

## FORGET VIDEO POKER: SELL MARIJUANA ON TRIBAL LANDS

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This paper explores a recent, dramatic change in policy that might allow Indian tribes to sell marijuana on reservation lands. We first discuss the history of marijuana regulation in America. Next, we discuss the recent change in policy and its effect on tribal sovereignty. In part three we discuss the significant impact tribal lands can have on this issue. Next, we explore the potential benefits and harms from tribes selling marijuana. In the final section we examine the division within the tribal communities about the prospect of a marijuana business. We conclude with predictions and implications for the nation as a whole.

### LEGALIZE PEJI!<sup>1</sup>

For native tribes, everything changed October 28, 2014.<sup>2</sup> Prior to that date, marijuana was illegal under federal law despite being approved by voters in several states.<sup>3</sup> On that date, the U.S. Department of Justice announced it would allow the nation's tribal governments to decide whether or not to grow marijuana (or cannabis) on their lands.<sup>4</sup> This turnabout in marijuana policy illustrated the United States government's breakneck pace

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<sup>1</sup> *Peji* is the Lakota word for "marijuana." See Ian MacDougall, *Smoke Signals*, 162 NEWSWEEK GLOBAL 1 (2014), <http://www.newsweek.com/2014/05/23/smoke-signals-251113.html>.

<sup>2</sup> See Memorandum from Monty Wilkinson, Director of Exec. Office for U.S. Att'y, U.S. Dep't of Justice, to All U.S. Att'ys, Policy Statement Regarding Marijuana Issues in Indian Country (Oct. 28, 2014), <https://www.justice.gov/sites/default/files/tribal/pages/attachments/2014/12/11/policystatementregardingmarijuananissuesinindiancountry2.pdf>.

<sup>3</sup> MacDougall, *supra* note 1 (voters in Colorado and Washington approved marijuana for all adults).

<sup>4</sup> See Memorandum from James M. Cole, Deputy Att'y Gen., U.S. Dep't of Justice, to All U.S. Att'ys, Guidance Regarding Marijuana Enforcement (Aug. 29, 2013), <http://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf>.

toward change.<sup>5</sup> This comes on the heels of multiple states and the District of Columbia legalizing marijuana in some form for medical use.<sup>6</sup> As of March 23, 2017, twenty-one (21) states and the District of Columbia have legalized marijuana in some form for medical use.<sup>7</sup> Eight (8) states – Alaska, California, Colorado, Maine, Massachusetts, Nevada, Oregon, and Washington – have legalized marijuana for recreational use.<sup>8</sup> Now with a clear majority of all states approving marijuana usage in some form, it is anticipated these changes will cause a great number of difficulties from employment<sup>9</sup> to child custody cases.<sup>10</sup>

This paper explores recent, dramatic change in policy that might allow tribal nations in the United States to sell marijuana on reservation lands. In part one the paper will provide an overview of the history of marijuana regulation in America. Part two includes a discussion of the recent change in policy and its effect on tribal sovereignty. Tribal lands and their significant impact upon this issue will be brought forward in part three. Part four will explore the potential benefits and harms from tribal marijuana sales. In part five examines the division within the tribal communities about the prospect of a marijuana business. Finally, the paper concludes with predictions and implications for the nation as a whole.

## I. HISTORY OF MARIJUANA

Marijuana did not start in the 1960s. The first recorded use of marijuana for medical ailments in history is 2727 B.C.<sup>11</sup> Even America's history of pot

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<sup>5</sup> Daniel G. Orenstein, *Voter Madness? Voter intent and the Arizona Medical Marijuana Act*, 47 ARIZ. ST. L.J. 391 (2015).

<sup>6</sup> See Marty Ludlum & Darrell Ford, *Colorado's 2010 Update to the Medical Marijuana Law: Three Problems, Three Solutions*, 2 MUSTANG J. L. & LEGAL STUD. 73 (2011); see also *infra* notes 74-84.

<sup>7</sup> eRepublic, *Marijuana States Map*, GOVERNING THE STATE AND LOCALITIES – GOVERNING.COM (2017), <http://www.governing.com/gov-data/safety-justice/state-marijuana-laws-map-medical-recreational.html>.

<sup>8</sup> See Marty Ludlum & Darrell Ford, *Marijuana Legalization in Washington and Colorado: The Tipping Point in Policy and Practical Implications*, 6 MUSTANG J. L. & LEGAL STUD. 37 (2014); see also *infra* notes 90-94.

<sup>9</sup> See Marty Ludlum & Darrell Ford, *Medical Marijuana and Employment Discrimination*, 13 S. L. J. 289 (2014) (noting that a host of employment issues are affected by medical marijuana legalization).

<sup>10</sup> Dana Petersen, *High Society: Washington State's Recreational Cannabis Law and Its Effects on Child Custody and Visitation Rights*, 13 SEATTLE J. SOC. JUST. 973 (2015) (marijuana use affects a variety of family law issues).

<sup>11</sup> Richard Glen Boire & Kevin Feeney, MEDICAL MARIJUANA LAW 13-14 (2006) (China records using marijuana for many ailments 3000 years ago); see also Mitch Earleywine, UNDERSTANDING MARIJUANA 26 (2002) (thousands of years of medical use); Tim Maloy & Anthony Henman, *No Marihuana: Plenty of Hemp*, 88 NEW SCIENTIST 433 (1980); Oakley

is misremembered. Marijuana has not always been illegal in the United States. In fact, marijuana and hemp (same plant species) were considered vital economic crops for the American colonies.<sup>12</sup> Our most celebrated founding father and first President, George Washington grew hemp at Mount Vernon.<sup>13</sup> Jamestown settlers used marijuana.<sup>14</sup> Early Americans used hemp for a variety of medical purposes.<sup>15</sup>

Even though there is an upsurge in more recent media attention, the United States has a long history of medical marijuana use.<sup>16</sup> Early American medical journals described the many uses for marijuana.<sup>17</sup> Marijuana was included in the United States *Pharmacopoeia* in 1850 as a treatment for numerous ailments, including: tetanus, cholera, rabies, dysentery, gout, convulsive disorders, tonsillitis, insanity, and menstrual bleeding.<sup>18</sup> Pharmaceutical giants such as Eli Lilly sold marijuana (in liquid form) in the United States.<sup>19</sup> Up to the time of alcohol prohibition, marijuana was used as a poor man's pain reliever.<sup>20</sup> The American Medical Association recognized the legitimate uses and fought for marijuana's use in medicine.<sup>21</sup> Marijuana

Ray & Charles Ksir, DRUGS, SOCIETY, AND HUMAN BEHAVIOR 404-05 (8th ed. 1999) (Chinese Emperor Shen Nung recorded use of marijuana in 2737 B.C.); and Department of Drug Enforcement Museum website, *Cannabis, Coca, & Poppy: Nature's Addictive Plants*, <https://www.deamuseum.org/ccp/cannabis/history.html> (last visited Aug. 30, 2017).

<sup>12</sup> See JOHN W. ROULAC, INDUSTRIAL HEMP: PRACTICAL PRODUCTS – PAPER TO FABRIC TO COSMETICS 8 (1995) (both industrial hemp [cannabis] and marijuana [cannabis sativa] are from the genus of the mulberry family); Robin Lash, *Comment: Industrial Hemp: The Crop for the Seventh Generation*, 27 AM. INDIAN L. REV. 313, 314 (2002) (colonists were required to grow hemp for its many uses including sails, rope, cloth, and paper); see also RICHARD JAY MOLLER, MARIJUANA: YOUR LEGAL RIGHTS 8 (1981).

<sup>13</sup> Lash, *supra* note 12, at 330. (In fact, part of its name, sativa, means “useful”); see Hampton Sides, *High Science*, 227.6 NAT. GEOGRAPHIC 30, 38 (2015); see also ROBERT DEITCH, HEMP - AMERICAN HISTORY REVISITED, VITAL RESOURCE TO CONTENTIOUS WEED 19 (2003).

<sup>14</sup> Andrew Renahan, *Comment: Clearing the Haze Surrounding State Medical Marijuana Laws: A Preemption Analysis and Proposed Solutions*, 14 HOUS. J. HEALTH L. & POL'Y 299 (2014).

<sup>15</sup> Christen D. Shepherd, *Comment, Lethal Concentration of Power: How the D.E.A. Acts Improperly to Prohibit Growth of Industrial Hemp*, 68 UMKC L. REV. 239, 245 (1999).

<sup>16</sup> Matthew J. Seamon, et al., *Medical Marijuana and the Developing Role of the Pharmacist*, 64 AM. J. HEALTH-SYST. PHARM. 1037, 1040 (2007).

<sup>17</sup> Patrick Stack & Claire Suddath, *A Brief History of Medical Marijuana*, TIME HEALTH & FAMILY (2009), <http://www.time.com/time/health/article/0,8599,1931247,00.html>.

<sup>18</sup> Boire & Feeney, *supra* note 11, at 16 (marijuana was also considered a treatment for alcoholism, opiate addiction, and anthrax).

<sup>19</sup> Roger Parloff, *How Pot Became Legal*, 160 FORTUNE 140 (2009).

<sup>20</sup> Peter J. Cohen, *Medical Marijuana: The Conflict Between Scientific Evidence and Political Ideology*, 2009 UTAH L. REV. 35 (2009).

<sup>21</sup> Laura M. Borgelt, et al., *The Pharmacologic and Clinical Effects of Medical Cannabis*, 33 PHARMACOTHERAPY 195 (2013) (the AMA objected to criminalization efforts because of the common use of marijuana in many medical settings).

also had important economic (non-medical) uses. Pot was often intentionally grown by farmers as a windbreak shrub.<sup>22</sup>

After the failed attempt at alcohol prohibition, the United States started a movement towards criminalizing marijuana. Marijuana was described as a loco-weed that drives addicts to murder and commit sex crimes.<sup>23</sup> States implemented anti-marijuana laws, often with highly charged racial motives<sup>24</sup> as it was considered primarily a black or Hispanic drug.<sup>25</sup> The federal government's first action was to set high taxes on marijuana in 1937.<sup>26</sup> The high taxes and significant fines for avoiding taxes were meant to discourage use.<sup>27</sup>

Marijuana was criminalized on a large scale for the first time in 1951.<sup>28</sup> The public supported criminalization of marijuana.<sup>29</sup> This effort was ramped

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<sup>22</sup> Chris Zdeb, *August 29, 1938: Police join forces to fight harmless-looking ‘loco-weed’; This Day in Journal History*, EDMONTON J., 2014, at A2.

<sup>23</sup> Foreword, REEFER MADNESS (Madacy Entertainment Group, Inc. 1998) (1936) ("The new drug menace which is destroying the youth of America in alarmingly-increasing numbers. Marihuana is that drug - a violent narcotic - an unspeakable scourge - The Real Public Enemy Number One!"); and *id.* (marijuana causes "ruthless murder, hold-up and sex crimes"); and Alyson Martin & Nushin Rashidian, A NEW LEAF: THE END OF CANNABIS PROHIBITION 39-40 (2014) (prohibitionists claimed marijuana turns black men into beasts and Hispanics into killers, with racist rhetoric of saving whites from minorities); *see also* Tim Weber, *Note: Would Government Prohibition of Marijuana Pass Strict Scrutiny?*, 46 IND. L. REV. 529, 553 (2013) (anti-Mexican immigrant and anti-African American sentiments fueled marijuana restrictions).

<sup>24</sup> David F. Musto, *Opium, Cocaine and Marijuana in American History*, 265 SCI. AM. 40, 45-46 (1991) (smoking cannabis leaves came to the U.S. with Mexican agriculture workers and became associated with black jazz musicians); *see also* Mitch Earleywine & Mallory Loflin, *Curious Consequences of Cannabis Prohibition*, 6 ALB. GOV'T L. REV. 438 (2013); Paul Butler, (*Color*) Blind Faith: The Tragedy of "Race, Crime and the Law," 111 HARV. L. REV. 1270, 1275 (1998) (book review); Harry G. Levine & Deborah Peterson Small, *Marijuana Arrest Crusade: Racial Bias and Police Policy in New York City 1997-2007*, N.Y. CIV. LIBERTIES UNION 6 (2008), <http://marijuana-arrests.com/docs/MARIJUANA-ARREST-CRUSADE.pdf>; and Michelle Alexander, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS (2013); Paul M. Gahlinger, ILLEGAL DRUGS: A COMPLETE GUIDE TO THEIR HISTORY, USE AND ABUSE 62 (2004).

<sup>25</sup> This discriminatory enforcement continues. In 2014, in marijuana friendly Seattle, Washington, 30% of marijuana offenses were to black defendants, who only account for 8% of the population. Rachel Alexander, *Pot Citations a Low Priority, SPD Officers have issued six since 2013*, SPOKESMAN REVIEW 1 (2015); and Julian Brave NoiseCat, *Native Tribes Want Pot Business but Financial Gain may cost their Sovereignty*, GUARDIAN, Oct. 13, 2015, <http://www.theguardian.com/commentisfree/2015/oct/09/native-tribes-want-pot-marijuana-business-financial-gain-may-cost-sovereignty>. (War on Drug has "caged generations of people of color and the poor").

<sup>26</sup> Stack & Suddath, *supra* note 17; *Marijuana Tax Act of 1937* 50 Stat. § 551 (repealed 1970).

<sup>27</sup> JACK HERER, THE EMPEROR WEARS NO CLOTHES (11th ed. 2000). (Taxes were set at over 100 percent of market prices, while fines were set at 100 times the market price.).

<sup>28</sup> Stack & Suddath, *supra* note 17.

up under Richard Nixon, culminating with the *Controlled Substances Act of 1970*,<sup>30</sup> making marijuana illegal in all states and for all uses. Federal law prohibited all possession and use of marijuana, and that was the end of the discussion. Almost.

