
NATURAL RESOURCES JOURNAL

Volume 58
Issue 1 *Winter 2018*

Winter 2018

New Mexico Tribal Cannabis: Policy, Politics, & Guidance for Government-to-Government Cooperation in State-Tribal Cannabis Compacting

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ABSTRACT

The purpose of this article is three-fold. First, it aims to provide a systematic review of international, United States, state, and federal Indian law and policy surrounding cannabis cultivation, possession, and use in Indian Country. Second, it argues that the 2017 New Mexico tribal medical cannabis bills (SB 345 & HB 348), which were introduced in the first regular session of the New Mexico State Legislature and would have permitted the state to enter into intergovernmental agreements (or compacts) with tribes who choose to implement the state's medical cannabis program on tribal lands, contained legal vulnerabilities likely to hinder their effectiveness if passed into law. Third, and as a result of this legal and political environment, this article serves as a tribal cannabis policy resource for New Mexico legislators and as a proposal of model legislation and compact terms for the drafting of effective tribal medical cannabis legislation and state-tribal cannabis compacts. Part I provides a historical and legal overview of international and United States federal controlled substances law and policy. Part II explores the issues arising in federal Indian cannabis law and regulation, including: state criminal jurisdiction over non-Public Law 280 tribal lands, state taxation in Indian Country, tribal sovereign immunity, and state-tribal dispute resolution. Part III covers New Mexico cannabis law, including a discussion of the state medical cannabis regulatory apparatus and policy analysis of the 2017 New Mexico tribal medical cannabis bills. Part IV closely analyzes the pros and cons of the 2017 New Mexico tribal medical cannabis bills and provides recommendations for future effective tribal medical cannabis legislation and compact drafting. Finally, Part V puts forward a model tribal medical cannabis bill and state-tribal cannabis compact terms reflecting the legal conclusions

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drawn herein, which may serve as constructive guidance in a future legislative session or compact negotiations between New Mexico and the Indian nations, tribes, and pueblos within the state.

INTRODUCTION

From time immemorial humankind has allied with the cannabis plant based on its ubiquitous spectrum of uses, which range from medicinal, spiritual, to industrial.[1] However, in the United States, there remains a staunch prohibition against the cultivation, possession, and use of cannabis under international and federal law.[2] In recent decades, states have acted to legalize and regulate cannabis for medical and recreational purposes under the authority of state law.[3] This trend led the United States government, through the Obama-era United States Department of Justice (DOJ), to issue guidance to the U.S. Attorneys' offices specifying the circumstances in which conduct related to cannabis in the states triggers a federal priority warranting enforcement of federal cannabis laws.[4] In 2014, the DOJ issued further guidance tailored to cannabis law enforcement in Indian Country, commonly referred to as the Wilkinson Memo.[5] The Wilkinson Memo recognizes that effective enforcement of cannabis law in Indian Country requires government-to-government consultation with tribes, and except in limited

1. TERRANCE MCKENNA, FOOD OF THE GODS: THE SEARCH FOR THE ORIGINAL TREE OF KNOWLEDGE 82–83 (1993), http://herbarium.0-700.pl/biblioteka/Food%20of%20the%20Goods.pdf; KING CTY. BAR ASS'N, EFFECTIVE DRUG CONTROL: TOWARD A NEW LEGAL FRAMEWORK 18 (2005), http://www.kcba.org/druglaw/pdf/effectivedrugcontrol.pdf.

2. *E.g.*, Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91-513, Title II, § 102, 84 Stat. 1247 (codified as amended at 21 U.S.C §§ 801–959 (2012)); Single Convention on Narcotic Drugs, *entered into force* Mar. 30, 1964, 520 U.N.T.S. 204 (ratified by the United States on May 25, 1967 with no reservations).

3. *29 Legal Medical Marijuana States and D.C.*, PROCON.ORG (last updated Dec. 28, 2016), http://medicalmarijuana.procon.org/view.resource.php?resourceID=000881 (providing a list of medical marijuana states with particulars of the laws in each state).

4. Memorandum from David W. Ogden, Deputy Attorney General, U.S. Dep't of Justice, to all U.S. Attorneys (Oct. 19, 2009) [hereinafter Ogden Memo] (re: "Investigations and Prosecutions in States Authorizing the Medical Use of Marijuana"), https://www.justice.gov/opa/blog/memorandum-selected-united-state-attorneys-investigations-and-prosecutions-states; Memorandum from James M. Cole, Deputy Attorney General, U.S. Dep't of Justice, to all U.S. Attorneys (June 29, 2011) [hereinafter Cole I] (re: "Guidance Regarding the Ogden Memo in Jurisdictions Seeking to Authorize Marijuana for Medical Use"), http://www.drugpolicy.org/sites/default/files/DOJ_Guidance_on_ Medicinal_Marijuana _1.pdf; Memorandum from James M. Cole, Deputy Attorney General, U.S. Dep't of Justice, to all U.S. Attorneys (Aug. 29, 2013) [hereinafter Cole II] (re: "Guidance Regarding Marijuana Enforcement"), https://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf; Memorandum from James M. Cole, Deputy Attorney General, U.S. Dep't of Justice, to all U.S. Attorneys (Feb. 14, 2014) [hereinafter Cole III] (re: "Guidance Regarding Marijuana Related Financial Crime"), http://www.dfi.wa.gov/documents/banks/dept-of-justice-memo.pdf.

5. Memorandum from Monty Wilkinson, Deputy Attorney General, U.S. Dep't of Justice, to all U.S. Attorneys & Tribal Liaisons (Oct. 28, 2014) [hereinafter Wilkinson Memo] (re: Policy Statement Regarding Marijuana Issues in Indian Country), https://www.indianz.com/News/2017/04/07/policystatementregardingmarijuanaissuesinindiancountry.pdf.

circumstances, U.S. Attorneys should not prioritize investigation and prosecution of alleged cannabis offenses on tribal lands.[6]

In 2017 and 2018, however, federal cannabis enforcement policy and priorities shifted with the inauguration of President Donald Trump and subsequent appointment of Jeffery Sessions as the United States Attorney General. By establishing a DOJ taskforce to study crime reduction,[7] Attorney General Sessions established the intellectual foundation for the deconstruction of key Obama-era smart-on-crime policies that paved the way for legal and economic stability in legal cannabis states and Indian tribes. Sessions' new policies include the rescinding of Obama-era DOJ criminal-charging policies that instructed prosecutors to avoid charging low-level offenses, like small drug offenses, to avoid harsh mandatory minimum sentences;[8] expansion of civil asset forfeiture (a policy abolished in the Obama era);[9] and rescinding the Obama-era DOJ state and tribal cannabis enforcement guidance, which was met with bi-partisan criticism from state and federal public officials.[10] However, although presidential administrations and policies have changed in the field of cannabis enforcement, the law has not—leaving valid much of the Obama-era cannabis enforcement doctrine. This is true in the current political and legal environment, where DOJ cannabis enforcement efforts are hindered by the federal government's inability to preempt state controlled substances law[11] and lack of funding from Congress to prosecute cannabis crimes on a large scale.[12] Additionally, because there is indication that the cannabis enforcement strategy on the ground in the U.S. Attorneys' offices is unlikely to change drastically under the new Sessions' policy,[13] the Obama-era policies still constitute the best statement of guidance to follow for states and tribes establishing or with established cannabis programs on their lands.

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6. *Id.* at 2 (directing U.S. Attorneys to prioritize investigation and prosecution of marijuana conduct in Indian country to: 1) prevent distribution of marijuana to minors; 2) prevent marijuana revenue going to criminal enterprises; 3) preventing diversion of marijuana from states where it is legal under state law; 4) preventing state-authorized marijuana activity from being used as pretext for illegal drug trafficking; 5) preventing drugged driving; 6) preventing growing marijuana on public lands; 7) preventing violence and use of firearms in state-authorized marijuana activity; and 8) preventing marijuana use and possession on federal property).

7. Press Release, U.S. Dep't of Justice, Office of Pub. Affairs, Attorney General Announces Crime Reduction and Public Safety Task Force (Feb. 28, 2017), https://www.justice.gov/opa/pr/attorney-general-announces-crime-reduction-and-public-safety-task-force

8. Memorandum from Jeffery B. Sessions, Attorney General, U.S. Dep't of Justice, to all Federal Prosecutors (May 10, 2017) (re: "Department Charging and Sentencing Policy"), https://www.justice.gov/opa/press-release/file/965896/download.

9. Attorney General Order No. 3946-2017, Federal Forfeiture of Property Seized by State and Local Law Enforcement Agencies (July 19, 2017), https://www.justice.gov/file/982611/download.

10. Memorandum from Jeffery B. Sessions, Attorney General, U.S. Dep't of Justice, to all U.S. Attorneys 1 (Jan. 4, 2018) (re: "Marijuana Enforcement") [hereinafter Sessions Memo], https://www.justice.gov/opa/press-release/file/1022196/download.

11. 21 U.S.C. § 903 (2012).

12. Consolidated Appropriations Act of 2017, Pub. L. No. 115-31, § 537, 115 H.R. 244 (2017).

13. Marijuana Business Daily Staff, *AG Sessions rescinds Cole Memo Roiling Marijuana Industry*, MARIJUANA BUS. DAILY (Jan. 4, 2018), https://mjbizdaily.com/report-sessions-rescind-cole-memo-creating-cloud-uncertainty-marijuana-businesses/.

Under the Obama-era DOJ policies, the National Congress of American Indians (NCAI) took the position in 2015 that Indian tribes have the inherent right as sovereign governments to set local laws addressing cannabis, including medical and industrial uses according to the public health and economic needs of their unique communities.[14] And so started the trial and error process of Indian tribes' entry into the domain of cannabis. For example, in 2015, three tribes located in California (the Alturas Indian Rancheria, Pit River, and Pinoleville Pomo Indian Nation tribes) had cannabis grows raided by federal agents and California county law enforcement officers based on suspicion that the tribes were growing cannabis on tribal lands in excess of California regulatory standards.[15] Together, these raids led to the seizure of thousands of cannabis plants.[16] But where these California tribes failed in effectively implementing cannabis programs on their lands, other tribes have been successful—particularly through tribes' efforts to cooperate with the states in which their lands are located. The states of Washington and Nevada are the leading examples. In 2015 and 2017, the Washington and Nevada state legislatures, respectively, passed bills permitting those states to negotiate mutually beneficial terms and enter into compacts with tribes to govern the establishment of tribal medical and recreational cannabis enterprises on tribal lands.[17] Upon the passage of these laws, three Washington tribes: the Suquamish, Squaxin, and Puyallup and three Nevada tribes: the Ely Shoshone, Yerington Paiute, and Las Vegas Paiute entered into cannabis compacts with the states of Washington and Nevada,[18] and to date, the cannabis retailers created on the tribal lands in these

14. Nat'l Congress of Am. Indians Res. SD-15-047, Gen. Assemb. (2015), http://www.ncai.org/attachments/ Resolution_exFmbjTpJKdWwCXpuSVMzbjUuBlOEwOWOVOPMEXLsxrysHoumey_SD-15-047.pdf.

15. *California Tribe's Marijuana Operation Raided in Mendocino County*, CANNABIST (Sept. 23, 2015, 8:57 AM), http://www.thecannabist.co/2015/09/23/california-tribal-marijuana-raid-mendocino-county/41339/; *Feds Seize Marijuana from Indian Tribal Lands in California*, CANNABIST (July 8, 2015, 6:27 PM), http://www.thecannabist.co/2015/07/08/california-indian-tribes-marijuana-federal-seizure/37695/.

16. *See id.*

17. H.B. 2000, 64th Leg., Reg. Sess. (Wash. 2015), http://lawfilesext.leg.wa.gov/biennium/2015-16/Pdf/Bills/House%20Bills/2000.pdf; S.B. 375, 79th Leg., Reg. Sess. (Nev. 2017), https://www.leg.state.nv.us/Session/79th2017/Bills/SB/SB375_EN.pdf.

18. Marijuana Compact, Suquamish Tribe-Wash. (Sept. 15, 2015) [hereinafter Suquamish Cannabis Compact], http://lcb.wa.gov/publications/Marijuana/Compact-9-14-15.pdf; Marijuana Compact, Squaxin Island Tribe-Wash. (2015) [hereinafter Squaxin Cannabis Compact], https://assets.documentcloud.org/documents/2394938/squaxin-island-draft-compact.pdf; Marijuana Compact, Puyallup Tribe-Wash. (2015) [hereinafter Puyallup Cannabis Compact], https://assets.documentcloud.org/documents/2699297/Puyallup-Tribal-Compact.pdf; Marijuana Compact, Ely Shoshone-Nev. (July 18, 2017), http://marijuana.nv.gov/uploadedFiles/marijuananvgov/Content/Stay_Informed/Ely-Shoshone-Compact-Fully-Executed.pdf [hereinafter Ely Shoshone Cannabis Compact]; Marijuana Compact, Yerington Paiute-Nev. (July 18, 2017), http://marijuana.nv.gov/uploadedFiles/marijuananvgov/Content/Stay_Informed/Yerington-Paiute-Tribe-Fully-Executed(1).pdf [hereinafter Yerington Paiute Cannabis Compact]; Marijuana Compact, Las Vegas Pauite-Nev. (July 18, 2017), http://marijuana.nv.gov/uploadedFiles/marijuananvgov/Content/Stay_Informed/LV-Tribe-of-Paiute-Indians-Fully%20Executed.pdf [hereinafter Las Vegas Paiute Cannabis Compact]. Note that while the Suquamish, Squaxin, Ely Shoshone, Yerington Paiute, and Las Vegas cannabis compacts are discussed in varying levels of detail in the discussion that follows, the Puyallup cannabis compact is not discussed further. This is because the Puyallup compact concerns the establishment of a cannabis research laboratory on its lands, as

states have been left alone by state and federal law enforcement and permitted to prosper.

Meanwhile, in Santa Fe New Mexico in 2007, the New Mexico Legislature passed an act legalizing cannabis for medical purposes and establishing a regulatory arm of the New Mexico Department of Health (DOH) to administer the state's medical cannabis program.[19] Since the establishment of the state medical cannabis program, there has been an increase in the New Mexico legislative landscape of bills introduced undertaking to either expand the scope of medical cannabis or legalize and tax it recreationally.[20] In addition, Representative Derrick J. Lente, D-Sandia Pueblo, and Senator Benny Shendo, Jr., D-Jemez Pueblo, introduced companion bills in the first regular session of the 2017 New Mexico Legislature aimed at opening the door for tribes within the state to establish medical cannabis programs on their lands.[21] But while the 2017 tribal medical cannabis bills demonstrate legislative intent to support cannabis in Indian Country, the contents of the bills contained potentially significant legal vulnerabilities.

For example, the 2017 New Mexico tribal medical cannabis bills: a) failed to provide for adequate representation by the state of New Mexico with the authority to negotiate with tribes for the establishment of medical cannabis programs on tribal lands tailored to the particular needs of individual tribes; and b) lacked regulatory direction to tribes and DOH for the establishment of tribal medical cannabis programs. Thus, it would have been unlikely that the bills would have facilitated the creation of well-regulated tribal medical cannabis programs and could have generated an environment ripe for litigation over the gaps in the legislation. As a result, New Mexico legislators should consider alternative approaches to tribal medical cannabis legislative drafting.

The approach to drafting New Mexico tribal medical cannabis legislation and intergovernmental cannabis agreements proposed in this article derives from a synthesis of the 2017 tribal medical cannabis bills, the state of Washington and Nevada's tribal cannabis statutes, compacts, on-point state and federal controlled substances and Indian law, and consideration of individual instances of cannabis law enforcement patterns. This article argues that New Mexico state legislators should work to introduce a bill in a future session drafted around the guidance derived from this approach, which aims to provide a blueprint for strong state-tribal

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opposed to establishment of regulated medical or recreational cannabis businesses and markets as contemplated by the Suquamish and Squaxin cannabis compacts (and as is contemplated by the New Mexico tribal medical cannabis bills, *infra* note 21).

19. N.M. STAT. ANN. §§ 26-2b-1 to -7 (2007).

20. *E.g.*, S.B. 8, 53rd Leg. 1st Sess. (N.M. 2017) (Medical Marijuana Changes); S.B. 258, 53rd Leg., 1st Sess. (N.M. 2017) (Decrease Marijuana Penalties); H.B. 89, 53rd Leg., 1st Sess. (N.M. 2017) (Cannabis Revenue & Freedom Act); Tom Angell, *New Mexico Weighs Legal Marijuana in Special Session*, MARIJUANA.COM (Sept. 30, 2016, 10:34 AM), http://www.marijuana.com/blog/news/2016/09/new-mexico-weighs-legal-marijuana-in-special-session/; Jason Barker, *New Mexico Hopeful for Hemp in 2017*, WEEDNEWS.COM (Dec. 30, 2016, 8:15 AM), http://www.weednews.co/new-mexico-hopeful-for-hemp-in-2017/.

21. H.B. 348, 53rd Leg., 1st Sess. (N.M. 2017) (Medical Marijuana Tribal Agreements), https://www.nmlegis.gov/Sessions/17%20Regular/bills/house/HB0348.pdf; S.B. 345, 53rd Leg. 1st Sess. (N.M. 2017) (Medical Marijuana Tribal Agreements), https://www.nmlegis.gov/Sessions/17%20Regular/bills/senate/SB0345.pdf.

cooperative relationships in the domain of medical cannabis. The article concludes by proposing model tribal medical cannabis legislation and medical cannabis compact terms that could serve as the foundation for a future statute and state-tribal cannabis compacts in New Mexico.

I. Federal Cannabis Law: Controlled Substances Act & Cannabis Policy

To understand where Indian tribes—and in particular the tribes, Nations, and Pueblos of New Mexico—stand in the maze of cannabis business, law, and policy takes appeal to the colored history, law, politics, and cultural influence of the cannabis plant in the United States. Accordingly, what follows in Part I is a discussion of the features of international and United States federal cannabis law.

