mental Health Services Admin., *SAMHSA American Indian / Alaska Native Data*, SAMHSA.GOV (2013), [https://www.samhsa.gov/sites/default/files/topics/tribal\\_affairs/ai-an-data-handout.pdf](https://www.samhsa.gov/sites/default/files/topics/tribal_affairs/ai-an-data-handout.pdf) [<https://perma.cc/Q9YF-X9UX>].

<sup>107</sup> Narcotics other than heroin. L.R. Stanley et al., *Rates of substance use of American Indian students in 8th, 10th, and 12th grades living on or near reservations: update, 2009–2012*, 129 PUB. HEALTH REP. 156 (2014). 156 (2014), available at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3904895/> [<https://perma.cc/ZJR4-GVZL>].

Native students nationally used marijuana and 14.6 percent reported drinking alcohol by the time they were in eighth grade.<sup>108</sup>

Moreover, addiction frequently presents co-morbidly with mental health issues. Native youth have the highest lifetime prevalence of major depressive episodes and are 70 percent more likely to be identified in schools as students with an emotional disturbance.<sup>109</sup> Male Native youth under age twenty-four commit suicide at 2.5 times the national rate.<sup>110</sup>

But is marijuana really addictive? Despite claims to the contrary, the Centers for Disease Control and Prevention (CDC) say yes – about one in ten marijuana users will become addicted.<sup>111</sup> If a person begins using marijuana prior to age eighteen, the chance the person will become addicted becomes one in six.<sup>112</sup> While the National Institute on Drug Abuse does not characterize marijuana as a gateway drug, it does report that early exposure to cannabinoids as a youth renders the adolescent vulnerable to abusing other substances later in life.<sup>113</sup>

Even if marijuana is not addictive, it does have some harmful effects. Short-term use can impair a person’s motor skills, including making driving difficult to dangerous. According to the CDC, daily marijuana use can damage a person’s ability to learn, to retain information, and to concentrate. Smoking marijuana presents the same risks to one’s lungs and cardiovascular system as cigarettes.<sup>114</sup> Additionally, some studies link marijuana use with mental health issues, although it is more likely that people use marijuana to self-medicate underlying anxiety, depression, and other psychological disorders.<sup>115</sup>

<sup>108</sup> *Id.* See the Discussion section for a comprehensive overview of the study’s findings.

<sup>109</sup> *Id.*

<sup>110</sup> *Id.* at 1.

<sup>111</sup> Ctrs. for Disease Control (hereafter CDC), *Marijuana: How Can It Affect Your Health? – Addiction*, U.S. DEP’T OF HEALTH & HUM. SERVS. (last updated Feb. 27, 2018), <https://www.cdc.gov/marijuana/health-effects.html> [<https://perma.cc/GF7E-GK66>].

<sup>112</sup> *Id.*

<sup>113</sup> Nat’l Inst. on Drug Abuse, *Is Marijuana A Gateway Drug?*, NAT’L INSTS. OF HEALTH (last updated June 2018), <https://www.drugabuse.gov/publications/research-reports/marijuana/marijuana-gateway-drug> [<https://perma.cc/HVQ3-WSPC>].

<sup>114</sup> CDC, U.S. Dep’t of Health & Hum. Servs., *Is Marijuana Safe Because It’s Legal?* (last updated Mar. 7, 2018), <https://www.cdc.gov/marijuana/faqs/is-marijuana-safe-because-its-legal.html> [<https://perma.cc/TNJ2-VWAZ>].

<sup>115</sup> *Marijuana: How Can It Affect Your Health? – Mental Health*, *supra* note 38.

#### d. Harmful to the Environment

The fourth consequence of the marijuana industry is the potential for harm to the environment. One of the greatest concerns is how growing pot impacts water systems.<sup>116</sup> Like other types of agriculture, cannabis cultivation has the potential to deplete the local water supply when growers siphon off water for agricultural use. Growers can use up to six gallons per day per plant during the summer.<sup>117</sup> Moreover, the process also releases sediments that clog waterways and end up depleting the habitats of salmon and other aquatic wildlife. As a result, commercial and recreational fisheries are also at risk.<sup>118</sup> Cultivation processes can also introduce toxic pesticides into water sources, which could then spread through the food chain to include local communities using the supply for drinking water.

For example, scientists are already observing evidence of food web contamination among California's threatened owl population.<sup>119</sup> Illegal marijuana growing operations using public lands rely on anticoagulant rodenticides (AR) in lieu of fences<sup>120</sup> to protect plants from wild rodents.<sup>121</sup> As discussed above, black

<sup>116</sup> See Ryan Stoa, *Weed and Water Law: Regulating Legal Marijuana*, 67 HASTINGS L.J. 3 (2015), available at [http://ecollections.law.fiu.edu/faculty\\_publications/99](http://ecollections.law.fiu.edu/faculty_publications/99) [<https://perma.cc/F6CK-KHEF>].

<sup>117</sup> Alastair Bland, *California's Pot Farms Could Leave Salmon Runs Truly Smoked*, NATIONAL PUBLIC RADIO BLOG (Jan. 13, 2014 at 11:10 a.m.), <https://www.npr.org/sections/thesalt/2014/01/08/260788863/californias-pot-farms-could-leave-salmon-runs-truly-smoked> [<https://perma.cc/K2QN-NL3D>].

<sup>118</sup> *Id.*; Letter from Mark Wheatly, City Manager, to Steven Lazar, Humboldt County Planning and Building Department, *Public Comments – Agencies, Districts and Tribes*, HUMBOLDTGOV.ORG., 7 (May 9, 2017) [<https://perma.cc/F5Q6-ZBHL>].

<sup>119</sup> See e.g. M.W. Gabriel et al., *Exposure to rodenticides in Northern Spotted and Barred Owls on remote forest lands in northwestern California: evidence of food web contamination*, 13 AVIAN CONSERVATION AND ECOLOGY 2 (2018), available at <https://doi.org/10.5751/ACE-01134-130102> [<https://perma.cc/BPB3-M4Q9>]. This study only infers but does not confirm these effects are tied to the illegal production of marijuana.

<sup>120</sup> Jason Mark, *Threatened Species Smoked by Pot Growers*, EARTH ISLAND JOURNAL (June 13, 2013), [http://www.earthisland.org/journal/index.php/articles/entry/threatened\\_species\\_smoked\\_by\\_pot\\_growers/](http://www.earthisland.org/journal/index.php/articles/entry/threatened_species_smoked_by_pot_growers/) [<https://perma.cc/3R9K-BA6C>].

<sup>121</sup> Alan B. Franklin et al., *Grass is not always greener: rodenticide exposure of a threatened species near marijuana growing operations*, 11 BMC RESEARCH NOTES 94 (Feb. 2, 2018), available at

market growers often target reservation lands because they lack people and policing. Owls are poisoned when they eat the rodents, their main food source. In 2018, the Hoopa Valley Tribe in partnership with the Integral Ecology Research Center (IREC) monitored the reservation's owl population for exposure to ARs; 100 percent of the wildlife sampled tested positive.<sup>122</sup> Additionally, growers are converting land once used for timber production into cultivation sites, and in doing so, eradicating owl habitats.<sup>123</sup>

Moreover, because federal law still prohibits cultivating marijuana, there are no regulations for the use of pesticides on marijuana plants as agricultural crops.<sup>124</sup> (However, many states that have legalized the cultivation of marijuana have provided growers with lists of pesticides that meet the state's safety standards).<sup>125</sup> Accordingly, even legal marijuana growing sites stand to have a negative environmental impact on Indian Country. Although tribal hunting and fishing rights are protected by treaty, these rights are meaningless if the reservations' wildlife populations are exhausted, their forests cleared, and their water supply contaminated.

