

THE EMERGING CANNABIS INDUSTRY AMONG NATIVE AMERICAN TRIBES: JURISDICTIONAL COMPLEXITIES AND POLICY IN WASHINGTON STATE

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ABSTRACT

The pace of changes in state-level cannabis policies in the United States has accelerated since the mid-1990s. While many states have decriminalized the possession of small amounts of cannabis and have allowed cannabis to be used for various medicinal purposes, the most recent landmark change has been the legalization of recreational cannabis. Native American tribes within these states which have legalized recreational cannabis are now exploring the opportunities to engage in this new cannabis industry as a means of bringing economic development to the tribes and creating employment for tribal members. The unique jurisdictional complexities of the federal, state, and tribal relations with regard to legal recreational cannabis are the subject of this paper, with a focus on policies in the State of Washington.

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I. INTRODUCTION

Major changes in cannabis policy have taken place in the United States since the 1970s, most of them in the past twenty years. The first was the decriminalization of possession in some states in the 1970s. Next came the now wide-spread authorization of cannabis for medicinal purposes in the 1990s and 2000s. More recently has been state legislation legalizing recreational cannabis. These massive changes in cannabis policy in the United States came at the state level, not the federal level. In many states these policy changes came from the grassroots level in the form of citizen initiatives. The topic of this paper is the result of a unique combination of these three changes in United States drug policy: the establishment of cannabis enterprises in Indian Country¹ in Washington State.

This paper first provides overviews of the policies of marijuana decriminalization, medical marijuana, and legalized recreational cannabis in the United States today. It then briefly gives an overview of the evolving history of Indian tribal sovereignty under the law, followed by recent developments in federal government and State of Washington policies that permit the cannabis industry to

1. 18 U.S.C. § 1151 (“[T]he term ‘Indian Country’ [is defined by federal statute as] (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, . . . (b) all dependent Indian communities within the borders of the United States . . . and (c) all Indian allotments, the Indian titles to which have not been extinguished. . .”).

be established and operate in Indian Country. These actions in Washington State may provide a model for other states which have legalized recreational cannabis, and by extension, to relations between indigenous peoples and governments in Canada now that it has legalized recreational cannabis nationwide.

II. CHANGES IN UNITED STATES CANNABIS POLICIES

A. Marijuana Decriminalization

The decriminalization movement in the United States began in the 1970s. Decriminalization for the first-time possession of a small amount of marijuana involves no arrest, jail, or prison time or criminal record.² The sanction is typically a civil infraction resulting in a citation and a small fine, or a low-level misdemeanor charge.³ Two of the policy goals of decriminalization are to eliminate the multiple harms caused to individuals by being involved in the criminal justice system (e.g., a criminal record which can hinder obtaining employment), and to reduce the resources expended on enforcement.⁴

Following the recommendations of the National Commission on Marijuana and Drug Abuse, which were rejected by President Richard Nixon, Oregon was the first state to decriminalize possession of small amounts of marijuana in 1973.⁵ By the late 1970s, eleven other states had enacted decriminalization legislation (Alaska, California, Colorado, Maine, Minnesota, Mississippi, Nebraska, New York, North Carolina, Ohio, and South Dakota).⁶

The decriminalization movement then ceased for nearly thirty years. In 2008 Massachusetts enacted such legislation.⁷ A second decriminalization movement then commenced. Eleven other states have now either decriminalized possession of small amounts of marijuana or have permitted possession and consumption by adults.⁸ Today twenty-six states and the District of Columbia have removed criminal sanctions for possession of small amounts of marijuana for a first offense.⁹

2. Eric L. Jensen, Clayton Mosher, Jurg Gerber & Kate Angulski, Progress at the State Level Versus Recent Regress at the Federal Level: Changes in the Social Consequences of the U.S. War on Drugs, 46(2) CONTEMPORARY DRUG PROBLEMS 139, 142 (2019).

3. *Id.* at 142.

4. *Id.*; see also Robert J. MacCoun & Peter Reuter, Drug War Heresies: Learning from Other Vices, Times, and Places 106-07 (2001).

5. MACCOUN & REUTER, *supra* note 4, at 46, 376.

6. South Dakota subsequently repealed the decriminalization legislation. See DAVID R. BEWLEY-TAYLOR, INTERNATIONAL DRUG CONTROL: CONSENSUS FRACTURED 169 (2012); MACCOUN & REUTER, *supra* note 4, at 46.

7. Marijuana Policy Project, *Massachusetts*, <https://www.mpp.org/states/massachusetts/?state=MA> (last updated Sept. 4, 2020).

8. Marijuana Policy Project, *State Policy*, <https://www.mpp.org/states/> (last visited Nov. 18, 2020).

9. *Id.* See also Marijuana Policy Project, *Marijuana Legalization*, <https://www.mpp.org/issues/legalization/> (last visited Nov. 18, 2020).

B. Medicinal Cannabis

Authorization of the use of medical marijuana began in 1996 with the passage of citizen initiatives in California and Arizona, although due to political resistance, cannabis for medical purposes only became fully accessible in Arizona in 2010.¹⁰ As of November 2019, thirty other states and the District of Columbia had enacted laws allowing medicinal cannabis.¹¹ Thus, thirty-three states and the District of Columbia now allow medicinal cannabis. Approximately sixty-four percent of the population of the United States will have access to medical marijuana once these states have implemented their laws.