A. Marihuana Tax Act of 1937, Single Convention on Narcotic Drugs, & the United States Controlled Substances Act

The roots of the United States government's prohibition on cannabis are traceable to the Marihuana Tax Act of 1937.[22] The act provided that "every person who imports, manufactures, produces, compounds, sells, deals in, dispenses, administers, or gives away marihuana" shall be subject to a special federal tax once per year.[23] The amount a person was taxed under the act was determined by the nature of their involvement with the plant.[24] For example, importers, manufactures, and compounders of cannabis were taxed $24 per year, while researchers were only taxed $1 per year.[25] Additionally, all persons who were subject to the tax, upon their first payment, were required to register their names and places of business "with the [Internal Revenue] collector of the district."[26] And despite the American Medical Association coming out against the bill, the Marihuana Tax Act passed, constituting a significant step in the evolution of the federal government's authority to regulate and police "drugs" with plenary authority.[27]

The next step in the federal government's prohibition of cannabis came in the form of its ratification of the Single Convention on Narcotic Drugs (Single

22. Marihuana Tax Act of 1937, 50 Stat. 551, 551 (imposing "excise tax upon certain dealers of marihuana, to impose transfer tax upon certain dealings of marihuana, and to safeguard the revenue therefrom by registry and recording"). For a thorough discussion of the legal history of drug regulation and prohibition by the United States federal government, see KING CTY. BAR ASS'N, *supra* note 1, at 26–39.

23. § 2(a), 50 Stat. at 551–52.

24. *Id.* § 2(a)(1)–(5).

25. *Id.* § 2(a)(1), (4).

26. *Id.* § 1(d), 2(e).

27. KING CTY. BAR ASS'N, *supra* note 1, at 34; *see also* Leary v. United States, 395 U.S. 6, 26 (1969) (holding Marihuana Tax Act unconstitutional on grounds that Petitioner Timothy Leary's privilege against self-incrimination had been violated because, at the time Leary "acquired marihuana[,] he was confronted with a statute which on its face permitted him to acquire the drug legally, provided he pay $100 per ounce transfer tax and gave incriminating information, and simultaneously within a system of regulations which, according to the Government, prohibited him from acquiring marihuana under any conditions").

Convention) on May 25, 1967. The Single Convention, as subsequently amended,[28] placed tetrahydrocannabinol ("THC," i.e., the psychoactive compound in the cannabis plant) in Schedule I,[29] subjecting the chemical to the strictest class of regulation. In effect, as a plant containing a Schedule I drug under the Single Convention, the United States (as a signatory to the convention) was required to enact domestic policy attaching criminal liability to the possession of cannabis.[30]

Three years later, Congress enacted the Comprehensive Drug Abuse Prevention and Control Act—commonly referred to as the Controlled Substances Act (CSA).[31] The CSA entered into force under the Richard Nixon administration and in the midst of its "War on Drugs"—the administration's thinly veiled attack on the counter-culture protesters of the era and racial minorities.[32] The CSA provides that it was the intent of Congress that the Act bring the federal government into compliance with its obligations under the international drug control conventions.[33] Congress also recognized in enacting the CSA that although some drugs listed as controlled substances under CSA are useful and legitimate, illegal use has a substantial and detrimental effect on the health and general welfare of the American people.[34]

Generally, by rule, the United States Attorney General may schedule or remove from a particular schedule controlled substances under the act.[35] Five schedules for substances are created under the CSA, ranging from Schedule I, under which a substance is deemed to have a "high potential for abuse," "no currently accepted medical use in treatment in the United States," and "a lack of

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28. *See generally* Single Convention on Narcotic Drugs, *supra* note 2; Convention on Psychotropic Substances arts. 7, 33, Feb. 21, 1971, 1019 U.N.T.S. 175 (1971); Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, U.N. Doc. E/CONF.82/13 (collectively "the International Drug Control Conventions"), https://www.unodc.org/documents/commissions/CND/Int_Drug_Control_Conventions/Ebook/The_International_Drug_Control_Conventions_E.pdf (amending the 1961 Single Convention).

29. UNITED NATIONS, THE INTERNATIONAL DRUG CONTROL CONVENTIONS: SCHEDULES OF THE CONVENTION ON PSYCHOTROPIC SUBSTANCES OF 1971 AS AT 25 SEPTEMBER 2013 2 (2013), https://www.unodc.org/documents/commissions/CND/Int_Drug_Control_Conventions/1971_Schedules/ST-CND-1-Add2_E.pdf.

30. *See* Single Convention on Narcotic Drugs, *supra* note 2, at arts. 4(a), 28(3), 33, 36.

31. Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91-513, Title II, § 102, 84 Stat. 1247 (codified as amended at 21 U.S.C §§ 801–959 (2012)). *See generally* CONG. RESEARCH SERV., HV-5801-A, COMPREHENSIVE DRUG ABUSE AND PREVENTION AND CONTROL ACT: SUMMARY OF MAJOR PROVISIONS (1971) (summarizing and interpreting the major pieces of the CSA, reflecting an early legislative intent for the act); *see also Thirty Years of America's Drug War: A Chronology*, PBS, http://www.pbs.org/wgbh/pages/frontline/shows/drugs/cron/ (last modified 2014) (featuring a timeline created for investigative series *Frontline: Drug Wars* and providing a history of the war on drugs spanning the last 30 years, focusing a majority of attention on the war against Colombian and Mexican drug cartels); Emily Dufton, *The War on Drugs: How President Nixon Tied Addiction to Crime*, ATLANTIC (Mar. 26, 2012), http://www.theatlantic.com/health/archive/2012/03/the-war-on-drugs-how-president-nixon-tied-addiction-to-crime/254319/ (discussing the war on drugs and specifically how President Nixon tied the politics of addiction to crime to implement the CSA and commence the war on drugs).

32. KING CTY. BAR ASS'N, *supra* note 1, at 37.

33. 21 U.S.C. § 801a (2012).

34. 21 U.S.C. § 801(1)–(2) (2012).

35. 21 U.S.C § 811(a)–(c) (2012).

accepted safety for use . . . under medical supervision," to Schedule V, under which a substance is deemed to have "a low potential for abuse," "a currently accepted medical use," and that "may lead to limited physical dependence or psychological dependence."[36] Like its placement in the Single Convention, THC is a Schedule I substance under the CSA.[37] As a result, the sale, purchase, and possession of THC or the cannabis plant is unlawful and subject to criminal punishment.[38]

Although it is well recognized as a point of constitutional law that the CSA provisions criminalizing the cultivation, sale, and possession of cannabis do not exceed Congress' authority to regulate interstate commerce,[39] the CSA neither preempts nor forecloses states' promulgation of state laws governing controlled substances in their territories.[40]

Through the Marihuana Tax Act, ratification of the Single Convention, and enactment of the CSA—and as a result of the harsh penalties and mass incarceration of non-violent drug offenders that has followed therefrom—the federal government has attempted to rid the general population of cannabis and cannabis users.[41] However, in an exercise of state rights, individual states remain free to reject the CSA and enact their own controlled substances and cannabis laws (even if those laws are inconsistent with the CSA). Accordingly, this Part turns to outlining how the CSA is structured to operate in states that have legalized medical or recreational cannabis.

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36. 21 U.S.C. § 812(a)–(b) (2012).

37. *Id.* at § 812 Schedule (c)(17).

38. Penalties for Simple Possession, 21 U.S.C. § 844 (2012); *but see* Complaint at 2–3, Washington v. Sessions, No. 1:17-cv-05625 (S.D.N.Y. filed July, 24, 2017) (arguing that the CSA has wrongfully and unconstitutionally criminalized cultivation, distribution, sale, and possession of cannabis and seeking a declaration that the CSA as it pertains to the classification of cannabis as a Schedule I drug violates the Due Process Clause of the Fifth Amendment, protections guaranteed by the First Amendment, and the fundamental Right to Travel), https://mjbizdaily.com/wp-content/uploads/2017/07/ECF-Version-of-Complaint.pdf.

39. Gonzales v. Raich, 545 U.S. 1, 15 (2005); *id.* at 27 n.37 (citations omitted) ("We acknowledge that evidence proffered by respondents in this case regarding the effective medical uses for marijuana, if found credible after trial, would cast serious doubt on the accuracy of the findings that require marijuana to be listed in Schedule I. But the possibility that the drug may be reclassified in the future has no relevance to the question whether Congress now has the power to regulate its production and distribution. Respondents' submission, if accepted, would place all homegrown medical substances beyond the reach of Congress' regulatory jurisdiction.").

40. 21 U.S.C. § 903 (2012) (providing "[n]o provision of this subchapter shall be construed as indicating an intent on the part of the Congress to occupy the field in which that provision operates, including criminal penalties, to the exclusion of any State law on the same subject matter which would otherwise be within the authority of the State, unless there is a positive conflict between that provision of this subchapter and that State law so that the two cannot consistently stand together"); Ledcke v. State, 260 Ind. 382, 393, 296 N.E.2d 412, 419–20 (1973); State v. McHorse, 1973-NMCA-144, ¶¶ 16–21, 85 N.M. 753, 517 P.2d 75.

41. *See generally* Kristen Gwynne, *10 Of The Harshest Sentences For Pot In The U.S.*, ALTERNET (Oct. 26, 2012), https://www.alternet.org/drugs/10-harshest-sentences-pot-us; *Marijuana Arrests & Punishments*, ACLU.ORG (last visited Jan. 9, 2018), https://www.aclu.org/other/marijuana-arrests-punishments; Eric Schlosser, *Marijuana And The Law*, ATLANTIC (Sept. 1994), https://www.theatlantic.com/magazine/archive/1994/09/marijuana-and-the-law/308958/; Eric Schlosser, *Reefer Madness*, ATLANTIC (Aug. 1994), https://www.theatlantic.com/magazine/archive/1994/08/reefer-madness/303476/.

B. DOJ Cannabis Policy & Legislation Concerning Cannabis in the States

Modern federal CSA enforcement strategy relating to cannabis is memorialized in Obama-era DOJ policies that took a populist and anti-war on drugs approach to controlled substances policing in the states. On October 19, 2009, Deputy Attorney General David W. Ogden, circulated a memorandum (the "Ogden Memo") providing "guidance to federal prosecutors in States that have enacted laws authorizing the medical use of marijuana."[42] The Ogden Memo established that the DOJ remains committed to enforcement of the CSA in the states[43] and recognizes that as a matter of policy "Congress has determined that marijuana is a dangerous drug, and the illegal distribution and sale of marijuana is a serious crime and provides a significant source of revenue to large-scale criminal enterprises, gangs, and cartels."[44] The Ogden Memo added that the DOJ was committed to "making efficient and rational use of its limited investigative and prosecutorial resources"[45] and that federal prosecutors were still delegated "the broadest discretion" in choosing whether to prosecute a given case.[46]

The Ogden Memo also directed that federal policy in the wake of state medical marijuana still called for the investigation and prosecution of "significant traffickers of illegal drugs, including marijuana," the disruption of cannabis cultivation and trafficking networks, and pursuit of cases against commercial enterprises "that unlawfully market and sell marijuana for profit."[47] However, the Ogden Memo provided that federal resources generally should not be focused on prosecuting cases involving individuals "whose actions are in clear and unambiguous compliance with existing state laws providing for the medical use of marijuana."[48] For example, prosecutorial discretion should not be exercised in the case of an individual with a serious illness who uses the substance as a part of a recommended regimen of treatment consistent with state law; this logic extended to caregivers who grow marijuana for the limited purposes of supplying medical marijuana patients.[49]

Based on this policy position, the Ogden Memo lays out a list of seven factors, which if present in a case, indicate marijuana conduct is not in "unambiguous compliance with applicable state law and may indicate illegal drug trafficking" that triggers federal interest: "1) unlawful possession of use of firearms; 2) violence; 3) sale to minors; 4) financial and marketing activities with the terms, conditions, or purposes of state law, including evidence of money laundering activity and/or financial gains or excessive amounts of cash inconsistent with purported compliance with state or local law; 5) amounts of cannabis

42. Ogden Memo, *supra* note 4, at 1.
43. *Id.*
44. *Id.*
45. *Id.*
46. *Id.*
47. *Id.* at 1–2.
48. *Id.* at 2.
49. *Id.*

inconsistent with purported compliance with state or local law; 6) illegal possession or sale of other controlled substances; or 7) ties to other criminal enterprises."[50]

The Ogden Memo recognized that its list of factors was not intended to be exhaustive of circumstances in which federal enforcement is warranted.[51] Additionally, the Ogden Memo established that prosecution under the CSA places no obligations on federal prosecutors to "charge, prove, or otherwise establish any state law violations."[52] The memorandum stated that it did not confer any new rights on individuals enforceable in any adjudicatory matter; nor did it foreclose federal prosecution of cases involving marijuana where there is clear and unambiguous compliance with state medical marijuana laws and an absence of one or all of the seven factors in a given case.[53] The memorandum concluded by directing that all United States Attorneys' offices should continue to review marijuana cases for potential prosecution on a case-by-case basis.[54]

On the same day that the Ogden Memo was released, the *New York Times* ran a story calling the document "hardly an enthusiastic embrace of medical marijuana . . . , but signaled clearly that the [Obama] administration thought there were more important priorities for [federal] prosecutors"[55] than prosecuting medical marijuana patients. However, confusion concerning the contours of the federal policy remained in medical cannabis states, and in some extreme cases resulted in the federal prosecution of medical cannabis patients and caregivers whose cannabis grows were determined to have reached a size triggering federal interest pursuant to the Ogden factors.[56] Based on the continued confusion regarding the status of federal medical cannabis regulation, on June 29, 2011, Deputy Attorney General James M. Cole issued the first in a trilogy of memoranda that defined the DOJ's stance on medical and recreational cannabis in the states for the remainder of the Obama administration.[57]

Deputy Attorney General Cole's June 2011 memo (Cole I) was issued based on a request for a legal opinion from Paula T. Dow, the Attorney General for the State of New Jersey, concerning the DOJ's position on New Jersey's medical marijuana law.[58] The purpose of Cole I, according to James Cole in a 2016 interview with a reporter from *Marijuana Business Daily*, was to "remedy" the

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.* at 3.

55. David Stout & Solomon Moore, *U.S. Won't Prosecute in States that Allow Medical Marijuana*, N.Y. TIMES (Oct. 29, 2009), http://www.nytimes.com/2009/10/20/us/20cannabis.html.

56. *See, e.g.*, Rob Reuteman, *The Confused State of Pot Law Enforcement*, CNBC (Apr. 20, 2010), http://www.cnbc.com/id/36179498 (reporting on a Colorado medical marijuana caregiver licensed to grow 72 marijuana plants who was discovered to be growing 224 plants by federal agents after appearing on local television boasting of the size of his grow and subsequently arrested and charged with federal marijuana crimes).

57. Cole I, *supra* note 4; Cole II, *supra* note 4; Cole III, *supra* note 4.

58. Letter from Paul J. Fishman, N.J. United States Attorney, to Paula T. Dow, Attorney General for the State of New Jersey (June 30, 2011) (re: "New Jersey Compassionate Use of Medical Marijuana Act"—cover letter to Cole I), http://www.drugpolicy.org/sites/default/files/DOJ_Guidance_on_Medicinal_Marijuana_1.pdf.

"over-reading [of] the Ogden Memo."[59] "The Ogden Memo," Cole stated, "was really intended to say people who are really sick, and people who give them care in that illness" are not going to be subject to marijuana prosecution efforts.[60] But it was not intended, said Cole, to imply that anyone involved with marijuana who is in compliance with state law would be left alone by the feds.[61] Cole I reiterated the Ogden Memo's policy of balancing the duty to prosecute large-scale criminal marijuana enterprises under the CSA with prosecutorial efficiency.[62] However, the memorandum noted that since the Ogden Memo there had been "an increase in the scope of commercial cultivation, sale, distribution and use of marijuana for purported medical purposes."[63] "Persons who are in the business of cultivating, selling or distributing marijuana, and those who knowingly facilitate such activities" according to Cole I, "are in violation" of the CSA; state and local laws or ordinances are no defense.[64] Moreover, Cole I advised that those engaging in "transactions involving the proceeds of such activity may also be in violation of the federal money laundering statute and other federal financial law."[65]

On August 29, 2013, Deputy Attorney General Cole issued his second memorandum (Cole II) to the U.S. Attorneys' offices concerning marijuana enforcement in the states in reaction to the 2012 passage of a statute and constitutional initiative in the states of Washington and Colorado legalizing recreational cannabis.[66] In its research, the DOJ concluded that the federal government could not preempt state laws legalizing cannabis by authority of the CSA,[67] but that it could likely "stop the regulatory scheme[s of the states] because it could probably stop conduct that's illegal under federal law."[68] According to Cole, the purpose of Cole II was to send a message to the states that "you guys have to become serious about your regulatory enforcement." Cole II provides that the DOJ has historically not devoted resources to prosecuting individuals whose conduct is limited to possession of small amounts of cannabis for personal use on private property, leaving such enforcement for state and local authorities.[69] It also stood for the proposition that the size or commercial nature of a cannabis operation alone should not constitute a proxy for determining whether such an operation triggers a federal priority.[70] However, this federal position on state cannabis industries rested on an expectation that states and localities implement "strong and

59. John Schroyer, *Famous Marijuana Memos: Q&A with Former Deputy Attorney General James Cole*, MARIJUANA BUS. DAILY (July 27, 2016) http://mjbizdaily.com/the-famous-marijuana-memos-qa-with-former-doj-deputy-attorney-general-james-cole/.

60. *Id.*

61. *Id.*

62. Cole I, *supra* note 4, at 1.

63. *Id.* at 2 (noting that, in the last year, several jurisdictions considered or enacted legislation authorizing multiple large-scale, privately-operated industrial cannabis grows with revenue projections in the millions of dollars).