Finally, the Green Rush may not be so green after all. Some environmentalists have started calling marijuana packaging "the new water bottle." A cannabis product that complies with local packaging and labeling requirements requires a cardboard box large enough to print the required warnings and ingredients. Inside of that box is generally a child-proof plastic container holding the product, with its own lid and paper seal. Many producers protest laws that would require them to make the packaging recyclable because the

<https://www.ncbi.nlm.nih.gov/pubmed/29391058> [<https://perma.cc/AP65-HJK8>].

<sup>122</sup> Allie Hostler, *The Hidden Impacts of the Pot Industry's Green Rush*, LENS MAGAZINE (Nov. 8, 2018), <https://lensmagazine.org/marijuana-impacts-in-the-trinity-watershed-e730bbd34d88> [<https://perma.cc/N6TM-X4U5>].

<sup>123</sup> M.W. Gabriel, *supra* note 119.

<sup>124</sup> E.g. Dave Stone, *Cannabis, pesticides and conflicting laws: the dilemma for legalized states and implications for public health*, 69 *Regulatory Toxicology and Pharmacology* 284 (2014), available at <https://www.ncbi.nlm.nih.gov/pubmed/24859075> [<https://perma.cc/EU8S-ZS8A>], e.g. WASHINGTON STATE DEPARTMENT OF AGRICULTURE, WSDA BULL. NO 19-01, UPDATED LIST OF PESTICIDES ALLOWED FOR USE IN MARIJUANA PRODUCTS (2019).

<sup>125</sup> E.g. Washington State Department of Agriculture, *Pesticide and Fertilizer Use for the Production of Marijuana in Washington*, available at <https://agr.wa.gov/departments/marijuana/pesticide-use> [<https://perma.cc/K8Z5-T65Z>].

cost would undermine their profits.<sup>126</sup> Moreover, some items are simply not recyclable in their current form. For example, “doob tubes,” plastic tubes used with pre-rolled joints, cannot be recycled because they fall through the grates of recycling machines.<sup>127</sup> The result is garbage – and a lot of it.

## 2. Tribes’ Arguments in Favor of Legalizing Cannabis in Indian Country

In 2016, the NCAI issued a resolution entitled “Affirming Tribal Sovereignty for Cannabis Regulation.” In it, tribes protested the federal government’s discriminatory legislation and policies toward tribes operating within state law and federal guidance, insisting that Congress treat states and tribes “with parity” for the purposes of cannabis regulation. The federal government also made the argument that tribes self-regulating marijuana in Indian Country was the true realization of federal policies promoting tribal self-determination and self-governance.<sup>128</sup> What changed over a year that made the NCAI so dramatically clarify its policy in favor of cannabis in Indian Country? As their statement suggests, tribal leaders have started to see the benefits of participating in the cannabis industry.

### a. Enhanced Sovereignty and Increasing Tax Revenue

The first benefit of legalizing cannabis on tribal land is the exercise of tribal sovereignty through taxation. As such, tribes may impose their own taxes on both members and non-members who make purchases on the reservation.<sup>129</sup> Similar to gaming, tribes can

<sup>126</sup> Daniel Shortt, *The Environmental Impact of Washington’s Marijuana Packaging*, CANNA LAW BLOG (Sep. 15, 2018), <https://www.cannalawblog.com/the-environmental-impact-of-washingtons-marijuana-packaging/> [https://perma.cc/QN2R-VVRR].

<sup>127</sup> Kristen Millares Young, *Garbage from Washington state’s booming pot industry clogs gutters, sewers and landfills*, WASH. POST, Aug. 14, 2018, available at [https://www.washingtonpost.com/national/garbage-from-booming-weed-industry-overruns-washington-gutters-sewers-and-landfills/2018/08/14/66f02384-9685-11e8-a679-b09212fb69c2\\_story.html](https://www.washingtonpost.com/national/garbage-from-booming-weed-industry-overruns-washington-gutters-sewers-and-landfills/2018/08/14/66f02384-9685-11e8-a679-b09212fb69c2_story.html) [https://perma.cc/5PS4-DNG7].

<sup>128</sup> *Affirming Tribal Sovereignty for Cannabis Regulation*, *supra* note 99.

<sup>129</sup> *Kerr-McGee Corp. v. Navajo Tribe*, 471 U.S. 195 (1985). The Supreme Court held that the Navajo may impose its mining tax on a non-Native mining

apply the revenue from tribal-owned cannabis businesses to maintaining the reservation and providing for tribal members' needs. As of 2012, 22 percent of American Indians and Alaska Natives live on reservations.<sup>130</sup> One in four Native persons lives in poverty,<sup>131</sup> with on-reservation poverty rates usually around three times the national average.<sup>132</sup>

One of the greatest expressions of poverty is the housing crisis on reservations. In 2008, Congress amended the Native American Housing Assistance and Self-Determination Act (NAHASDA) of 1996 “to establish a program for self-determined housing activities for the tribal communities to provide Indian tribes with the flexibility to use...in manners that are wholly self-determined by the Indian tribe....”<sup>133</sup> However, despite federal funding, there is not enough housing available for the on-reservation population.<sup>134</sup>

To put it plainly, between 42,000 and 85,000 people in tribal areas stay with friends or relatives because they do not have a home. On the reservation this is considered “couch surfing,” but anywhere else these persons would be accurately characterized as homeless.<sup>135</sup> For example, the Northern Arapaho Tribe on Wyoming's Wind River Indian Reservation has 11,000 members, but only 230 homes

business operating on the reservation without the Secretary of Interior's approval because taxing is an inherent sovereign power.

<sup>130</sup> Office of Minority Health, U.S. Dep't of Health and Hum. Servs., *Profile: American Indian / Alaska Native*, <https://minorityhealth.hhs.gov/omh/browse.aspx?lvl=3&lvlid=62> [https://perma.cc/2YH7-UYNK].

<sup>131</sup> Jens Manuel Krogstad, *One-in-four Native Americans and Alaska Natives are living in poverty*, PEW RESEARCH CENTER (Jan. 13, 2004), <http://www.pewresearch.org/fact-tank/2014/06/13/1-in-4-native-americans-and-alaska-natives-are-living-in-poverty> [https://perma.cc/3E4N-SYV9].

<sup>132</sup> *Id.*

<sup>133</sup> Native American Housing Assistance and Self-Determination Act of 1996, H.R. 3219, 104th Cong., § 231 (2nd Sess. 1996), *available at* [https://www.hud.gov/sites/documents/DOC\\_8141.PDF](https://www.hud.gov/sites/documents/DOC_8141.PDF) [https://perma.cc/THE6-TB9Y].

<sup>134</sup> Robert Johnson, *Here's What Life Is Like On The Notorious Wind River Indian Reservation*, BUSINESS INSIDER, Feb. 15, 2013, <https://www.businessinsider.com/wind-river-indian-reservation-in-wyoming-2013-2> [https://perma.cc/U2CP-L8AZ].