Medicinal cannabis is a gray area in United States drug policy. In 1970 Richard Nixon's administration created the Controlled Substances Act (CSA).¹² The CSA contains five schedules based on the likelihood for the substance to be abused and if the substance has an accepted medical use.¹³ Marijuana was placed in Schedule 1, which contains substances with no accepted medical use and which present a high potential for abuse.¹⁴ Heroin, for example, is also listed in Schedule 1. Thus, using cannabis and its products for medical purposes is permitted within specified state boundaries but continues to be illegal under federal law.¹⁵ By placing cannabis in Schedule 1, most research on its usefulness for medical purposes in the United States has been prohibited as well.¹⁶

In November 2011, then Governor Chafee of Rhode Island and then Washington State Governor Gregoire petitioned the Drug Enforcement Administration (DEA) to consider rescheduling cannabis from Schedule 1 of the federal Controlled Substances Act to a lesser scheduling category.¹⁷ In August 2016, the DEA denied this petition citing a high potential for abuse, no accepted medical use in the United States, and lacking an acceptable level of safety for use even under medical supervision.¹⁸ This decision not only affects medical and recreational users, but also the ability to conduct cannabis research in the United States.

A substantial change in federal policy took place in June 2018 when the U.S. Food and Drug Administration approved the first drug derived from the cannabis

10. See Marijuana Policy Project, *Arizona*, <https://www.mpp.org/states/arizona/> (last updated Nov. 5, 2020); Marijuana Policy Project, *California*, <https://www.mpp.org/states/california/> (last updated April 23, 2020).

11. Marijuana Policy Project, *State Policy*, <https://www.mpp.org/states/> (last visited Nov. 18, 2020).

12. See DAN BAUM, *SMOKE AND MIRRORS: THE WAR ON DRUGS AND THE POLITICS OF FAILURE* (1996); see also Eric L. Jensen, *Harm Reduction Programs in the U.S.A.: Emerging Trends*, 16 *EGUZKILORE* 127, 129 (2002).

13. See Jensen, *supra* note 12, at 129.

14. *Id.*

15. *Id.*

16. *Id.*

17. Denial of Petition to Initiate Proceedings to Reschedule Marijuana, 81 Fed. Reg. 53, 688 (August 12, 2016) (at 21 C.F.R. pt. 1301).

18. *Id.*

plant for specified medicinal uses.¹⁹ The medicine, Epidiolex, is a cannabidiol (CBD) oral solution for the treatment of seizures associated with two rare severe forms of epilepsy.²⁰ CBD is an active-chemical component of the Cannabis sativa plant.²¹

The drug was studied in three randomized, double-blind clinical trials involving patients with either Lennox-Gastsut syndrome or Dravel syndrome, both rare conditions involving early-onset epilepsy in children.²² When taken in conjunction with other medications, the drug “was shown to be effective in reducing the frequency of seizures when compared with the placebo.”²³

At the state level, Washington approved the first research license for cannabis in November 2018.²⁴ Research projects must pass an independent third-party scientific reviewer before being granted a license.²⁵ This research project allows a private biotechnology firm to study lesser-known compounds in cannabis for potential therapeutic uses.²⁶

C. Recreational Cannabis

In 2012 the voters of the states of Washington and Colorado passed Initiative 502 and Initiative 64 respectively, which legalized the production, processing, distribution and retail sale of cannabis and its products for recreational purposes.²⁷ These groundbreaking moves were followed in 2014 by the voters of the states of Oregon, Alaska, and the District of Columbia choosing to legalize recreational cannabis as well.²⁸ In November 2016, the voters of four additional states enacted legislation which allowed adult use of recreational cannabis: California, Massachusetts, Nevada, and Maine.²⁹ Vermont was the first state to legalize

19. Press Release, Food and Drug Administration, FDA Approves First Drug Comprised of an Active Ingredient Derived from Marijuana to Treat Rare, Severe Forms of Epilepsy (June 25, 2018), <https://www.fda.gov/newsevents/newsroom/pressannouncements/ucm611046.htm>.

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.*

24. *Washington Issues its First Marijuana Research License*, THE SPOKESMAN-REVIEW (Nov. 19, 2018), <https://www.spokesman.com/stories/2018/nov/19/washington-issues-its-first-marijuana-research-lic/>.

25. Press Release, Washington State Liquor and Cannabis Board, Liquor and Cannabis Board Issues First Marijuana Research License (Nov. 19, 2018), <https://lcb.wa.gov/pressreleases/liquor-and-cannabis-board-issues-first-mj-research-license>.

26. *Id.*

27. Maia Szalavitz, *Two U.S. States Become First to Legalize Marijuana*, TIME (Nov. 7, 2012), <https://healthland.time.com/2012/11/07/two-u-s-states-become-first-to-legalize-marijuana/>.

28. Dan Merica, *Oregon, Alaska and Washington, D.C. Legalize Marijuana*, CNN (Nov. 5, 2014, 2:39 PM), <https://www.cnn.com/2014/11/04/politics/marijuana-2014/index.html>.