64. *Id.*

65. *Id.*

66. Cole II, *supra* note 4.

67. Schroyer, *supra* note 59; *see also* 21 U.S.C. § 903 (2012).

68. Schroyer, *supra* note 59.

69. Cole II, *supra* note 4, at 2.

70. *Id.* at 3.

effective regulatory and enforcement systems" addressing the threats posed by cannabis legalization in the realm of "public safety, public health, and other law enforcement interests."[71] In furtherance of its policy position and expectations of the states, Cole II established that the federal government's updated cannabis law enforcement priorities (Cole II Priorities) were as follows:

- Preventing the distribution of cannabis to minors
- Preventing revenue from the sale of cannabis from going to criminal enterprises, gangs, and cartels
- Preventing the diversion of cannabis from the states where it is legal under state law in some form to other states
- Preventing state-authorized cannabis activity from being used as a cover or pretext for the trafficking of other illegal drugs or other illegal activity
- Preventing violence and the use of firearms in the cultivation and distribution of cannabis
- Preventing drugged driving and the exacerbation of other adverse public health consequences associated with cannabis use
- Preventing the growing of cannabis on public lands and the attendant public safety and environmental dangers posed by cannabis production on public lands
- Preventing cannabis possession or use on federal property[72]

Finally, on February 14, 2014, Deputy Attorney General Cole released the third DOJ cannabis policy memorandum, the subject of which was "Guidance Regarding Marijuana Related Financial Crimes" (Cole III).[73] Cole's purpose for the memorandum was to send a message to banks to "go ahead" and provide services to cannabis industry clients.[74] Cole III stands for the proposition that in determining whether to enforce federal money laundering and financial crimes statutes,[75] it should consider whether financial conduct implicates the Cole II Priorities.[76]

Since 2015, Congress has embraced the Cole Trilogy, approving budgets providing that federal appropriations cannot be used to enforce federal cannabis

71. *Id.*

72. *Id.* 1–2.

73. Cole III, *supra* note 4. *See generally* Janel Greiman & Stephanie E. Slaughter, *Marijuana, State Taxation, and the Risks to Practitioners Serving the Pot Culture*, J. MULTISTATE TAX'N & INCENTIVES (Aug. 2014) (discussing a brief history of marijuana law, states' legalization, guidance for tax professionals, individual tax payers, business taxpayers, the federal view, and the hemp market); Wei-Chih Chiang, *Obstacles to Legalizing Marijuana: Resolving the Federal-State Conflict*, 94 PRAC. TAX STRATEGIES 219 (2015) (discussing several areas of tax law that affect medical and recreational marijuana industry, including: tax exempt status, medical expense deductions, illegal income, costs of sold goods, business expenses, forfeitures, self-employment tax, and estate tax).

74. Schroyer, *supra* note 59.

75. *E.g.*, 18 U.S.C. § 1957 (2012) (money laundering); 18 U.S.C. § 1960 (2012) (unlicensed money transmitter); 31 U.S.C. § 5318(g) (2012) (non-reporting of transactions involving the proceeds of marijuana-related violations).

76. Cole III, *supra* note 4, at 2.

prohibition in states that have legalized it.[77] These budgets have also operated to prevent the DOJ and United States Drug Enforcement Agency (DEA) from using appropriated funds to prosecute institutions of higher education and state departments of agriculture that have been authorized to grow hemp for research or establish agricultural pilot programs under the Legitimacy of Industrial Hemp Research Section of the Agricultural Act of 2014.[78] A bill was also introduced in February, 2017, in the House of Representatives by Dana Rohrbacher, D-California, seeking to protect individuals in legal cannabis states from the threat of federal enforcement[79] by amending the CSA to not apply to any person acting in compliance with state cannabis laws.[80] However, there has been no action on the bill since its introduction and referral to the House Subcommittee on Health.[81] Transitioning into 2018, 29 states and Washington DC have legalized either medical or recreational marijuana.[82]

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77. Consolidated and Further Continuing Appropriations Act of 2015, Pub. L. No. 113-235, § 538, 128 Stat. 2130, 2217 (2015); Consolidated Appropriations Act of 2016, Pub. L. No. 114-113, § 542, 129 Stat. 2242, 2333 (2016); Consolidated Appropriations Act of 2017, Pub. L. No. 115-31, § 537, 115 H.R. 244 (2017); *see also* United States v. McIntosh, 833 F.3d 1136, 1178–79 (9th Cir. 2016) (Section 542 of the Consolidated Appropriations Act of 2016 prohibits the federal government only from preventing the implementation of the "specific rules of state law authorizing the use, possession, or cultivation of medical" cannabis and does not prohibit prosecution of individuals who use, possess, or cultivate cannabis in a manner *unauthorized* by state law. And individuals are entitled to evidentiary hearings to determine whether their use, possession, or cultivation of cannabis was in compliance with state law prior to federal prosecution). However, it should be noted that the official statement released by President Trump accompanying his signing of H.R. 244 stated that the President intends to "treat" the provision of the budget providing that DOJ may not use appropriated funds to prevent the implementation of state medical cannabis programs "consistently with my constitutional responsibility to take care that the laws be faithfully executed." Press Release, The White House, Office of the Press Secretary, Statement by President Donald Trump on Signing H.R. 244 into Law (May 5, 2017), https://www.whitehouse.gov/the-press-office/2017/05/05/statement-president-donald-j-trump-signing-hr-244-law. And thereafter, the Washington Post reported that DOJ spokesperson Ian Prior stated: "[t]he Department of Justice must be in a position to use all laws available to combat the transnational drug organizations and dangerous drug traffickers who threaten American lives." John Wagner & Matt Zapotosky, *Jeff Sessions' War on Drugs Has Medical Marijuana Advocates Worried*, WASH. POST (May 15, 2017), https://www.washingtonpost.com/politics/jeff-sessions-war-on-drugs-has-medical-marijuana-advocates-worried/2017/05/12/0c0043ee-3738-11e7-b4ee-434b6d506b37_story.html?utm_term=.a95b99b965f9.

78. Consolidated and Further Appropriations Act of 2015 § 539; Consolidated Appropriations Act of 2016 § 763; Consolidated Appropriations Act of 2017 § 538; *see also* Legitimacy of Industrial Hemp Research, 7 U.S.C. § 5940 (2012).

79. H.R. 975, 115 Cong. 2017–2018 (Respect State Marijuana Laws Act of 2017 introduced on Feb. 7, 2017 by Rep. Dana Rohrbacher (R-CA-48) assigned to House Judiciary, Energy & Commerce, and Health Committees); Daniel M. Jimenez, *House Bill Seeks to Protect Individuals in Legal Marijuana States from Feds*, CANNABIST (Feb. 10, 2017, 1:10 PM), http://www.thecannabist.co/2017/02/10/state-marijuana-laws-individuals-protection/73471/.

80. 163 CONG. REC. H1075 (daily ed. Feb. 7, 2017) (statement of Rep. Rohrbacher), https://www.congress.gov/crec/2017/02/07/CREC-2017-02-07-pt1-PgH1075.pdf.

81. *See H.R. 975, Respect State Marijuana Laws Act of 2017* under *Actions* tab, CONGRESS.GOV, https://www.congress.gov/bill/115th-congress/house-bill/975/actions (last visited Aug. 30, 2017).

82. *29 Legal Medical Marijuana States and D.C.*, PROCON.ORG (last updated June 26, 2017, 12:53 PM), http://medicalmarijuana.procon.org/view.resource.php?resourceID=000881 (listing medical marijuana states with details of the laws in each state); *see also* Benjamin Groggin, *Weed is Legal in Eight States. Here's What You Need to Know Before Lighting Up*, DIGG (Nov. 20, 2016),

Notwithstanding, the Trump administration's DOJ—led by Attorney General Jeffery Sessions—was bound by neither the Ogden Memo nor the Cole Trilogy, and since coming into power, has shifted the focus of cannabis enforcement away from the Cole II Priorities, signaling "a return to outdated drug-war policies[.]"[83] These policies, however, have flown in the face of the early indications by then-candidate Donald Trump that his administration would continue the Obama era's populist and states' rights approach to cannabis law enforcement. In fact, in 2015, candidate Trump stated on the campaign trial that "[i]n terms of marijuana and legalization, I think that should be a state issue, state-by-state. . . . Marijuana is such a big thing. I think medical should happen—right? Don't we agree? I think so. And then I really believe we should leave it up to the states."[84] In contrast, however, Attorney General Sessions is on the record stating that "good people don't smoke marijuana," that he is "definitely not a fan of expanded use of marijuana," and that he will support the DOJ adopting "responsible polices" for enforcement of the CSA.[85]

In step with the early Trump-Sessions political positions quoted above, common sense counseled that the Trump-Sessions effect on state and tribal cannabis was likely to manifest in one of five general scenarios: 1) Sessions, with Trump's blessing, takes the "nuclear option and wages war" against both recreational and medical cannabis; 2) medical cannabis is left in place, but recreational use is terminated; 3) existing cannabis markets are left alone, but new states or tribes are delayed or blocked; 4) status quo—no change in position; or 5) Trump comes out in support of cannabis and the cannabis industry.[86]And with the first year of Sessions DOJ policy as the chief indicator of the future of federal cannabis policy, there is strong indication that Attorney General Sessions' is opting for the "nuclear option,"[87] despite his acknowledgment that the policies embodied in the Cole Trilogy are largely "valid."[88]

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http://digg.com/2016/legal-marijuana-law-guide (listing recreational marijuana states with particulars of laws in each state).

83. Marijuana Business Daily Staff, *supra* note 13.

84. Jenna Johnson, *Trump Softens Position on Marijuana Legalization*, WASH. POST (Oct. 29, 2015), https://www.washingtonpost.com/news/post-politics/wp/2015/10/29/trump-wants-marijuana-legalization-decided-at-the-state-level/?utm_term=.8a1e22d0c791.

85. Matt Laslo, *Donald Trump's Cabinet Picks Could Be a Bummer for Legal Weed in 2017*, DAILY BEAST (Dec. 26, 2016), http://www.thedailybeast.com/articles/2016/12/27/donald-trump-s-cabinet-picks-could-be-a-bummer-for-legal-weed-in-2017.html(quoting Jeff Sessions stating "good people don't smoke marijuana"). *See generally* Cannabist Staff, *Federal Marijuana Playbook: Trump Administration's Tough Talk and What We Know So Far*, CANNABIST (Mar. 23, 2017, 6:12 PM), http://www.thecannabist.co/2017/03/23/federal-marijuana-trump-administration-tough-talk-jeff-sessions/76000/(providing timeline of major federal cannabis policy statements since Trump took office).

86. Debra Borchardt, *5 Ways Trump Could Affect The Marijuana Industry*, FORBES (Jan. 20, 2017), http://www.forbes.com/sites/debraborchardt/2017/01/20/5-ways-trump-could-affect-the-marijuana-industry/#173fc0d95416; *see also Sean Spicer Says Federal Crackdown on Recreational Marijuana is Coming Soon*, YOUTUBE (Feb. 23, 2017), https://www.youtube.com/watch?v=x5FzP41FXlk (clip from February 23, 2017 White House Briefing by White House Press Secretary Sean Spicer, discussing Trump's position on medical and recreational cannabis policy).

87. Letter from Jeffery Session, Attorney General, U.S. Dep't of Justice, to Mitch McConnell, Majority Leader, U.S. Senate, Paul Ryan, Speaker, U.S. House of Representatives, Charles Schumer,

Sessions took the first step in rooting his ideology in the DOJ and renewing the war on drugs[89] on February 27, 2017, where the Attorney General established a DOJ "Task Force on Crime Reduction and Public Safety" (Task Force).[90] The Task Force reportedly included the directors of the Bureau of Alcohol, Tobacco, Firearms, and Explosives; the Federal Bureau of Investigation; the United States Marshals Service; and Administrator of the DEA.[91] In a DOJ memorandum providing updates on the Task Force to the U.S. Attorneys' Offices, Sessions wrote that the Task Force had been commissioned to identify ways in which the federal government can more effectively fight "illegal immigration and violent crime . . . , drug trafficking, and gang violence."[92] The Task Force is structured to function through a group of subcommittees that have been commissioned to review, among other matters, "existing policies in the areas of charging, sentencing, and marijuana to ensure consistency with the Department's overall strategy on reducing violent crime and with Administration goals and

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Minority Leader, U.S. Senate, & Nancy Pelosi, Minority Leader, U.S. House of Representatives (May 1, 2017), https://www.scribd.com/document/351079834/Sessions-Asks-Congress-To-Undo-Medical-Marijuana-Protections ("I write to renew the Department of Justice's opposition to the inclusion of language in any appropriation legislation[, chiefly Section 542 of the Consolidated Appropriations Act of 2016,] that would prohibit the use of Department of Justice funds or in any way inhibit its authority to enforce the Controlled Substances Act. . . . I believe it would be unwise for Congress to restrict the discretion of the Department to fund particular prosecutions, particularly in the midst of an historic drug epidemic and potentially long-term uptick in violent crime. The Department must be in a position to use all laws available to combat the transnational drug organizations and dangerous drug traffickers who threaten American lives."); *see supra* note 77 (2015–2017 federal budget legislation); *see also* Press Release, U.S. Dep't of Justice, Office of Pub. Affairs, Attorney General Jeff Sessions Delivers Remarks on Efforts to Combat Crime and Restore Public Safety Before Federal, State and Local Law Enforcement (Mar. 15, 2017) ([W]e need to focus on . . . fight[ing] drug use: preventing people from ever taking drugs in the first place. . . . I realize this may be an unfashionable belief in a time of growing tolerance of drug use. But too many lives are at stake to worry about being fashionable. I reject the idea that America will be a better place if marijuana is sold in every corner store. . . . Our nation needs to say clearly once again that using drugs will destroy your life."), https://www.justice.gov/opa/speech/attorney-general-jeff-sessions-delivers-remarks-efforts-combat-violent-crime-and-restore.

88. *Jeff Sessions Confirms Validity of "Cole Memo" Respecting States On Marijuana Legalization*, YOUTUBE (Mar. 5, 2017), https://www.youtube.com/watch?v=X-EvCFJUj2A; Tom Angell, *Sessions Says Obama Marijuana Memo is 'Valid'*, MASS ROOTS (Mar. 5, 2017), https://www.massroots.com/news/sessions-says-obama-marijuana-memo-is-valid.

89. Carter Sherman, *Sessions Might Bring Back the War on Drugs With Harsher Sentences for Low-Level Offenders*, VICE NEWS (May 9, 2017), https://news.vice.com/story/jeff-sessions-might-bring-back-the-war-on-drugs-with-harsher-sentences-for-low-level-offenders; Sari Horwitz, *How Sessions Wants to Bring Back the War on Drugs*, WASH. POST (Apr. 8, 2017), https://www.washingtonpost.com/world/national-security/how-jeff-sessions-wants-to-bring-back-the-war-on-drugs/2017/04/08/414ce6be-132b-11e7-ada0-1489b735b3a3_story.html?utm_term=.c90a384aa94b; C.K., *Drug War Policies: Jeff Session Orders Tougher Drug Crime Charges*, ECONOMIST (May 12, 2017), http://www.economist.com/blogs/democracyinamerica/2017/05/drug-war-policies.

90. *See* U.S. Dep't of Justice, Office of Pub. Affairs, *supra* note 7.

91. Pema Levy, *Sessions Claims A Mysterious Task Force Is Behind His Most Controversial Reforms*, MOTHER JONES (Aug. 2, 2017, 6:00 AM), http://www.motherjones.com/crime-justice/2017/08/sessions-claims-a-mysterious-task-force-is-behind-his-most-controversial-reforms/.

92. Memorandum from Jeffery B. Sessions, Attorney General, U.S. Dep't of Justice, to Head of Department Components U.S. Attorneys 1 (Apr. 5, 2017), https://www.justice.gov/opa/press-release/file/955476/download (re: "Update on the Task Force on Crime Reduction and Public Safety").

priorities."[93] The memo concludes by requesting the Task Force to provide Sessions with its first policy recommendations by July 27, 2017.[94]

As July 27, 2017 came and went, the substance of the Task Force's recommendations to Attorney General Sessions remained secret and the DOJ subsequently declined to release the Task Force's findings to the public.[95] The Associated Press (AP), however, intercepted in early August, 2017, portions of the Task Force's recommendations concerning CSA enforcement and cannabis.[96] The AP reported that the Task Force's conclusions generally reiterated the Cole doctrine of cannabis enforcement strategy, but urged DOJ to continue to study whether to change or rescind the Cole Trilogy.[97] The AP noted two other salient points in the Task Force's recommendations. First, federal officials should continue to oppose legislation blocking the DOJ from interfering with medical cannabis in states where it is allowed.[98] And second, the DOJ should collaborate with Department of Treasury officials to offer guidance to financial institutions concerning implementation of robust anti-money laundering programs to combat illegal transactions where cannabis is legal.[99]

Despite the lack of transparency on the part of the DOJ, the Task Force's position on CSA enforcement strategy outlined by the AP appears congruent with Attorney General Sessions' recent response to the Governors of Alaska, Washington, Colorado, and Oregon's joint letter calling for state-federal cooperation in regulating legal cannabis in their states.[100] The Governors' letter requests that the Trump administration "engage with us before embarking on any changes to [cannabis] regulatory and enforcement systems" because Cole doctrine "has been indispensable—providing the necessary framework for state regulatory programs centered on public safety and health protections."[101] The Governors

93. *Id.*

94. *Id.;* b*ut see* Press Release, U.S. Dep't of Justice, Office of Pub. Affairs, Statement by Attorney General Jeff Sessions on Recommendations from the Task Force on Crime Reduction and Public Safety (July 26, 2017), https://www.justice.gov/opa/pr/statement-attorney-general-jeff-sessions-recommendations-task-force-crime-reduction-and (disclosing that the Task Force has been providing Attorney General Sessions with "recommendations on a rolling basis").

95. Levy, *supra* note 91; *see also* Letter from Ron Wyden, U.S. Senator, State of Oregon, to Jeffery B. Sessions, Attorney General, U.S. Dep't of Justice 1–2 (Aug. 1, 2017), https://www.wyden.senate.gov/download/?id=4EA1FB77-9E23-4CFD-AD92-BE2F2E830F27&download=1 (requesting that Attorney General Sessions immediately make public the recommendations of the Task Force, including those related to cannabis).