<sup>135</sup> Diane K. Levy et al., *Housing Needs of American Indians and Alaska Natives in Tribal Areas: A Report From the Assessment of American Indian, Alaska Native, and Native Hawaiian Housing Needs Executive Summary*, U.S. Dep't of Housing & Urban Develop't, 6 (Jan. 2017) *available at* <https://www.huduser.gov/portal/sites/default/files/pdf/NAHSG-UrbanStudy.pdf> [https://perma.cc/XV2D-6FEC].

on the reservation. An astonishing fifty-five percent of the tribe is homeless.<sup>136</sup> Entering the cannabis market is one way tribes might be able to generate their own funds, independent of federal allocations, to confront the homelessness on reservations by exercising their sovereign powers to legalize and then tax tribal cannabis production and sales.

### b. Creating Jobs

A second benefit of tribes entering the cannabis market is the potential to encourage entrepreneurship and ameliorate joblessness. The American Indian and Alaska Native population make up only 1% of the country's labor force, with the lowest participation rate of any ethnicity at 60.3%.<sup>137</sup> While the average 2018 national unemployment rate hovered just below 4% by the end of 2018, the American Indian and Alaska Native population's averaged 7.8%, nearly double.<sup>138</sup> Nine of the country's twenty-seven counties with a majority American Indian or Alaskan Native population average unemployment rates of 10% or higher.<sup>139</sup> Significantly, Native individuals are not any less willing to work than the average American; rather, there are not enough jobs available on the reservation.<sup>140</sup>

<sup>136</sup> Melodie Edwards, *With Little Housing Growth, Native American Families Live In Close Quarters*, NATIONAL PUBLIC RADIO, Nov. 16, 2016, <https://www.npr.org/2016/11/16/502333761/with-little-housing-growth-native-american-families-live-in-close-quarters> [<https://perma.cc/7JW7-K6CG>].

<sup>137</sup> Bureau of Labor Statistics, *Labor force characteristics by race and ethnicity, 2017*, BLS REPORTS, Aug. 2018, available at <https://www.bls.gov/opub/reports/race-and-ethnicity/2017/home.htm> [<https://perma.cc/T5AN-R65C>].

<sup>138</sup> Bureau of Labor Statistics, *The Employment Situation – December 2018*, BLS, Dec. 2018, available at <https://www.bls.gov/news.release/pdf/empst.pdf> [<https://perma.cc/BPZ7-3FGK>]; Bureau of Labor Statistics, *Labor market trends for American Indians and Alaska Natives, 2000-17*, BLS, Nov. 8, 2018, available at <https://www.bls.gov/opub/ted/2018/labor-market-trends-for-american-indians-and-alaska-natives-2000-17.htm> [<https://perma.cc/XNP3-N96E>].

<sup>139</sup> Shelly Hagan, *Where U.S. Unemployment Is Still Sky-High: Indian Reservations*, BLOOMBERG, Apr. 5, 2018, available at <https://www.bloomberg.com/news/articles/2018-04-05/where-u-s-unemployment-is-still-sky-high-indian-reservations> [<https://perma.cc/EL65-3Y6V>].

<sup>140</sup> Indeed, the Harvard Project on American Indian Economic Development noted in 2008 that since 1990 tribes have actively supported private entrepreneurship by “investing in their own capacities to govern and thereby



In addition to addressing joblessness, the Green Rush<sup>141</sup> offers a unique economic opportunity for tribal entrepreneurs. First, their Indian status means they are not subject to the profit-slashing state and local taxes non-Native cannabis businesses must pay. Accordingly, nascent Indian-owned cannabis ventures can find their footing more quickly, while attracting off-reservation investors. Second, it allows Indians living on the reservation to make use of their land; industrial hemp is one of the most viable crops on some reservation lands.<sup>142</sup> Third, Native-owned and operated businesses will diversify the already predominately white cannabis industry.<sup>143</sup> In a 2015 conference where representatives from seventy-five tribes met to discuss the prospect of participating in the cannabis market, Tulalip Vice Chairman Les Parks remarked the economic development possibilities could help tribes accomplish “a dream of another point of self-sufficiency on our reservations.”<sup>144</sup>

Given the current number of marijuana initiatives across the country, the trend of legalization is likely to grow regardless of the current federal government position. The longer federal and state governments frustrate tribal members’ efforts to enter the legal cannabis market, the more disadvantaged they will be when eligibility finally occurs.

### c. Tribal Healthcare

The third benefit of bringing legal cannabis into Indian Country is its potential positive impact on tribal health and well-being.<sup>145</sup> Native culture is rooted in natural, plant-based medicine

improving local accountability and encouraging tribal and non-tribal investments in human and other capital.” *Supra* at note 138.

<sup>141</sup> The Green Rush is a term used to describe the burgeoning marijuana industry.

<sup>142</sup> *United States v. White Plume*, 447 F.3d 1067, 1076 (8th Cir. 2006).

<sup>143</sup> As of 2017, 81 percent of cannabis executives were White. Liz Posner, *The Green Rush is Too White*, PACIFIC STANDARD, Dec. 10, 2018, available at <https://psmag.com/economics/the-green-rush-is-too-white-hood-incubator-race-weed> [<https://perma.cc/4V5J-ZHGB>].

<sup>144</sup> Gene Johnson, *Indian tribes converge in Washington state to discuss marijuana legalization*, THE CANNABIST, Feb. 27, 2015, <https://www.thecannabist.co/2015/02/27/indian-tribes-marijuana-legalization-washington-state/30622/> [<https://perma.cc/3VWG-GJKR>].

<sup>145</sup> James Ellis, *Legal Weed Could Be a Godsend For American Indian Tribes*, NEWSWEEK, April 23, 2018, available at <https://www.newsweek.com/legal-cannabis-could-be-godsend-american-indian-tribes-895240> [<https://perma.cc/K7KL-EN4H>].

and many tribal members want access to marijuana and cannabis products as an alternative to expensive pharmaceuticals that often come with severe side effects.<sup>146</sup> While Congress has provided an exemption for the Native American Church to use, possess, and transport peyote for ceremonial purposes, no similar exemption exists for cannabis.<sup>147</sup> Nevertheless, many tribes are exploring how to use medical marijuana to improve the quality of life for tribal members with chronic pain caused by cancer and other serious conditions.<sup>148</sup>

In doing so, the tribe relieves its reliance on the perpetually under resourced Indian Health Services (IHS), the federal agency charged with administering health care to tribes. As of 2015, IHS's per capita healthcare expenditure was \$3,688, as compared with the \$9,523 per capita expenditures for the overall U.S. population.<sup>149</sup> In addition to a lack of funding, the IHS also has a shortage of medical care professionals. As a result, tribal members are denied care for even the most critical illnesses.<sup>150</sup> Alternatively, THC-based medicines can be used to treat nausea in cancer patients, to stimulate appetite in persons suffering from AIDS, and to reduce seizures in children with epilepsy, among other things.<sup>151</sup> Tribes may be able to more immediately and effectively tend to members' health by providing medical marijuana for pain management purposes.<sup>152</sup>

<sup>146</sup> Alysa Landry, *Proceed With Caution: A Warning to Tribes Wanting to Grow Medical Marijuana*,

INDIAN COUNTRY TODAY MEDIA NETWORK (Feb. 16, 2015),

<https://newsmaven.io/indiancountrytoday/archive/>

[proceed-with-caution-a-warning-to-tribes-wanting-to-grow-medical-marijuana-QLg8IzPQNOK2hERYGoU03w](https://newsmaven.io/indiancountrytoday/archive/proceed-with-caution-a-warning-to-tribes-wanting-to-grow-medical-marijuana-QLg8IzPQNOK2hERYGoU03w) [<https://perma.cc/RJP5-YWUH>].