While the federal government preached law and order, and regulation of the evil weed, portions of the federal government reacted in the opposite direction. In 1976, the federal Compassionate Investigative New Drug (CIND) Program was started.<sup>31</sup> The CIND program allowed a small number of highly screened patients to receive free marijuana from the federal government.<sup>32</sup> The program was not publicized, even among medical circles. Most taxpayers had no idea they were funding prisons for pot sellers and simultaneously funding distribution of marijuana for medical use.

The CIND program stopped accepting new patients in 1991,<sup>33</sup> largely because of the dramatically growing number of AIDS patients seeking marijuana and because of the media attention to the program.<sup>34</sup> However, the program was not halted entirely. Currently, a handful of the original CIND patients survive,<sup>35</sup> each getting monthly shipments of marijuana provided free of charge by the federal government.<sup>36</sup>

<sup>29</sup> Lydia Saad, *Majority Continues to Support Pot Legalization in U.S.*, GALLUP (Nov. 6, 2014), <http://www.gallup.com/poll/179195/majority-continues-support-pot-legalization.aspx>. (Only 12% of Americans favored legalizing marijuana in 1969, a year prior to the *Controlled Substances Act*.)

<sup>30</sup> *Comprehensive Drug Abuse and Control Act of 1970*, Pub. L. No. 91-513 § 1101(b)(3)(A), 84 Stat. 1236, 1292 (codified at 21 U.S.C. §§ 801-971) (2000) (hereinafter *Controlled Substances Act*).

<sup>31</sup> See Compassionate Investigational New Drug Program Wikipedia, [http://en.wikipedia.org/wiki/Compassionate\\_Investigational\\_New\\_Drug\\_program](http://en.wikipedia.org/wiki/Compassionate_Investigational_New_Drug_program) (last visited Aug. 30, 2017). (The National Institute of Drug Abuse created the program that distributed government produced marijuana to seriously ill patients, with only a few remaining.)

<sup>32</sup> Mark Eddy, *Cong. Research Serv., RL33211, MEDICAL MARIJUANA: REVIEW AND ANALYSIS OF FEDERAL AND STATE POLICIES* 8 (2010); see also Michael Eisenstein, *Showdown at the Cannabis Corral*, 525 NATURE 15, 16 (Sept. 24, 2015) (the free federal marijuana is grown at a research facility at the University of Mississippi).

<sup>33</sup> Michael Isikoff, *HHS to Phase Out Marijuana Program: Officials Fear Sending "Bad Signal" by Giving Drug to Seriously Ill*, THE WASHINGTON POST, Jun. 22, 1991, at A14 (during George H.W. Bush's administration).

<sup>34</sup> See Pete Guither, *Irvin Rosenfeld and the Compassionate IND – Medical Marijuana Proof and Government Lies*, DRUG WARRANT (Feb. 18, 2005), <http://www.drugwarrant.com/articles/irvin-rosenfeld-and-the-compassionate-ind>.

<sup>35</sup> The most vocal advocate and patient from the program is Irvin Rosenfeld, a stockbroker who since 1982 continues to get his marijuana provided by the U.S. government; see Russell Goldman, *Irvin Rosenfeld has Received Over 115,000 Joints from the Federal Government* (Nov. 24, 2009), <http://abcnews.go.com/Business/man-sets-marijuana-record-smokes-115000-joints-provided/story?id=9159281>.

<sup>36</sup> Harris Gardiner, *Researchers find Study of Medical Marijuana discouraged*, N.Y. TIMES 14, Jan. 19, 2014; see also Parloff, *supra* note 19.

While the federal government stealthily implemented their CIND program, states tried small programs of medical marijuana. New Mexico was the first state to start a medical marijuana program in 1978.<sup>37</sup> Thirty states followed New Mexico's lead, but the support was short lived. The FDA approved a synthetic form of marijuana, Marinol, in 1980.<sup>38</sup> Marinol is an FDA-approved form of THC, the active chemical in marijuana.<sup>39</sup> Since marijuana was now available in pill form, the interest in medical pot waned.<sup>40</sup> Marinol was moved to Schedule 3 in 1999.<sup>41</sup>

While Marinol has had some positive results,<sup>42</sup> it is too early to break out the Cheetos. As a pill, it is difficult to absorb and regulate, especially for those with wasting syndrome.<sup>43</sup> Marinol is also much more expensive than marijuana.<sup>44</sup> Is Marinol the solution for those who desire the medical benefits of marijuana? It is unclear. Rob MacCoun, Stanford law professor explains that research in medical marijuana has been limited by politics.<sup>45</sup>

Certainly the proponents of medical marijuana claim a host of benefits from the plant.<sup>46</sup> Dr. Sanja Gupta suggests that the American public has been misled to stop using medical marijuana in favor of (more expensive) pharmaceutical drugs.<sup>47</sup> While the medical research is beyond the scope of this paper,<sup>48</sup> the basics are that marijuana helps settle the stomach of

<sup>37</sup> Behavioral Health Servs. Div. Health & Env't Dep't, THE LYNN PIERSON THERAPEUTIC RESEARCH PROGRAM: A REPORT ON PROGRESS TO DATE 1, 1 (1983).

<sup>38</sup> See, e.g., Kambiz Akhavan, *Marinol vs. Marijuana: Politics, Science, and Popular Culture*, DRUGTEXT.ORG 4-5 (2001), <http://www.drugtext.org/pdf/Cannabis-marijuana-hashisch/marinol-vs-marijuana-politics-science-and-popular-culture.pdf>; Laurence Brunton, et al., GOODMAN & GILMAN'S MANUAL OF PHARMACOLOGY AND THERAPEUTICS 396 (2008).

<sup>39</sup> See *Marinol Prescribing and Safety Information*, DRUGS.COM, <https://www.drugs.com/pro/marinol.html> (last visited Aug. 30, 2017).

<sup>40</sup> See Gregg A. Bilz, *The Medical Use of Marijuana: The Politics of Medicine*, 13 HAMLINE J. PUB. L. & POL'Y 117, 125 (1992); see also Renahan, *supra* note 14.

<sup>41</sup> See *id.* at 125; see also Renahan, *supra* note 14; *Schedules of Controlled Substances: Rescheduling of the Food and Drug Administration Approved Product Containing Synthetic Dronabinol [(-)-[DELTA] 9-(trans)-Tetrahydrocannabinol] in Sesame Oil and Encapsulated in Soft Gelatin Capsules From Schedule II to Schedule III*, 64 FED. REG. 35, 928-30 (June 8, 1999) (to be codified at 21 C.F.R. pts. 1308, 1312).

<sup>42</sup> Eddy, *supra* note 32.

<sup>43</sup> Mitch Earleywine, *Opinion: Medical Marijuana Benefits*, CBS NEWS (Mar. 5, 2009), [http://www.cbsnews.com/2100-503823\\_162-4844665.html](http://www.cbsnews.com/2100-503823_162-4844665.html).

<sup>44</sup> A sixty day supply of Marinol (5mg. capsules) was priced at \$1,431.46 at drugs.com in August 2017; see Marinol Prices, <http://www.drugs.com/price-guide/marinol> (last visited Aug. 28, 2017).

<sup>45</sup> John Ingold, *Researchers Bemoan Roadblocks to Research*, DENVER POST 12A, Dec. 8, 2014 (the onerous regulations prevent serious researchers from attempting work with marijuana).

<sup>46</sup> Dr. Murray Dease, *Cannabis beneficial*, STAR PHOENIX, July 31, 2014, at A6.

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

<sup>48</sup> For an in depth discussion of the medical research on marijuana see Cohen, *supra* note 20.

chemotherapy patients and others. Additionally, some research indicates marijuana helps regenerate brain cells.<sup>49</sup> The substance contains sixty cannabinoids in addition to THC.<sup>50</sup> Researchers have conducted few studies on the other chemicals in marijuana so it remains as a largely untapped reserve of information.<sup>51</sup>

While the benefits of marijuana are debated in medical circles, pot has many practical benefits as a medicine. Marijuana can be ingested in many ways (smoked, eaten, liquefied, aerosol, and others).<sup>52</sup> The drug is relatively inexpensive, and some patients can grow their own in their backyard or even a closet of their home.<sup>53</sup> Most importantly, marijuana is safe. No recorded fatal overdose has occurred in 3,000 years of use.<sup>54</sup> However, marijuana is not all good. Everyone acknowledges the hazards of smoking marijuana being as bad if not worse than smoking cigarettes.<sup>55</sup> Some sociological research suggests that medical marijuana leads to more recreational access.<sup>56</sup>

Despite then-candidate Barack Obama's 2008 campaign stance that medical marijuana was best left to state and local governments, President Obama's administration quietly unleashed a multi-federal agency initiative to stop medical cannabis in 2012.<sup>57</sup> This crackdown far exceeded any efforts by the previous Republican administration according to all accounts.<sup>58</sup> The federal government seemed unwilling or unable to find an alternative to the War on Drugs. States have also attempted their own solutions. Some states have allowed medical use of marijuana to limited persons. Others have legalized pot for any and all users (all adult users). How can we make a workable system of selling/regulating/taxing an item that is illegal under

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<sup>49</sup> Peter J. Cohen, *Medical Marijuana 2010: It's Time to Fix the Regulatory Vacuum*, 38 J.L. MED. & ETHICS 654 (2010); see also Dease, *supra* note 46.

<sup>50</sup> Sue Vorenberg, *THC, CBD, Terpenes? It's the Science of Pot*, COLUMBIA, Aug. 30, 2014.

<sup>51</sup> *Id.*

<sup>52</sup> Eddy, *supra* note 32, at 30.

<sup>53</sup> The ease of acquiring marijuana has been a burden for the drug-free workplace initiatives; see Ludlum & Ford, *supra* note 9.

<sup>54</sup> STEVEN B. DUKE & ALBERT C. GROSS, AMERICA'S LONGEST WAR: RETHINKING OUR TRAGIC CRUSADE AGAINST DRUGS 51 (1993); see also J. Michael Walker & Susan M. Huang, *Cannabinoid Analgesia*, 95 PHARMACOLOGY & THERAPEUTICS 127, 133 (2002); Sandra P. Welch & Billy R. Martin, *The Pharmacology of Marijuana*, PRINCIPLES OF ADDICTION MEDICINE 249, 260 (Allan W. Graham, et al., eds., 3d. ed. 2003); see also Sides, *supra* note 13, at 39.

<sup>55</sup> Seamon, et al., *supra* note 16, at 1040.

<sup>56</sup> See Noelle Crombie, *Medical Marijuana: A Few High-Volume Doctors Approve Most Patients*, OREGON LIVE (Dec. 29, 2012), [http://www.oregonlive.com/health/index.ssf/2012/12/medical\\_marijuana\\_a\\_few\\_high-v.html](http://www.oregonlive.com/health/index.ssf/2012/12/medical_marijuana_a_few_high-v.html).

<sup>57</sup> Tim Dickinson, *Obama's War on Pot*, ROLLING STONE (Feb. 16, 2012), <http://www.rollingstone.com/politics/news/obamas-war-on-pot-20120216>.

<sup>58</sup> *Id.*

federal law but legal under state law? Medical marijuana will be the biggest preemption controversy of this generation.<sup>59</sup>

The War on Drugs provides many frustrations throughout the United States.<sup>60</sup> Incarceration costs have skyrocketed which taps in to already struggling governmental budgets.<sup>61</sup> Punishments for offenders have increased.<sup>62</sup> Individual rights of citizens have been curtailed.<sup>63</sup> Law enforcement has become more militaristic to respond to and perhaps meet the often violent drug trade.<sup>64</sup> However, the demand for marijuana remains strong, and the supply keeps coming.<sup>65</sup>

Essentially marijuana (*cannabis sativa*) has always been with us, and it is not leaving any time soon.<sup>66</sup> Despite being illegal under federal law since 1970,<sup>67</sup> it is the most widely used psychoactive drug in the United States,<sup>68</sup>

<sup>59</sup> Renehan, *supra* note 14.

<sup>60</sup> Maria McFarland Sanchez-Moreno, *Winding Down the War on Drugs*, 12 HARV. INT'L REV. 35, 36 (2015) (the War on Drugs has failed with devastating consequences). Will Dana, *A Trillion-Dollar Failure*, 1238 ROLLING STONE 38 (2015) (trillion-dollar failure is a reference to the War on Drugs). Vanessa Baird, *Long and Violent 'War on Drugs' has been a Colossal Failure*, 19 CCPA MONITOR 28, 29 (2012) (causing a deadly set of unintended consequences). Julien Mercille, *Violent Narco-Cartels or US Hegemony? The Political Economy of the 'War on Drugs' in Mexico*, 32 THIRD WORLD Q. 1637, 1650 (2011) (drug treatment is 23 times more effective than our War on Drugs).

<sup>61</sup> John F. Praff, *The War on Drugs and Prison Growth: Limited Importance, Limited Legislative Options*, 52 HARV. J. ON LEGIS. 173 (2015) (prison population has grown 500% during the war on drugs); Sanchez-Moreno, *supra* note 60, at 61 (prisons are “engorged” with low-legal drug participants, disproportionately minorities); *see also* Eugene Jarecki, *Voting Out the Drug War*, 295 NATION 5, 6 (2012) (“tragic excesses of the criminal justice nightmare”).

<sup>62</sup> Jarecki, *supra* note 61 (the War on Drugs is “a predatory monster that sustains itself on the mass incarceration of fellow human beings”).

<sup>63</sup> Lawrence D. Bobo & Victor Thompson, *Unfair by Design: The War on Drugs, Race, and the Legitimacy of the Criminal Justice System*, 73 SOC. RES. 445 (2006) (politicians on both sides eagerly support punishments that at any other time in history would be unthinkable).

<sup>64</sup> Sanchez-Moreno, *supra* note 60, at 36 (military has increasingly been involved in the War on Drugs, in the US and abroad); Mercille, *supra* note 60, at 1645 (describing military equipment being used in the War on Drugs in Mexico and the US); *see also* Horace A. Bartilow, *Drug Wars Collateral Damage: US Counternarcotic Aid and Human Rights in the Americas*, 49 LAT. AM. RES. REV. 24 (2014) (describes the escalation of drug violence, including mass graves and beheadings).