96. Sadie Gurman, *Huff, Puff, Pass? AG's Pot Fury Not Echoed By Task Force*, ASSOCIATED PRESS (Aug. 5, 2017), https://apnews.com/ad37624fcb8e485a8d57a013d48a227c.

97. *Id.*

98. *Id.*

99. *Id.*

100. *See* Letter from Jeffery B. Sessions III, Attorney General, U.S. Dep't of Justice, to Jay Inslee, Governor, State of Washington & Robert Ferguson, Attorney General, Office of the Att'y Gen. 1–2 (July 24, 2017), https://s3.amazonaws.com/big.assets.huffingtonpost.com/LtrfromSessions.pdf; Letter from Bill Walker, Governor, State of Alaska, John Hickenlooper, Governor, State of Colorado, Kate Brown, Governor, State of Oregon, & Jay Inslee, Governor, State of Washington to Jeffery B. Sessions, Attorney General, U.S. Dep't of Justice & Steve Mnuchin, Secretary, U.S. Dep't of the Treasury 1–2 (Apr. 3, 2017), https://s3.amazonaws.com/big.assets.huffingtonpost.com/LtrfromSessions.pdf.

101. Walker, Hickenlooper, Brown, & Inslee, *supra* note 100, at 1.

conclude by expressing continued commitment "to implementing the will of our citizens" and working with their legislatures to put in place "robust [cannabis] regulatory structures" that prioritize public health and safety, reduction of inequitable incarceration, and economic expansion.[102]

Attorney General Sessions responded to the Governor of the state of Washington by quoting the language from Cole II under which the DOJ expresses the primacy of its authority to investigate and prosecute cannabis crimes under the CSA, even where a Cole II Priority is not triggered, but an important federal interest is implicated.[103] Sessions also cited a study conducted by the Northwest High Intensity Drug Trafficking Area (HIDTA) concluding cannabis activity in the State of Washington was under-regulated and lacked adequate oversight.[104] Sessions concluded that in order to engage in productive dialogue on the issue of cannabis legalization, Washington should advise the DOJ of: 1) its plan to address the problems raised in the HIDTA report; and 2) its "efforts to ensure that all marijuana activity is compliant with state marijuana laws" and the Cole II Priorities.[105]

The Attorney General's new war on drugs gained further traction when Sessions overturned key Obama-era criminal law enforcement policies implicating cannabis users and growers. On May 10, 2017, Sessions rescinded his predecessor, Eric Holder's criminal-charging policies that instructed DOJ prosecutors to avoid charging low-level offenses, like small drug offenses, which would trigger harsh mandatory minimum sentences.[106] Sessions' new policy requires prosecutors to charge defendants with the most serious and readily provable offense.[107] Sessions also issued an order expanding the use of asset forfeiture, a policy abolished in the Obama era that gives law enforcement broad authority to permanently seize money

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102. *Id.*

103. Sessions, *supra* note 100, at 1; Cole II, *supra* note 4, at 3–4.

104. Sessions, *supra* note 100, at 1–2; NW. HIGH INTENSITY DRUG TRAFFICKING AREA, WASHINGTON STATE MARIJUANA IMPACT REPORT 14 (2016), http://www.riag.ri.gov/documents/NWHIDTAMarijuanaImpactReportVolume1.pdf.

105. Sessions, *supra* note 92, at 2.

106. *Compare* Memorandum from Jeffery B. Sessions, Attorney General, U.S. Dep't of Justice, to all Federal Prosecutors (May 10, 2017) (re: "Department Charging and Sentencing Policy"), https://www.justice.gov/opa/press-release/file/965896/download, *with* Memorandum from Eric H. Holder, Attorney General, U.S. Dep't of Justice, to all Federal Prosecutors (May 19, 2010), (re: "Department Policy on Charging and Sentencing"), https://www.fd.org/sites/default/files/criminal_defense_topics/essential_topics/sentencing_resources/clemency/holdermemo.pdf; Memorandum from Eric H. Holder, Attorney General, U.S. Dep't of Justice, to the U.S. Attorneys and Assistant Attorney General for the Criminal Div. (Aug. 12, 2010), (re: "Department Policy on Charging Mandatory Minimum Sentences and Recidivist Enhancements in Certain Drug Cases"), https://www.fd.org/sites/default/files/criminal_defense_topics/essential_topics/sentencing_resources/useful_reports/august-12-2013-holder-memo-on-charging-mandatory-minimum-sentences.pdf; Memorandum from Eric H. Holder, Attorney General, U.S. Dep't of Justice, to Dep't of Justice Attorneys (Sept. 24, 2014) (re: "Guidance regarding § 851 Enhancements In Plea Negotiations"), https://www.justice.gov/oip/foia-library/ag_guidance_on_section_851_enhancements_in_plea_negotiations/download [collectively, the "Holder Memos"].

107. Sessions, *supra* note 106.

and property from individuals, even if they have not been charged with a crime.[108] "[A]sset forfeiture," stated Sessions in a press release accompanying the new policy, "is a key tool that helps law enforcement defund organized crime, take back ill-gotten gains, and prevent new crimes from being committed, and it weakens the criminals and cartels."[109]

Finally, on January 4, 2018 in memorandum titled "Marijuana Enforcement" (the "Sessions Memo"),[110] Attorney General Sessions announced a "return to the rule of law" in cannabis enforcement in a society where the Obama-era policies had undermined local, state, tribal, and federal law enforcement partners' ability to enforce the laws of the United States.[111] The Sessions Memo begins by observing that Congress, through the CSA, has determined "that marijuana is a dangerous drug and that marijuana activity is a serious crime."[112] It directs that "[i]n deciding which marijuana activities to prosecute under these laws with the Department's finite resources should follow the well-established principles that govern all federal prosecutions. Attorney General Benjamin Civiletti originally set forth these principles in 1980, and they have been refined over time, as reflected in chapter 9-27.000 of the U.S. Attorneys' Manual." As a result, federal prosecutors in deciding which cases to prosecute must "weigh all relevant considerations" with focus directed at the following factors:

- The seriousness of the crime
- The deterrent effect of criminal prosecutions
- The cumulative impact of the particular crimes on the community[113]

Based on this guidance, the Sessions Memo concludes that all "previous nationwide guidance specific to marijuana enforcement is unnecessary and is rescinded[, i.e., the Ogden Memo, Cole Trilogy, and Wilkinson Memo (addressed further in Part II(A))], effective immediately."[114]

The issuance of the Sessions Memo was met by bi-partisan criticism. The list of state and federal public officials that came out publicly in the first twenty-four hours against Attorney General Sessions' new cannabis enforcement policy includes: U.S. Senators Cory Gardener, R-Colorado, and Lisa Murkowski, R-

108. *Compare* Attorney General Order No. 3946-2017, *supra* note 9, *and* Deborah Connor, U.S. Dep't of Justice Criminal Div., Policy Directive 17-1 (July 19, 2017), https://www.justice.gov/file/982616/download, *with* Attorney General Order, Prohibition On Certain Federal Adoptions Of Seizures By State And Local Law Enforcement Agencies (Jan. 16, 2015), https://www.justice.gov/file/318146/download.

109. Press Release, U.S. Dep't of Justice, Office of Pub. Affairs, Attorney General Sessions Issues Policy and Guidelines on Federal Adoptions of Assets Seized by State or Local Law Enforcement (July 19, 2017), https://www.justice.gov/opa/pr/attorney-general-sessions-issues-policy-and-guidelines-federal-adoptions-assets-seized-state.

110. Sessions Memo, *supra* note 10, at 1.

111. Press Release, U.S. Dep't of Justice, Office of Pub. Affairs, Justice Department Issues Memo On Marijuana Enforcement (Jan. 4, 2018), https://www.justice.gov/opa/pr/justice-department-issues-memo-marijuana-enforcement.

112. Sessions Memo, *supra* note 10, at 1.

113. *Id.*

114. *Id.*

Alaska; U.S. Representatives Earl Blumenauer, D-Oregon, and Dina Titus, D-Nevada; and Governors Kate Brown, D-Oregon, Jay Inslee, D-Washington, John Hickenlooper, D-Colorado, Charlie Baker, D-Massachusetts, Phil Scott, D-Vermont, and Lt. Governor Gavin Newsom, D-California.[115] In no uncertain terms, these officials—all of whom reign from legal cannabis states—promised to fight Attorney General Sessions' new policy, including by holding up confirmation of DOJ nominees.[116] Additionally, U.S. Attorneys from the Western District of Washington, District of Colorado, and District of Maine forecast no significant shifts in their offices' cannabis enforcement strategies under the new Sessions policy.[117] However, while there is some indication that cannabis enforcement strategy on the ground may not see a drastic shift in priorities, it is also worth noting that of the 93 U.S. Attorney positions across the United States, President Trump has nominated 58 individuals to fill these positions—46 of whom have been confirmed.[118] As a result, it is probable that some federal prosecutors, like Trump-appointee for U.S. Attorney for the District of Massachusetts Andrew Lelling, will "aggressively" pursue cannabis crimes—even in states like Massachusetts, where the plant has been legalized.[119]

Although presidential administrations and policies have changed concerning cannabis enforcement, the law has not—leaving valid much of the Cole doctrine as guidance to states (and Indian tribes) establishing or with established cannabis programs on their lands. First, because the CSA still contains no provision preempting state or tribal laws legalizing recreational and medical cannabis, this means that even under the Sessions policy state laws and tribal ordinances legalizing cannabis remain valid.

Second, Cole doctrine instructs that unless one or more of the stated priorities are triggered in a given case (e.g., curbing cartel and gang activity, preventing flow of cannabis into states where the plant remains illegal, or preventing distribution to minors), federal intervention is generally unwarranted. This policy is not inconsistent with Sessions' position, which directs federal prosecutors to evaluate the "seriousness" of the crime, "the deterrent effect" of prosecution, and the "cumulative impact of the particular crimes on the community" in determining whether to prosecute a given cannabis case. Cole doctrine simply sets out in practical terms for interests involved in cannabis the same prosecutorial model of pursuing serious cannabis crimes that detrimentally affect the community and would serve a deterrent that now guides Sessions-DOJ cannabis enforcement.

Third, the federal budget still contains the provision precluding federally appropriated funds from being used to prosecute and enforce the CSA against

115. Marijuana Business Daily Staff, *supra* note 13.

116. *Id.*

117. *Id.*

118. Matt Zapotosky, Sari Horwitz, & Joel Achenbach, *Use of Legalized Marijuana Threatened As Sessions Rescinds Obama-era Directive That Eased Federal Enforcement*, WASH. POST (Jan. 4, 2018), https://www.washingtonpost.com/world/national-security/sessions-is-rescinding-obama-era-directive-for-feds-to-back-off-marijuana-enforcement-in-states-with-legal-pot/2018/01/04/b1a42746-f157-11e7-b3bf-ab90a706e175_story.html?utm_term=.16b6b04f8626.

119. Marijuana Business Daily Staff, *supra* note 13.

cannabis enterprises in compliance with state law. This means that funding for a crusade against state (and tribal) cannabis is significantly hindered as a financial matter—without financing to fund large-scale cannabis raids and prosecutions in legal cannabis states, such enforcement is unlikely to occur. This also means that enforcement actions will likely be strategic and aimed at making examples of cannabis enterprises either in direct violation of state and federal cannabis laws or enterprises pushing the boundaries in the many grey areas of legal state (and tribal) cannabis.

Finally, early signs from U.S. Attorneys' offices located in states with established cannabis programs (e.g. in Washington, Colorado, and Maine) indicates that Cole doctrine is ingrained as in their prosecutorial philosophies as smart on crime, and that they will continue to exercise the same discretion and consider the same factors under the Trump administration and Sessions DOJ as was exercised and as were considered under the Obama administration and Cole doctrine. In practice, this analysis counsels that compliance with Cole doctrine remains a wise waypoint for calibrating how to structure state (and tribal) recreational and medical cannabis programs in the Trump-era.[120]

Having crossed a legal grid ranging from strict prohibition of controlled substances under international and federal law to state cannabis legalization and shifting priorities in DOJ CSA enforcement in the states, this article shifts to the topic of cannabis law in Indian County.

II. Indian Cannabis Law: Issues and Approaches

Although the federal government's policy on cannabis enforcement is a major factor to be weighed by tribes in establishing cannabis programs on their tribal lands, the issue of cannabis governance in Indian Country is also deeply entangled with the laws of the states in which cannabis tribes' lands are located. Part II proceeds by considering the topic of cannabis Indian law, covering the concrete legal issues driving state-tribal cannabis relations, including cases of tribal cannabis enterprises that have been subject to law enforcement actions.

A. Federal Guidance on Cannabis in Indian Country

Federal guidance to Indian Nations in the area of cannabis on tribal lands is largely undeveloped, but during the Obama era tracked the federal-state approach outlined in Part I(B). In the Trump-era, however, the path is uncharted. But for the reasons discussed *supra* in Part I(B), Indian tribes (as well as states) are well-advised to continue to administer or establish cannabis programs in line with the Cole doctrine and Wilkinson Memo.

On October 28, 2014, DOJ Deputy Attorney General Monty Wilkinson issued a policy statement concerning cannabis enforcement in Indian Country, the

120. *See generally* Paul Waldman, *Why Sessions's Crackdown Is Going To Make Legalization More Likely*, N.Y. TIMES (Jan. 5, 2018), https://www.washingtonpost.com/blogs/plum-line/wp/2018/01/05/why-jeff-sessions-marijuana-crackdown-is-going-to-make-legalization-more-likely/?utm_term=.88eb6703a72b (discussing potential implications of the Sessions Memo, including that states in the interest of exercising sovereignty may now be more likely to legalize cannabis and fight federal attempts to disrupt cannabis markets that are in compliance with state law).

Wilkinson Memo, in light of the continued state trend of cannabis legalization and requests from tribes for guidance on CSA enforcement on tribal lands.[121] The Wilkinson Memo recognized that "Indian Country includes numerous reservations and tribal lands with diverse sovereign governments, many of which traverse state borders and federal districts" with, at times, divergent public safety concerns.[122] As a result, United States Attorneys, in determining whether to enforce federal cannabis laws in Indian Country must consider each case on a case-by-case basis guided by the Cole II Priorities.[123] The Wilkinson Memo finally required the United States government to consult with Indian tribes on a government-to-government basis in evaluating whether there is a basis to enforce federal cannabis laws in Indian Country.[124]

Although the Wilkinson Memo stood for the proposition that the federal government would take the same hands-off position toward cannabis in Indian Country as it does for the states, the policy statement was met with mixed reactions in Indian communities.[125] In particular, some tribes believed the growing of cannabis on their lands would exacerbate substance abuse and crime on the reservations, while others believed it could become a major economic driver in Indian Country.[126]

But economic and cultural impacts of cannabis on tribal lands aside, the issue of cannabis in Indian Country is also fraught with challenging legal issues. These issues, examined next in this Part, are situated at the intersection of state police and taxing power, tribal sovereignty, and intergovernmental dispute resolution.

B. State Law & Cannabis in Indian Country: Criminal Jurisdiction, State Taxation, Tribal Sovereign Immunity, & Dispute Resolution

Even in a legal and political environment where the federal government takes a hands-off approach to CSA enforcement in Indian Country pursuant to the Wilkinson Memo, the question remains: how will state governments with Indian lands traversing their territories react to tribes' establishment of medical or recreational cannabis enterprises on tribal lands? Any accurate answer to this question must approach the inquiry on a state-by-state and tribe-by-tribe basis. However, across the board, the issues of state criminal jurisdiction, tribal sovereign immunity, state taxation, [127] and dispute resolution constitute the central

121. Wilkinson Memo, *supra* note 5, at 1–2.

122. *Id.* at 2.

123. *Id.*

124. *Id.* at 2–3.

125. *See* Jeff Barnard & Gosia Wozniacka, *DOJ Ruling: Indian Tribes Can Legalize Pot on Their Lands*, CANNABIST (Dec. 11, 2014, 3:46 PM), http://www.thecannabist.co/2014/12/11/doj-ruling-indian-tribes-states-can-decide-whether-legalize-pot/25119/.

126. *Id.*

127. *See* Kyle Montour, *Where There's Smoke, There's Fire: The State-Tribal Quandary of Tribal Marijuana*, 4 AM. INDIAN L.J. 222 (2016) (highlighting the issues arising in PL 280 and non-PL 280 states involving criminal jurisdiction, tribal sovereign immunity, and state taxation in Indian Country); *see also* Melinda Smith, *Native Americans and the Legalization of Marijuana: Can the Tribes Turn Another Addiction into Affluence?*, 39 AM. INDIAN L. REV. 507 (2015).

considerations of any tribe considering the prospect of cannabis on tribal lands or state considering whether to enforce its cannabis laws on tribal lands. For purposes of the analysis that follows, discussion of state criminal jurisdiction and tribal immunity will be limited to the issues likely to arise in non-PL 280 states, like New Mexico.[128]

1. State Criminal Jurisdiction in Indian Country in Non-PL 280 States

The first issue pertinent to state-tribal relations and cooperation surrounding cannabis is the scope of state criminal jurisdiction in Indian Country. In non-PL 280 jurisdictions, states generally only have authority to prosecute crimes involving only non-Indians that occurred in Indian Country; and this rule has been embraced by the New Mexico Supreme Court.[129] As a result, it is unlikely that state courts would be able to obtain criminal jurisdiction over alleged violations of state cannabis law involving only Indian tribal members' conduct on tribal lands. However, this analysis leaves open the question of cases involving non-Indians selling or purchasing and possessing cannabis originating from a tribal cannabis enterprise. *United States v. Langford*,[130] *People v. Collins*,[131] and *California v. Cabazon Band of Mission Indians*[132] provide guidance applicable to tribes in non-PL 280 states like New Mexico.