<sup>147</sup> 42 U.S.C. § 1996(a)(b)(1) (2012).

<sup>148</sup> Walker Orenstein, *Puyallup Tribe pursuing medical marijuana grow after signing deal with state*, THE NEWS TRIBUNE, Aug. 3, 2016, available at

<https://www.thenewstribune.com/news/local/marijuana/article93623607.html>

[<https://perma.cc/6KJS-RGLM>].

<sup>149</sup> Cathleen E. Willging et al., *Challenges on the Horizon for Native American Sovereignty and Health Care*, SCHOLARS STRATEGY NETWORK (Apr. 30, 2018),

<https://scholars.org/brief/challenges-horizon-native-american-sovereignty-and-health-care> [<https://perma.cc/X3S2-3L3V>].

<sup>150</sup> *Id.*

<sup>151</sup> Nat'l Inst. on Drug Abuse, *Is marijuana safe and effective as medicine?*,

NAT'L INSTS. OF HEALTH (last updated June 2018),

<https://www.drugabuse.gov/publications/research-reports/marijuana/marijuana-safe-effective-medicine> [<https://perma.cc/A3CB-R2WC>].

<sup>152</sup> A tribe's ability to provide in the absence of federal funding was underscored by the 2018-2019 government shutdown, where tribes' clinics closed and left members stranded without access to health care. Mitch Smith & Julie Turkewitz, *Shutdown Leaves Food, Medicine and Pay in Doubt in Indian Country*, N.Y.

Proponents for bringing marijuana to a population that already has high rates of substance abuse issues argue that the drug can be differentiated from alcohol and other, more addictive drugs.<sup>153</sup> It is virtually impossible to overdose on cannabis because it has such a high estimated lethal dose: a person would have to smoke 1,500 pounds of marijuana in fifteen minutes in order to reach a lethal overdose.<sup>154</sup> Moreover, the U.S. Food and Drug Administration (FDA) has classified synthetic derivatives of cannabis' psychoactive cannabinoid, THC, as a Schedule III drug.<sup>155</sup> Side effects for most people using cannabis or cannabis-based substances are minimal and short-lived, and there is even some evidence that long-term use of cannabinoids can strengthen immune function.<sup>156</sup>

#### d. Positive Impact on the Environment

Finally, the fourth benefit of legalization might be a positive impact on the environment. Legalizing marijuana, some argue, would move illegal production from public lands and the outskirts of reservations to private properties. In doing so, the overall impact on wildlife and the ecosystem would be reduced. Additionally, growers would consume less energy because they could rely on sunlight instead of indoor lighting. Furthermore, hemp may provide alternatives to chemical-intensive crops like cotton and imported fossil fuels.<sup>157</sup> In other words, tribes may be able to better mitigate the environmental effects of cultivating cannabis by legalizing it and then heavily regulating its growth and production.

TIMES, Jan. 1, 2019, <https://www.nytimes.com/2019/01/01/us/native-american-government-shutdown.html> [<https://perma.cc/C89T-UEQC>].

<sup>153</sup> The rate of illegal drug use in the last month among American Indians and Alaska Natives ages 12 and up in 2014 was 14.9%, compared with the national average of 10.2%. *Racial and Ethnic Minority Populations*, Substance Abuse and Mental Health Services Administration, U.S. DEPT. OF HEALTH & HUMAN SERVICES (last updated Aug. 16, 2018), <https://www.samhsa.gov/> [<https://perma.cc/C9NW-JZYY>].

<sup>154</sup> PATRICIA C. FRYE, MD, *THE MEDICAL MARIJUANA GUIDE: CANNABIS AND YOUR HEALTH* 103 (2018).

<sup>155</sup> *Id.*

<sup>156</sup> *Id.*

<sup>157</sup> Susan David Dwyer, *The Hemp Controversy: Can Industrial Hemp Save Kentucky*, 86 KY. L. J. 1143, 1151 (1998).

### C. *A Case Study of Washington State Tribes' Policymaking About Cannabis Enterprises*

After the news broke in January 2018 about the DOJ's decision to rescind the Cole Memo, Washington Governor Jay Inslee expressed his commitment to maintaining the state's legal cannabis market:

In Washington state we have put in place a system that adheres to what we pledged to the people of Washington and the federal government; it's well regulated, keeps criminal elements out, keeps pot out of the hands of kids and tracks it all carefully enough to clamp down on cross-border leakage. We are going to keep doing that and overseeing the well-regulated market that Washington voters approved. ...[W]e will vigorously defend our state's laws against undue federal infringement.<sup>158</sup>

Recalling the earlier discussion about how a state's policy toward marijuana can help or hinder tribal efforts to break into the cannabis market, Governor Inslee's intent toward tribal cannabis is unclear. Is he vowing to defend state law, which does not apply to tribal lands, or to more broadly defend the state's cannabis market, to include participating tribes? The state government's actions suggest the latter; Washington state law currently still provides for marijuana agreements between the governor and federally-recognized Indian tribes.<sup>159</sup>

Against this policy backdrop, Washington State's tribes provide helpful case studies for understanding tribal debate over legalizing cannabis for three reasons. First, Washington was the first state to develop a compacting system enabling tribes to participate

<sup>158</sup> Wa. Gov. Jay Inslee, *Statement from Inslee regarding reports that USJOJUSDOJ will rescind Cole Memo*, THE STATE OF WASHINGTON (January 4, 2018), <https://www.governor.wa.gov/news-media/statement-inslee-regarding-reports-usdoj-will-rescind-cole-memo> [<https://perma.cc/2A5M-VNNX>].

<sup>159</sup> RCW §43.06.490 (2015). Additionally, in 2019 Governor Inslee announced the formation of the Marijuana Justice Initiative to pardon people with a single misdemeanor conviction on their criminal record for adult marijuana possession prosecuted under Washington state law. See Marijuana Justice Initiative, GOVERNOR.WA.GOV (2019).

in the legal marijuana market. The State's compact with the Suquamish Tribe served as a model for its subsequent compacts with five more tribes as of 2018.<sup>160</sup> Second, despite Washington's decision to legalize cannabis on the state level, some tribes, like the Yakama Nation, are opting to ban the substance on their lands. Third, whether tribes choose to legalize or criminalize cannabis, part of their decision is informed by the desire to express and retain their sovereignty vis-à-vis both the state and federal governments.

## 1. The Suquamish Tribe Legalizes Cannabis

### a. Why the Tribe Legalized

In November 2012, Initiative 502 ("I-502") passed in Washington State, where residents voted to decriminalize adult marijuana use and the state government agreed to bring marijuana under the control of its Liquor and Cannabis Board (LCB).<sup>161</sup> I-502's success gave some of the Suquamish members an idea: what if the Tribe also legalized recreational marijuana and deflected federal scrutiny by forming an alliance with the state? Rion Ramirez, general counsel for the Tribe's Port Madison Enterprises, began researching how the tribe might break into the market. Ultimately, there were three main reasons the tribe decided to legalize cannabis on its lands.