29. Katy Steinmetz, *These States Just Legalized Marijuana*, TIME (Nov. 8, 2016, 11:25 PM), <https://time.com/4559278/marijuana-election-results-2016/>.

recreational cannabis through the legislative process.³⁰ The law took effect in July 2018.³¹ Vermont has not legalized the retail sale of cannabis, however. In November 2018, the people of Michigan voted to legalize recreational cannabis.³² In June 2019, the Illinois legislature legalized recreational cannabis in Illinois.³³ This bill was subsequently signed by the governor.³⁴ If all of these state laws are implemented, 24 percent of adults in the U.S. will be able to purchase, possess, and consume cannabis for recreational purposes.³⁵ The grassroots decisions of the voters of these states are a paradigm shift in U.S.A. and comparative drug policies.

Concerns at the state level over federal intervention were eased by two memorandums issued to U.S. Attorneys General by the U.S. Department of Justice under the Obama Administration in 2009 and in 2011.³⁶ Issues regarding the federal tolerance of cannabis for medical and recreational purposes became more non-partisan during the eight years of the Obama Administration.³⁷ Under the Trump Administration, former Attorney General Sessions took a tougher stance on the enforcement of federal cannabis law.³⁸

III. THE CANNABIS INDUSTRY AMONG NATIVE TRIBES

In addition to voter-backed, state-regulated cannabis markets, cannabis micro-economies are cropping up on Native American reservation lands.³⁹ Native

30. Clover Whitham, *Recreational Marijuana Now Legal in Vermont*, USA TODAY (July 1, 2018, 12:31 AM), <https://www.usatoday.com/story/news/nation-now/2018/07/01/recreational-marijuana-use-now-legal-vermont/748793002/>.

31. *Id.*

32. Christine Hauser, *Marijuana Embraced in Michigan, Utah, and Missouri, but Rejected in North Dakota*, N.Y. TIMES (Nov. 7, 2018), <https://www.nytimes.com/2018/11/07/us/politics/michigan-marijuana-legalization.html>.

33. Scott Neuman, *Illinois Governor Signs Law Legalizing Recreational Use of Marijuana*, NPR (June 26, 2019, 2:18 AM), <https://www.npr.org/2019/06/26/736117895/illinois-governor-signs-law-legalizing-recreational-use-of-marijuana>.

34. *Id.*

35. Jensen et al., *supra* note 2, at 144.

36. Memorandum from David W. Ogden, Deputy Att'y Gen., U.S. Dep't of Justice, to Selected U.S. Att'ys (Oct. 19, 2009) [hereinafter Ogden Memo], <http://www.justice.gov/usao/az/reports/medical-marijuana.pdf>; Memorandum from James M. Cole, Deputy Att'y Gen., to U.S. Att'ys, at 3 (Aug. 29, 2013) [hereinafter Cole Memo], <http://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf>.

37. Mark Sappenfield et al., *A Federal Misstep with Medical Marijuana?*, CHRISTIAN SCIENCE MONITOR (Oct. 20, 2009), <https://csmonitor.com/commentary/the-monitors-view/2009/1020/p08s01-comv.html>; Sarah N. Lynch, *Trump Administration Drops Obama Easing of Marijuana Prosecutions*, REUTERS (Jan. 4, 2018, 6:39 AM), <https://fr.reuters.com/article/us-usa-justice-marijuana-idUSKBN1ET1MU>.

38. Lynch, *supra* note 38.

39. Joe Boomgaard, *With Vertically Integrated Cannabis Startup, U.P. Tribe Forges Own Path to Economic Diversification*, MIBIZ (Aug. 23, 2020, 6:58 PM), <https://mibiz.com/sections/economic-development/with-vertically-integrated-cannabis-startup-u-p-tribe-forges-own-path-to-economic-diversification>; Patricia Miller, *How Tribal Communities are Embracing the Cannabis Market*, CANNABIS & TECH TODAY (June 18, 2019), <https://cannatechtoday.com/tribal-communities/>.

American tribes in the United States have historically been economically disadvantaged.⁴⁰ This is due in part to the forced resettlement of many indigenous peoples to areas outside of their ancestral homelands.⁴¹ These reservation lands were deemed to be unproductive and undesirable by non-Natives.⁴² Thus, many tribes have engaged in alternative means of economic development. For example, some tribes pursued gaming operations on reservation lands as an economic opportunity.⁴³ Following a favorable court decision, which is discussed later in this paper, numerous tribes have now developed casino gaming as a much-needed means of economic development in Indian Country.⁴⁴

Tribes have differing opinions regarding cannabis, however. On the one hand, some tribes believe that involvement in the legal state-based cannabis economy will provide economic development opportunities for those tribes and their members.⁴⁵ On the other hand, some tribes perceive cannabis as a public health problem and will not allow cannabis on their reservations (e.g., the Yakama Nation).⁴⁶

In Washington, seven tribes have opened, or are opening, retail shops: Suquamish, Muckleshoot, Puyallup, Squaxin, Tulalip, Port Gamble S'Klallam, and the Colville Confederated Tribes.⁴⁷ In addition, the Puyallup Tribe of Indians has

40. Algernon Austin, *Native Americans and Jobs: The Challenge and the Promise*, ECON. POL'Y INST. (Dec. 17, 2013), <https://www.epi.org/publication/bp370-Native-Americans-jobs/>.