In *Langford*, a non-Indian was convicted in Oklahoma federal district court of the crime of watching a cockfight held on Kiowa tribal lands in violation of state and federal law.[133] On appeal of the non-Indian's conviction, the court determined that "states possess exclusive criminal jurisdiction over [victimless] crimes occurring in Indian Country if there is neither an Indian victim nor an Indian

128. Although federal or tribal courts generally have criminal jurisdiction over Indians in Indian Country, an exception to this rule is Public Law 83-280 (PL 280), which conferred criminal jurisdiction on six states (Alaska, California, Minnesota, Nebraska, Oregon, and Wisconsin) over all or a portion of Indian country within them. *See, e.g.*, General Crimes Act, 18 U.S.C. § 1152 (2012); Major Crimes Act, 18 U.S.C. § 1153 (2012); *see also* Pub. L. No. 83-280, 67 Stat. 588 (1953) (codified as amended at 18 U.S.C. § 1162 (2012)); Pub. L. No. 85-615, § 2, 72 Stat. 545 (1958) (amending 1953 Act to add Alaska as falling under the law); CONFERENCE OF WESTERN ATTORNEYS GENERAL, AMERICAN INDIAN LAW DESKBOOK §§ 4:2, :8 (2016) ("Tribal courts have jurisdiction over crimes committed by an Indian against an Indian otherwise cognizable under the General Crimes Act; whether tribal courts have jurisdiction concurrent with the United States over conduct constituting a major crime is undetermined.").

129. Solem v. Bartlett, 465 U.S. 463, 465 n.2 (1984); *see also* State v. Harrison, 2010-NMSC-038, ¶ 13, 148 N.M. 500, 238 P.3d 869 ("[A]s a general principle, a state does not have jurisdiction over crimes committed by an Indian in Indian country").

130. United States v. Langford, 641 F.3d 1195 (10th Cir. 2011) (applicable to non-Indians who sell cannabis as a tribal enterprise).

131. People v. Collins, 826 N.W.2d 175 (Mich. App. 2012) (applicable to non-Indians who purchase/possess cannabis in Indian Country as well as controlled substance possession by non-Indian in Indian Country); *see also* Nevada v. Hicks, 533 U.S. 353, 374 (2001).

132. California v. Cabazon Band of Mission Indians, 480 U.S. 202 (1987); *accord* Montour, *supra* note 127, at 230 n.32 (arguing that, although limited by *Michigan v. Bay Mills Indian Community*, 134 S.Ct. 2024 (2014), the *Cabazon* criminal vs. civil-regulatory law test for whether a state may police Indian conduct in Indian Country is still intact).

133. *Langford*, 548 F.3d at 1196.

perpetrator" involved.[134] As a result, the court held that because the non-Indian was charged with having perpetrated the victimless Oklahoma state law crime of cock-fight spectating, the Oklahoma state courts had jurisdiction over the defendant's case.[135] Similarly, in *Collins*, two non-Indians were charged, under state law, with delivery and possession of controlled substances, including cannabis, while inside a casino on the land of the Hannahville Indian Community.[136] The court determined that the cannabis crimes implicated in the case were subject to the jurisdiction of the state courts of Michigan because they fell into the category of victimless crimes committed by non-Indian perpetrators.[137]

In *Cabazon*, the Cabazon and Morongo Bands of Mission Indians who occupy reservations in Riverside County, California, pursuant to federal approval, operated bingo games and a card club on their lands.[138] The state of California and County of Riverside pursued enforcement of a state criminal law and county ordinance that concerned the terms under which Indian gaming could occur.[139] The bands responded by suing the Riverside County in federal court seeking a declaratory judgment that the county had no authority to apply its ordinance on their lands; and the state was added as a party through intervention.[140] The court fashioned a rule providing that if state law generally classifies the conduct at issue as "civil/regulatory" as opposed to "criminal/prohibitory" (i.e., conduct that violates public policy of the state), states may not enforce such laws on tribal lands.[141] Applying this rule, the court reasoned that because the state did not prohibit all forms of gambling and itself operated gaming enterprises under California law that the state gaming laws at issue were civil/regulatory.[142] Therefore, because the state gaming laws at issue were civil/regulatory, the court held that the laws could not be enforced by state and county on the bands' lands.[143]

As a result, in a non-PL 280 state like New Mexico, the general principle from the case law concerning state criminal and civil/regulatory jurisdiction on tribal land is that the sale by or to or possession of cannabis (i.e., victimless crimes) by non-Indians, absent an agreement between the state and tribes providing otherwise, would likely render those non-Indians vulnerable to state court criminal jurisdiction if charged with violations of state cannabis laws under *Langford* and *Collins*. Additionally, and consistent with *Langford* and *Collins*, the provision of cannabis grow consultation services by non-Indians to tribes concerning establishing cannabis grows on tribal lands will also leave those consultants vulnerable to state criminal jurisdiction in states where the plant remains illegal in

134. *Id.* at 1197; *see also Harrison*, 2010-NMSC-038, ¶ 14.
135. *Langford*, 548 F.3d at 1200.
136. *Collins*, 826 N.W.2d at 176.
137. *Id.* at 181.
138. *Cabazon Band of Mission Indians*, 480 U.S. at 204–05.
139. *Id.* at 205–06.
140. *Id.* at 206.
141. *Id.* at 208.
142. *Id.* at 210–11.
143. *See id.* at 212.

both the medical and recreational domains.[144] However, under *Cabazon*, assuming tribes in a state like New Mexico—which already has a state medical cannabis civil regulatory system—only establish medical cannabis programs under which tribal members serve as caregivers to tribe member patients, it is unlikely that the state could enforce its criminal cannabis laws in Indian Country because medical cannabis is a civil/regulatory matter under the state's law.

2. State Taxation of Indian Tribal Cannabis Enterprises

The second issue universal to state-tribal cannabis relations is whether states may levy direct taxes on tribal members and non-Indians for their transactions with tribal cannabis enterprises or may assess fees—*de facto* taxes—from tribal cannabis enterprises to operate (e.g., in a manner reminiscent of the Marihuana Tax Act of 1937 discussed *supra* in Part I(A)). *Washington v. Confederated Tribes of Colville Indian Reservation*[145] provides the clearest guidance on the validity of state taxation of tribal cannabis, standing for the proposition that states are permitted to levy taxes in Indian Country when state interests are implicated outside of a tribe's lands.[146]

In *Colville*, tribes in the state of Washington sold cigarettes at tribal smokeshops under the authority of tribal ordinances.[147] Tribal members as well as non-Indians were permitted to purchase cigarettes from these tribal smokeshops.[148] However, the tribes were not collecting a state cigarette tax from non-tribal member cigarette purchasers as required under Washington law.[149] So the state sought to enforce its tax by seizing, as contraband, cigarettes being transported to tribal lands from outside wholesalers.[150] The tribes sued the state in federal court for a declaratory judgment that the state's cigarette tax could not be levied on tribal lands and to enjoin the state from seizing cigarettes being transported to the tribes.[151] The tribes' theory of the case relied, *inter alia*, on the argument that the state tax and cigarette seizures contravened the tribe's right to govern itself.[152] The court determined that Washington had the authority to require the tribes to collect a state cigarette tax from non-Indian purchasers.[153] The court reasoned that the state's interest in enforcing its lawful cigarette tax on non-Indian cigarette purchasers by seizing cigarettes being transported to tribal lands was sufficient where the tribes

144. Jonathan Ellis, *Consultant Found Not Guilty in Flandreau Marijuana Trial*, ARGUS LEADER (May 24, 2017), http://www.argusleader.com/story/news/crime/2017/05/24/eric-hagen-found-not-guilty-flandreau-marijuana-trial/342971001/ (Attorney General of South Dakota Marty Jackley reasoning that the state had jurisdiction to indict and try non-Indian cannabis grow consultants for their provision of cannabis grow consultation services to the Flandreau Santee Sioux tribe on grounds that states have "jurisdiction to prosecute victimless crimes committed by non-Indians.").

145. Washington v. Confederated Tribes of Colville Indian Reservation, 447 U.S. 134 (1980).

146. *See* Montour, *supra* note 127, at 238–39.

147. *Colville*, 447 U.S. at 144.

148. *See id.* at 134.

149. *See id.* at 144–45.

150. *Id.* at 142.

151. *Id.* at 139.

152. *Id.* at 154.

153. *Id.* at 161.

refused to collect and remit that revenue to the state.[154] As a result, the court held that the principle of tribal self-government did not authorize the tribes to ignore state taxes on the sale of goods to non-Indians.[155]

Thus, absent an agreement between a state and tribes providing otherwise, a state may be able to regulate the sale of recreational cannabis on tribal land through taxing cannabis transactions involving non-Indians under *Colville*'s "sufficient state interest" test and proper legislation levying a lawful state cannabis sales tax on non-Indians. However, tribal medical (and likely recreational) cannabis grown, sold, and purchased by tribal members is unlikely to be subject to taxes levied by states, even under *Colville*, because where only tribal members are involved in a cannabis transaction with a tribal cannabis enterprise, the argument fails that a state would have a sufficient interest in taxing that transaction. And in the limited context of tribal medical cannabis programs established under the authority of state law and regulations, states may be able to levy *de facto* taxes on tribal cannabis enterprises akin to the Marihuana Tax Act of 1937. *De facto* taxes are identifiable in statutory and regulatory forms as: fees associated with the acquisition of a medical cannabis card, licensure of cannabis caregivers' grow operations, and cannabis grow and dispensary operational compliance costs or fees. To avoid *de facto* taxation, tribes should, as discussed in detail *infra* Part IV(A), either compact around establishing tribal medical cannabis programs under the authority of state medical cannabis law and programs or include provisions in a state-tribal medical cannabis compact exempting or requiring a timely refund of such fees to tribal governments.

3. Tribal Sovereign Immunity

The third issue directly bearing upon state-tribal relations and cannabis is the doctrine of tribal sovereign immunity. Because Indian tribes are domestic dependent nations that exercise sovereign authority over their territories, Indian tribes possess immunity from suit to the same extent enjoyed by all other sovereign powers.[156] This means tribal governments are immune from suit unless: a) the tribe expressly and clearly waives immunity; b) Congress has unequivocally abrogated tribal sovereign immunity; or c) the suit is brought against a tribe by the federal government.[157] *Michigan v. Bay Mills Indian Community* is a principal case on the issue of tribal sovereign immunity.[158]

In *Bay Mills*, the State of Michigan entered into a compact with a tribe pursuant to the Indian Gaming Reform Act (IGRA), which authorized the tribe to conduct Class III gaming, i.e., to open a casino on tribal lands.[159] The compact provided that nothing in the agreement was to be deemed a waiver of tribal or state

154. *Id.* at 161–62.

155. *See id.* at 155.

156. Puerto Rico v. Sanchez Valle, 136 S.Ct. 1863, 1872 (2016); Santa Clara Pueblo v. Martinez, 436 U.S. 49, 58 (1978).

157. Okla. Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Okla., 498 U.S. 505, 509 (1991); E.E.O.C. v. Karuk Tribe Hous. Auth., 260 F.3d 1071, 1075 (9th Cir. 2001); United States v. Velarde, 40 F. Supp. 2d 1314, 1315 (D.N.M. 1999).

158. Michigan v. Bay Mills Indian Cmty., 134 S.Ct. 2024 (2014).

159. *Id.* at 2026.

sovereign immunity; and the tribe prosperously operated a casino established under this compact on its reservation.[160] The tribe then established another Class III gaming operation off of tribal lands, and the state sued to enjoin this second gaming enterprise as a violation of IGRA.[161] The court determined that the provision of the IGRA authorizing the state to sue the tribe to enjoin Class III gaming activity located on Indian lands would abrogate the tribe's sovereign immunity in that narrow circumstance.[162] However, the court held that the same authority did not abrogate the tribe's sovereign immunity in the case before it.[163] This was because the state-tribal compact at issue did not contain a general waiver of the tribe's sovereign immunity permitting it to be sued for gaming operations off tribal lands and IGRA did not extend to suits seeking to enjoin operation of a casino operated outside of tribal lands.[164]

Additionally, as states, including New Mexico and tribal nations within state boundaries, begin to navigate resolution of disputes in the domain of medical or recreational cannabis in Indian Country, the sovereign status of tribal enterprises, officials, and employees should be considered. As a general matter, tribal officials and members employed by a tribe acting in the scope of their delegated tribal duties are afforded immunity from suit.[165] This is based on the law's recognition of tribal corporations as arms of tribal governments, which enjoy sovereign immunity.[166] However, tribal sovereign immunity is unlikely to extend to business enterprises on tribal lands owned, even in part, by non-Indians.[167] Additionally, the doctrine of *Ex parte Young*[168] extends to tribal officials, allowing suits against them for declaratory and injunctive relief for violations of law occurring in their tribal official capacity.[169]

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160. *Id.* at 2029.

161. *Id.* at 2026, 2029.

162. *Id.* at 2032.

163. *Id.*

164. *Id.* at 2032, 2035.

165. Pistor v. Garcia, 791 F.3d 1104, 1112 (9th Cir. 2015); *see also* Burrell v. Armijo, 603 F.3d 825, 832–35 (10th Cir. 2010) (holding tribal Governor was entitled to official immunity from suit related to his issuance of a "no-[alfalfa]baling directive" to farmer lessees because the action was within the Governor's official authority); Bassett v. Mashantucket Pequot Tribe., 204 F.3d 343, 359 (2d Cir. 2000) (citing *Doe v. Phillips*, 81 F.3d 1204, 1210 (2d Cir. 1996), for the proposition that a government official sued in their official capacity loses official immunity only when they act manifestly or palpably beyond their authority).

166. Cook v. AVI Casino Enters., Inc., 548 F.3d 718, 725 (9th Cir. 2008) ("[T]ribal corporations acting as an arm of the tribe enjoy the same sovereign immunity granted to a tribe itself.")

167. *Id.* at 726 (finding it significant in determining the tribe enjoyed sovereign immunity from suit that the tribal business was wholly owned and operated by the tribe); Allen v. Gold Country Casino, 464 F.3d 1044, 1046–47 (9th Cir. 2006) (same).

168. *See Ex parte* Young, 209 U.S. 123 (1908). *Ex parte* Young has evolved to stand for the proposition that plaintiffs may seek declaratory and injunctive relief from state officials where the complaint alleges an ongoing violation of federal law and seeks only prospective relief. *See* 17A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 4232 (3d. ed. 2017).

169. *E.g.*, Norton v. Ute Indian Tribe of the Uintah & Ouray Reservation, 862 F.3d 1236, 1251 (10th Cir. 2017).

As a result, the case law surrounding tribal sovereign immunity instructs that unless states and tribes compact around tribal sovereign immunity, i.e., waive sovereign immunity in the arena of disputes concerning cannabis on tribal lands, neither state nor tribal governments are likely to be subject to civil suits brought by the other. However, tribal officials may be vulnerable to suits against them in their official capacity brought under the doctrine of *Ex parte Young* or for conduct "manifestly or palpably" beyond an official's tribal authority. And a tribal cannabis enterprise may lose its privilege of sovereign immunity where the enterprise is less than wholly owned by the tribe.

4. State-Tribal Dispute Resolution in the Courts

The final Indian cannabis law issue concerns the law applicable to the resolution of disputes between states and tribes that make it into the courts. At least one state trial court case, *Hammer v. Today's Health Care II*, has determined that contracts concerning the cultivation of cannabis are unenforceable in the courts.[170]

In *Hammer*, a lender entered into loan agreements with a Nevada-based retail cannabis sales and cultivation center (THC) to grow cannabis in Colorado where medical cannabis was legal.[171] THC defaulted on the loans by failing to timely pay the interest pursuant to the terms of the loan agreements.[172] As a result, the lender sued to enforce the loan agreements.[173] The Arizona state trial court determined that the loan agreements were unenforceable and void as a violation of public policy.[174] This was chiefly because cannabis is federally illegal, and courts cannot enforce contracts with illegal purposes, such as a cannabis cultivation agreement.[175]

Even though *Hammer* stands for the proposition that agreements concerning the cultivation of cannabis will be ruled void, it is unlikely that other state trial courts will adopt the *Hammer* approach. First, *Hammer* is not binding in any jurisdiction based on its status as a ruling of an Arizona state trial court. Second, *Hammer* is unlikely to be persuasive in subsequent cases because the court unnecessarily relied on federal law to void the loan agreements in a contract dispute presumably executed in compliance and in reliance on Arizona and Colorado medical cannabis law.[176] Moreover, states, including New Mexico, generally apply the rule that the validity of a contract must be determined by the law of the state in which it was made. Thus, the federal CSA is unlikely to be applied to void cannabis contracts and compacts where such instruments comply

170. Hammer v. Today's Health Care II, Nos. CV 2011-051310, CV 2011-051311 (Ariz. Super. Ct. Apr. 17, 2012), 2012 WL 12874349.

171. *Id.* at 1.

172. *Id.*

173. *See id.*

174. *Id.* at 2 (emphasis added) (citing Arizona state law cases for the proposition that "[a]n agreement is unenforceable if the acts to be performed would be *illegal* or would violate public policy").

175. *Id.* ("The explicitly stated purpose of these loan agreements was to finance the sale and distribution of marijuana. This was in clear violation of the laws of the United States, [i.e., the CSA]").

176. *See id.* at 1 ("The retail medical marijuana sales and grow center [at issue] was located in Colorado. Colorado, like Arizona, has adopted a scheme by which patients may obtain amounts of marijuana for medicinal purposes.")

with the cannabis laws in the state in which they are executed—even in a federal court.[177]

As a result, where *Hammer* demonstrates that a state trial court may void cannabis agreements on public policy grounds, states and tribes compacting for the establishment of cannabis enterprises in Indian Country will be wise to negotiate for a mutually beneficial dispute resolution process. Such a process will focus on alternatives to litigation and compliance with the Wilkinson Memo.

Having navigated the complexity of criminal jurisdiction, state taxation on tribal lands, sovereign immunity, and state-tribal dispute resolution facing tribes that consider entering into the field of cannabis, the focus of this Part shifts to illustration of these issues through specific instances of Indian cannabis cases and controversies.