First, the Tribe could delineate its sovereignty around cannabis before the State or other cannabis ventures did it for the Tribe. Ramirez outlined for Suquamish leaders how to operate their own marijuana business largely by their own rules: by forming a compact with the State.<sup>162</sup> In 2014, the tribe initiated discussions with the State, submitting a proposal outlining how the tribe could

<sup>160</sup> In addition to the Suquamish Tribe, the Muckleshoot, Port Gamble S'Klallam, Puyallup, Squaxin Island, and Tulalip Tribes operate cannabis businesses in Washington State.

<sup>161</sup> Wa. Initiative Measure No. 502, Filed July 8, 2011, Passed November 2012, available at [https://sos.wa.gov/\\_assets/elections/initiatives/i502.pdf](https://sos.wa.gov/_assets/elections/initiatives/i502.pdf) [<https://perma.cc/AD8T-3VHV>].

<sup>162</sup> Tobias Coughlin-Bogue, *Washington State's Second Native American-Owned Pot Shop Is a Big Win for Tribal Sovereignty*, THE STRANGER, Dec. 8, 2015, available at <https://www.thestranger.com/blogs/slog/2015/12/08/23245665/washington-states-second-native-american-owned-pot-shop-is-a-big-win-for-tribal-sovereignty> [<https://perma.cc/AF5H-DDNM>].

regulate marijuana sales in tandem with the LCB's regulatory system.

Second, the Tribe perceived enormous economic opportunity in legal cannabis. Chairman Leonard Forsman, another driving force behind the Tribe legalizing cannabis, issued a statement explaining, “[the Tribe] has a responsibility to explore business opportunities that may help raise funds for its people and government” and it was “vital to approach the Liquor Control Board as part of that process.”<sup>163</sup> After Washington and the Suquamish Tribe signed the compact, Forsman reiterated the Tribe's economic development priority: “With the passage of I-502, we knew we needed to adapt to the changing environment surrounding our reservation and saw an opportunity to diversify our business operations.”<sup>164</sup>

Third, the Tribe saw how legalization might contribute to its members' health and safety. On the one hand, both Forsman<sup>165</sup> and Ramirez<sup>166</sup> have stated that if Washington had not legalized marijuana, the Tribe probably would not have either. Moreover, Suquamish Tribal Council member Robin Sigo, former director of the Tribe's Wellness Center, said, “Because it's legal, adults 21 and older get to make that choice. But that doesn't mean we endorse it.”<sup>167</sup> On the other hand, Sigo, along with Suquamish Police Chief Mike Lasnier agreed that bringing marijuana use into the open would teach Native youth to make educated choices.<sup>168</sup>

Tribal law enforcement officials also supported the compact because they wanted to avoid jurisdictional conflicts on the 3,581

<sup>163</sup> Jordan Schrader, *Marijuana raises issue of tribal authority*, THE NEWS TRIBUNE, Apr. 6, 2014, available at <https://www.thenewstribune.com/news/politics-government/article25867264.html> [<https://perma.cc/2AQ8-55RN>].

<sup>164</sup> Bob Young, *Deal to let Suquamish Tribe open Kitsap County pot store*, THE SEATTLE TIMES, Sept. 14, 2015, updated Apr. 25, 2016, available at <https://www.seattletimes.com/seattle-news/marijuana/deal-to-let-suquamish-tribe-open-kitsap-county-pot-store/> [<https://perma.cc/MCM4-RA6K>].

<sup>165</sup> Richard Walker, *Compact 'doesn't mean we endorse marijuana use'*, KITSAP DAILY NEWS, Sept. 15, 2015, available at <https://www.kitsapdailynews.com/news/compact-doesnt-mean-we-endorse-marijuana-use/> [<https://perma.cc/ZAE4-8WGQ>].

<sup>166</sup> Coughlin-Bogue, *supra* note 162.

<sup>167</sup> Walker, *supra* note 165.

<sup>168</sup> *Id.* Lasnier remarked, “The fact is, people have freedom and part of that is the freedom to make choices. We can teach our young people to make good choices in their lives, teach them good values and balance that against the freedom to make choices.”

acres owned by non-Indians on Port Madison Indian Reservation. The Tribe does not have jurisdiction over this land.<sup>169</sup> Accordingly, Lasnier explained, if the Tribe had not legalized after the State did, “that would have created some headaches. ...[Enforcement] would have been quite complex and complicated. We actually supported the council in making the change so there wouldn’t be that disparity. We — all of law enforcement — have bigger issues to deal with, like meth and heroin.”<sup>170</sup>

b. The Compact

On September 15, 2015, the State of Washington and the Suquamish Tribe signed the nation’s first state-tribal marijuana compact.<sup>171</sup> The agreement reflected the state’s recognition of the tribe as a sovereign nation, with whom the LCB would partner with rather than license.<sup>172</sup> The compact describes the Suquamish Tribe’s motivation for entering into the compact:

After serious deliberation, the Tribe, as a sovereign nation, has also determined that present day circumstances make a complete ban of marijuana within Indian Country ineffective and unrealistic and has decriminalized its sale and possession in certain circumstances. At the same time, consistent with the federal priorities, the need still exists for strict regulation and control over the production, possession, delivery, distribution, sale, and use of marijuana in Indian Country.<sup>173</sup>

This language suggests that the tribe is accepting the realities of marijuana use without necessarily endorsing it. Instead, the tribe is

<sup>169</sup> Except in cases of violence against women on Tribal land.

<sup>170</sup> *Id.*

<sup>171</sup> Compact, *supra* note 89.

<sup>172</sup> Press Release, Washington State Liquor and Cannabis Board, *Liquor and Cannabis Board and Suquamish Tribe sign marijuana compact* (2015), available at <https://lcb.wa.gov/pressreleases/lcb-and-suquamish-tribe-sign-mj-compact> [<https://perma.cc/M3CJ-EKEU>]. The compact was entered after the state passed House Bill 2000, giving the governor the authority to enter into agreements with federally recognized Indian tribes in Washington State concerning marijuana. H.B. 2000, 64th Leg., Reg. Sess. (Wa. 2015).

<sup>173</sup> Compact, *supra* note 89, at 2.

interested in the economic opportunities marijuana presents, while recognizing the federal policy outlined in the Cole and Wilkinson memos. In entering the compact, the tribe is asserting its power to regulate marijuana on its land with – not under – the state.

Moreover, in the compact’s introductory remarks, the state acknowledges the Suquamish’s sovereignty. The State explains its partnership with the Suquamish: “The State and the Tribe have recognized the need for cooperation and collaboration with regard to marijuana in Indian Country.”<sup>174</sup> Both parties state that their shared objectives in entering the compact are to 1) enhance public health and safety, 2) ensure a robustly regulated marijuana market, 3) encourage economic development in Indian Country, and 4) create broader economic benefits for both the tribe and the state.<sup>175</sup> Furthermore, the state and tribe agreed to “support the Compact and defend each of their authority to enter into and implement this Compact,” a provision likely directed at the federal government.<sup>176</sup> However, the tribe expressly retained its sovereign immunity, barring the state from bringing any action against it.