41. Wilcomb E. Washburn, *Red Man's Land/White Man's Law: The Past and Present Status of the American Indian 204-05* (Norman and London: University of Oklahoma Press. 2d ed. 1995).

42. Wilcomb E. Washburn, *The Assault on Indian Tribalism: The General Allotment Law (Dawes Act) of 1887* (1975); John R. Wunder, "Retained by the People": A History of American Indians and the Bill of Rights (1994).

43. Frank Pommersheim, *Broken Landscape: Indians, Indian Tribes, and the Constitution 247* (Oxford and N.Y.: Oxford University Press. 2009).

44. See *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987).

45. Richard Walker, *Many Tribes Say Billion-Dollar Cannabis Business is a Gateway to Economic Development*, INDIAN COUNTRY TODAY: NEWS (Feb. 25, 2019), <https://indiancountrytoday.com/news/many-tribes-say-billion-dollar-cannabis-business-is-a-gateway-to-economic-development-2mDYegq8v02VmO-7SzjyQg>. Kip Hill, *WSU Researchers Team with Puyallup Tribe on Medicinal Cannabis Research*, THE SPOKESMAN-REVIEW: NEWS, SPOKANE (May 21, 2019), <https://www.spokesman.com/stories/2019/may/21/wsu-researchers-team-with-puyallup-tribe-on-medic/>.

46. Maria L. La Ganga, *Yakama Tribe Just Says No to Washington State's Legal Pot Market*, WASHINGTON POST (Jan. 9, 2014), 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.

47. Tad Sooter, *S'Klallam Tribe Moves Closer to Marijuana Sales*, KITSAP SUN (Jan. 3, 2018, 5:32 PM), <https://www.kitsapsun.com/story/news/2018/01/03/sklallam-tribe-moves-closer-marijuana-sales/1000961001/>; Nathan Pilling, *S'Klallam Pot Shop to Open Saturday*, KITSAP SUN (Mar. 5, 2018, 4:32 PM), <https://www.kitsapsun.com/story/news/2018/03/05/sklallam-pot-shop-open-saturday/396722002/>; *Colville Confederated Tribes Sign Marijuana Compact with State*, 500NATIONS.COM (Apr. 9, 2019), <https://www.500nations.com/Washington-Cannabis.asp#20190409>.

established a cannabis testing laboratory.⁴⁸ All of these tribes are located in the more progressive western side of the state. Thus, about one third of the 29 federally recognized tribes in Washington have established or are pursuing compact agreements with the state.

To understand the ability of Indian tribes to engage in the state-approved cannabis industry, we must first discuss certain core concepts in Indian tribal sovereignty and the jurisdictional issues involving tribes, the states, and the federal government. These issues are complex.

IV. INDIAN TRIBAL SOVEREIGNTY AND THE CANNABIS INDUSTRY: A BRIEF OVERVIEW

“The legal relationship of Indian Tribes to non-Indian governments in what is now the United States, and the tribes’ status as sovereign or quasi-sovereign or semi-sovereign governments, has been a perplexing problem for centuries and remains so.”⁴⁹ A thorough review of the history of the colonial subjugation of indigenous peoples in the United States and the eventual establishment of Indian tribal sovereignty under the law are outside of the scope of this paper. We will focus on the issues of concern to the existence of the legal cannabis industry on Indian land and under tribal authority.

Before the Constitution of the United States became effective on March 4, 1789, non-Indians and Indians had utilized a treaty system to achieve mutually compromised upon objectives.⁵⁰ Of course, as the power of the United States increased, the power of Indian tribes with treaties declined.⁵¹ Indian tribes were never fully treated as sovereign nations.⁵² Elements of the treaties were often not fulfilled by the U.S. federal government.⁵³

Once the Constitution was established, Section 8 of the Constitution defined the powers of Congress.⁵⁴ Clause 3 authorizes Congress “to regulate Commerce with foreign Nations and among the several States, and with Indian tribes.”⁵⁵ This statement seems to recognize that Indian tribes should be treated as comparable to “foreign nations” and the “states.” However, “[t]he grant of power to Congress under ‘the Indian commerce clause’ has been construed to give Congress plenary

48. Press Pool, *Medicine Creek Analytics Becomes Only Lab in the State of Washington Certified to Test Cannabis for Heavy Metals*, INDIAN COUNTRY TODAY (Apr. 30, 2019), <https://indiancountrytoday.com/the-press-pool/medicine-creek-analytics-becomes-only-lab-in-the-state-of-washington-certified-to-test-cannabis-for-heavy-metals-jxWjkgiFaEi-8lk1lb7ang#:~:text=Press%20Pool-,Medicine%20Creek%20Analytics%20becomes%20only%20lab%20in%20the%20State%20of,test%20cannabis%20for%20heavy%20metals&text=Medicine%20Creek%20Analytics%20opened%20in,able%20to%20run%20each%20year.>

49. David M. Schraver & David H. Tennant, *Indian Tribal Sovereignty—Current Issues*, 75 ALB. L. REV. 133, 133 (2012).

50. *Id.* at 136.

51. *Id.* at 136-37.

52. *Id.* at 137.