<sup>65</sup> Mercille, *supra* note 60, at 1638 (Mexico’s drug crops are in the thousands of acres in production, nearly all headed toward the United States); *see also* Glen Olives Thompson, *Slowly Learning the Hard Way: U.S. America’s War on Drugs and Implications for Mexico*, 9 NORTEAMERICA 59 (2014) (describing the war as an abject failure, and a failure that cannot be overstated).

<sup>66</sup> Sides, *supra* note 13, at 38; *see also* Ludlum & Ford, *supra* note 8.

<sup>67</sup> Eddy, *supra* note 32.

<sup>68</sup> Am. Psychiatric Ass'n., *DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS* 512 (5th ed. 2013).

and the most commonly used drug in the world.<sup>69</sup> Marijuana is as readily available as alcohol for most.<sup>70</sup> Ironically, marijuana is currently more abundant now than prior to Nixon's War on Drugs.<sup>71</sup> Attitudes toward the substance appear to be changing. Even the current U.S. Surgeon General, Vivek Murthy admitted that medical marijuana may be helpful for some people.<sup>72</sup>

## II. CHANGES IN POLICY

As of March 23, 2017, twenty-nine (29) states have broadly legalized marijuana usage in some form,<sup>73</sup> with twenty-one (21) of those states, the District of Columbia, Guam,<sup>74</sup> and Puerto Rico<sup>75</sup> allowing usage specifically for medicinal purposes.<sup>76</sup> A few other jurisdictions specifically allow cannabis products only if needed for medicinal usage such as debilitating seizures in children.<sup>77</sup> In 2016 Pennsylvania<sup>78</sup> became the twenty-fourth state to legalize its usage for medical conditions such as Crohn's Disease, Cancer, Epilepsy, Glaucoma, HIV, Multiple Sclerosis, Parkinson's Disease, and Post-

<sup>69</sup> Nancy Rumbaugh Whitesell, et al., *Marijuana Initiation in 2 American Indian Reservation Communities: Comparison with a National Sample*, 97 AM. J. PUB. HEALTH 1311 (2007).

<sup>70</sup> *Id.* (For young people, marijuana is much easier to acquire than alcohol because of regulated alcohol sales.)

<sup>71</sup> Tim Dickinson, *A Drug war Truce?* 1081 ROLLING STONE 45, 48 (2009); see also Thomas Nicholson, et al., *Focus on Abuse, Not Use: A Proposed New Direction for US Drug Policy*, 19 DRUGS: EDUCATION, PREVENTION, AND POLICY 303 (2012) (describing the antidrug effort as an ineffective and maladaptive policy).

<sup>72</sup> Sides, *supra* note 13, at 38. This view of marijuana is not new. It is reported that Queen Victoria (who reigned over the United Kingdom of Great Britain and Ireland from 1837 until 1901) was prescribed marijuana by her court physician; see LESTER GRINSPOON & JAMES B. BAKALAR, MARIJUANA, THE FORBIDDEN MEDICINE 4 (1993).

<sup>73</sup> eRepublic, *supra* note 7.

<sup>74</sup> Joy Blackburn, *Can the V.I. Learn from State that have Legalized Marijuana*, VIRGIN ISLANDS DAILY NEWS, Apr. 13, 2015; Carol Josel, *PA's Medical Marijuana Act: A moneymaker with health benefits*, EXAMINER.COM (Apr. 28, 2016), <http://www.examiner.com/article/pa-s-medcal-marijuana-act-a-moneymaker-with-health-benefits>.

<sup>75</sup> Alexandra Sifferlin, *Puerto Rico Governor Signs Executive Order to Legalize Medical Marijuana*, TIME.COM (May 4, 2015), <http://time.com/3845638/puerto-rico-medical-marijuana>.

<sup>76</sup> Zach Kayser, *Dayton Taps Local Doctor for Medical Cannabis Board*, BEMIDJI PIONEER , July 11, 2014; Bill Hendrick, *Georgia Governor Signs Medical Marijuana Bill into Law*, MSNBC.COM (Apr. 16, 2015), <http://www.msnbc.com/msnbc/georgia-gov-deal-signs-medical-marijuana-bill-law>.

<sup>77</sup> Stephanie Backus, *Governor Mary Fallin signs bill allowing pilot program for cannabis oil*, KOCO.COM (Apr. 30, 2015), <http://www.koco.com/article/gov-mary-fallin-signs-bill-allowing-pilot-program-for-cannabis-oil/4303904>.

<sup>78</sup> Josel, *supra* note 74.

Traumatic Stress Disorder.<sup>79</sup> This reflects the change in political support for marijuana.<sup>80</sup> According to a 2017 Gallup poll, forty-five (45) percent of all Americans has tried marijuana.<sup>81</sup> Four years earlier, a similar Gallup poll had indicated thirty-eight (38) percent of Americans had used the drug.<sup>82</sup> Even the typically highly conservative southern states are considering legalization.<sup>83</sup> Even one state can have a large impact on marijuana production. A single growing operation the size of a football field can yield 1,000 pounds of marijuana per year.<sup>84</sup> With over half the U.S. allowing legalized marijuana under some conditions, the production of marijuana is flourishing. It is also notable that as of October 2016, a clear majority of all Americans support legal marijuana usage.<sup>85</sup>

Support for medical marijuana is also growing in unlikely places. Three out of every four American physicians support medical marijuana.<sup>86</sup> Famously, a sitting New York judge uses medical marijuana to alleviate his pain.<sup>87</sup> Even Pennsylvania's Governor Tom Wolfe illustrated his support for the drug's legalization when he propounded that his signing of his state's *Medical Marijuana Act* was "about helping peoples' lives, about helping

<sup>79</sup> *Id.*

<sup>80</sup> Saad, *supra* note 29 (in 2015, a majority of adults favor legalization of marijuana).

<sup>81</sup> Art Swift, *In U.S., 45 Percent Say They Have Tried Marijuana*, GALLUP (July 19, 2017), [http://www.gallup.com/poll/214250/say-tried-marijuana.aspx?g\\_source=Well-Being&g\\_medium=newsfeed&g\\_campaign=tiles](http://www.gallup.com/poll/214250/say-tried-marijuana.aspx?g_source=Well-Being&g_medium=newsfeed&g_campaign=tiles). (Finding that 45 percent of Americans have tried marijuana as of 2017).

<sup>82</sup> Lydia Saad, *In U.S., 38 Percent Have Tried Marijuana, Little Changed Since '80s*, GALLUP (Aug. 2, 2013), <http://www.gallup.com/poll/163835/tried-marijuana-little-changed-80s.aspx>. (Finding that 38 percent of Americans have tried marijuana as of 2013.)

<sup>83</sup> Jack Healy, *Voters Ease Marijuana Laws in 2 States, but Legal Questions Remain*, N.Y. TIMES, Nov. 7, 2012, at P15, <http://www.nytimes.com/2012/11/08/us/politics/marijuana-laws-eased-in-colorado-and-washington.html>.

<sup>84</sup> Geordon Omand, *Medical Marijuana Growers Face Rising Competition, Few Investment Dollars*, PRINCE GEORGE CITIZEN, Mar. 2, 2015.

<sup>85</sup> Art Swift, *Support for Legal Marijuana Use Up to 60 percent in U.S.*, GALLUP (Oct. 19, 2016), [http://www.gallup.com/poll/196550/support-legal-marijuana.aspx?g\\_source=position2&g\\_medium=related&g\\_campaign=tiles](http://www.gallup.com/poll/196550/support-legal-marijuana.aspx?g_source=position2&g_medium=related&g_campaign=tiles). (Finding that 60 percent of Americans support legal marijuana usage as of 2016.)

<sup>86</sup> Michelle Castillo, *Survey: 76 percent of doctors approve of medical marijuana use*, CBS NEWS (May 31, 2013), <https://www.cbsnews.com/news/survey-76-percent-of-doctors-approve-of-medical-marijuana-use>. (Citing the New England Journal of Medicine polling results.); see also *State Medical Marijuana Laws*, Nat'l Conf. St. Legislatures (Aug. 2, 2017), <http://www.ncsl.org/research/health/state-medical-marijuana-laws.aspx>.

<sup>87</sup> Gustin L. Reichbach, *Op-Ed., A Judge's Plea for Pot*, N.Y. TIMES, May 17, 2012, at A27, <http://www.nytimes.com/2012/05/17/opinion/a-judges-plea-for-medical-marijuana.html>. ("I did not foresee that after having dedicated myself for 40 years to a life of the law ... my quest for ameliorative and palliative care would lead me to marijuana.")

people that are going to be better, faster. They're going to feel better and that is just such a rewarding thing.”<sup>88</sup>

Demand for pot is, well, high – pun intended. The legal marijuana market increased by seventy-four percent (74%)<sup>89</sup> to \$2.7 billion in 2014.<sup>90</sup> Through the first half of 2017 these numbers continued to rise to an additional twenty-five percent (25%) in at least one U.S. state.<sup>91</sup> The numbers are staggering in any industry. The highly competitive pot markets are saturated with sellers. The city of Seattle has 103 medical marijuana dispensaries.<sup>92</sup> In some areas, legal marijuana merchants outnumber McDonalds and Starbucks.<sup>93</sup> Medical marijuana is not the only growth market. In the last five years, eight states including Colorado,<sup>94</sup> Washington,<sup>95</sup> Oregon, Alaska, and the District of Columbia have legalized recreational use of marijuana.<sup>96</sup> In these states, marijuana is treated like alcohol, legal but regulated by age. These policies affect tribal areas also.

### **III. IMPACT ON TRIBAL LANDS**

Indian reservations are not new to drug trafficking. Drugs seized on Indian reservations exceed 65,000 pounds a year.<sup>97</sup> Authorities monitored fifty (50) pounds of marijuana a week flowing through one small reservation in South Dakota alone.<sup>98</sup> Drug grow operations on reservations are

<sup>88</sup> Josel, *supra* note 74.

<sup>89</sup> Michael Pollick, *Two Pot Amendments could make the 2016 Ballot*, SARASOTA HERALD TRIBUNE, Mar. 10, 2015.

<sup>90</sup> *Id.*

<sup>91</sup> Medical Marijuana Inc., *Colorado's Marijuana Sales Up 25%, Top \$750 Million in First Half of 2017*, MEDICAL MARIJUANA INC., (Aug. 25, 2017), <http://www.medicalmarijuanainc.com/colorados-marijuana-sales-25-top-750-million-first-half-2017>.

<sup>92</sup> Jim Camden, *House Weights Pot Law Proposals*, SPOKESMAN REVIEW, Mar. 6, 2015.

<sup>93</sup> Ludlum & Ford, *supra* note 7.

<sup>94</sup> Healy, *supra* note 83; see Colo. Const. art. XVIII, § 16 (West, Westlaw through Dec. 2012 amendments).

<sup>95</sup> I.M. 502, 63d Leg., Reg. Sess. (Wash. 2012).

<sup>96</sup> Mary Ellen Klas, *Tribes May Grow Pot*, TAMPA BAY TIMES , Dec. 13, 2014; Kenneth R. Gosselin, *A Slow Start: Medical Marijuana*, HARTFORD COURANT, Apr. 19 2015; see also Sue Vorenberg, *Marijuana Market Mellows*, COLUMBIAN, Jan. 4, 2015.

<sup>97</sup> Kevin Johnson, *Drugs Invade via Indian Land*, USA TODAY (Aug. 7, 2003), [https://usatoday30.usatoday.com/news/nation/2003-08-06-indian-drugs-usat\\_x.htm](https://usatoday30.usatoday.com/news/nation/2003-08-06-indian-drugs-usat_x.htm).

<sup>98</sup> Barry Amundson, *South Dakota Tribe Prepares to Open ‘Marijuana Resort’*, ST. PAUL PIONEER PRESS (Oct. 10, 2015), <http://www.twincities.com/2015/10/10/south-dakota-tribe-prepares-to-open-marijuana-resort> (Estimates by Flandreau Police Chief about the Sioux Reservation 35 miles from Sioux Falls, South Dakota.)

significant.<sup>99</sup> Often drug dealers illegally use tribal lands.<sup>100</sup> Many find tribal lands which have limited enforcement resources and limited access to state law enforcement as an attractive venue for illegal drug pipelines.<sup>101</sup> Tribal lands are often remote and sparsely populated with minimal law enforcement manpower. The illegal operation can thrive without usual fear of discovery or detection. As a result, tribal lands are perfect for illegal grows. Since the land is owned by the tribe or its members, the drug grower does not face a potential sanction of land forfeiture as one would on privately owned land.

A single tribe's example shows the difficulty of stopping illegal marijuana grown on tribal lands. In July, 2014, the Yurok tribe in Humboldt County, California cooperated with state and local authorities resulting in week long raid and destruction of nearly 100,000 marijuana plants.<sup>102</sup> Seven months later, in February, 2015, Yurok tribe again helped DEA eradicate illegal grow of 15,000 plants on reservation land.<sup>103</sup> Five months later, in July of 2015, another raid found over 10,000 plants and 600 pounds of processed marijuana illegally grown on reservation lands.<sup>104</sup> The tribe noted that water theft to support illegal marijuana grows has been devastating.<sup>105</sup>

Drug cases on Indian lands are important but rare.<sup>106</sup> Tribes have poor enforcement of drug laws on tribal lands.<sup>107</sup> Tribal police are mostly reactive to drug problems because of a lack of resources, explained Walter Lamar, deputy director of Bureau of Indian Affairs Office of Law Enforcement.<sup>108</sup>

<sup>99</sup> Rick Jervis, *Smugglers Intrude on Arizona Reservation*, USA TODAY (Mar. 18, 2010), [https://usatoday30.usatoday.com/printedition/news/20100318/tribal18\\_st.art.htm](https://usatoday30.usatoday.com/printedition/news/20100318/tribal18_st.art.htm).