However, the tribal self-determination is somewhat tempered in the compact’s fine print. The tribe may only buy outside products approved by the state. It must notify the state at least thirty days<sup>177</sup> before opening a new retailer and ninety days before starting a new tribal processing operation. Only the tribe as an entity or tribal enterprises may produce or process marijuana in Indian Country; tribal member businesses are prohibited from doing so.<sup>178</sup> In terms of taxes, the state will not impose a tax on tribal marijuana enterprises. However, the compact requires that the tribal tax on all marijuana sales in Indian Country equal at least 100% of the state’s rate when the product is made outside of Indian Country and sold to a non-Indian purchaser.<sup>179</sup> In a curiously-worded provision, the tribe agrees “[w]hile not required under State law, . . . to use the proceeds of the Tribal Tax for Essential Government Services.”<sup>180</sup>

<sup>174</sup> *Id.*

<sup>175</sup> *Id.* at 3.

<sup>176</sup> *Id.* at 11.

<sup>177</sup> *Id.* at 5.

<sup>178</sup> *Id.* at 6.

<sup>179</sup> *Id.* at 7. The Supreme Court held in 1982 that an Indian tribe’s sovereign powers include the authority to tax non-Indians conducting business on tribal lands. *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982).

<sup>180</sup> *Id.* at 8. On page 3 of the compact, “essential government services” is defined as services provided by the tribe, including administrative, social, transportation,



Consequently, although the compact refers to the tribe as a sovereign nation, most of the provisions are not bilateral; the state does not have to notify the tribe of new marijuana businesses nor does it pledge to spend its taxes a certain way. Perhaps this kind of compact model is the reality for tribes that want to legalize marijuana without provoking competitiveness in a state. But as the Suquamish compact and subsequent compacts suggest, tribes that opt into the existing state regulatory system may find there are some strings attached.

### c. The Results

Today, the Suquamish Tribal Code (“the Code”) expressly permits marijuana possession by persons aged twenty-one or older as long as the amount does not exceed Washington State’s legal limit.<sup>181</sup> The Code also allows persons who hold medical marijuana cards to possess plants, in addition to products and concentrates.<sup>182</sup> However, no individual tribal members may plant, grow, produce, cultivate, or process marijuana in any form within the boundaries of the tribe’s land. This provision, however, does not apply to commercial marijuana activity.<sup>183</sup>

Chapter 11.10 of the Code governs the tribe’s commercial marijuana activities. In it, the tribe delegates sole authority to the Suquamish Evergreen Corporation (SEC) to “locate, manage, and operate all commercial marijuana activity on behalf of the Tribe...subject to oversight by the Tribal Council.”<sup>184</sup> The SEC is also empowered to negotiate compacts with the State.<sup>185</sup> Additionally, the Tribal Council authorizes the SEC to develop policies and procedures governing matters related to the production and processing of marijuana procedures.<sup>186</sup> There are parallels between the Code’s procedure and that of U.S. Congressional

utility, community, and economic development services. The tribe may apply its on tax in addition to the state rate and gets to keep every penny.

<sup>181</sup> Suquamish Tribe, 7.26.4(a) Controlled Substances: Marijuana Possession and Use, Suquamish Tribal Code (May 15, 2018), *available at* <https://suquamish.nsn.us/wp-content/uploads/2018/05/Chapter-7.26.pdf> [<https://perma.cc/2WEL-AYTH>].

<sup>182</sup> *Id.* at 7.26.4(b).

<sup>183</sup> *Id.* at 7.25.5 (a), (d).

<sup>184</sup> *Id.* The SEC is a wholly owned subsidiary of Port Madison Enterprises, an agency of the Suquamish Tribe.

<sup>185</sup> *Id.* at 11.10.4.

<sup>186</sup> *Id.* at 11.10.7(h).

delegating authority to administrative agencies. However, one of the results of the tribe entering the cannabis market is the tribe's unique regulatory apparatus tailored to its community's precise needs. Consequently, while the state-tribe compact asks the tribe to conform to state law in many instances, the Suquamish are making their own law on the reservation in ways that make sense for the tribe's government, commercial enterprises, and individual members.

In December 2015 the tribe opened Agate Dreams on the Port Madison Indian Reservation. Its clientele includes both tribal members and non-Indians who come to shop for products supplied by over thirty vendors.<sup>187</sup> The store's manager, Calvin Medina, stated, "We want to prove to the state and to the rest of the country that we can run this just as well as every other operation. We're not trying to get around any particular rules or regulations. We just want to compete like everyone else."<sup>188</sup> The tribe issued a statement reiterating Medina's point in 2018 after U.S. Attorney General Sessions rescinded the Cole and Wilkinson Memos. In it, Chairman Forsman expresses his confidence in the "State and Tribal laws [that] were created and crafted in response to the challenges marijuana presented to our communities."<sup>189</sup>

Because ultimately, the Suquamish's idea of compacting with the state is not only about the tribe breaking into the cannabis industry. Robin Sigo, the Tribal Treasurer, best explains how the tribe's agreement with Washington state strengthens the tribe's sovereignty:

It strengthens the government-to-government relationship between the tribe and the state government. It basically says, 'You might be the state and you have said that marijuana is legal here, but we're not going to apply as a business and get a business license from the state.' That wouldn't make any sense for us. We worked to negotiate a compact

<sup>187</sup> AGATE DREAMS, <https://www.agatedreams.com/> [<https://perma.cc/5384-3U7S>] (last visited Jan. 29, 2019).

<sup>188</sup> Coughlin-Bogue, *supra* note 162.

<sup>189</sup> Press Release, Suquamish Nation, *Tribe Responds to DOJ's Memorandum Regarding Marijuana Enforcement* (Jan. 4, 2018), available at <https://suquamish.nsn.us/suquamish-tribe-responds-doj-memorandum-regarding-marijuana-enforcement/> [<https://perma.cc/3XB5-QHRP>].

with the state that was an official government-to-government relationship, and to look at making sure we got to keep the tax revenue because we're operating [marijuana businesses] here and the tax revenue should come to us.... We've gotten to take a stand for other tribes in the state and country. As [marijuana / cannabis] gets legalized in more and more states, more and more tribes are going to be having this opportunity, and we're glad to lead.<sup>190</sup>

In fact, the tribe's compact has proved successful so far and served as the model for other Washington tribes seeking compacts with the state to regulate cannabis in Indian Country. The Squaxin Island, Puyallup, Muckleshoot, and Tulalip tribes have also entered into agreements with the state. For tribes that decide to legalize cannabis, two winning arguments usually include the economic development opportunity and how cannabis ventures stand to enhance a tribe's exercise of its sovereignty. Yet these very same arguments are what prompt[ed?] other tribes to criminalize marijuana and ban the substance on their lands.

## 2. The Yakama Nation Bans Cannabis

### a. Yakama Nation's History of Battling Substance Abuse with Legal Measures

By the time Washington voters approved an initiative legalizing marijuana in 2012, the Yakama Nation had already been fighting for over a decade to keep alcohol off of its 1.2 million acre reservation.<sup>191</sup> The Nation started discussing prohibition in 1993, citing health and safety reasons.<sup>192</sup> Children born on the reservation had a 500 percent higher rate of birth defects caused by fetal alcohol syndrome as compared with the general population.<sup>193</sup> Seventy-

<sup>190</sup> Coughlin-Bogue, *supra* note 162.