53. See *id.*

54. See U.S. CONST. art. I, § 8.

55. *Id.* at cl. 3.

authority over Indian tribes.”⁵⁶ In this context, plenary power means the complete control of Indian tribes by Congress.⁵⁷

The Cherokee Nations cases were instrumental in establishing the plenary power principle between the federal government and Indian tribes.⁵⁸ While stating that Indian tribes are not similar to foreign nations, a number of foundational principles of Indian law emerged from these decisions.⁵⁹ These principles “include the recognition of tribal sovereignty and self-government, the existence of a unique federal-tribal relationship often identified as a trust relationship, federal exclusivity in dealing with Indian tribes . . . and . . . the absence of any inherent state authority in Indian affairs.”⁶⁰ Of course, a trust relationship between entities such as the United States federal government and Indian tribes denotes relations based upon colonialism and paternalism.⁶¹

The Indian Trade and Intercourse Act was passed by Congress in 1834.⁶² While this Act and its predecessors were primarily intended to protect Indians from the deleterious conduct of non-Indians, the realities of public policy took a different direction. “[I]n regulating non-Indians in their trade and intercourse with Indian tribes, they necessarily regulated Indian tribes and contributed to the development of the concept of tribes as dependent wards of the federal government and not independent sovereigns.”⁶³

Congress ended treaty making with Indian tribes in 1871.⁶⁴ In theory, treaties are intended to be agreements between sovereign nations.⁶⁵ In practice, then, Indian tribes which signed treaties should be treated as are other sovereign nations, but they have not been.⁶⁶

Beginning in the 1970s, there was a movement within the federal government to support tribal self-determination.⁶⁷ Federal statutes now contain such language as “a government-to-government relationship between the United States and each Indian tribe.”⁶⁸ Under the Obama administration, the federal government continued in this direction and adopted a policy which describes the relationship between tribes and federal agencies that deliver services to Indians as a

56. Schraver & Tennant, *supra* note 49, at 138.

57. *Id.*

58. *Cherokee Nation v. Georgia*, 31 U.S. 1, 44 (1831); *Worcester v. Georgia*, 31 U.S. 515, 561 (1832).

59. Frank Pommersheim, *Broken Landscape: Indians, Indian Tribes, and the Constitution* 112 (Oxford University Press ed., 2009).

60. *Id.*

61. *Id.*

62. Schraver & Tennant, *supra* note 49, at 140.

63. *Id.*

64. *Id.* at 140-41.

65. *Id.*

66. *Id.*

67. *U.S. v. State of Wash.*, 384 F. Supp. 312 (W.D. Wash. 1974).

68. Schraver & Tennant, *supra* note 49, at 145.

“government-to-government” relationship.⁶⁹ These policies do not apply to cases of jurisdictional disputes between states and tribes in the courts, however.⁷⁰

For the purposes of this paper, the next major decision which effected tribal relations with the states was the U.S. Supreme Court decision in *California v. Cabazon Band of Missions Indians*.⁷¹ In this case, the Supreme Court ruled that if the State of California regulated bingo gaming on Indian land this “would impermissibly infringe on tribal government.”⁷² In response to this decision, Congress passed the Indian Gaming Regulatory Act in 1988.⁷³ Under this Act, Indian tribes could establish gaming operations by entering into a Tribal-State compact governing such activities.⁷⁴ This compact is subject to the approval of the Secretary of the Interior.⁷⁵ This law “attempted to forge a workable compromise between the competing interests of the tribes and the states.”⁷⁶ The statute also sought to promote tribal-state cooperation.⁷⁷ For many tribes, gaming has since provided economic benefits and a source of employment for tribal members.⁷⁸

A. The Centennial Accord of August 4, 1989: State-Tribal Relationships

The Centennial Accord of August 4, 1989 (Centennial Accord) is a compact between the State of Washington, through the governor, and the federally recognized Indian tribes located within the physical boundaries of the state.⁷⁹ The Accord provided a framework for government-to-government relationships between their sovereign governments to better achieve mutual goals.⁸⁰ “This relationship respects the sovereign status of the parties, enhances and improves communications between them, and facilitates the resolution of issues” (Governor’s Office of Indian Affairs, 1989).⁸¹ The ultimate purpose of this Accord “is to improve the services delivered to people by the parties” (Governor’s Office of Indian Affairs, 1989).⁸²

B. The Cole Memorandum of August 29, 2013: Federal Marijuana Enforcement Priorities

On August 29, 2013, James M. Cole, U.S. Deputy Attorney General, issued a memorandum setting forth guidance for U.S. attorney generals regarding

69. See *id.*

70. *Id.* at 145-46.

71. *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 221-22 (1987).

72. *Id.* at 222.

73. Schraver & Tennant, *supra* note 49, at 144.

74. *Id.*

75. *Id.*

76. POMMERSHEIM, *supra* note 59, at 247.

77. *Id.* at 248.

78. *Id.*

79. Centennial Accord between the Federally Recognized Indian Tribes in Washington State and the State of Washington, <https://goia.wa.gov/relations/centennial-accord> (last visited Sept., 2020).