<sup>100</sup> Johnson, *supra* note 97.

<sup>101</sup> *Id.*

<sup>102</sup> Lee Romney, *Agencies Raid Pot Growers on Tribal Land; Yurok Leaders had Pleaded for Outside Help, saying Marijuana Cultivation was Damaging Reservation*, LOS ANGELES TIMES, July 22, 2014 (the marijuana grows stole millions of gallons of water and harmed the ecosystem with sediment and chemical runoff).

<sup>103</sup> Juniper Rose & Gene Johnson, *Tribes Nationwide Tackle Pot*, EUREKA TIMES STANDARD, Mar. 3, 2015.

<sup>104</sup> Tabitha Soden, *10,000 Pot Plants Pulled from Grows on Tribal Lands; Huge Hold Dug in Road in Attempt to Block Access*, CHICO ENTERPRISE-RECORD, July 16, 2015 (seizure was by sheriff's office and tribal authorities).

<sup>105</sup> Rose & Johnson, *supra* note 103 (each plant needs 3-6 gallons of water per day, significantly diverting the water supply); Harriet Taylor, *Water-Guzzling Pot Plants Draining Drought-Wracked California*, NBC NEWS (July 8, 2014), <http://www.nbcnews.com/storyline/legal-pot/water-guzzling-pot-plants-draining-drought-wracked-california-n149861>. (Explaining that a marijuana plant uses about six gallons of water per day); Katherine Curl Reitz, *An Environmental Argument for a Consistent Federal Policy on Marijuana*, 57 ARIZ. L. REV. 1085, 1093 (2015) (illegal growers use water intensive methods).

<sup>106</sup> Johnson, *supra* note 97.

<sup>107</sup> *Id.*

<sup>108</sup> Ruben Rosario, *Heroin a Grim Reaper of the American Indian Community*, ST. PAUL PIONEER PRESS (May 27, 2015), <http://www.twincities.com/2015/05/27/ruben-rosario-heroin->

However, natives attempt to stop the drug trade are analogized to trying to hold water with an open hand.<sup>109</sup>

Federal policy has evolved. Obama's marijuana policy is a complete reversal of Bush's hardline approach.<sup>110</sup> The United States Department of Justice's Ogden Memo encouraged relaxed enforcement of marijuana laws in medical marijuana states.<sup>111</sup> The Cole Memo also encouraged discretion in prosecuting marijuana cases in states with marijuana legalization provided eight goals of marijuana policy were being followed.<sup>112</sup>

Currently, the government is clearing the way for tribal governments to experiment with marijuana laws.<sup>113</sup> The DOJ's Wilkinson Memo was meant to clarify federal policy towards marijuana on tribal lands.<sup>114</sup> It did so by repeating the eight goals of the Cole Memo. In addition, the Wilkinson Memo dictated that prosecutors should cooperate with sovereign tribal governments to draft a mutually beneficial policy.

Commentators have indicated that tribal governments could start production of marijuana, but might only have a comparative advantage in marijuana for a few years since it appears the nation is becoming more accepting of legalization of marijuana in general.<sup>115</sup> If marijuana prohibition is repealed for all 50 states, everyone could be involved in the marijuana trade. Tribes would only have an advantage over non-tribal lands until full legalization, perhaps within a decade.<sup>116</sup> As a result, tribal governments should move quickly to seize the economic opportunity while it is available.

a-grim-reaper-of-the-american-indian-community. (Tribes do not have the resources to be proactive against drug pipelines.)

<sup>109</sup> Jervis, *supra* note 99.

<sup>110</sup> Dickinson, *supra* note 57.

<sup>111</sup> Memorandum from David W. Ogden, Deputy Att'y Gen., U.S. Dep't of Justice, to Selected U.S. Att'ys, Investigations and Prosecutions in States Authorizing the Medical Use of Marijuana (Oct. 19, 2009), <http://www.justice.gov/sites/default/files/opa/legacy/2009/10/19/medical-marijuana.pdf>.

<sup>112</sup> See Memorandum from James M. Cole, *supra* note 4.

<sup>113</sup> Tim Dickinson, *The War on Drugs is Burning Out*, ROLLING STONE (Jan. 8, 2015), <http://www.rollingstone.com/politics/news/the-war-on-drugs-is-burning-out-20150108>.

<sup>114</sup> See Memorandum from Monty Wilkinson, *supra* note 2.

<sup>115</sup> Carly Schwartz, *More than 100 Native American Tribes Consider Growing Marijuana*, HUFFINGTON POST, (Feb. 3, 2015), [http://www.huffingtonpost.com/2015/02/03/native-americans-marijuana\\_n\\_6599984.html](http://www.huffingtonpost.com/2015/02/03/native-americans-marijuana_n_6599984.html); Jacqueline Keeler, *Tribal Marijuana Conference: 'A 10-year Window for Tribes to Capitalize'*, INDIAN COUNTRY TODAY (Mar. 2, 2015), <http://indiancountrytodaymedianetwork.com/2015/03/02/tribal-marijuana-conference-10-year-window-tribes-capitalize-159431>.

<sup>116</sup> Keeler, *supra* note 115.

However, current federal policy depends on non-enforcement.<sup>117</sup> *The Controlled Substances Act* has not been repealed or replaced.<sup>118</sup> Marijuana businesses are basically “rolling the dice”<sup>119</sup> with hopes that non-enforcement will continue. The next presidential election could possibly change all current policies.<sup>120</sup> Galanda Broadman, a lawyer representing several Indian tribes, has also argued that everything could change with the next election.<sup>121</sup> No one knows who the next president might be, or whether he or she supports continued non-enforcement regarding marijuana. Any entity choosing to become involved in the business of marijuana faces the uncertainty and risk.<sup>122</sup> Even the Cole, Wilkinson, and Ogden Memos do not help, since each lacks the force of law.<sup>123</sup> The memos could be changed, cancelled, or replaced with contradictory policy at any time.<sup>124</sup>

The extent of tribal sovereignty as it relates to marijuana is unclear. Anthony Broadman, an Indian law attorney in Seattle, explained that sovereignty might only allow production of marijuana on tribal lands for tribal members.<sup>125</sup> The tribes could be punished the instant any of the marijuana leaves the reservation, making for a great deal of liability.<sup>126</sup> Carl Artman, former head of U.S. Bureau of Indian Affairs and Oneida tribal member, indicated the memo lacked specifics on how to proceed.<sup>127</sup>

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<sup>117</sup> Jacob Sullum, *From Casinos to Cannabis: Indian Tribes Eye Pot Profits*, FORBES (Mar. 12, 2015), <http://www.forbes.com/sites/jacobsullum/2015/03/12/from-casinos-to-cannabis-indian-tribes-eye-pot-profits/#52251a011e26>; and Keeler, *supra* note 115.

<sup>118</sup> *Id.*

<sup>119</sup> Alysa Landry, *Proceed with Caution: A Warning to Tribes Wanting to Grow Medical Marijuana*, INDIAN COUNTRY TODAY (Feb. 16, 2015), <http://indiancountrytodaymedianetwork.com/2015/02/16/proceed-caution-warning-tribes-wanting-grow-medical-marijuana-159208>.

<sup>120</sup> *Id.*

<sup>121</sup> Glenda Anderson, *Raid on Tribal Marijuana Farms Underscores Uncertainty over Pot Laws*, PRESS DEMOCRAT (Sept. 25, 2015), <http://www.pressdemocrat.com/news/4521945-181/raid-on-tribal-marijuana-farms>.

<sup>122</sup> Rosalie Winn, *Comment: Hazy Future: The Impact of Federal and State Legal Dissonance on Marijuana Businesses*, 53 AM. CRIM. L. REV. 215 (2016) (constant threat of federal prosecution prevents a great deal of development in marijuana businesses); *see also* Sam Kamin & Joel Warner, *Your Money Stinks*, SLATE (Jan. 31, 2014), [http://www.slate.com/articles/news\\_and\\_politics/altereds\\_state/2014/01/colorado\\_marijuana\\_businesses\\_have\\_a\\_big\\_problem\\_banks\\_won\\_t\\_take\\_their.html](http://www.slate.com/articles/news_and_politics/altereds_state/2014/01/colorado_marijuana_businesses_have_a_big_problem_banks_won_t_take_their.html) (noting that banks avoid transactions with marijuana businesses to avoid potential conspiracy charges).

<sup>123</sup> Winn, *supra* note 122.

<sup>124</sup> Paula Burkes, *Could Marijuana Grow Like Casinos in Oklahoma?*, DAILY OKLAHOMAN 4, Apr. 30, 2015.

<sup>125</sup> Cary Spivak, *Menominee Tribal Official Raises Prospect of Growing Marijuana*, ST. PAUL PIONEER PRESS, Feb. 19, 2015.

<sup>126</sup> *Id.* (transporting marijuana off the reservation would not be exempt from prosecution).

<sup>127</sup> *Id.* (“It was like being in New York and being told that to get to Wisconsin, you head west.”)

Marijuana is still a risky business even a year later, after the memo was supposed to give guidance.<sup>128</sup> The best advice is proceed with caution, from Michael Reif, attorney for Menominee tribe in Wisconsin.<sup>129</sup> Tribal businesses should view these memos as a ceasefire in the War on Drugs. The feds could start fighting again at any time.<sup>130</sup> States, however, do not prosecute marijuana possession on tribal lands because of sovereignty.<sup>131</sup> Tribal nations must have the ability to protect themselves from outside influences, like all sovereign nations.<sup>132</sup>

While tribal governments have always had inherent sovereign governments,<sup>133</sup> the Justice department's 2014 announcement truly treats tribes as sovereign.<sup>134</sup> Tribal Sovereignty is often seen as a complex tangle of tribal, state, and federal oversight on reservations.<sup>135</sup> Tribal sovereignty means state/local authorities have no control over tribal lands.<sup>136</sup> Only the federal government and the tribe can regulate activity on tribal lands. The legal definition of "sovereignty" is "[s]upreme dominion, authority, or rule" or "supreme political authority of an independent state."<sup>137</sup> While "sovereign power" is more generally defined as "the power to make and enforce laws."<sup>138</sup> Specifically, "inherent power" is "a power that necessarily derives from an office, position, or status."<sup>139</sup> Therefore, "inherent tribal sovereignty" is authority, to make and enforce laws, derived from the status of being a tribal government.<sup>140</sup>

The concept of sovereignty is further complicated by the fact that not all tribes have actual reservation lands.<sup>141</sup> Out of the 567 federally recognized tribes in the United States, only 326 Indian reservations are associated with a

<sup>128</sup> Mary Hudetz, *Legal Experts Urge Caution as Tribes Enter Cannabis Business*, EUREKA TIMES-STANDARD, Nov. 19, 2015.

<sup>129</sup> *Id.*

<sup>130</sup> Reitz, *supra* note 105, at 1104.

<sup>131</sup> Sullum, *supra* note 117.

<sup>132</sup> Leah Jurss, *Halting the "Slide Down the Sovereignty Slope: " Creative Remedies for Tribes Extending Civil Infraction Systems over Non-Indians*, 16 RUTGERS RACE & L. REV. 39, 41 (2015).

<sup>133</sup> See *United States v. Wheeler*, 435 U.S. 313, 324 (1978) (explaining that tribal governments have inherent powers to exercise jurisdiction over their own members).

<sup>134</sup> Burkes, *supra* note 124.

<sup>135</sup> Hudetz, *supra* note 128.

<sup>136</sup> Zoe Sullivan, *A 'Deal with the Devil'? Native American Tribes Push for Marijuana Legalization*, GUARDIAN (Oct. 2, 2015), <http://www.theguardian.com/us-news/2015/oct/02/wisconsin-native-americans-legal-marijuana-menominee-ho-chunk>.

<sup>137</sup> BLACK'S LAW DICTIONARY 1402 (7th ed. 1996).

<sup>138</sup> BLACK'S LAW DICTIONARY 1401 (7th ed. 1996).

<sup>139</sup> BLACK'S LAW DICTIONARY 1189 (7th ed. 1996).

<sup>140</sup> Lash, *supra* note 12, at 330.

<sup>141</sup> Department of the Interior, *Frequently Asked Questions*, BUREAU OF INDIAN AFFAIRS, <https://www.bia.gov/frequently-asked-questions> (last visited Aug. 30, 2017).

particular tribal nation.<sup>142</sup> At the ratification of the U.S. Constitution, the term “reservation” was conceptualized for recognition of the Native American tribes as independent sovereigns.<sup>143</sup> In those days, peace treaties were often signed between tribal governments<sup>144</sup> and the U.S. government wherein tribes surrendered large parcels of land to the U.S. government, and in turn the U.S. government was to “reserve” those lands for the tribes as sovereigns, and thereby creation of the term “reservations.”<sup>145</sup> Even after many tribes were forcibly relocated by the federal government to parcels of land to which they had no historical connection, the term continued to be used.

While the United States Supreme Court has held that state laws do not have any application in Indian country,<sup>146</sup> there are exceptions.<sup>147</sup> As originally codified in 1953, Public Law 280 requires tribes operate under federal and tribal jurisdiction on Indian land with no state jurisdiction.<sup>148</sup> Now, fifteen states have criminal jurisdiction over tribal lands,<sup>149</sup> including Alaska, Arizona, California, Florida, Idaho, Iowa, Minnesota, Montana, Nebraska, Nevada, North Dakota, Oregon, South Dakota, Utah, Washington, and Wisconsin.<sup>150</sup> After the *Oliphant* decision in 1978, tribes could begin to exercise non-criminal jurisdiction over non-Indians in very few circumstances.<sup>151</sup> *Oliphant* was a sweeping decision to strip most of authority

<sup>142</sup> *Id.*

<sup>143</sup> United States v. Dion, 476 U.S. 734 (1986); Francis v. Francis, 203 U.S. 233 (1906).

<sup>144</sup> Often under duress.