C. Tribal Cannabis Since the Wilkinson Memo: Cases of Success and Failure

Since the issuance of the Wilkinson Memo, only a minority of the federally-recognized tribes are reported to be considering entry into the cannabis industry in one form or another.[178] However, this group of tribes has been active in their initiatives and exploration of cannabis, which have ranged from the creation of the National Indian Cannabis Coalition[179] to NCAI's adoption of the "Marijuana and Hemp Policy in Indian Country" joint resolution, which takes the position that Indian tribes' inherent right as sovereign governments empowers them to set local laws addressing cannabis, including medical and industrial uses according to the public health and economic needs of their unique communities.[180]

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177. Flemma v. Halliburton Energy Servs., Inc., 2013-NMSC-022, ¶ 14, 303 P.3d 814 ("As a general proposition of law, it is settled that the validity of a contract must be determined by the law of the state in which it was made") (quoting Boggs v. Anderson, 72 N.M. 136, 140, 381 P.2d 419, 422 (1963)); Colorado Interstate Corp. v. CIT Grp./Equip. Fin., Inc., 993 F.2d 743, 749 (10th Cir. 1993) (stating that, where sophisticated parties enter into an agreement setting forth their rights and obligations, the terms of the agreement should control unless the agreement would otherwise be void under state law).

178. Gene Johnson, *Indian Tribes Converge in Washington State to Discuss Marijuana Legalization*, CANNABIST (Feb. 27, 2015, 1:57 PM), http://www.thecannabist.co/2015/02/27/indian-tribes-marijuana-legalization-washington-state/30622/ (75 of 566 federally recognized tribes were represented at the conference; some tribes, particularly smaller tribes, were interested in the economic viability of cannabis with an eye toward self-sustainability; other tribes remained reluctant, especially to the proposition of getting ahead of state law).

179. Ricardo Baca, *Exclusive: National Indian Cannabis Coalition Aims to Bring Tribes Together*, CANNABIST (Mar. 9, 2015), http://www.thecannabist.co/2015/03/09/national-indian-cannabis-coalition/31358/ (discussing the National Indian Cannabis Collation's creation and interview with physician and Mohawk tribe member, Allyson Doctor).

180. Nat'l Congress of Am. Indians Res. SD-15-046, Gen. Assemb. (2015). See Troy A. Eid, *Opinion: Indian Youth Entangled in Colorado's Marijuana Experiment*, CANNABIST (July 28, 2014, 7:59 AM), http://www.thecannabist.co/2014/07/28/american-indian-colorado-marijuana-experiment/17016/, for an argument that marijuana adversely affects other states and Indian tribes through "diversion" of tribal cannabis into states where it is still illegal and that Indian children are disproportionately affected by diverted marijuana because Indian country contains some of the poorest and crime-prone places in the country.

Despite some tribes' strong position in support of cannabis in Indian Country, the earliest rollouts of tribal cannabis enterprises on tribal lands were sloppy at best and rose to the level of Cole II Priority violations at their worst. For example, in July 2015, federal agents raided the Alturas Indian Rancheria and Pit River tribes in California on information that grows were occurring on the reservations exceeding California medical marijuana standards.[181] The raid resulted in the seizure of more than 12,000 cannabis plants[182] (clearly implicating the Wilkinson policy of incentivizing establishment of strong tribal regulatory regimes and triggering the priority of enforcing the CSA in cases of tribal cannabis enterprises serving as pretext for illegal activity (e.g., like growing more plants than allowed under state law)). Similarly, on September 22, 2015, in Mendocino County, California Police seized 400 cannabis plants from the Pinoleville Pomo Indian Nation being grown on tribal lands after the tribe made public statements that it intended to profit from its cannabis cultivation, which violated California state law.[183]

In South Dakota, the Flandreau Santee Sioux Tribe was able to avoid a state or federal raid of its summer 2015 cannabis grow operation on its tribal lands by voluntarily burning its crop prior to enforcement;[184] however, two non-Indian cannabis growing consultants from the Colorado-based Monarch America firm (Eric Hagen and Jonathan Hunt), who were hired by the tribe to assist it in constructing its grow, were charged with multiple counts of felony possession, attempt, and conspiracy to possess large quantities of cannabis under South Dakota state law.[185]

At Hagen's trial, the jury was instructed to determine two issues: 1) whether Hagen possessed cannabis or intended to possess cannabis; and 2) whether he engaged in a conspiracy to possess cannabis.[186] In its case-in-chief, the state argued that because Hagen's consultation services put him, at times, in control of cannabis, that his actions met the elements of possession.[187] The prosecutor for the state compared the state's theory of possession to a teenager driving a car owned by

181. *Feds Seize Marijuana from Indian Tribal Lands in California*, CANNABIST (July 8, 2015, 6:27 PM), http://www.thecannabist.co/2015/07/08/california-indian-tribes-marijuana-federal-seizure/37695/.

182. *Id.*

183. *California Tribe's Marijuana Operation Raided in Mendocino County*, CANNABIST, (Sept. 23, 2015, 2:42 PM), http://www.thecannabist.co/2015/09/23/california-tribal-marijuana-raid-mendocino-county/41339/.

184. Regina Garcia Cano, *South Dakota Tribe Burned Pot Crop Over Fear of Federal Raid*, CANNABIST (Nov. 9, 2015, 3:27 PM), http://www.thecannabist.co/2015/11/09/south-dakota-marijuana-tribal-lands-tribe-burned-pot-crop-fear-federal-raid/43555/.

185. Press Release, Office of the South Dakota Attorney General, Charges Filed in Connection with Marijuana Grow Facility in Flandreau (Aug. 3, 2016), https://atg.sd.gov/OurOffice/Media/pressreleasesdetail.aspx?id=1621; Ellis, *supra* note 144. Hagen, President of Monarch America, Inc., was charged and indicted for one count of conspiracy to possess more than 10 lbs. of cannabis (a class 3 felony punishable up to 10 years imprisonment) and one count of possession of more than 10 lbs. of cannabis (a class 3 felony punishable by up to 7.5 years imprisonment). *Id.* Hunt, Vice President of Monarch America, Inc., was charged with and plead guilty to one count of conspiracy to possess more than one-half lb. but less than one lb. of cannabis (a class 6 felony punishable by up to two years imprisonment). *Id.*

186. Ellis, *supra* note 144.

187. *Id.*

her parents, i.e., although the car is actually owned by the parents, the teenager possesses the vehicle while she drives it.[188] In Hagen's defense, Flandreau Santee Sioux Chairman, Tony Reider, testified that the tribe owned the cannabis with which Hagen was charged with possessing.[189] Hagen and Hunt also both took the stand to testify that the extent of their involvement in the grow operation was limited to offering advice to the tribe based on their experience in the cannabis growing industry.[190] Counsel for Hagen also argued that there was no evidence of a conspiracy where the tribe had legalized cannabis by tribal ordinance and Hagen and the tribe had been open with authorities about the grow operation, citing invitations made by the tribe inviting South Dakota state lawmakers, media, and the FBI to tour its grow facilities.[191] After a four-day trial and a short deliberation, the twelve-person jury acquitted Hagen of all charges.[192] But notwithstanding the favorable ruling, neither Monarch America nor the Flandreau Santee Sioux are currently contemplating reestablishment of the tribal grow.[193]

However, where the California and South Dakota tribes failed in their early attempts to enter into the cannabis industry, Indian tribes located within the states of Washington and Nevada, respectively, have achieved unprecedented success. During the 2015 and 2017 regular sessions of the Washington and Nevada state legislatures, bills (the "cannabis compacting" bills or legislation) were passed permitting those states to engage in government-to-government negotiations with tribes for the establishment of cannabis programs on tribal lands.[194] On the heels of the enactment of HB 2000 in the State of Washington, the Suquamish, Puyallup, and Squaxin became the first tribes to enter into cannabis compacts with the State of Washington for the establishment of recreational cannabis stores and a research center for medical cannabis on their tribal lands.[195] To date, there is no indication

188. *Id.*

189. *Id.*

190. *See id.*; Jacob Sullum, *South Dakota Jury Acquits Tribal Cannabis Consultant of All Charges*, REASON.COM (May 25, 2017, 8:00 AM), http://reason.com/blog/2017/05/25/south-dakota-jury-acquits-tribal-cannabi.

191. Ellis, *supra* note 144; Sullum, *supra* note 190.

192. *Consultant Not Guilty at Marijuana Trial*, KSFY, (May 24, 2017, 9:13 AM), http://www.ksfy.com/content/news/South-Dakota-jury-to-get-case-of-man-charged-in-pot-resort-424069624.html.

193. *See* Ellis, *supra* note 144 (reporting that Flandreau Santee Sioux Chairman Reider "said the tribe did not want a repeat of what happened in 2015, but was monitoring the situation at the federal level to see if there would be any changes in the future"); *see also* James Nord, *South Dakota Jury Finds Consultant Not Guilty in Pot Case*, U.S. NEWS & WORLD REP. (May 24, 2017, 5:09 PM), https://www.usnews.com/news/best-states/south-dakota/articles/2017-05-24/south-dakota-jury-to-get-case-of-man-charged-in-pot-resort (reporting that after his acquittal, Hagen stated that the case against him had damaged his business, Monarch America, Inc.).

194. S.B. 375, 79th Leg., Reg. Sess. (Nev. 2017), https://www.leg.state.nv.us/Session/79th2017/Bills/SB/SB375_EN.pdf; H.B. 2000, 64th Leg., Reg. Sess. (Wash. 2015), http://lawfilesext.leg.wa.gov/biennium/2015-16/Pdf/Bills/House%20Bills/2000.pdf.

195. Suquamish Cannabis Compact, *supra* note 18; Squaxin Cannabis Compact, *supra* note 18; Puyallup Cannabis Compact, *supra* note 18; *see also Suquamish Tribe and Washington State Agree to Historic Cannabis Compact*, MARIJUANAPOLITICS (Sept. 15, 2015), http://marijuanapolitics.com/suquamish-tribe-and-washington-state-agree-to-historic-cannabis-compact/; Tobias Coughlin-Bogue, *Washington State's Second Native American-Owned Pot Shop Is a Big Win For Tribal Sovereignty*, STRANGER (Dec. 8, 2015), http://www.thestranger.com/blogs/slog/2015/12/08/23245665/washington-

that the cannabis enterprises located on these tribes' lands have either triggered federal interest under the Wilkinson Memo or clashed with federal, state, or local law enforcement.

Similarly in the State of Nevada, shortly after the enactment of SB 375, three federally recognized tribes in the state—the Ely Shoshone, Yerington Paiute, and Las Vegas Paiute—entered into compacts with the State of Nevada to cultivate, infuse, study, and dispense recreational and medical cannabis on their tribal lands.[196] Evincing the success of the state-tribal cannabis compacts executed in Nevada, in particular, is the case of the Las Vegas Paiute that recently opened the self-proclaimed largest cannabis retail facility in the United States on its tribal lands located in downtown Las Vegas—approximately two blocks from the Freemont Street Experience—again without indication of federal, state, or local law enforcement interest or interdiction.[197]

Considering the California, South Dakota, Washington, and Nevada cases together, there are two major takeaways from tribes' ventures into cannabis since the Wilkinson Memo. First, the Alturas Indian Rancheria, Pit River, and Pinoleville Pomo Indian Nation cases demonstrate that the federal government will not hesitate to enforce the CSA on tribal lands where it receives information that a tribal cannabis grow violates the Wilkinson Memo by triggering Cole II Priorities. Additionally, there is no indication in these cases that federal government consultation with the California tribes occurred prior to the enforcement of the CSA on tribal lands as is required, at least in theory, under the Wilkinson Memo. Second, absent an agreement providing otherwise, state governments will be similarly obliged to enforce State cannabis laws on tribal lands if they become aware of alleged violations of those laws. However, where tribes, like the Suquamish, Puyallup, and Squaxin of the state of Washington and the Ely Shoshone, Yerington Paiute, and Las Vegas Paiute tribes of the State of Nevada,

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states-second-native-american-owned-pot-shop-is-a-big-win-for-tribal-sovereignty (interview with Suquamish's cannabis attorney); *Squaxin Island Tribe Enters Marijuana Compact In Washington*, INDIANZ.COM (Sept. 24, 2015), http://www.indianz.com/News/2015/019025.asp; *First Native American Cannabis Business Opens*, MARIJUANA BUS. DAILY (Nov. 16, 2015), http://mjbizdaily.com/first-native-american-cannabis-business-opens/ (reporting on opening of Washington-based Squaxin Island Tribe's first dispensary and providing details on the business); *Washington Signs 3rd Tribal Compact as Puyallup Tribe to Open Cannabis Testing Lab*, NEW CANNABIS VENTURES (Jan. 26, 2017), https://www.newcannabisventures.com/washington-signs-3rd-tribal-compact-as-puyallup-tribe-to-open-cannabis-testing-lab/; Jordan Schraeder, *Pallyup Tribe Plans Pot Testing Lab*, OLYMPIAN (Jan. 27, 2016), http://www.theolympian.com/news/local/marijuana/article56927813.html; John Gillie, *Two Marijuana Retailors Opening Soon In City That Still Bans Cannabis Sales*, NEWS TRIBUNE (Jan. 28, 2017), http://www.thenewstribune.com/news/local/marijuana/article128704919.html.

196. Ely Shoshone Cannabis Compact, *supra* note 18; Yerington Paiute Cannabis Compact, *supra* note 18; Las Vegas Paiute Cannabis Compact, *supra* note 18; Debra Krol, *Nevada Tribes Get Medical Marijuana Compacts*, INDIAN COUNTY TODAY (Sept. 1, 2017), https://indiancountrymedianetwork.com/news/business/nevada-tribes-get-medical-marijuana-compacts/.

197. Chris Kudialis, *Tribal Pot Store Near Downtown Las Vegas To Be Biggest In the Country*, L.V. SUN (Aug. 3 2017), https://lasvegassun.com/news/2017/aug/03/tribal-pot-store-near-downtown-las-vegas-aims-to-b/; Chris Kudialis, *'Years in the Making': Tribal Pot Store Downtown To Open Monday*, L.V. SUN (Oct. 15, 2017), https://lasvegassun.com/news/2017/oct/15/years-in-the-making-massive-tribal-pot-store-near/; *Home*, NUWU CANNABIS MARKETPLACE (last visited Nov. 4, 2017), https://www.nuwucannabis.com/.

execute compacts with the states in which their lands lie providing for the terms that will govern state-tribal relations around cannabis, it is possible to establish mutually beneficial tribal cannabis programs that minimize the risk of law enforcement intervention on tribal lands by another sovereign.

D. Washington and Nevada Tribal Cannabis Legislation and Cannabis Compacts

The success of Washington and Nevada's tribal cannabis legal regimes stem from the particular terms of the cannabis compacting legislation and state-tribal compacts executed between the State of Washington and the Suquamish, Puyallup, Squaxin tribes and state of Nevada and the Ely Shoshone, Yerington Paiute, and Las Vegas Paiute tribes. In particular, the cannabis compacting legislation confers authority on the governors of Washington and Nevada to negotiate, government-to-government, with tribes in their states for individualized state-tribal cannabis compacts, including those which address the four central Indian cannabis law issues discussed *supra* Part II(C)(1)–(4): state criminal jurisdiction in Indian Country, tribal sovereign immunity, state taxation, and dispute resolution.

The Washington cannabis compacting bill, HB 2000, provides in pertinent part:

> The legislature intends to further the government-to-government relationship between the state of Washington and federally recognized Indian tribes in the state of Washington by authorizing the governor to enter into agreements concerning the regulation of marijuana. Such agreements may include provisions pertaining to: The lawful commercial production, processing, sale, and possession of marijuana for both recreational and medical purposes; marijuana-related research activities; law enforcement, both criminal and civil; and taxation. The legislature finds that these agreements will facilitate and promote a cooperative and mutually beneficial relationship between the state and the tribes regarding matters relating to the legalization of marijuana, particularly in light of the fact that federal Indian law precludes the state from enforcing its civil regulatory laws in Indian country. Such cooperative agreements will enhance public health and safety, ensure a lawful and well-regulated marijuana market, encourage economic development, and provide fiscal benefits to both the tribes and the state.[198]

Nevada's cannabis compacting bill, SB 375, similarly provides:

> 1. The Governor or his or her designee may enter into one or more agreements with tribal governments in this State to efficiently coordinate the cross-jurisdictional administration of the laws of this State and the laws of tribal governments relating

198. H.B. 2000, 64th Leg., Reg. Sess. (Wash. 2015), http://lawfilesext.leg.wa.gov/biennium/2015-16/Pdf/Bills/House%20Bills/2000.pdf

> to the use of marijuana. Such an agreement may include, without limitation, provisions relating to:
> (a) Criminal and civil law enforcement;
> (b) Regulatory issues relating to the possession, delivery, production, processing or use of marijuana, edible marijuana products, marijuana-infused products and marijuana products;
> (c) Medical and pharmaceutical research involving marijuana;
> (d) The administration of laws relating to taxation;
> (e) Any immunity, preemption or conflict of law relating to the possession, delivery, production, processing, transportation or use of marijuana, edible marijuana products, marijuana infused products and marijuana products; and
> (f) The resolution of any disputes between tribal government and this State, which may include, without limitation, the use of mediation or other nonjudicial processes.
> 1. An agreement entered into pursuant to this section must:
> (a) Provide for the preservation of public health and safety;
> (b) Ensure the security of medical marijuana establishments and marijuana establishments and the corresponding facilities on tribal land; and
> (c) Establish provisions regulating business involving marijuana which passes between land and non-tribal land in this State.[199]

Based on the broad authority conferred on the Governors of Washington and Nevada to negotiate with tribes in their states concerning tribes' establishment of tribal cannabis enterprises, the Suquamish and Squaxin cannabis compacts (after which the Ely Shoshone, Yerington Paiute, and Las Vegas Paiute tribes' state-tribal cannabis compacts were closely modeled), in particular, appear to be the product of negotiations that addressed head-on the four central Indian cannabis law issues. First, the Squaxin cannabis compact's "Safety and Enforcement" provision states that "[t]he *Tribe* shall address safety and enforcement issues in accordance with . . . this Compact, and internal policies and controls of the Tribe or Tribal Enterprise."[200] The provision also establishes procedure for "Premises Checks" and "Compliance Checks-Minors." Under these terms, the "Squaxin Police Department or other authorized agency" may conduct cannabis enterprise premises checks to ensure: a) minors are not being sold cannabis on tribal lands, and b) tribal compliance with the compact.[201] The state is also authorized to conduct its own premises- and minor-compliance checks, but only if the tribe is given "reasonable notice," the check is conducted with Squaxin Police observation and participation, and the results of the check are shared with the tribe.[202] Additionally, both parties agree "to cooperate in good faith" to undertake all state requested checks jointly,

199. S.B. 375, 79th Leg., Reg. Sess. (Nev. 2017), https://www.leg.state.nv.us/Session/79th2017/Bills/SB/SB375_EN.pdf.

200. Squaxin Cannabis Compact, *supra* note 18, at 8 (emphasis added); *but see* Suquamish Cannabis Compact, *supra* note 18, at 8 (emphasis added) (providing that "[t]he Tribe *and the State* shall address safety and enforcement issues in accordance with . . . this Compact, and internal policies and controls of the Tribe and Tribal Enterprise").