80. *Id.*

81. *Id.*

82. *Id.*

marijuana enforcement (the Cole Memorandum).⁸³ Since marijuana is included in Schedule 1 of the Controlled Substances Act, this memorandum was updated to provide guidance on marijuana enforcement by the federal government given that states have permitted recreational marijuana within their boundaries.⁸⁴

The Cole Memorandum set forth enforcement priorities important to the federal government: preventing the distribution of marijuana to minors; preventing revenue from the sale of marijuana going to criminal enterprises, gangs, and cartels; preventing the diversion of marijuana from states where it is legal under state law in some form to other states; preventing state-authorized marijuana activity from being used as a cover or pretext for the trafficking of other illegal drugs or other illegal activity; preventing violence and the use of firearms in the cultivation and distribution of marijuana; preventing drugged driving and the exacerbation of other adverse public health consequences associated with marijuana use; preventing the growing of marijuana on public lands and the attendant public safety and environmental dangers posed by marijuana production on public lands; and preventing marijuana possession or use on federal property.⁸⁵

The memo goes on to note that federal enforcement efforts should be focused on these priority areas.⁸⁶ In addition, the U.S. Department of Justice expected that state and local governments in states where marijuana has been authorized will implement effective regulatory and enforcement systems that will address the threat legal marijuana may present to public safety, public health, and other law enforcement interests.⁸⁷

C. The Wilkinson Memorandum of October 28, 2014: Marijuana in Indian Country

On October 28, 2014, Monty Wilkinson, Director, Executive Office for United States Attorneys, issued a memorandum which stated that the eight priorities of the Cole Memorandum will guide the marijuana enforcement efforts of United States Attorneys in the event that Indian tribes sought to allow the cultivation or use of marijuana in Indian Country.⁸⁸ In effect, this memorandum treats tribal governments in the same manner as state governments if they decide to authorize the cannabis industry.

Although the Cole and the Wilkinson Memoranda express the more tolerant position of the Obama administration on state and tribal-level changes in cannabis

83. Cole Memo, *supra* note 36.

84. *Id.* at 1.

85. *Id.*

86. *Id.*

87. *Id.*

88. Memorandum from Monty Wilkinson, Dir. of the Exec. Office for U.S. Att'ys, to All United States Attorneys, All First Assistant United States Attorneys, All Criminal Chiefs, All Appellate Chiefs, All OCDETF Coordinators, & All Tribal Liaisons, Policy Statement Regarding Marijuana Issues in Indian Country (Oct. 28, 2014), <https://dfi.wa.gov/sites/default/files/monty-wilkinson-memo.pdf>.

policies, they point out that marijuana is illegal under federal law and that federal prosecutors can choose to enforce the federal law if they determine that enforcement is appropriate under the guidelines set forth in the Cole Memorandum.⁸⁹

D. Marijuana Compact between The State of Washington and Indian Tribes: 2015

On May 8, 2015, Washington State Governor Jay Inslee signed House Bill 2000 authorizing his office to enter into agreements with federally recognized Indian tribes in the State of Washington concerning marijuana.⁹⁰ According to this legislation, tribes do not need the permission of the state to become engaged in cannabis commerce, but given the complex legal status involved, coordination with the state is preferred.⁹¹ The process was put in place to jointly regulate marijuana should a tribe decide to venture into cannabis-related business.⁹²

Shortly thereafter, in 2015, the Puyallup Tribe drafted a compact agreement outlining their intent to build and operate a cannabis testing laboratory on their land and subsequently entered into negotiations with the Governor and the Washington State Liquor and Cannabis Board (WSLCB).⁹³ These negotiations resulted in a compact agreement that was acceptable to both parties. Governor Inslee signed legislation supporting the operation of the laboratory (Marijuana Compact between the State of Washington and the Puyallup Tribe of Indians, 2015).⁹⁴ This legislation became effective July 24, 2015.⁹⁵ The agreement is entitled Marijuana Compact between The State of Washington and the Puyallup Tribe of Indians (Marijuana Compact).⁹⁶ The Marijuana Compact states “The parties may agree to expand this Compact, by amendment after its initial adoption to cover a range of the elements of the broad subject of regulation of marijuana, including medical marijuana, growing, producing, processing and retail sales of marijuana, marijuana concentrates, and marijuana-infused products.”⁹⁷

89. Cole Memo, *supra* note 36.

90. WASH. REV. CODE § 43.06.490 (2015).

91. Tom Banse, *Tribes, Washington State Open Door to Cooperation on Legal Marijuana*, NORTHWEST NEWS NETWORK (May 8, 2015), <https://www.nwnewsnetwork.org/post/tribes-washington-state-open-door-cooperate-legal-marijuana>.

92. *Id.*

93. Hilary Bricken, *State-Tribal Marijuana Compacts: Will Tribal Marijuana Look Like Gaming?*, Harris Bricken, Comment to *Federal Law and Policy*, NATIVE AMERICAN TRIBES, (April 2, 2015) <https://harrisbricken.com/cannalawblog/state-tribal-marijuana-compacts-will-tribal-marijuana-look-like-gaming>.

94. Marijuana Compact Between the Puyallup Tribe and the State of Washington (2015), <https://assets.documentcloud.org/documents/2699297/Puyallup-Tribal-Compact.pdf> (last visited Nov. 18, 2020).

95. *Id.* at 3.

96. *Id.* at 1.

97. *Id.* at 6.