<sup>145</sup> See, e.g., United States v. Dion, 476 U.S. 734 (1986); Francis v. Francis, 203 U.S. 233 (1906). There are actually two other types of land that are referred to as “Indian lands” besides reservation lands: allotted lands and restricted status lands. (Department of the Interior, *Frequently Asked Questions*, BUREAU OF INDIAN AFFAIRS, <https://www.bia.gov/frequently-asked-questions> (last visited Aug. 30, 2017)). Allotted lands are the leftover fragments of reservations that were divided during the federal allotment period of the late nineteenth and early twentieth centuries. (Department of the Interior, *Frequently Asked Questions*, BUREAU OF INDIAN AFFAIRS, <https://www.bia.gov/frequently-asked-questions> (last visited Aug. 30, 2017)). These allotted lands are privately owned by tribal citizens and/or their descendants. Restricted status or restricted fee lands, are where the title to certain land is “held by an individual Indian person or a tribe and which can only be alienated or encumbered by the owner with the approval of the Secretary of the Interior because of limitations contained in the conveyance instrument pursuant to federal law.” (Department of the Interior, “*Frequently Asked Questions*,” BUREAU OF INDIAN AFFAIRS, <https://www.bia.gov/frequently-asked-questions> (last visited Aug. 30, 2017)).

<sup>146</sup> Worcester v. Georgia, 31 U.S. 515, 595 (1832).

<sup>147</sup> Pub. L. No. 83-280, § 2, 67 Stat. § 588 (1953) (codified as amended in 18 U.S.C. § 1162, 28 U.S.C. § 1360).

<sup>148</sup> Sullivan, *supra* note 136.

<sup>149</sup> Pub. L. No. 83-280, § 2, 67 Stat. § 588 (1953) (codified as amended in 18 U.S.C. § 1162, 28 U.S.C. § 1360); *see also* Sullum, *supra* note 117.

<sup>150</sup> Sullivan, *supra* note 136 (other states were allowed to opt in).

<sup>151</sup> *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978).

from tribal courts.<sup>152</sup> Twelve years later, the United States Supreme Court extended the *Oliphant* decision to dictate that tribes also lacked criminal jurisdiction over tribal people who were not members of the tribe exercising jurisdiction in *Duro v. Reina*.<sup>153</sup> Congress later abrogated that decision when it amended the *Indian Civil Rights Act* to affirm that tribes had inherent criminal jurisdiction over nonmember natives.<sup>154</sup> The constitutionality of this legislation was upheld fourteen years later.<sup>155</sup>

Many tribes also recognize a tribal jurisdictional area for purposes of services. This is often the area that formerly held a tribe's reservation that now does not have a reservation in that state. Essentially 241 tribes do not reside on reservation lands at all.<sup>156</sup> Furthermore, the majority of tribal people do not live on reservations in the United States.<sup>157</sup>

#### IV. POTENTIAL IMPACT ON TRIBAL LANDS

Previously, tribal gaming seemed to be a rarity, and now such businesses are commonplace in Indian country.<sup>158</sup> Tribal marijuana sales could potentially be the next step in revenues for tribal governments. According to Timothy Purdon, U.S. Attorney for South Dakota, "tribes have a sovereign right to set the code on their reservations."<sup>159</sup> Minnesota Health Commissioner Manny Munson-Regala, in charge of implementing the state's Medical Cannabis Program confirms that the tribal lands are each tribe's own jurisdiction and the tribes control those lands.<sup>160</sup> However, the tribes must be proactive and regulate marijuana – there is no room for laissez faire attitudes.<sup>161</sup>

<sup>152</sup> Jurss, *supra* note 132, at 48.

<sup>153</sup> *Duro v. Reina*, 495 U.S. 676 (1990).

<sup>154</sup> Bethany R. Berger, *U.S. v. Lara as a Story of Native Agency*, 40 TULSA L. REV. 5 (2004), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=687356](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=687356); Philip S. Deloria & Nell Jessup Newton, *The Criminal Jurisdiction of Tribal Courts over Non-Member Indians: An Examination of the Basic Framework of Inherent Tribal Sovereignty Before and After Duro v. Reina*, 38 FED. B. NEWS & J. 70, 70-71 (1991).

<sup>155</sup> *United States v. Lara*, 541 U.S. 193 (2004).

<sup>156</sup> Department of the Interior, *Frequently Asked Questions*, BUREAU OF INDIAN AFFAIRS, <https://www.bia.gov/frequently-asked-questions> (last visited Aug. 30, 2017).

<sup>157</sup> John Iceland & Daniel H. Weinberg, *Racial and Ethnic Residential Segregation in the United States: 1980-2000* (issued Aug. 2002), CENSUS.GOV, [https://www.census.gov/hhes/www/housing/housing\\_patterns/pdf/censr-3.pdf](https://www.census.gov/hhes/www/housing/housing_patterns/pdf/censr-3.pdf).

<sup>158</sup> Sullum, *supra* note 117.

<sup>159</sup> Klas, *supra* note 96.

<sup>160</sup> Jennifer Brooks, *Red Lake to Study Cannabis Business*, STAR TRIBUNE, Feb. 8, 2015.

<sup>161</sup> Marc Yaffe, *La Push Kush, Lummi Yummy, Apache Gold? When the Rez Smoke Shop goes to Pot*, INDIAN COUNTRY TODAY (Dec. 15, 2014), <http://indiancountrytodaymedianetwork.com/2014/12/15/la-push-kush-lummi-yummy-apache-gold-when-rez-smoke-shop-goes-pot-158295>.

It is unlikely a tribe could sell marijuana on non-reservation land without legal troubles.<sup>162</sup> In 2015, Senator James Lankford (R-OK) introduced a bill that would prohibit any federal funds going to an Indian tribe that cultivated or distributed marijuana.<sup>163</sup> Further, the *KIDS Act* (*Keeping out Illegal Drugs Act*) could stop millions in federal funding to tribes if they distributed marijuana.<sup>164</sup> In addition, transportation on state roads would not be protected.<sup>165</sup> Law is very much unsettled in this realm.<sup>166</sup> As a result, most tribes are cautious in even publicly discussing the possibility of tribal marijuana sales. The largest federally recognized tribe in the United States, the Cherokee Nation of Oklahoma indicated that the tribe had “zero interest in growing or selling marijuana.”<sup>167</sup> In 2016, the tribe’s Attorney General confirmed that the tribe would not consider tribal marijuana sales unless or until the state made it legal in Oklahoma. The Chickasaw Nation of Oklahoma, which benefits from the largest gaming enterprise of all Oklahoma tribes, is also not interested in tribal marijuana according to its Governor Bill Anoatubby:<sup>168</sup>

“Regardless of recent changes to U.S. Department of Justice policy, the Chickasaw Nation has no desire to pursue growing or selling marijuana,” Anoatubby said. “The Chickasaw Nation plans to continue its current policy of abiding by state marijuana laws on lands where we have legal jurisdiction.”<sup>169</sup>

In February of 2015, representatives from roughly 75 tribes from around the United States attended a conference in Tulalip, Washington on the

<sup>162</sup> Burkes, *supra* note 124.

<sup>163</sup> William S. Savage III & Laura Estes, *Are Our State’s Marijuana Laws Going Up In Smoke?*, OKLAHOMA GAZETTE 4, 6 (2015).

<sup>164</sup> Laura Estes, *Bill Aims to Prevent Tribes from Pursuing Marijuana Commerce, Despite Recent Federal Moves that could allow otherwise*, OKLAHOMA GAZETTE 8 (2015) (for example, \$647 million a year is given to tribes for child care and energy assistance programs).

<sup>165</sup> Burkes, *supra* note 124.

<sup>166</sup> Anderson, *supra* note 121 (quoting Galanda Broadman, lawyer representing many Indian tribes).

<sup>167</sup> Sean Rowley, *Cherokee Nation: Tribe is not interested in marijuana market*, TAHLEQUAH DAILY PRESS, (Dec. 31, 2014), [http://www.tablequahdailypress.com/news/cherokee-nation-tribe-is-not-interested-in-marijuana-market/article\\_6b2409c2-910f-11e4-a647-d7e96136e753.html](http://www.tablequahdailypress.com/news/cherokee-nation-tribe-is-not-interested-in-marijuana-market/article_6b2409c2-910f-11e4-a647-d7e96136e753.html).

<sup>168</sup> James Bright, *Indian Tribes Can Grow and Sell Pot on Tribal Lands*, THE DUNCAN BANNER (Dec. 14, 2014), [http://www.duncanbanner.com/news/indian-tribes-can-grow-and-sell-pot-on-tribal-lands/article\\_cb7fad94-8354-11e4-90f1-1b9aace139e9.html](http://www.duncanbanner.com/news/indian-tribes-can-grow-and-sell-pot-on-tribal-lands/article_cb7fad94-8354-11e4-90f1-1b9aace139e9.html). (The Chickasaw Nation of Oklahoma owns and operates the largest gaming enterprise in the United States: WinStar Casino located in Thackerville, Oklahoma. WinStar has been in the top five of Casinos in the world by floor size for the last five years.)

<sup>169</sup> *Id.*

regulatory, legal, and social issues related to pot legalization.<sup>170</sup> Many of the attendees were reportedly from smaller tribes who are seeking a potential economic edge.<sup>171</sup>

Selling marijuana to non-tribal members could also run afoul of the law.<sup>172</sup> Some tribes are still policed by local law enforcement agencies including states.<sup>173</sup> Although tribal members are governed by tribal law, non-tribal members on tribal land are subject to state law and could be prosecuted by state authorities for marijuana in states where it has not yet been made legal. To avoid raids and to legalize marijuana in line with how the 2014 guidelines would be interpreted by state and local authorities, tribal governments would have to compact and enter into non-prosecution agreements with those state and local governments as those tribes did in gaming states for gaming compacts.<sup>174</sup>

Currently, the United States recognizes 567 Indian tribes.<sup>175</sup> America also has 326 reservations that are self-governing.<sup>176</sup> The tribes do not have to work in concert with each other to form a consistent tribal marijuana policy. We could have 327 different marijuana policies, 326 from each reservation and one from federal policy (the *Controlled Substances Act*).

Some tribes do not have a reservation, while some have multiple reservations. Those without actual reservations have tribal jurisdictional areas which are actually a part of the states in which they reside. The Seminole tribe has seven reservations in Florida, one with 100,000 acres.<sup>177</sup>

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<sup>170</sup> Associated Press, *Marijuana legalization debate draws 75 tribes to Washington state conference*, THE OREGONIAN (Feb. 27, 2015),

[http://www.oregonlive.com/marijuana/index.ssf/2015/02/marijuana\\_legalization\\_debate\\_1.html](http://www.oregonlive.com/marijuana/index.ssf/2015/02/marijuana_legalization_debate_1.html); Troy A. Eid, *Indian Youth Hurt by Colorado's Marijuana Experiment*, DENVER POST, July 27, 2014; Sullum, *supra* note 117; Keeler, *supra* note 115; *Tribal Leaders to Discuss Formation of Tribal Cannabis Association*, INDIAN COUNTRY TODAY (Feb. 18, 2015), <http://indiancountrytodaymedianetwork.com/2015/02/18/tribal-leaders-discuss-formation-tribal-cannabis-association-159272>.

<sup>171</sup> Associated Press, *supra* note 170.

<sup>172</sup> NoiseCat, *supra* note 25 (states still control the roads and highways around the reservations).

<sup>173</sup> *Id.*

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

<sup>175</sup> Schwartz, *supra* note 115; Jeff Bernard & Gosia Wozniacka, *Native American Tribes Can Grow Pot, Feds Say*, THE TIMES TRIBUNE (Dec. 12, 2014), <http://thetimes-tribune.com/news/native-american-tribes-can-grow-pot-feds-say-1.1801497>; Jeff Barnard & Gosia Wozniacka, *DOJ says Tribes can decide whether to Legalize Pot*, TULSA WORLD (Dec. 11, 2014),

[http://www.tulsaworld.com/news/usworld/doj-says-tribes-can-decide-whether-to-legalize-pot/article\\_6f77a2e4-c02d-5dca-ab83-55063e2d4358.html](http://www.tulsaworld.com/news/usworld/doj-says-tribes-can-decide-whether-to-legalize-pot/article_6f77a2e4-c02d-5dca-ab83-55063e2d4358.html).

<sup>176</sup> MacDougall, *supra* note 1.

<sup>177</sup> Tom Lyons, *Tribes might offer another kind of pipe*, SARASOTA HERALD TRIBUNE, Dec. 16, 2014.

California has 100 recognized Indian tribes,<sup>178</sup> with thirty (30) recognized tribes in Southern California alone.<sup>179</sup> Alaska has 230 federally recognized tribes.<sup>180</sup> As tribal gaming has demonstrated, every state has Indian land within its borders, so this policy could potentially allow legal marijuana available to everyone within a short drive of tribal lands.

## V. DIVISION AMONG THE TRIBES

Shortly after the memo was released, Amanda Marshall, U.S. Attorney for Oregon indicated she knew of three tribes that were interested in the marijuana trade.<sup>181</sup> The tribes moved quickly. Nearly a hundred tribes have entered into commercial contact with FoxBarry Farms.<sup>182</sup> FoxBarry is a Kansas company,<sup>183</sup> which plans on investing \$30 million on several tribal marijuana operations.<sup>184</sup> Such widespread interest is an indicator that many tribes want to know more about tribal marijuana sales operations and the potential for such in their jurisdictions. Additionally, firms like United Cannabis have become linked to tribes all over the country.<sup>185</sup> Tribal officials are driven by providing jobs for their constituents, and even the potential for financial independence.<sup>186</sup> With commercial funding opportunities, even small tribes could get into the marijuana production industry. At least two dozen tribes have reported to be seriously considering marijuana.<sup>187</sup> A few examples are worth noting.

The first large scale commercial marijuana growing operation was a \$10 million project, covering two and a half acres, with 50-100 employees, on the

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<sup>178</sup> Landry, *supra* note 119.