<sup>191</sup> Associated Press, *Tribe Votes to Go Dry*, LOS ANGELES TIMES, Apr. 8, 2000, available at <http://articles.latimes.com/2000/apr/08/news/mn-17407> [<https://perma.cc/6FPX-CQS8>].

<sup>192</sup> Associated Press, *Indians and Washington State Are at Odds Over Alcohol Ban*, N.Y. TIMES, Oct. 10, 2000, available at <https://www.nytimes.com/2000/10/10/us/indians-and-washington-state-are-at-odds-over-alcohol-ban.html> [<https://perma.cc/NT6P-9DYS>].

<sup>193</sup> *Id.*

eight percent of motor vehicle deaths on the reservation were alcohol-related.<sup>194</sup> Proponents also mentioned alcohol as a factor in the reservation's high rates of sexual abuse, domestic violence, murder, and suicide.<sup>195</sup> In early 2000, tribal officials voted to make the Yakama Nation completely dry.<sup>196</sup>

In order to reduce its members' alcohol use, the Nation went after the underlying liquor economy on the reservation. Tribal Council Member Jack Fiander characterized the act as "a symbol that this is not the type of economy we want to see concentrated on the reservation" because "[y]ou can't base your economy on selling cigarettes, alcohol and fireworks."<sup>197</sup> At the time, the reservation had over fifty establishments selling alcohol.<sup>198</sup> In enacting the ban, tribal jurisdiction bumped up against the state's authority when tribal leaders said the prohibition applied to nonmembers as well.<sup>199</sup>

While the State of Washington did not object to tribal efforts to mitigate alcohol-related health and safety concerns, the State accused the Yakama Nation of exceeding its authority.<sup>200</sup> Washington's then-attorney general, Christine Gregoire, petitioned the Federal District Court in Spokane to issue a ruling the Nation's ban did not extend to nonmembers or to those persons on nonmembers' property.<sup>201</sup> The court dismissed the lawsuit as not ripe because the Nation had yet to enforce the ban.<sup>202</sup> The following year, acting U.S. Attorney in Spokane, Jim Shively, issued an opinion stating that the Nation could not ban the sale of alcohol on

<sup>194</sup> *Id.*

<sup>195</sup> Cate Montana, *Tension, misunderstanding arise over Yakama alcohol ban*, INDIAN COUNTRY TODAY (Dec. 13, 2000),

<https://newsmaven.io/indiancountrytoday/archive/tension-misunderstanding-arise-over-yakama-alcohol-ban-LUv42h3CTk6TiubTuIAO4Q/>

[<https://perma.cc/AJ6B-BLVN>]. At the time there were thirteen unsolved killings on the reservation involving Indian women, most of whom were last seen in a tavern. *Tribe Votes To Go Dry*, *supra* note 191.

<sup>196</sup> *Id.* Alcohol was already long prohibited at the tribe's casino, at powwows, and in the convenience store per a 150-year-old alcohol ban on the reservation.

<sup>197</sup> *Tribe Votes To Go Dry*, *supra* note 191.

<sup>198</sup> *Indians and Washington State at Odds*, *supra* note 192.

<sup>199</sup> *Id.*

<sup>200</sup> For a focused discussion on the state's legal case against the Yakama Nation, consult Robert J. Haupt, 'Never Lay a Salmon on the Ground with His Head toward the River': *State of Washington Sues Yakamas over Alcohol Ban*, 26 AMERICAN INDIAN LAW REVIEW 67 (2001).

<sup>201</sup> *Indians and Washington State at Odds*, *supra* note 192.

<sup>202</sup> Associated Press, *Feds will enforce existing liquor laws*, LEWISTON TRIBUNE, Apr. 1, 2001, [https://lmtribune.com/northwest/feds-will-enforce-existing-liquor-laws/article\\_cf76a03c-8b66-5fc6-bb15-2c119a6fbfa8.html](https://lmtribune.com/northwest/feds-will-enforce-existing-liquor-laws/article_cf76a03c-8b66-5fc6-bb15-2c119a6fbfa8.html) [<https://perma.cc/K9X2-8YB3>].

non-Indian communities on private land within the reservation.<sup>203</sup> However, his opinion was not binding and the state eventually backed off the suit.

b. Resisting Legalization As An Exercise of Tribal Sovereignty

After Washington State voters passed I-502 in 2012, the Yakama Nation faced a new challenge: keeping the cannabis market out of its territory. Tribal Chairman Harry Smiskin compared the Nation’s battle against the cannabis industry with its earlier liquor ban: “We have had a long and unpleasant history with marijuana — just as we have had with alcohol. We fight them both on our lands.”<sup>204</sup>

George Colby, attorney to the Yakama Nation, agreed: “Marijuana is the biggest problem for our people up to age forty.... It’s a bigger problem than alcohol.”<sup>205</sup> At a 2013 LCB public hearing, Colby took the floor to warn cannabis entrepreneurs they were not welcome on the reservation:

“I’m here to tell you that if you want to spend half a million dollars on growing marijuana in central Washington, I suggest you don’t do that.... Because we will come after you. The Yakama Nation will come after you. And under our treaty, all we have to do is pick up the phone and call the federal government and tell you to get off of our land.”<sup>206</sup>

The treaty Colby was referring to is the Yakama Nation Treaty of 1855 signed between the then-governor of the Washington Territory and the Confederated Tribes of the Yakama Nation.<sup>207</sup> In it, the Nation ceded 10.8 million acres of its twelve million acre territory to the U.S. government, retaining fishing and hunting

<sup>203</sup> *Id.*

<sup>204</sup> *Id.*

<sup>205</sup> Jonathan Kaminsky, *Indian tribe seeks pot business ban in part of Washington state*, REUTERS, Mar. 24, 2014, <https://www.reuters.com/article/us-usa-marijuana-tribe-idUSBREA2N12J20140324> [<https://perma.cc/FJ3L-59W5>].

<sup>206</sup> *Feds will enforce existing liquor laws*, *supra* note 202.