E. Marijuana Compact between The State of Washington and The Puyallup Tribe
of Indians, Amendment No. 1: 2016

This amendment to the Marijuana Compact (Amendment No. 1) enables the tribe to establish a vertically integrated enterprise for recreational and medicinal cannabis.⁹⁸ Amendment No. 1 became effective on June 29, 2016.⁹⁹ That is, the State of Washington and the Puyallup Tribe agreed that the tribe can produce, process, and retail recreational and medical cannabis within the state’s regulatory scheme, in addition to operating a cannabis testing laboratory.¹⁰⁰ This agreement is in compliance with the enforcement priorities set forth in the Cole Memorandum.¹⁰¹ These entities will operate within the regulations set forth by the State of Washington for non-Indian cannabis operations.¹⁰² This agreement is unique, in that the State of Washington does not allow vertically integrated cannabis enterprises with the exception of those which may be operated by Indian Tribes.¹⁰³

The parties have agreed that the tribe will provide for a tribal cannabis tax that is at least one hundred percent of the state marijuana excise tax, in addition to state and local taxes and use taxes on sales of cannabis.¹⁰⁴ “While not required under State law, the Tribe agrees to use the proceeds of the Tribal Tax for Essential Government Services.”¹⁰⁵ The tribe may, however, exempt enrolled members of the tribe, the tribe, tribal enterprises, and tribal member businesses from payment of these taxes on cannabis and cannabis products.¹⁰⁶

In addition, the Port Gamble S’Klallam Tribe has received permission from the State of Washington to open a retail cannabis dispensary and is negotiating a compact which would allow a vertically integrated tribal enterprise within the

98. Marijuana Compact Between the Puyallup Tribe and the State of Washington, Amendment No. 1, §§ VII, VIII (2015) [hereinafter Washington, Amendment].

99. *Id.* at § I.

100. *Id.* at 4-8.

101. Cole Memo, *supra* note 36, at § 3.

102. *Marijuana Compacts*, WASH. ST. LIQUOR AND CANNABIS BOARD, https://lcb.wa.gov/tribal/mj_compacts.

103. Adam Darnell et al., *Suppressing Illicit Cannabis Markets After State Marijuana Legalization*, WASH. ST. INST. FOR PUB. POL’Y 3, (Aug. 2019), https://www.wsipp.wa.gov/ReportFile/1708/Wsipp_Suppressing-Illicit-Cannabis-Markets-After-State-Marijuana-Legalization-Report.pdf.

104. Washington, Amendment, *supra* note 98, § X.

105. Washington, Amendment, *supra* note 98, § X.B.3.

106. Washington, Amendment, *supra* note 98, § X.B.2

state's legal cannabis market.¹⁰⁷ The S'Klallam Tribe is seeking to expand its cannabis enterprise to include production, processing, and laboratory testing.¹⁰⁸

V. THE TRUMP ERA POLICIES

On January 4, 2018, three days after the sale of recreational cannabis began in California, former Attorney General Sessions issued a memorandum to federal prosecutors which rescinded the Obama-era memos and policy of tolerance in the enforcement of federal cannabis statutes.¹⁰⁹ This memorandum gave the discretion to prosecute cannabis violations back to local federal prosecutors.¹¹⁰ Several of the governors of states that have allowed recreational cannabis consumption and sales have objected to this policy change.¹¹¹

In response to this decision, Governor Inslee of Washington state issued the following statement, "In Washington state we have put in place a system . . . 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. Make no mistake: As we have told the Department of Justice . . . , we will vigorously defend our state's laws against undue federal infringement."¹¹²

U.S. Senator Cory Gardner of Colorado reacted by blocking all nominees for appointments to the Department of Justice until the Trump Administration softened its stance on marijuana.¹¹³ Gardner lifted those holds after receiving assurances from President Donald Trump that the administration would support a federalism-based legislative solution.¹¹⁴

A bipartisan bill sponsored by U.S. Senators Cory Gardner and Elizabeth Warren that would end conflict between federal and state cannabis laws was introduced in June 2018.¹¹⁵ The measure would recognize legalization of cannabis and the U.S. state laws that have legalized it through their legislatures or citizen

107. See Tad Sooter, *S'Klallam Tribe Moves Closer to Marijuana Sales*, KITSAP (Jan. 3, 2018), <https://www.kitsapsun.com/story/news/2018/01/03/sklallam-tribe-moves-closer-marijuana-sales/1000961001/>.

108. *Id.*

109. *Justice Department Issues Memo on Marijuana Enforcement*, THE U.S. DEP'T OF JUST. (Jan. 4, 2018), <https://www.justice.gov/opa/pr/justice-department-issues-memo-marijuana-enforcement>.

110. *Id.*

111. *Statement from Inslee Regarding Reports that USDOJ Will Rescind Cole Memo*, ACCESS WASHINGTON (Jan. 4, 2018), <https://www.governor.wa.gov/news-media/statement-inslee-regarding-reports-usdoj-will-rescind-cole-memo>; *Oregon Reels After Sessions Rescinds Policy that Allowed Legal Marijuana to Flourish*, OREGONIAN (Jan. 4, 2018), https://www.oregonlive.com/marijuana/2018/01/sessions_to_rescind_policy_tha.html.

112. Statement from Inslee Regarding Reports that USDOJ Will Rescind Cole Memo, *supra* note 111.

113. Mark K. Matthews, *Cory Gardner's Siege of the Justice Department Over Marijuana Enters Second Month*, DENVER POST (Feb. 7, 2018), <https://www.denverpost.com/2018/02/07/cory-gardner-marijuana-fight-jeff-sessions/>.