<sup>179</sup> Timothy M. Phelps, *U.S. will let Tribes Grow and Sell Pot; Native Americans can opt to have Marijuana Laws Enforced on Reservations or Not*, LOS ANGELES TIMES, Dec. 11, 2014.

<sup>180</sup> See *Alaska Region Overview*, U.S. Department Interior: Indian Affairs, <https://www.bia.gov/regional-offices/alaska> (last visited Aug. 30, 2017) (229 Federally Recognized Tribes are under the jurisdiction of the Alaska Regional Office).

<sup>181</sup> *U.S.: Tribes can Legalize Pot*, LOWELL SUN (Dec. 12, 2014),

[http://www.lowellsun.com/breakingnews/ci\\_27120354/u-s-tribes-can-legalize-pot](http://www.lowellsun.com/breakingnews/ci_27120354/u-s-tribes-can-legalize-pot).

<sup>182</sup> Schwartz, *supra* note 115; Harlan McKosato, *Should Tribes Grow Pot on the Rez?*, INDIAN COUNTRY TODAY (Feb. 10, 2015),

<http://indiancountrytodaymedianetwork.com/2015/02/10/should-tribes-grow-pot-rez>; and Landry, *supra* note 119.

<sup>183</sup> Landry, *supra* note 119.

<sup>184</sup> Steve Raabe, *Marijuana Expertise for Sale*, DENVER POST, Jan. 8, 2015 (in exchange, FoxBarry would receive 15% of all net marijuana sales).

<sup>185</sup> Schwartz, *supra* note 115; and Steve Raabe, *United Cannabis of Denver to help California Indian Tribes Grow Marijuana*, DENVER POST (Jan. 8, 2015),

[http://www.denverpost.com/business/ci\\_27284773/united-cannabis-denver-help-calif-indian-tribes-grow](http://www.denverpost.com/business/ci_27284773/united-cannabis-denver-help-calif-indian-tribes-grow).

<sup>186</sup> Schwartz, *supra* note 115.

<sup>187</sup> MacDougall, *supra* note 1.2

Pinoleville Pomo Reservation in California.<sup>188</sup> Pomo Pinoleville is the start of a trend.<sup>189</sup> Tribes, even small ones can get involved in the pot business. The Pomo Pinoleville tribe only has 250 members.<sup>190</sup> The Pinoleville Pomo tribe intended their marijuana factory to comply with California law and be a non-profit entity.<sup>191</sup> Despite the lure of huge profits, the business has been a failure. The Pinoleville Pomo marijuana project was raided by Drug Enforcement Agency in September, 2015.<sup>192</sup>

The Poarch Creek tribe, which has an established gaming enterprise, is exploring the possibility of tribal marijuana sales.<sup>193</sup> The tribe has been attempting to negotiate with the state of Florida for a gaming enterprise in Escambia County near the Alabama-Florida state line. The tribe appears to have taken a hardball stance practically threatening the state that it will start up a tribal marijuana sales enterprise if the state does not approve its request for gaming in Florida.<sup>194</sup> A month later, the tribe appeared to back off of its original threat indicating it wanted to focus on gaming.<sup>195</sup>

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<sup>188</sup> Schwartz, *supra* note 115; McKosato, *supra* note 182; Raabe, *supra* note 185; *Tribal Leaders to Discuss Formation of Tribal Cannabis Association*, *supra* note 171; Landry, *supra* note 119; and Glenda Anderson, *Mendocino County Officials Surprised by Tribe's Plan for Pot Farm*, PRESS DEMOCRAT, Jan. 10. 2015. (Only 110,000 square feet of cultivation needed for the \$10 million harvest.)

<sup>189</sup> Schwartz, *supra* note 115; Anderson, *supra* note 188.

<sup>190</sup> Glenda Anderson, *Ukiah Pimos to Establish state's First Tribal Pot Operation*, PRESS DEMOCRAT (Jan. 8, 2015), <http://www.pressdemocrat.com/news/3352320-181/pinoleville-pomo-nation-of-ukiah>; Glenda Anderson, *Ukiah Tribe Touts benefits of its Proposed Pot Farm*, PRESS DEMOCRAT (Jan. 15, 2015), <http://www.pressdemocrat.com/news/3381274-181/ukiah-tribe-touts-benefits-of?ref=related>. (Only 70 members live on the tribe's rancheria.)

<sup>191</sup> Glenda Anderson, *Legality of Ukiah Tribal Pot Operation Questioned*, PRESS DEMOCRAT (Jan. 29, 2015), <http://www.pressdemocrat.com/news/3356501-181/mendocino-county-officials-surprised-by> (quoting a FoxBarry Farms official).

<sup>192</sup> Anderson, *supra* note 121. (Mendocino county sheriff's office seized 382 plants and more than 100 pounds of processed marijuana); and Glenda Anderson, *Mendocino County Sheriff's Deputies Raid Tribe's Pot Operation Near Ukiah*, PRESS DEMOCRAT (Sept. 22, 2015), <http://www.pressdemocrat.com/news/4516490-181/mendocino-county-sheriffs-deputies-raid>; see also Joseph Serna, *Tribe's Marijuana is Seized: A Pinoleville Pomo Nation Official Asserts the Cannabis Plants are 'Perfectly Legal,'* LOS ANGELES TIMES, Sept. 24, 2015. (The tribe severed the relationship with FoxBarry Farms in August.)

<sup>193</sup> Associated Press, *Poarch Creek tribe may sell marijuana if Florida denies gambling deal that includes Jacksonville*, THE FLORIDA TIMES UNION (Feb. 20, 2015), <http://jacksonville.com/breaking-news/2015-02-20/story/poarch-creek-tribe-may-grow-marijuana-if-florida-denies-gambling-plan>.

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

<sup>195</sup> *Poarch Creek Tribal Chair: No Plans for Pot in Nokomis, We Really Want Scott to Talk Gaming*, NORTHESCAMBIA.COM (Mar. 16, 2015), <http://www.northescambia.com/2015/03/poarch-tribal-chair-no-plans-for-pot-in-nokomis-we-really-want-scott-to-talk-gaming>.

The Flandreau Santee Sioux tribe of South Dakota, which has 385 members,<sup>196</sup> planned to have marijuana operation open by January 1, 2016.<sup>197</sup> It planned for both a growing facility and a smoking lounge.<sup>198</sup> The tribe expected \$2 million per month profit from the project.<sup>199</sup> It would grow its own marijuana for the smoking lounge.<sup>200</sup> However, South Dakota Attorney General Marty Jackley indicated that the smoking lounge would violate state law if marijuana was distributed to non-Indians or to anyone off the reservation.<sup>201</sup> In November, 2015, the tribe burned their entire marijuana crop amid fears of a federal raid.<sup>202</sup>

Finally, the Alturas tribe in northeast California was trying to operate a large marijuana grow, perhaps to go along with their Desert Rose Casino.<sup>203</sup> The Alturas tribe has only five registered members.<sup>204</sup> Money for project supposedly came from Canadian Jerry Montour, CEO of a major cigarette

<sup>196</sup> Barry Amundson, *S.D. Tribe wants to Grow Pot, Allow Recreational Use on Reservation*, ST. PAUL PIONEER PRESS (June 17, 2015), <http://www.twincities.com/2015/06/17/s-d-tribe-wants-to-grow-pot-allow-recreational-use-on-reservation>. (Tribal lands comprise only 5000 acres); and Regina Garcia Cano, *S.D. Tribe is Building a Marijuana Resort*, DENVER POST, Sept. 30, 2015 (tremendous business acumen for such a small tribe, running a casino, a buffalo ranch, and a 120 room hotel).

<sup>197</sup> Regina Garcia Cano, *S.D. Indian Tribe to Be Selling Recreational Pot by Jan. 1*, WASHINGTON TIMES, June 16, 2015, <http://www.washingtontimes.com/news/2015/jun/16/indian-tribe-in-south-dakota-moves-to-legalize-mar>; Keloland News, *Trailblazing South Dakota Indian Reservation Legalizes Marijuana*, MINT PRESS NEWS (June 16, 2015), <http://www.mintpressnews.com/south-dakota-indian-reservation-legalizes-marijuana/206620>; see also Estes, *supra* note 164 (pursuing marijuana to boost revenue in struggling tribal lands).

<sup>198</sup> Amundson, *supra* note 196 (lounge would be near their casino, about 45 miles north of Sioux Falls); and Amundson, *supra* note 98 (aiming for a New Year's Eve opening, growing about 80 pounds of pot every 14 weeks); see also Regina Garcia Cano, *S.D. Tribe sends its Pot Crop up in Smoke*, STAR TRIBUNE, Nov. 12, 2015 (tribe planned to open the marijuana lounge on New Year's Eve); and Cano, *supra* note 196 (first attempt at a marijuana resort in the U.S.).

<sup>199</sup> Cano, *supra* note 197; see also Sullivan, *supra* note 136; Amundson, *supra* note 98 (facility would hold 1000 people at a time, and had over 6 million online views).

<sup>200</sup> Cano, *supra* note 196.

<sup>201</sup> Amundson, *supra* note 196; NoiseCat, *supra* note 25 (dubbed at the nation's first marijuana resort).

<sup>202</sup> Gosia Wozniacka, *Oregon Warm Springs Tribe Approves Marijuana Sales Project*, MARIN INDEP. J., Dec. 19, 2015 (legal challenges on whether the tribe could sell to non-tribal members were one of the worries); see also Cano, *supra* note 198 (after three weeks of negotiations with federal authorities, the tribe thought burning the crop was the only option to avoid a raid); Regina Garcia Cano, *South Dakota Tribe Burned Pot Crop for Fear of Federal Raid*, DENVER POST, Nov. 10, 2015.

<sup>203</sup> Steve Buist, *GRE Boss Linked to Native Grow Op in US; Lawyers say Medical Marijuana Operations were being developed on Sovereign Territories*, HAMILTON SPECTATOR, July 16, 2015. (Tribe is on the California-Oregon border.)

<sup>204</sup> *Id.* (even with five members, the group is experiencing a power struggle between a brother and sister, both who claim leadership of the small tribe).

company.<sup>205</sup> That endeavor appears to be somewhat short-lived. In July of 2015, the Alturas tribe along with the Pit River Tribe had 12,000 marijuana plants and 50 kilograms of processed marijuana<sup>206</sup> were seized from “federally recognized tribal lands at the Alturas Indian Rancheria and the XL Ranch in Modoc County.”<sup>207</sup> The Pit River Tribe had also been trying a large marijuana growing operation.<sup>208</sup>

If a tribe with only five members can seriously entertain a marijuana project, larger tribes could possibly self-fund similar endeavors – if they choose to do so. Based on attendance of seventy-five (75) tribes at the First Tribal Hemp Conference in 2015,<sup>209</sup> it appears that many tribes are considering the prospect of the marijuana businesses.<sup>210</sup> Surveys suggest that a majority of tribal members do support legalized marijuana.<sup>211</sup> Some states such as Florida have illustrated support for tribal marijuana sales as high as fifty-seven percent (57%) as of 2014.<sup>212</sup>

The Mohegan Tribe of Connecticut is also reviewing the possibility of a tribal marijuana sales enterprise as a means to “diversify into new emerging markets and products that promise to sustain their government for years to come” without jeopardizing the significant investments the tribe has made in gaming according to Charles F. Bunnell as the tribe’s Chief of Staff for External Affairs.<sup>213</sup> The tribe wants to find ways to stimulate more interest

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<sup>205</sup> Anderson, *supra* note 121 (based on federal search warrant).

<sup>206</sup> Buist, *supra* note 203 (tribe was planning to build a \$2 million power plant for electric use of the marijuana grow); and Wozniacka, *supra* note 202; *see also* Hudetz, *supra* note 128 (rumors involved international parties funding the marijuana grow on tribal lands); and Jenny Espino, *Feds Raid Huge Pot Grows on Pit River Tribe Lands*, CHICO ENTERPRISE-RECORD, July 9, 2015. (Interestingly, no tribal property was seized and no federal charges were immediately filed.)

<sup>207</sup> Ken Broder, *Feds Bust 5-Member Tribe for Growing 12,000 Marijuana Plants*, ALLGOV.COM (July 15, 2015), <http://www.allgov.com/usa/ca/news/controversies/feds-bust-5-member-tribe-for-growing-12000-marijuana-plants-150715?news=856965>.

<sup>208</sup> Buist, *supra* note 203 (marijuana operation consisted of two buildings and forty greenhouses, which had the potential to cultivate 60,000 plants).

<sup>209</sup> Eid, *supra* note 170; Sullum, *supra* note 117; Keeler, *supra* note 115; *Tribal Leaders to Discuss Formation of Tribal Cannabis Association*, *supra* note 170.

<sup>210</sup> Sullum, *supra* note 117.

<sup>211</sup> McKosato, *supra* note 182.

<sup>212</sup> Lyons, *supra* note 177.

<sup>213</sup> Matthew Sturdevant, *Mohegans Review Pot as Economic Opportunity*, HARTFORD COURANT (Dec. 11, 2014), <http://www.courant.com/health/he-casino-marijuana-tribes-announcement-20141211-story.html>.

for its casinos.<sup>214</sup> Bunnell suggests that the Mohegan's potential legalization of marijuana for commercial purposes is "extraordinarily preliminary."<sup>215</sup>

Lance Gumbs, former chairman of the Shinnecock Tribe of New York, indicated his tribe was not giving up on commercial marijuana because of these legal issues.<sup>216</sup> In fact, the Shinnecock Indian Nation has approved two resolutions that will allow the tribe to move forward with an outside developer to cultivate and sell medical marijuana.<sup>217</sup> Members of the tribe voted with seventy-one percent (71%) in favor of the development of the facility.<sup>218</sup> The proposed plan would include a facility on its tribal land on Long Island's East End.<sup>219</sup> Also included is the development of cultivation and dispensary facilities which would be owned by the Shinnecock Nation, but under the designation of New York State.<sup>220</sup> New York began allowing medical marijuana at the beginning of 2016.<sup>221</sup>

The Menominee Indian Tribe of Wisconsin is among those tribes pursuing marijuana commerce.<sup>222</sup> The Menominee were seeking to put a casino in Kenosha, Wisconsin but the plan was rejected by Governor Scott Walker.<sup>223</sup> The Menominee tribe is exempt from Wisconsin's state enforcement of drug laws.<sup>224</sup> However, federal agents raided the Menominee Indian Tribe's Wisconsin reservation a full year after the Cole Memo was public and confiscated 30,000 cannabis plants.<sup>225</sup> This federal action

<sup>214</sup> Tara Palmeri, *Pot Puts Indians on Spot*, NEW YORK POST, Dec. 13, 2014; Brian Hallenbeck, *Mohegans 'not actively pursuing' Marijuana Production, Sales*, THE DAY (Dec. 12, 2014) <http://www.theday.com/article/20141212/BIZ02/141219945>.