201. Squaxin Cannabis Compact, *supra* note 18, at 9.

202. *Id.* at 9–10.

but that "if the Squaxin Police Department is unable or unwilling to arrange and conduct a properly requested premises [or minor compliance] check[s] 48 hours after receiving the original written notice[, then] the [State Liquor] Board may then perform" the check "on its own without the Squaxin Police Department."[203]

Second, the Squaxin cannabis compact's "Tax" provision states that "no State Tax or fee, assessment, or other charge may be assessed against or collected from the Tribe, Tribe Enterprises, Tribal Member Businesses, State Licensees, or retail customers related to any commercial activity related to the production, processing, sale, and possession of marijuana products" governed by the compact.[204] The only exception to this rule allows Washington to require tribal enterprises to pay a licensing fee for the application, issuance and renewal of a license to grow and sell cannabis under state law.[205] The term also provides that the Squaxin "Tribe shall impose and maintain a Tribal Tax that is equal to at least 100 percent of the State Tax on all sales of marijuana products" on tribal land unless: 1) the sale is to the tribe, tribal Enterprise, tribal member business, or an enrolled member of the tribe; 2) the cannabis product was grown, produced, or processed in Indian Country; 3) the transaction is otherwise exempt from state cannabis taxation under the state or federal law; or 4) the transaction involves medical cannabis products used in the course of medical treatments.[206] The tribe may also choose to levy a tribal tax on any cannabis transaction "that may otherwise be exempt," but agrees to use all proceeds of tribal taxes for "Essential Government Services."[207]

Third, the Suquamish and Squaxin cannabis compacts contain identical "Sovereign Immunity" provisions stating that:

> The State agrees that except for the limited purpose of resolving disputes . . . the signing of this Compact by the Tribe does not imply a waiver of sovereign immunity by the Tribe or any of its subdivisions or enterprises and is not intended as a waiver of sovereign immunity and that any action by the State in regard to marijuana regulation by the Tribe shall be in accord with this Compact.[208]

Finally, the Suquamish and Squaxin cannabis compacts contain "Dispute Resolution" provisions stating that neither party, nor officers acting on behalf of either party, may petition a court to enforce the compact, unless: 1) the dispute resolution process contained in the compact has been followed in good faith without successful resolution; or 2) the other party fails to enter into the dispute resolution process.[209] In this regard, the Ely Shoshone and Yerington Paiute cannabis compacts add an additional caveat to the provision by inserting a judicial litigation forum selection, venue, and limited waiver of sovereign immunity

203. *Id.*

204. *Id.* at 8 (internal citations omitted).

205. *Id.*

206. *Id.*

207. *Id.*

208. Suquamish Cannabis Compact, *supra* note 18, at 11; Squaxin Cannabis Compact, *supra* note 18, at 11.

209. Squaxin Cannabis Compact, *supra* note 18, at 10.

clause.[210] The Ely Shoshone and Yerington Paiute compacts provide that "[s]hould litigation arise under this Compact, the Parties agree:" that the litigation must occur in federal district court for the District of Nevada "and any court having appellate jurisdiction thereover[.]"[211] The clause continues that "[v]enue for said litigation shall be the Northern District of the United States District Court of Nevada located in Reno, Nevada" and that the state and tribe mutually waive any claim to *forum nonconveniens* should litigation be filed in that court.[212] The clause concludes by providing that both "Parties waive their sovereign immunity from suit only in said United States District Court of Nevada, and only for declaratory judgment and injunctive relief. . . . No waiver of sovereign immunity extends to monetary relief of any kind" including attorneys' fees and costs, which the parties agree must be borne by each party.[213]

The non-judicial dispute resolution process under the Squaxin cannabis compact is three-part.[214] As a general matter, either party "may invoke the dispute resolution process by notifying the other, in writing, of its intent to do so. The notice must set out the issues in dispute and the notifying Parties' position on each issue."[215] Once the dispute resolution process has been invoked by notice, the first step is for the parties to set up a "face-to-face meeting" for the parties' representatives to attempt to resolve the dispute by negotiation.[216] If negotiation does not resolve the parties' dispute, the second step in the dispute resolution is mediation.[217] In this step, the parties agree to "engage the services of a mutually agreed upon qualified mediator to assist them in attempting to negotiate the dispute."[218] The parties also agree to pursue mediation in "good faith until the dispute is resolved or until the mediator determines that the Parties are not able to resolve the dispute."[219] In the event mediation fails to result in a resolution to the parties' dispute, or one party terminates the dispute resolution process before completion, the third step of the process is triggered—binding arbitration.[220] The arbitration term requires, at minimum, that one party initiate binding "arbitration proceedings under the Rules of the American Arbitration Association," but permits the parties to choose another institutional arbitrator to conduct the arbitration proceedings.[221] If the arbitrator "determines that a Party is in violation of a material provision of this Compact," then the other party may terminate the compact;

210. *See* Ely Shoshone Cannabis Compact, *supra* note 18, at 9; Yerington Paiute Cannabis Compact, *supra* note 18, at 9.

211. *Id.*

212. *Id.*

213. *Id.*

214. *Id.* at 10–11.

215. *Id.* at 10.

216. *Id.* ("The meeting must be convened within 30 days after the receiving Party's receipt of the written notice," and each party's representatives must come with the authority to resolve dispute; any resolution reached will be memorialized in a writing signed by the parties).

217. *Id.* at 10–11.

218. *Id.*

219. *Id.* at 11 (any resolution to the dispute will be memorialized in a writing signed by both parties, which will be binding upon the parties).

220. *Id.*

221. *Id.*

however, an arbitrator "shall have no authority to award monetary damages or issue injunctive or other equitable relief."[222] And, in the context of suits against the state or tribe by a third party over a state-tribal cannabis compact "challenging either the Tribe's or the State's authority to enter into or enforce this Compact, the Parties each agree to support the Compact and defend . . . their authority to enter into and implement this Compact."[223]

Having identified the federal position on cannabis in Indian Country, considered the four central issues in Indian cannabis law, reviewed accounts of tribes' failures and successes in establishing cannabis enterprises on tribal lands, and conducted a close reading of the relevant portions of the Washington and Nevada cannabis compacting legislation and compacts, this article turns to the question of whether and in what form a tribal cannabis regime may be established on tribal lands in the state of New Mexico.

III. Cannabis on State and Tribal Lands in New Mexico

New Mexico, with the support and lobbying of Lynn Pierson (a young cancer patient) in the late 1970s, was the first state to establish a program where cannabis was used as a medicine to alleviate suffering in individuals undergoing chemotherapy.[224] However, the state has been slow to join its neighboring Western states in cannabis legalization and cultural amelioration through state public policy and politics. This quasi-legal status is currently the central source of uncertainty to the tribes, Nations, and Pueblos of New Mexico that may be considering establishing tribal cannabis enterprises. The contours of New Mexico cannabis law and politics are, therefore, the subject of Part III.

A. State and Tribal Cannabis: The Legal and Political Landscape

New Mexico cannabis law and politics are rooted in the Lynn and Erin Compassionate Use Act (Compassionate Use Act) that was adopted by the New Mexico Legislature in 2007, which established a medical cannabis program in the state.[225] The purpose of the act is "to allow the beneficial use of medical cannabis in a regulated system for alleviating symptoms caused by debilitating medical conditions[226] and their medical treatments."[227] Qualified medical cannabis patients

222. *Id.*

223. Suquamish, *supra* note 18, at 11; Squaxin Cannabis Compact, *supra* note 18, at 11.

224. LESTER GRINSPOON & JAMES B. BAKALAR, MARIHUANA: THE FORBIDDEN MEDICINE 18 (1997), https://books.google.com/books?id=B4TsXLl5CjIC&pg=PA18#v=onepage&q&f=false; Abq Journal News Staff, *9:40am—Gov. Pushes Medical Marijuana Bill*, ALBUQUERQUE J. (Feb. 7, 2007), https://www.abqjournal.com/23857/940am-gov-pushes-medical-marijuana-bill.html.

225. N.M. STAT. ANN. §§ 26-2b-1 to -7 (2007).

226. 7.34.3.3 N.M. ADMIN. CODE. "Debilitating medical condition" means: 1) cancer; 2) glaucoma; 3) multiple sclerosis; 4) damage to the nervous tissue of the spinal cord, with objective neurological indication of intractable spasms; 5) epilepsy; 6) positive status for human immunodeficiency virus or acquired immune deficiency syndrome; 7) admission to hospice care in accordance with rules promulgated by the department; or 8) any other medical condition, medical treatment, or disease as approved by the DOH which results in suffering, or debility for which there is credible evidence that medical use cannabis could be of benefit including "severe pain." Subparagraphs (1)-(8) of Subsection N of 7.34.3.7 N.M. ADMIN. CODE.

and caregivers (medical cannabis growers) are not to be subjected to arrest or any other criminal penalty for the possession or cultivation of cannabis that does not exceed an adequate supply[228] under the act.[229]

The Compassionate Use Act confers on DOH and the cannabis advisory board (established by the Secretary of DOH) with the responsibility of administering the state's medical cannabis program.[230] The administrative framework built around the state's medical cannabis program focuses on three areas of regulation. First, the regulations establish the cannabis advisory board's responsibilities, which include the duty to: review proposed changes in cannabis regulations by individuals and organizations; conduct public hearings; and make recommendations to DOH on rule changes.[231] Second, the regulations govern patient registration and rule compliance and enforcement,[232] including: administration of the process for obtaining a medical cannabis card, regulation of quantities and uses of cannabis sold to patients and cultivated by caregivers, as well as disciplinary action for rule violations and the appeal process.[233] Third, the regulations set licensing requirements for cannabis producers, couriers and manufactures, and laboratories.[234]

The number of bills introduced in the New Mexico Legislature undertaking to either change, expand the scope of the state's medical cannabis program, or to legalize and tax recreational cannabis in the state have risen.[235]

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227. N.M. STAT. ANN. § 26-2b-2 (2007).

228. 7.34.3.9(A) N.M. ADMIN. CODE. "Adequate supply" means an amount of cannabis, derived solely from an intrastate source and in a form approved by the department, that is possessed by a qualified patient or collectively possessed by a qualified patient and the qualified patient's primary caregiver, that is determined by the department to be no more than reasonably necessary to ensure the uninterrupted availability of cannabis for a period of three months or 90 consecutive calendar days," i.e. 230 grams). *Id.*

229. N.M. STAT. ANN. § 26-2b-4(A)–(B), (D), (F) (2007); N.M. STAT. ANN. § 30-31-6(E) (2011) (criminal liability does not attach to "to the use of marijuana, tetrahydrocannabinols or chemical derivatives of tetrahydrocannabinol by certified patients pursuant to the Controlled Substances Therapeutic Research Act or by qualified patients pursuant to the provisions of the Lynn and Erin Compassionate Use Act").

230. N.M. STAT. ANN. § 26-2b-6 (2007).

231. 7.34.2 N.M. ADMIN. CODE.

232. 7.34.3.2-7.34.3.3 N.M. ADMIN. CODE.

233. 7.34.3.9-7.34.3.10, 7.34.3.16 N.M. ADMIN. CODE.

234. 7.34.4 N.M. ADMIN. CODE.

235. *See, e.g.*, H.B. 102, 53rd Leg., 1st Sess. (N.M. 2017) (Marijuana Tax Act); H.B. 334, 53rd Leg., 1st Sess. (N.M. 2017) (Local Approval of Medical Marijuana Locations); S.B. 8, 53rd Leg., 1st Sess. (N.M. 2017) (Medical Marijuana Changes); S.B. 177, 53rd Leg., 1st Sess. (N.M. 2017) (Medical Marijuana Changes); S.B. 258, 53rd Leg., 1st Sess. (N.M. 2017) (Decrease Marijuana Penalties); H.B. 378, 53rd Leg., 1st Sess. (N.M. 2017) (Medical Marijuana Changes); H.B. 89, 53rd Leg., 1st Sess. (N.M. 2017) (Cannabis Revenue & Freedom Act); H.B. 155, 53rd Leg., 1st Sess. (N.M. 2017) (Medical Cannabis Research); H.B. 351, 53rd Leg., 1st Sess. (N.M. 2017) (Define & Schedule Cannabidiol); S.B. 278, 53rd Leg., 1st Sess. (N.M. 2017) (Cannabis Revenue & Freedom Act); S.B. 365, 53rd Leg., 1st Sess. (N.M. 2017) (Define & Schedule Cannabidiol); S.B. 6, 53rd Leg., 1st Sess. (N.M. 2017) (Research on Industrial Hemp); *see also* Tom Angell, *New Mexico Weighs Legal Marijuana in Special Session*, MARIJUANA.COM (Sept. 30, 2016), http://www.marijuana.com/blog/news/2016/09/new-mexico-weighs-legal-marijuana-in-special-session/; Jason Barker, *New Mexico Hopeful for Hemp in 2017*, WEED NEWS (Dec. 30, 2016), http://www.weednews.co/new-mexico-hopeful-for-hemp-in-2017/; Jason Barker, *New*

Following this trend, New Mexico State Representative Derrick J. Lente and Senator Benny Shendo, Jr. introduced companion bills—HB 348 and SB 345— in the first regular session of the 2017 New Mexico Legislature aimed at opening the door for tribes within the state to establish medical cannabis programs on tribal lands by creating new rights for tribes under the Compassionate Use Act.[236]

These bills provide that DOH "shall[237] enter into an intergovernmental agreement with any sovereign Indian nation, tribe, or pueblo located in New Mexico that elects to implement the provisions of the medical cannabis program" established under the Compassionate Use Act.[238] These intergovernmental agreements[239] (or compacts) shall provide for any assistance requested by tribes concerning implementation of the state's medical cannabis program on their lands.[240] The state is also required to provide tribes with guidelines for compliance with their agreements with the state and with the DOH regulations.[241]

The New Mexico Legislative and Finance Committee's (NMLFC) fiscal impact report for SB 345 takes the position that while the bill "serves to incentivize production of cannabis on tribal land within New Mexico," it lacks regulatory direction.[242]

HB 348 was referred to the House State Government, Indian & Veteran Affairs Committee and House Judiciary Committee, but did not receive a hearing before the closing of the legislative session on March 15, 2017.[243]

Mexico's 2017 Cannabis Conundrum, WEED NEWS (Jan. 18, 2017), http://www.weednews.co/new-mexicos-2017-cannabis-conundrum/; *Is This The Next State To Legalize Marijuana? State Lawmakers Hope So*, CANNABIST (Jan. 26, 2017, 6:38 AM), http://www.thecannabist.co/2017/01/26/marijuana-legalization-lawmakers-bill/72223/ (discussing prospects of legalizing and taxing recreational cannabis in New Mexico).

236. H.B. 348, 53rd Leg., 1st Sess. (N.M. 2017) (Medical Marijuana Tribal Agreements), https://www.nmlegis.gov/Sessions/17%20Regular/bills/house/HB0348.pdf; S.B. 345, 53rd Leg. 1st Sess. (N.M. 2017) (Medical Marijuana Tribal Agreements), https://www.nmlegis.gov/Sessions/17%20 Regular/bills/senate/SB0345.pdf.

237. Amended from "shall" to "may" by Senate Public Affairs Committee on motion by Senator Craig W. Brandt, R-Rio Rancho, i.e. the "Brandt Amendment." S. Rep. No. 53-SB0345IC1.wpd, at 1, (N.M. Feb. 24, 2017) (S. Pub. Affairs Comm.) [hereinafter "SPAC Report"], https://www.nmlegis.gov /Sessions/17%20Regular/bills/senate/SB0345PA1.pdf; *Medical Tribal Agreements: Hearing on S.B. 345 Before the S. Pub. Affairs Comm.*, N.M. LEGISLATURE (Feb. 24, 2017), http://sg001-harmony.sliq. net/00293/Harmony/en/PowerBrowser/PowerBrowserV2/20170224/-1/32388#info_.

238. H.B. 348 (N.M. 2017); S.B. 345 (N.M. 2017).

239. *See* NEW MEXICO DEPARTMENT OF HEALTH, STATE-TRIBAL CONSULTATION, COLLABORATION AND COMMUNICATION POLICY 1 (https://nmhealth.org/publication/view/regulation/847/) (last visited Sept. 28, 2017) (Negotiations toward these agreements would likely be guided by the New Mexico Health and Human Services Departments); *see also* Statewide Adoption of Pilot Tribal Consultation Plans, Executive Order No. 2005-004 (N.M. 2005), http://www.indianz.com/docs/richardsoneo2.pdf (State-Tribal Consultation Protocol, created in response to former Governor Bill Richardson's 2003 executive order providing state agencies were required to implement protocols for conducting government-to-government consultation with Indian nations, tribes and pueblos).

240. H.B. 348 (N.M. 2017); S.B. 345(N.M. 2017).

241. *Id.*

242. N.M. LEG. FIN. COMM., FISCAL IMPACT REPORT FOR S.B. 345: MEDICAL MARIJUANA TRIBAL AGREEMENTS 1–2 (2017), https://www.nmlegis.gov/Sessions/17%20Regular/firs/SB0345.PDF.