114. *Id.*; Janet Burns, *Congress Launches Bipartisan STATES Act to Protect Legal Cannabis Once and for All*, FORBES (June 7, 2018), <https://www.forbes.com/sites/janetburns/2018/06/07/congress-launches-bipartisan-states-act-to-protect-legal-cannabis-once-and-for-all/#3822850642ba>.

115. Burns, *supra* note 114.

initiatives, and give those states access to financial institutions.¹¹⁶ The STATES (Strengthening the Tenth Amendment Through Entrusting States) Act is a significant step towards the end of federal cannabis prohibition.¹¹⁷ President Trump stated publicly that he would “probably” support the bill giving states autonomy over their cannabis laws, a move that would put the White House in conflict with the Justice Department.¹¹⁸ However, given President Trump’s well-known practice of vacillating on policy issues, some drug policy scholars are skeptical.¹¹⁹ Subsequent comments by a Trump campaign spokesperson indicate that the skepticism of the drug policy scholars was warranted.¹²⁰

VI. CONCLUSION

Native American tribes that have entered the emerging cannabis economy in the United States are navigating jurisdictional complexities at the federal, state, and tribal levels. The cannabis industry presents potential opportunities for tribes to enhance their economic resources and provide employment for tribal members and the nearby non-Indian communities. These opportunities exist with the establishment of retail shops, cultivation, manufacturing, laboratory testing, and medical research. Given that there are 109 federally-recognized native tribes in California, the experience in Washington State is only a beginning of what may become a major commercial benefit for economically disadvantaged native populations in the U.S.¹²¹ The legal cannabis industry is the fastest growing job sector in the United States, with 150,000 full-time employees and a projected

116. *Id.*

117. *Id.*

118. *Id.* (summarizing quote by Justin Strekal which states, “Congress must do its part and swiftly move forward on this bipartisan legislation that explicitly provides states with the authority and autonomy to set their own marijuana policies absent the fear of federal incursion from a Justice Department led by militant cannabis prohibitionist Attorney General Jeff Sessions.”); Colby Itkowitz & John Wagner, *Trump Says He ‘Probably’ Will Support Bill to Protect States that have Legalized Marijuana*, WASH. POST (June 8, 2018), https://www.washingtonpost.com/politics/trump-say-he-probably-will-support-bill-to-protect-states-that-have-legalized-marijuana/2018/06/08/23fe0884-6b24-11e8-bea7-c8eb28bc52b1_story.html.

119. Based on the authors’ observations and correspondence with Jurg Gerber, Andrew D. Hathaway, Clayton Mosher, and Aaron Roussell; See also Jane C. Timm, *Tracking President Trump’s Flip-Flops*, NBC NEWS (Nov. 19, 2016), <https://nbcnews.com/storyline/president-trumps-first-100-days/here-are-new-policy-stances-donald-trump-has-taken-election-n684946>.

120. Brendan Bures, *Trump Administration Doubles Down on Anti-Marijuana Position*, CHICAGO TRIBUNE (Feb. 21, 2020), <https://chicagotribune.com/marijuana/sns-tft-trump-anti-marijuana-stance-20200221-jfdx4urb5bhrf6ldtfxleopi-story>.

121. See David Stout, *U.S. Justice Department Allows Native American Tribes to Grow, Sell Marijuana*, TIME, (Dec. 11, 2014), <https://www.time.com/3631184/drugs-marijuana-native-americans-justice-department/>. See also David Treuer, *From Casinos to Cannabis: The Native Americans Embracing the Pot Revolution*, GUARDIAN (Mar. 15, 2019), <https://www.theguardian.com/news/2019/mar/15/from-casinos-to-cannabis-the-native-americans-embracing-the-pot-revolution>.

340,000 by 2022.¹²² The emerging industry has provided a new source of economic growth and job opportunities for Native American tribes that have entered into this new enterprise and which have successfully navigated the numerous complex jurisdictional issues involved.

The cannabis industry could prove lucrative, as has gaming for some tribes. In 2017, companies that grow, process, or sell cannabis reported \$12.9 billion in revenue, and upwards of \$4.7 billion was collected in sales, excise, and income taxes.¹²³ In Indian Country, cannabis can provide a source of revenue and tribal taxes, which can be used for essential services to tribal members.

As would be anticipated, many tribes are concerned about the enforcement direction that will be taken by the Trump administration. The Trump administration has sent mixed messages about its intentions in dealing with the state-level legalized recreational cannabis industries. In response, at least some of the tribes with a cannabis enterprise have decided to maintain a low profile during these unpredictable political times in the U.S. It is anticipated that some of the other tribes will delay any decision to establish cannabis businesses until after the Trump administration is replaced by a more tolerant federal administration.¹²⁴

122. See Julie Weed, *Cannabis Industry Delivers 100,000+ Jobs and Billions in Tax Revenue*, FORBES (May 22, 2018), <https://www.forbes.com/sites/julieweed/2018/05/22/cannabis-industry-delivers-100000-jobs-and-billions-in-tax-revenue/#b0c66a62879f>.

123. Weed, *supra*, note 122.

124. This information was obtained from an interview with a tribal official that wished to remain anonymous.