<sup>215</sup> Steven Nelson, *Native American Tribes Take on Pot, Consider Gamble on Legalization*, U.S. NEWS & WORLD REPORT (Jan. 27, 2015), <http://www.usnews.com/news/articles/2015/01/27/native-american-tribes-take-on-pot-consider-gamble-on-legalization>.

<sup>216</sup> Hudetz, *supra* note 128 ("But are we giving up on it? Absolutely not."); Mark Harrington, *Shinnecocks Eye Medical Marijuana*, NEWSDAY, Nov. 24, 2015 (could have a marijuana facility open in eight months of a decision by the tribe).

<sup>217</sup> Mark Harrington, *Shinnecock Nation Oks developing medical marijuana program*, NEWSDAY (Feb. 9, 2016), <http://www.newsday.com/long-island/shinnecock-nation-oks-developing-medical-marijuana-program-1.11447392>.

<sup>218</sup> *Shinnecock Nation Approves Medical Marijuana Dispensary on Tribal Land*, CBS NEW YORK (Feb. 10, 2016), <http://newyork.cbslocal.com/2016/02/10/shinnecock-nation-medical-marijuana>.

<sup>219</sup> *Id.*

<sup>220</sup> *Id.*

<sup>221</sup> *Id.*

<sup>222</sup> Estes, *supra* note 164 (the tribe has only 9,000 members but recently voted to support recreational marijuana use by 58% and medical marijuana use by 77%).

<sup>223</sup> Spivak, *supra* note 125 (tribe had been working for 20 years on the casino project off the reservation); Sullivan, *supra* note 136 (the casino was to be a Hard Rock Casino).

<sup>224</sup> Spivak, *supra* note 125 (Wisconsin is one of six exempt states).

<sup>225</sup> Steve Nelson, *DEA Raid on Tribe's Cannabis Crop Infuriates and Confuses Reformers*, U.S. NEWS & WORLD REPORT (Oct. 26, 2015),

confused and alarmed not only Menominee tribal leaders, but also tribal leaders across the U.S., policy reformers, and tribal attorneys working toward legal tribal marijuana sales enterprises.<sup>226</sup> Perhaps most alarming was the statement from the Drug Enforcement Administration and the acting U.S. Attorney Gregory Haanstad that indicate points of contention were THC levels as well as the fact that individuals who “appeared to be non-native” were aiding the tribe in its marijuana production.<sup>227</sup> Robert Odawi Porter, a former president of the Seneca Nation says “this certainly suggests a real divergence in policy approach for Indian country” compared to what the states have been allowed to do.<sup>228</sup>

In June of 2015, the Pine Ridge Tribe of South Dakota approved marijuana without taking any action.<sup>229</sup> The tribe is already facing high rates of violence and alcohol addiction and limited economic opportunities.<sup>230</sup> To date, the tribe has not started any tribal marijuana sales.

The Warm Springs Confederated Tribes of Oregon – with roughly 5,000 members, is planning a marijuana grow facility on the reservation and a retail store.<sup>231</sup> Plans include a 36,000 square foot greenhouse.<sup>232</sup> The tribe broke ground on its marijuana grow facility in May of 2016 and expects its three retail stores with sales to begin in early 2017.<sup>233</sup> The project is expected to create more than 80 jobs and \$11,000,000 in the first year increasing to \$27,000,000 by the fifth year of operation.<sup>234</sup>

Washington State has been very supportive of marijuana legalization. It was the first to allow medical marijuana, and then recreational marijuana. Washington Governor Jay Inslee has signed a bill for tribal marijuana regulation.<sup>235</sup> Several tribes have already shown interest. The Squaxin Island Tribe from Washington opened a retail marijuana store on their

<http://www.usnews.com/news/articles/2015/10/26/dea-raid-on-wisconsin-tribes-cannabis-crop-infuriates-and-confuses-reformers>.

<sup>226</sup> *Id.*

<sup>227</sup> *Id.*

<sup>228</sup> *Id.*

<sup>229</sup> Cano, *supra* note 197.

<sup>230</sup> Regina Garcia Cano, *In South Dakota, Indian Tribe plans to Grow, Sell Marijuana by Jan. 1*, THE CANNABIST (June 17, 2015), <http://www.thecannabist.co/2015/06/17/south-dakota-marijuana-indian-tribe-flandreau-santee-sioux/36247>.

<sup>231</sup> Wozniacka, *supra* note 202 (plans would create 80 jobs in the marijuana effort).

<sup>232</sup> *Id.* (annual revenues should top \$26 million).

<sup>233</sup> Associated Press, *Warm Springs tribe breaks ground on marijuana grow facility*, STATESMAN J. (May 3, 2016), <http://www.statesmanjournal.com/story/news/2016/05/03/warm-springs-tribe-breaks-ground-marijuana-grow-facility/83864114>.

<sup>234</sup> *Id.*

<sup>235</sup> Jessica Holdman, *Former Tribal Chairman Joins Marijuana Company*, BISMARCK TRIB., May 30, 2015 (agreement signed in May 2016).

reservation.<sup>236</sup> The Suquamish Tribe of Washington has also signed a state compact to allow a retail marijuana store on tribal lands.<sup>237</sup>

Several other tribes are considering commercial marijuana operations including: the Passamaquoddy Tribe of Maine,<sup>238</sup> the Omaha Tribe of Nebraska,<sup>239</sup> the Ho-Chunk Nation of Wisconsin,<sup>240</sup> the Red Lake Band of Chippewa,<sup>241</sup> and Picuris Pueblo Tribe of New Mexico.<sup>242</sup> Both the Hoopa Valley Tribe of California<sup>243</sup> and the Yurok Tribe of California originally did not support tribal marijuana sales but a few months later were attending the tribal marijuana conference in Washington and have changed their minds, hoping to fight poverty and unemployment on reservations.<sup>244</sup> At least three Oklahoma tribes will wait and see on marijuana.<sup>245</sup> Oklahoma's Sac and Fox tribes have indicated they may be interested in tribal marijuana sales.<sup>246</sup>

## VI. PREDICTIONS FOR TRIBAL LANDS

The sale of marijuana should be a huge boost to tribal economies. Estimates are the legal marijuana trade could reach \$30 billion by 2019.<sup>247</sup> For example, Colorado's marijuana sales topped \$700 million the first

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<sup>236</sup> Wozniacka, *supra* note 202 (the tribe does not grow marijuana, but resells marijuana from the legal state system); Hudetz, *supra* note 128 (store opened in November, 2015).

<sup>237</sup> Wozniacka, *supra* note 202 (the store is still under construction).

<sup>238</sup> *Id.* (the tribe has contracted with a medical marijuana company to start operations on tribal land, and intends to start with hemp, and move into the marijuana market once the legal situation is clear); and Johanna S. Billings, *Passamaquoddy Tribe Signs Letter of Intent for Marijuana Facility*, BANGOR DAILY NEWS (Sept. 8, 2015), <http://bangordailynews.com/2015/09/08/news/down-east/passamaquoddy-tribe-signs-letter-of-intent-for-marijuana-facility> (35,000 square feet of cultivation is planned).

<sup>239</sup> Wozniacka, *supra* note 202 (the tribe is considering a marijuana growing operation located on tribal lands in western Iowa).

<sup>240</sup> Sullivan, *supra* note 136; NoiseCat, *supra* note 25 (The tribe is interested in commercial marijuana production, but must consider the concurrent jurisdiction of the state of Wisconsin under Public Law 280.)

<sup>241</sup> Sullivan, *supra* note 136.

<sup>242</sup> Phaedra Haywood, *Tribal Members Hear Proposal on Marijuana Business*, SANTA FE NEW MEXICAN (Mar. 27, 2015), [http://www.santafenewmexican.com/news/business/tribal-members-hear-proposal-on-marijuana-business/article\\_891f3280-3bca-5f61-8fea-cd81815c9295.html](http://www.santafenewmexican.com/news/business/tribal-members-hear-proposal-on-marijuana-business/article_891f3280-3bca-5f61-8fea-cd81815c9295.html) (negotiations with Blaze America LLC, a marijuana consulting business; the event was attended by Picuris and five other tribes not mentioned by name).

<sup>243</sup> Klas, *supra* note 96; Bernard & Wozniacka, *supra* note 175.

<sup>244</sup> Rose & Johnson, *supra* note 103 (tribe has only 3200 members).

<sup>245</sup> Wozniacka, *supra* note 202.

<sup>246</sup> Keeler, *supra* note 117.

<sup>247</sup> Holdman, *supra* note 235 (industry is currently \$11 billion a year and poised for tremendous growth); and Rhys Blakely, *Tribes Diversify from Casinos to Marijuana*, TIMES, June 4, 2015 (marijuana industry could reach \$30 billion in four years).

year.<sup>248</sup> Tribes have an economic (price) advantage because state sales taxes do not apply to tribal marijuana.<sup>249</sup> This allows tribes to undercut legal markets in other states.

Marijuana will have a strong economic impact, besides the sale. The tribes would enjoy additional benefits. Half of America's 567 tribes have casinos.<sup>250</sup> Pot will likely boost casino tourism.<sup>251</sup> Tribal income from marijuana and gaming could skyrocket.<sup>252</sup> The tribes could operate like Amsterdam cafes.<sup>253</sup> The Indian casinos could be an open marijuana smoking destination. Tribal hotels could market to pot smokers, offering stay-n-smoke parties.<sup>254</sup> For example, Connecticut has six marijuana dispensaries open near reservations and has seen the benefits of marijuana consumers.<sup>255</sup> Tribal marijuana could offer a safe zone for smoking marijuana, eliminating the criminal element.<sup>256</sup>

America's Indian tribes could use an economic boost. Poverty is a plague on reservations. Poverty rate approaches 40% in some tribes despite significant income from casinos.<sup>257</sup> Most tribes have no economic opportunity, explained Blake Trueblood of the National Center for American Indian Enterprise Development.<sup>258</sup> Unemployment is big problem on reservations.<sup>259</sup>

Many tribes experience third world living standards.<sup>260</sup> Poverty on the reservation is staggering.<sup>261</sup> The related social problems are shockingly bad. High school dropout rates on reservations are 3-4 times that of the white community.<sup>262</sup> The most telling problem might be the suicide rate.

Suicide is most common cause of death for Indians aged 10-34.<sup>263</sup> Theresa Two Bulls of the Oglala Sioux tribe in South Dakota has declared a

<sup>248</sup> Pollick, *supra* note 89.

<sup>249</sup> Johnson, *supra* note 97; Sullum, *supra* note 117.

<sup>250</sup> Blakely, *supra* note 247 (Casino profits have grown to \$28 billion since the 1980s when the tribes started with gaming.)

<sup>251</sup> McKosato, *supra* note 182.

<sup>252</sup> Estes, *supra* note 164 (estimating the marijuana revenues will far outpace gaming income).

<sup>253</sup> Sullum, *supra* note 117.

<sup>254</sup> Yaffe, *supra* note 161.

<sup>255</sup> Hallenbeck, *supra* note 213.

<sup>256</sup> Keeler, *supra* note 115.

<sup>257</sup> Blakely, *supra* note 247.

<sup>258</sup> Cano, *supra* note 196.

<sup>259</sup> Johnson, *supra* note 97.

<sup>260</sup> *Id.* (a third of homes on the reservation lack running water or electricity).

<sup>261</sup> *Id.* (80% unemployment on the reservations and per capita incomes on par with Bulgaria).

<sup>262</sup> *Id.* (dropout rates on Arizona reservations are 34% to 42%, depending on the reservation; among Arizona towns outside the reservation, the rate is 9%).

<sup>263</sup> Chris McGreal, *A Reservation Town Fighting Alcoholism, Obesity and Ghosts from the Past*, GUARDIAN (Nov. 22, 2015), [https://www.theguardian.com/us-](https://www.theguardian.com/us-news)

“suicide state of emergency” on the reservation.<sup>264</sup> Because of the high suicide rate, the life expectancy on Pine Ridge reservation is only 50 years.<sup>265</sup>

Dependency problems on the reservation are nightmarish. Substance abuse among Indians is a big problem.<sup>266</sup> The problems start at an early age. Indian kids are already exposed to alcohol and drug use.<sup>267</sup> Indian youth have a greater likelihood to use alcohol and drugs.<sup>268</sup>

Indians have high rates of alcoholism.<sup>269</sup> This is not a new phenomenon. Indians have a legacy of alcohol abuse.<sup>270</sup> Attempts to limit access to alcohol (prohibition on reservations) have been a failure.<sup>271</sup>

Seattle attorney Anthony Broadman, who represents many western tribes, explained that tribes have been decimated by drug use.<sup>272</sup> Drug abuse is higher among Indians.<sup>273</sup> For example, Indians use meth at three times the non-Indian rate.<sup>274</sup> Drug related deaths are highest in the Native American community.<sup>275</sup>

Marijuana use on the tribal lands is already a problem. Indian marijuana use is greater than any other ethnic group.<sup>276</sup> Indians have a younger first use of marijuana.<sup>277</sup> Legalizing marijuana on the reservation may send exactly the wrong message. Indian marijuana use leads to less disapproval.<sup>278</sup> By

[news/2015/nov/22/blackwater-arizona-native-americans-us-poorest-towns \(suicide rates are double the national average for Indians\).](http://news.yahoo.com/news/2015/nov/22/blackwater-arizona-native-americans-us-poorest-towns-suicide-rates-are-double-national-average-for-indians-171111111.html)

<sup>264</sup> Christ McGreal, *Obama’s Indian Problem*, GUARDIAN (Jan. 10, 2010), <http://www.theguardian.com/global/2010/jan/11/native-americans-reservations-poverty-obama> (more than 100 suicides on the reservation of 45,000 residents last year alone).