<sup>207</sup> Yakama Nation Treaty of 1855, U.S.-Yakama Nation, *opened for signature* June 9, 1855, *ratified* Mar. 8, 1859, *available at* <http://www.yakamanation-nsn.gov/treaty.php> [<https://perma.cc/8JPS-34GE>].

rights.<sup>208</sup> The remaining 1.2 million acres became the Yakama Nation’s reservation land.<sup>209</sup> In its totality, the Yakama Nation comprises more than thirty percent of Washington state and is a checkerboard of incorporated cities patched in among tribal land.<sup>210</sup>

In response, the LCB added a rule requiring the Board to notify a tribe’s government if anyone applies for a permit to sell marijuana on tribal land.<sup>211</sup> The state also agreed not to issue a license to any business located on an Indian reservation.<sup>212</sup>

c. An Historic First – the Yakama Nation Attempts to Block State Law

In an unprecedented move, the Yakama Nation asserted its sovereignty to ban cannabis not only on its reservation, but also, on the ceded lands. Chairman Smiskin explained, “We’re merely exercising what the treaty allows us to do, and that is prevent marijuana grows (and sales) on those lands.”<sup>213</sup>

In a written statement to *SeattlePi*, Smiskin elaborated the Nation’s position: “I cannot tell you what to do on state lands in Seattle or elsewhere — I can tell you how it is going to be on Yakama Lands. The use of marijuana is not a part of our culture or religions or daily way of life. Nor is it one of our traditional medicines. Please respect our lands and our position.”<sup>214</sup>

<sup>208</sup> *Id.*

<sup>209</sup> *Id.*

<sup>210</sup> Maria L. La Ganga, *Yakama tribe just says no to Washington state’s legal pot market*, WASH. POST, Jan. 9, 2014, available at [https://www.washingtonpost.com/national/yakama-tribe-just-says-no-to-washington-states-legal-pot-market/2014/01/09/14e2aab6-6bfc-11e3-aecc-85cb037b7236\\_story.html](https://www.washingtonpost.com/national/yakama-tribe-just-says-no-to-washington-states-legal-pot-market/2014/01/09/14e2aab6-6bfc-11e3-aecc-85cb037b7236_story.html) [<https://perma.cc/XTR7-XKFD>].

<sup>211</sup> Associated Press, *Yakama Nation won’t recognize legal marijuana*, KOMO NEWS (Oct. 27, 2013), <https://komonews.com/news/local/yakama-nation-wont-recognize-legal-marijuana> [<https://perma.cc/PP7V-K9YZ>].

<sup>212</sup> Elaine Thompson & Associated Press, *Yakama Nation wants to ban marijuana on ancestral lands*, OREGONLIVE (Jan. 13, 2014), [https://www.oregonlive.com/pacific-northwestnews/index.ssf/2014/01/yakama\\_nation\\_wants\\_to\\_ban\\_mar.html](https://www.oregonlive.com/pacific-northwestnews/index.ssf/2014/01/yakama_nation_wants_to_ban_mar.html) [<https://perma.cc/BMY9-Q395>]. This decision is largely because reservations are federal lands and marijuana is illegal under federal law. Thus, the LCB did not see a point in issuing licenses the federal government could then come in and take away. *Yakama Nation won’t recognize legal marijuana*, *supra* note 211.

<sup>213</sup> *Id.*

<sup>214</sup> Jake Ellison, *Guest Post by Chairman of Yakama Nation, Harry Smiskin: Why the Yakama Nation opposes state’s ‘legal’ marijuana on its land*, SEATTLE PI (Oct. 22, 2013), <https://blog.seattlepi.com/marijuana/2013/10/22/guest-post->

The Yakama created its own database to track applications for establishing a cannabis business on the Nation's reservation and ceded lands.<sup>215</sup> Then it filed objections to 1,300 pending marijuana licenses.<sup>216</sup> Citing federal anti-drug laws, the Nation has vowed to sue to enforce its marijuana ban in ceded lands, making it the first time a tribe has sought to block a state law from applying in ceded territory.<sup>217</sup>

Curiously, the Nation may not have to; neighboring non-tribal counties Yakima and Wenatchee, which overlap with the ceded lands, have already banned marijuana enterprises as well. Yet local governments are not interested in allying themselves with the Yakama because of other sovereignty issues, like water rights.<sup>218</sup> This issue is still playing out and the Yakama Nation has taken no further legal action against Washington State or neighboring local governments at this time.

### 3. Same Priorities, Different Methods

The Suquamish Tribe legalized commercial marijuana on its land because it wanted to enhance its sovereignty through increased opportunities for economic development and safeguard its members' health and wellness. To that end, the tribe devised a unique, first-of-its-kind compact with Washington State so that it could frame the terms by which the cannabis market would operate in Indian Country. The tribe's success sparked a succession of similar agreements between tribes and the states they are located in. The compact the Suquamish government co-drafted has since served as a model for other tribes seeking to assert their sovereign power to regulate marijuana on tribal lands.

Alternatively, the Yakama Nation criminalized liquor and marijuana commercial activity to protect its members and prevent the Nation's economy from being overly reliant on "fringe businesses."<sup>219</sup> Its leaders challenged the state and cannabis businesses, citing its 1855 Treaty rights, federal law, and most

why-the-yakama-nation-opposes-legal-marijuana-on-tribal-lands/  
[<https://perma.cc/C46Y-YVXM>].

<sup>215</sup> La Ganga, *supra* note 210.

<sup>216</sup> Kaminsky, *supra* note 205.

<sup>217</sup> *Id.*

<sup>218</sup> *Id.*

<sup>219</sup> *Tribe Votes to Go Dry*, *supra* note 191.

significantly, the Yakama Nation's sovereign authority to make and enforce its laws on both its reservation and ceded lands.

These case studies sketch out how tribes weigh the perceived benefits and harms of legalizing cannabis. But they also illustrate how one tribe's benefit is another's harm, and how any tribal discussion of legalization is necessarily underpinned by the tribe's interest in preserving its sovereignty. Accordingly, whether a tribe elects to welcome in a well-regulated cannabis industry, or to employ every legal tool available to block marijuana from passing into Indian Country, the discussion itself about legalization is an exercise of the tribe's sovereignty. Tribes are deciding questions like, who are we? What do we want for our members? How do we use our power to achieve these goals? And when it comes to cannabis, it appears that both legalization and criminalization are effective routes for tribes to say to both state and federal governments that they claim jurisdiction over their own land and the people on it.

#### IV. CONCLUSIONS AND RECOMMENDATIONS

This article offers the most current analysis of federal policy on cannabis in Indian Country as examined through the lens of federalism. The complex concept of tribal sovereignty coupled with the federal government's inability to craft a stable and marijuana policy only hurts the tribes, who have more to lose than anyone else. Congress and the federal government should establish a clear and viable marijuana policy that effectively addresses legality of marijuana activity. Evidently from the Flandreau tribe scenario, the discretionary guidelines offered in the Cole and Wilkson Memos are inadequate on its own. Moreover, tribe took cautionary steps to not upset the South Dakota officials, but were still penalized for their attempt in following the Memos. The main reason why the Flandreau tribe burned one million dollars' worth of marijuana crop and had the marijuana resort fail, was because of the power struggle between the State Attorney General who disagreed and the federal government, and the federal government who failed to stand behind its word. Congress should reschedule marijuana and act to update its marijuana laws and policies.

Additionally, this paper extends the topic of cannabis law beyond jurisdictional conflicts and brings tribal perspectives on



legalization to the forefront. After all, the confusion about the application of federal law in Indian Country rests somewhere in the intersection between administrative turnover, changing cultural norms, and entrepreneurs' insistence that profits are to be made. Accordingly, why not look at the conversations and policy-making among tribal leaders to best understand if and how cannabis should be regulated and enforced in Indian Country? Federal policy is to engage with tribes in a government-to-government capacity. Tribes can and are exercising the self-determination afforded to them as sovereign entities through the cultivation, possession, and sale of cannabis in Indian Country. Case studies demonstrate that proactive tribes have successfully conditioned cannabis enforcement and regulation in Indian Country in states where cannabis is legal. Tribes should make laws about cannabis tailored to their members' specific interests and needs. Otherwise, federal or state governments will impose their own laws that will invariably fail to account for each tribes' unique interest in or rejection of cannabis in Indian Country.

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