<sup>265</sup> *Id.* (half the population over age 40 are diabetic and alcoholism is rampant).

<sup>266</sup> Daniel Dickerson, et al., *Substance Use Patterns among High-Risk American Indians/Alaskan Natives in Los Angeles County*, 21 AMER. J. OF ADDICTIONS 445 (2012); Dan Herbeck, *Move might pave way for Pot Sales on Indian Land; U.S. Policy Change Raises Possibility of Legalization*, BUFFALO NEWS , Dec 14, 2014; Hallenbeck, *supra* note 213; Eid, *supra* note 170.

<sup>267</sup> A. Mercedes Nalls, et al., *American Indian Youths’ Perceptions of their Environment and their Reports of Depressive Symptoms and Alcohol/Marijuana Use*, 44 ADOLESCENCE 965 (2009); and Herbeck, *supra* note 266; see also Estes, *supra* note 164 (citing federal reports that Native American children are exposed to marijuana at twice the national average).

<sup>268</sup> Nalls, *supra* note 267, at 968.

<sup>269</sup> Whitesell, *supra* note 69.

<sup>270</sup> *Id.*

<sup>271</sup> Lyons, *supra* note 177.

<sup>272</sup> Bernard & Wozniacka, *supra* note 175.

<sup>273</sup> Dickerson, *supra* note 266; Herbeck, *supra* note 266.

<sup>274</sup> *Id.*

<sup>275</sup> Estes, *supra* note 166.

<sup>276</sup> *Id.*

<sup>277</sup> *Id.* at 448.

<sup>278</sup> Randall C. Swaim, et al., *The Normative Environment for Substance Use among American Indian Students and White Students Attending Schools on or near Reservations*, 83 AMER. J. OF ORTHOPSYCHIATRY 422, 427 (2013).

making pot legal, it is inevitable more people will use it, explained Dr. David Lott, medical director of addiction services at Linden Oaks Behavioral Health (IL).<sup>279</sup>

Tribal marijuana faces some practical, market based hurdles. The marijuana market needs non-Indians to be viable.<sup>280</sup> If only Indians could legally purchase marijuana, the market would be too small to be viable. Marijuana sales would be dependent on non-Indian customers. However, non-Indians are still subject to state laws.<sup>281</sup> If a state strictly enforced the law, it could arrest all persons leaving the reservation with marijuana in their possession or possibly with THC in their system. Avoiding this situation would require cooperation between states and tribes, and would not be resolved by memos from federal officials.

Additionally, local governments would need to be involved. States are not uniform and local pockets of support and resistance occur within each state. For example, pot friendly Washington State has 99 cities which prohibited recreational marijuana.<sup>282</sup>

Tribal marijuana does not happen in a vacuum. The trend favors more states allowing marijuana. Several more states are considering recreational use. California, Arizona, Nevada and New Hampshire are expected to vote for recreational use very soon.<sup>283</sup> The landscape for marijuana regulation is constantly changing.

Opponents might think that a solution for this problem would be only allowing tribal members to smoke pot while on the reservation lands. This is a naïve simplification. Already thinking of this possibility, pot smokers are asking to be “adopted” by Indian tribes, so they could smoke on the reservations legally.<sup>284</sup> Tribes determine for themselves their membership within the parameters of the Bureau of Indian Affairs. Indian tribal lands are not the only areas in the United States subject to claims of sovereignty.<sup>285</sup>

America’s neighbors are also involved in the pot dispute. Jamaica is decriminalizing marijuana.<sup>286</sup> While technically still illegal, marijuana has become *de facto* legal in Jamaica. Foreign investment (from the USA or elsewhere) might encourage Jamaica to shift its approach to encourage a steady stream of cash-rich pot tourists on the island state.

<sup>279</sup> Marie Wilson, *Will Medical Pot Spur More Illicit Use? Pot: Marijuana Possession is still a Crime for Most*, CHICAGO DAILY HERALD, Nov. 16, 2015 (going to seem less risky since everyone is talking about it in a positive way).

<sup>280</sup> MacDougall, *supra* note 1.

<sup>281</sup> Sullum, *supra* note 117; Keeler, *supra* note 115.

<sup>282</sup> Sullum, *supra* note 117.

<sup>283</sup> McKosato, *supra* note 182.

<sup>284</sup> Amundson, *supra* note 196.

<sup>285</sup> Keeler, *supra* note 115 (Native Hawaiians have claims to sovereignty).

<sup>286</sup> Raabe, *supra* note 185 (use and cultivation of marijuana would remain illegal in Jamaica).

While most Americans think of Mexico as a neighbor with an active marijuana trade, they have forgotten the Canadians. Canada has an active medical marijuana program and recently announced it had 1,200 applications for new pot growers for Canada's 40,000 medical marijuana patients.<sup>287</sup> Canada's defunct mining operations are switching to underground marijuana growing as a secondary industry.<sup>288</sup> The Cowlitz tribe in Canada is building a new casino and entertaining the idea of a marijuana business.<sup>289</sup> American Indian tribes might combine with Canadian tribes for funding or expertise in the pot industry.<sup>290</sup>

It is a mistake to assume all Indian tribes are interested in marijuana. Support for pot is not universal. The Ogala Sioux tribe of South Dakota has maintained that marijuana is a drug,<sup>291</sup> and has rejected marijuana all plans to legalize marijuana on their lands.<sup>292</sup>

Other tribes have declared to not support marijuana legalization on their reservation lands. In Oklahoma, a land dominated with the presence of many tribes, support for marijuana has been absent. The Osage tribe prohibited marijuana under tribal law and will not change that position.<sup>293</sup> The Cherokee Nation of Oklahoma, the Chickasaw Nation of Oklahoma,<sup>294</sup> and the Muscogee Creek Nation are all not interested in marijuana.<sup>295</sup> No other Oklahoma tribe has shown support for tribal marijuana.<sup>296</sup>

The Seneca Nation of Indians tribe located in western New York appears to be interested in marijuana issue.<sup>297</sup> Tribal officials are on the

<sup>287</sup> Omand, *supra* note 84.

<sup>288</sup> *Id.* (Bayhorse Silver, Inc. and Satori Resources are some of the companies transitioning from mining to marijuana production.)

<sup>289</sup> Lauren Dake, *Bill would let Tribes work with State on Pot*, COLUMBIAN, Mar. 25, 2015 (tribe will use only 152 acres for a casino and related businesses).

<sup>290</sup> Keeler, *supra* note 115.

<sup>291</sup> McKosato, *supra* note 182.

<sup>292</sup> Bernard & Wozniacka, *supra* note 175.

<sup>293</sup> Cary Aspinwall, *Justice Department Memo not likely to Change Pot Laws on Tribal Land soon, Officials say*, TULSA WORLD (Dec. 13, 2014), [http://www.tulsaworld.com/news/courts/justice-department-memo-not-likely-to-change-pot-laws-on/article\\_c18f9b8c-cb33-5c8c-9ca3-88a11f4526aa.html](http://www.tulsaworld.com/news/courts/justice-department-memo-not-likely-to-change-pot-laws-on/article_c18f9b8c-cb33-5c8c-9ca3-88a11f4526aa.html).

<sup>294</sup> Herbeck, *supra* note 266; Randy Ellis, *No Pot Sales for Oklahoma Tribes, Official Says*, DAILY OKLAHOMAN, Dec. 12, 2014.

<sup>295</sup> Ellis, *supra* note 294; Wozniacka, *supra* note 202.

<sup>296</sup> Cary Aspinwall, *Justice Department Memo not likely to Change Pot Laws on Tribal Land soon, Officials say*, TULSA WORLD (Dec. 13, 2014), [http://www.tulsaworld.com/news/courts/justice-department-memo-not-likely-to-change-pot-laws-on/article\\_c18f9b8c-cb33-5c8c-9ca3-88a11f4526aa.html](http://www.tulsaworld.com/news/courts/justice-department-memo-not-likely-to-change-pot-laws-on/article_c18f9b8c-cb33-5c8c-9ca3-88a11f4526aa.html); and Ellis, *supra* note 294, (U.S. Attorney Sanford Coates indicated any movement towards tribal marijuana sales are extremely unlikely in Oklahoma.)

<sup>297</sup> Dan Herbeck, *Senecas' Tribal Government is Taking a Cautious Approach*, The BUFFALO NEWS, Dec. 14, 2014; Palmeri, *supra* note 214 (tribes do not want their land to become a stoner's playground).

record as saying, “If Indian tribes were allowed to legally grow and sell marijuana to customers off the reservations \* \* \* we’ve got a very independent, entrepreneurial group of business people who might be interested.”<sup>298</sup> However, the Seneca tribe does not see marijuana business in the near term according to the tribe’s chief counsel, Martin E. Seneca Jr.<sup>299</sup> The tribe continues to watching the tribal marijuana sales potential closely, but is not yet interested.<sup>300</sup>

The following tribes have also announced opposition to tribal marijuana sales enterprises: Onondaga tribe,<sup>301</sup> the Oneida tribe,<sup>302</sup> and the Yakama tribe.<sup>303</sup> The tribal liaison for the U.S. Attorney in Minnesota, Deidre Aanstad, has indicated that no tribes in Minnesota support marijuana legalization.<sup>304</sup>

A number of tribes, even those who have wholeheartedly endorsed gaming, have not supported the push for pot. According to Bill Satti, tribal director of public affairs for the Mashantucket Pequots of Connecticut (owner of Foxwoods Resort Casino), the tribe is not discussing marijuana sales.<sup>305</sup> No reaction has been recorded among Utah’s Indian tribes.<sup>306</sup> The Seminole Nation of Florida (of Hard Rock Casino fame) will not support marijuana sales.<sup>307</sup> The Navajo tribe of New Mexico is also not ready to legalize marijuana at this point.<sup>308</sup> However, most of these tribes are heavily reliant on gaming revenues which have continued to grow year-over-year.<sup>309</sup> If tribal gaming begins to fall off in years to come, tribes may reconsider getting into the business of marijuana sales for additional revenue streams.

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<sup>298</sup> Dan Herbeck, *Could Legal Pot Sales Be Coming to Seneca’s Reservations?*, THE BUFFALO NEWS (Dec. 13, 2014), <http://www.buffalonews.com/city-region/state/could-legal-pot-sales-be-coming-to-senecas-reservations-20141213>.

<sup>299</sup> Herbeck, *supra* note 297 (while studying the marijuana issue closely, does not expect any action in the near future); Harrington, *supra* note 215 (still being considered, and the project could be operational within eight months of tribal approval).

<sup>300</sup> Herbeck, *supra* note 297.

<sup>301</sup> *Id.*

<sup>302</sup> Palmeri, *supra* note 214.

<sup>303</sup> Timothy M. Phelps, *Tribes allowed to decide on pot*, STAR TRIBUNE, Dec. 12, 2014; Wozniacka, *supra* note 202 (the tribe has banned tribal marijuana sales).

<sup>304</sup> Phelps, *supra* note 303.

<sup>305</sup> Hallenbeck, *supra* note 213.

<sup>306</sup> Herbeck, *supra* note 266.

<sup>307</sup> Klas, *supra* note 96.

<sup>308</sup> Noel Lyn Smith, *Navajo Lawmakers Could Reinforce Stance Against Legalizing Marijuana*, FARMINGTON DAILY TIMES (Mar. 4, 2015), <http://www.abqjournal.com/550176/news/navajo-lawmakers-could-reinforce-stance-against-legalizing-marijuana.html> (alcohol remains illegal on the Navajo reservation except for areas of their three casinos).

<sup>309</sup> Randy Ellis, *Indian Gaming Revenues Show National, Regional Growth*, NEWSOK.COM (July 28, 2017), <http://newsok.com/article/5556653>. Tribal gaming revenue showed a national growth rate of 4.4 percent, while Oklahoma City’s region grew at a rate of 5.7 percent.

Opposition to marijuana is dying. Many predict within ten (10) years legalization is likely everywhere in United States.<sup>310</sup> This means marijuana businesses would only have any economic power for the next decade. Perhaps medical marijuana for Indians on reservations is a first step.<sup>311</sup>

## VII. CONCLUSION

Some tribes may move forward with a marijuana industry. Since the future depends on the attitudes of presidential administration, and the election is pending, a clear path is not obvious. The election outcome is not a certainty, and neither candidate has expressed views on marijuana policy, especially on tribal lands. Investment hates uncertainty.

Many tribes will be paralyzed by claims of impending doom if they invested in marijuana. Warnings of violent drug gangs and societies awash in heroin will clog the media. These fears may be misguided. When tribes became interested in gaming, critics alarmed the public with promises this would lead to large scale prostitution and organized crime.<sup>312</sup> It is not clear that either happened. Instead, gaming has provided many tribes economic opportunity and job creation as never before. If tribal gaming begins to match the slowing trends in non-tribal gaming, tribal governments may reconsider and seek out new revenue streams including marijuana sales.

The opportunity for a marijuana industry on tribal lands, even if for a short term, could have dramatic economic consequences. Colorado shows how a maverick in marijuana can be an economic boom in these times of slowing governmental revenues. Marijuana poses interesting questions for tribal leaders and politicians alike.

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<sup>310</sup> Keeler, *supra* note 115.

<sup>311</sup> Sullum, *supra* note 117.

<sup>312</sup> Amundson, *supra* note 196 (quoting Mike Weston, Flandreau Santee Sioux executive committee member).