243. *2017 Regular Session - HB 348*, N.M. LEGISLATURE, https://www.nmlegis.gov/Legislation/ Legislation?chamber=H&legType=B&legNo=348&year=17 (last visited Sept. 4, 2017).

SB 345, in contrast, received thorough debate in the Senate Indian & Cultural Affairs Committee (SICAC) and Senate Public Affairs Committee (SPAC). In SICAC, Senator William Sharer, R-Farmington, argued in opposition to the bill that opening the door to cannabis in Indian Country would inevitably lead to New Mexico turning into "the Afghanistan of America," where drugs and violence will be New Mexican children's only opportunities.[244] Senator Sharer urged the tribes to "find some better way to go"[245] than SB 345 and work to introduce "vibrant" programs into Indian Country like "grow[ing] 2x4's," i.e., the logging industry.[246] In support of the bill, Senator Benny Shendo, Jr., D-Jemez Pueblo, and his expert witness, attorney Anthony J. Trujillo of the Gallagher & Kennedy law firm, argued that the effect of SB 345 would merely be to permit the tribes to become "compliant with state [cannabis] law" and to provide certainty with regard to how the tribes may participate in the New Mexico medical cannabis program via intergovernmental agreements reached with the state.[247] SB 345 passed SICAC by a 4-1 vote.[248] In SPAC, SB 345 received the strong support of the medical cannabis lobby and tribal stakeholders including: Robert Romero, Ultra Health (an AZ/NM-based cannabis grower and seller); Craig Quanchello, Governor of the Pueblo of Picuris; and James Naranjo, Lt. Governor of the Pueblo of Santa Clara.[249] SB 345 passed SPAC in a bipartisan 7-0 vote.[250] But despite SB 345's momentum through its committee assignments, the bill was withdrawn from the senate floor calendar and referred to a third committee, the Senate Judiciary Committee, where the bill did not receive a hearing and died at the close of the legislative session.[251]

But, even assuming SB 345 or HB 348 would have passed in both houses of the New Mexico Legislature, such a bill would have likely been vetoed by Republican Governor Susana Martinez who has historically cited the apparent conflict between state and federal law that would arise if New Mexico legalized cultivation and sale of cannabis in the state as her administration's reason for not

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244. *Medical Tribal Agreements: Hearing on S.B. 345 before the S. Indian and Cultural Affairs Comm.*, 53rd Leg., 1st Sess. at 9:32:35 AM–9:32:55 AM (N.M. Feb. 14, 2017) (statement of Sen. William Sharer, Member S. Comm. Indian & Cultural Affairs), http://sg001-harmony.sliq.net/00293/Harmony/en/PowerBrowser/PowerBrowserV2/20170214/-1/32184.

245. *Id.* at 9:32:56 AM–9:33:03 AM.

246. *Id.* at 9:29:25 AM–9:30:10 AM.

247. *Id.* at 9:33:43 AM–9:34:11 AM (statement of Sen. Benny Shendo, Jr., Member, S. Comm. Indian & Cultural Affairs); *Id.* at 9:38:55 AM–9:40:35 AM (statement of Antonio J. Trujillo, Expert Witness, S. Comm. Indian & Cultural Affairs).

248. S. REP. NO. SB 345IC1.WPD, at 1 (N.M. Feb. 14, 2017)[hereinafter SICAC Report], https://www.nmlegis.gov/Sessions/17%20Regular/bills/senate/SB0345IC1.pdf. (Senator Sharer was the lone dissenting vote on the bill.)

249. *Medical Tribal Agreements: Hearing on S.B. 345 Before the S. Pub. Affairs Comm.*, *supra* note 237, at 2:50:48 PM–2:54:00 PM (public comment from: Robert Romero, Ultra Health, Craig Quanchello, Governor of the Pueblo of Picuris, and James Naranjo, Lt. Governor of the Pueblo of Santa Clara, S. Comm. Pub. Affairs).

250. SPAC Report, *supra* note 237, at 1.

251. *See 2017 Regular Session—SB 345*, N.M. LEGISLATURE (last visited Sept. 4, 2017), https://www.nmlegis.gov/Legislation/Legislation?chamber=S&legType=B&legNo=345&year=17. Senator Shendo and Representative Lente were contacted for comment on the future of tribal cannabis in New Mexico but could not be reached for interviews.

supporting legalization in New Mexico.[252] As a result, unless the Martinez administration is persuaded to change its position on cannabis because of the economic and medical potential of the plant[253] or until a governor open to exploring the prospects presented by cannabis is elected,[254] a tribal medical cannabis law is likely to be delayed.[255]

But all is not lost for tribal cannabis in New Mexico. The current political environment affords New Mexico lawmakers with the opportunity to continue to debate and draft cannabis compacting legislation tailored to the unique needs of the state and the tribes. Toward that end, this article now turns to recommendations for future state-tribal cannabis compacting legislation in New Mexico.[256]

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252. Matthew Reichbach, *Martinez Vetoes Bill to Allow Hemp Research*, N.M. POLITICAL REPORT (Apr. 10, 2015) , http://nmpoliticalreport.com/2953/martinez-vetoes-bill-to-allow-hemp-research/.

253. *See* O'DONNEL ECONOMICS & STRATEGY, LEGALIZATION OF CANNABIS FOR SOCIAL USE: A NEW MEXICO MARKET ANALYSIS 2 (2016) (projecting NM legalizing recreational marijuana would raise $412 million in revenue in one year—more than three times the state's annual revenue from its pecan crop), https://www.newcannabisventures.com/wp-content/uploads/Legalization-of-Cannabis-for-Social-Use-New-Mexico-Market-Analysis-09-2016.pdf; Marissa Higdon, *New Report Predicts High Dollars if NM Legalizes Marijuana*, ALBUQUERQUE BUS. FIRST (Sept. 21, 2017), http://www.bizjournals.com/albuquerque/news/2016/09/21/report-predict-high-dollars-nm-legalize-marijuana.html. *See generally* George R. Greer et. al, *PTSD Symptoms Reports of Patients Evaluated for the New Mexico Medical Cannabis Program*, 46 J. OF PSYCHOACTIVE DRUGS 73 (2014); S.D. McAllister et. al, *Pathways Mediating the Effects of Cannabidiol on the Reduction of Breast Cancer Cell Proliferation, Invasion, and Metastasis*, 129 BREAST CANCER RES. & TREATMENT 37 (2011); M.A. Ware et. al, *Cannabis Use for Chronic Non-Cancer Pain: Results of a Prospective Survey*, 102 PAIN 211 (2003).

254. *See generally* Aaron Cantú, *Looking Ahead: Gubernatorial Candidates On NM's Cannabis Future*, SANTA FE REP. (May 24, 2017), http://www.sfreporter.com/santafe/article-13457-looking-ahead-gubernatorial-candidates-on-nm%E2%80%99s-cannabis-future.html.

255. This delay is evident in the lack of a tribal medical cannabis bill being introduced in either the 2017 special session of the New Mexico Legislature or the first legislative session of 2018 as of January 22, 2018.

256. But before moving on, it is worth noting and analyzing the 2017 agreement closed between the Acoma Pueblo of New Mexico and Bright Green Group of Companies (Bright Green) for the establishment of a $160 million and 150-acre green house and research facility for the development of medicinal plant oil extracts, including cannabis, on tribal lands for the next twenty-five years. Susana M. Bryan, *The Largest Medical Marijuana Grow Up in U.S., Nearly 6 Million Square Feet, Breaks Ground In New Mexico*, CANNABIST (Feb. 28, 2017, 9:19 AM), http://www.thecannabist.co/2017/02/28/commercial-marijuana-cultivation-new-mexico/74507/; Rachel Sapin, *Large Medical Greenhouse on NM Tribal Land Slated to Create Over 1,200 jobs*, ALBUQUERQUE BUS. FIRST (Jan. 19 2017), http://www.bizjournals.com/albuquerque/news/2017/01/19/large-medical-greenhouse-on-nm-tribal-land-slated.html. Although it appears from the drastic simplification of the company's website and URL name-change, *compare* BRIGHT GREEN GROUP OF COMPANIES, http://www.bright.green/ (last visited Jan. 8, 2018), *with* BRIGHT GREEN GROUP OF COMPANIES, http://www.brightgreengroup.com/ [https://web.archive.org/web/20170202113540/http://www.brightgreengroup.com/](archived Feb. 2, 2017), that the recent developments in federal cannabis enforcement may have chilled the momentum behind the Acoma Pueblo-Bright Green cannabis development project, the company and Pueblo's agreement illustrates a prime example of the kind of tribal grow operating in the grey area of cannabis regulation that is likely to garner state and federal law enforcement attention, and which New Mexico tribal leaders should avoid establishing on their lands.

The Delaware-based Bright Green was funded by 125 international investors, primarily Chinese, who purchased shares in quantities of $800,000 per investor in the company. Bright Green had attracted international investment largely through its touting of the United States Citizenship and Immigration Service's (USCIS) EB-5 Immigrant Investor Program, under which entrepreneurs are provided a route

to acquiring a green card by investing in a U.S.-based business venture at least $500,000 with a plan to create at least ten jobs in the United States. Marie C. Baca, *Acoma, Company Announce Massive Greenhouse Operation*, ALBUQUERQUE J. (Oct. 6, 2017), https://www.abqjournal.com/861776/acoma-company-announce-massive-operation.html. The operation would have included a 118-acre fully automated greenhouse, a 900,000-square-foot manufacturing warehouse, a 96,000-square foot research center, and a 12-megawatt power generation system. Sapin, *supra*. The construction of the Bright Green facilities was forecasted to create over 1,200 jobs and employ about 250 people to tend plants, conduct research, and develop products. *Id.* Bright Green also actively accepted resumes from the public for employment opportunities in its facilities. *Id.*; *Employment*, BRIGHT GREEN GROUP OF CO.'S (last visited Mar. 17, 2017), http://www.brightgreengroup.com/. And, although not explicitly stated on its website, there is no indication that sale of Bright Green's medicinal cannabis oils would have been be limited to within the tribe. *See id.* Rather, based on the size of the operation, personnel, and mission to provide customers with the purest and most consistent plant oil extracts in the industry, all indications were that Bright Green's commercial ambitions are likely national or worldwide. And even though Bright Green was expected to be able to produce four times as much cannabis as is cultivated through New Mexico's entire medical cannabis program, the joint venture did not plan on pursuing a license from the state to grow in compliance with New Mexico's medical cannabis laws and regulations. Bryan, *supra*.

Applying the Wilkinson Memo, conclusions drawn from the case law concerning the central Indian cannabis law issues, and Sessions' deterrence-based marijuana enforcement policy, leads to the following analysis. First, pursuant to the Wilkinson Memo, a large cannabis grow in a 118-acre greenhouse, the extracts from which are being sold in interstate and potentially international commerce is likely to trigger the federal prosecutorial priority of "preventing the diversion of marijuana from states where it is legal under state law in some forms to other states." Second, under *United States v. Langford*, 641 F.3d 1195 (10th Cir. 2011), and *People v. Collins*, 826 N.W.2d 175 (Mich. App. 2012), of the company's projected 250 employees and management-level officers, all non-Indians will fall within the criminal jurisdiction and police power of the State of New Mexico for all activities and business in violation of the state's cannabis laws under the theory such activities are victimless crimes. Additionally, because recreational and commercial cannabis operations are still unlawful and unregulated in New Mexico, the civil/regulatory test of *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987), will provide no protection to the Acoma-Bright Green joint venture from the state's assertion of its criminal/prohibitory laws on Pueblo lands insofar as the company's cannabis enterprise will not fall under the umbrella of a medical cannabis program similar to the state's program through DOH. Third, assuming the state permits the Acoma-Bright Green joint venture to operate, the state's interest in regulating products being sold in and transported through and from New Mexico is likely sufficient to permit it to levy taxes on the enterprise's transactions under *Coleville*. Fourth, and in the event litigation arises against the Acoma Pueblo or Bright Green by a state or the federal government based on their conduct concerning their medicinal plant oil extraction enterprise, because certain officers and shareholders of the joint venture are non-Indian, the company is not wholly owned by the Pueblo, precluding the company from being able to claim sovereign immunity as a defense to a civil suit under *Michigan v. Bay Mills Indian Cmty.*, 134 S.Ct. 2024 (2014). And its contracts with private third parties may be found void as a matter of public policy should courts follow the court's approach in *Hammer v. Today's Health Care II*, Nos. CV 2011-051310, CV 2011-051311 (Ariz. Super. Ct. Apr. 17, 2012), 2012 WL 12874349. Finally, based on the Acoma Pueblo-Bright Green venture's stated plan to neither pursue permission from the state of New Mexico to conduct its massive cannabis grow nor comply with established New Mexico medical cannabis laws and regulations, the operation would likely be a large target for a federal enforcement to deter tribes from establishing cannabis programs or businesses that go beyond the scope of state law. Considered together, the Acoma-Bright Green joint venture presents a very high risk to the Pueblo and Delaware company of being: raided by federal or state police authorities, taxed heavily by the state of New Mexico, vulnerable to civil liability, and having its contracts found to violate public policy.

IV. Recommendations for Tribal Cannabis Legislation and Compacts in New Mexico[257]

While the 2017 tribal medical cannabis bills demonstrate legislative intent to open the door in New Mexico to cannabis on tribal lands, the bills contain legal vulnerabilities that could lead to regulatory uncertainty and litigation. Part IV proceeds in two parts. First, it will describe the areas ripe for improvement in the 2017 New Mexico tribal medical cannabis bills and argue that the bills, if passed as drafted, may not have been effective in application. Second, it will provide cannabis compacting legislation and cannabis compact drafting recommendations. Moreover, it will argue that, in order to avoid the potential pitfalls of the 2017 New Mexico tribal medical cannabis bills, a bill and compact terms reflecting this guidance should be introduced in a future New Mexico legislative session and drawn upon in negotiations with tribes once the law has passed.

A. New Mexico HB 348 & SB 345: Constructive but Imperfect Bills

There are four potential vulnerabilities drafted into the 2017 New Mexico tribal medical cannabis bills. First, the language of the bills fails to provide the state of New Mexico with adequate authority to negotiate with tribes for the establishment of autonomous and well-regulated cannabis programs on tribal lands structured around the needs of individual tribes. The bills provide DOH with the authority to cooperate with tribes for the establishment of tribal cannabis programs, but limit the state's authority to enter into "intergovernmental agreement[s]" with tribes "that elect[] to implement the provisions of the medical cannabis program established pursuant to" the Compassionate Use Act. This implies that DOH's role in the execution of the state's obligations under the bills would have been restricted to permitting tribes to opt into the state's established medical cannabis regime, under which the state would have been the primary regulator of cannabis on tribal lands. Consequently, the bills are also drafted too narrowly to permit DOH to bind the state to tribes' proposals to establish tribal government cannabis regulatory regimes that operate independent of the state's program and oversight.

Second, it is unclear that DOH, alone, is the proper representative from the New Mexico executive branch to be charged with negotiating transboundary cannabis programs that have federal, state, and tribal law implications. DOH's specialization in cannabis law and policy is limited to the three areas of regulation that DOH focuses on under the Compassionate Use Act, i.e., rulemaking, patient and caregiver registration and rule enforcement, and cannabis cultivation licensure. It is ill-equipped to negotiate transboundary agreements, which, on a tribe-by-tribe

257. *See generally* SUSAN JOHNSON & JEANNE KAUFMANN, NAT'L CONFERENCE OF STATE LEGISLATURES, GOVERNMENT TO GOVERNMENT: MODELS OF COOPERATION BETWEEN STATES AND TRIBES (2009), http://www.ncai.org/policy-issues/tribal-governance/state-tribal-relations/Govt_to_Govt_Models_of_Cooperation_Between_States_and_Tribes_2002.pdf; SUSAN JOHNSON & JEANNE KAUFMAN, NAT'L CONFERENCE OF STATE LEGISLATURES, GOVERNMENT TO GOVERNMENT: UNDERSTANDING STATE AND TRIBAL GOVERNMENTS (2000), http://www.ncai.org/policy-issues/tribal-governance/state-tribal-relations/Govt_to_Govt_Understanding_State_and_Tribal_Governments_2000.pdf; COMMISSION ON STATE-TRIBAL RELATIONS, AM. INDIAN LAW CENTER, INC., HANDBOOK: STATE-TRIBAL RELATIONS, http://digitalrepository.unm.edu/cgi/viewcontent.cgi?article=1000&context=ailc_pubs (providing government-to-government negotiation guidance between states and tribes).

basis, will have to address questions including whether or to what extent the state will have criminal jurisdiction or civil/regulatory authority on tribal lands, or how to structure tribal cannabis enterprises to minimize both the tribes' and the state's potential exposure to federal enforcement by the Trump administration and Sessions DOJ.

Third, and as observed by NMLFC, the bills suffer from a lack of regulatory direction. The bills mandate that state-tribal medical cannabis agreements shall provide for: "any assistance from the department [of health] that an Indian nation, tribe or pueblo may request in implementing its own medical cannabis program" on tribal lands. The bills also require the state to provide tribes opting into medical cannabis with "guidelines for compliance with department [of health] rules or compliance with separate express provisions of the intergovernmental agreement" governing cannabis on tribal lands. However, it is still unclear what assistance to tribes is contemplated by this language and what form and structure tribally-implemented medical cannabis programs are expected to take.[258] This is problematic because there is no indication in the bills that tribes would have any policymaking authority to tailor their medical cannabis programs to the particularized needs of their communities.

Finally, under the Compassionate Use Act and New Mexico Administrative Code (incorporated into the New Mexico tribal cannabis bills by reference), there are also no apparent answers to the following critical questions: 1) Will tribal governments be able to establish a medical cannabis administrative office or advisory board to provide regulatory recommendations to the state? 2) Will tribes play any role in reviewing and granting applications to tribal members for medical cannabis cards and licenses to cultivate cannabis on tribal lands? 3) If not, will fees for applying for a cannabis card or license to cultivate be paid to the state or will such revenue go to the tribal governments? 4) Will state police and code enforcement officers or tribal police have the authority to enforce cannabis laws and regulations on tribal lands?

As a result of these four legal vulnerabilities in the 2017 New Mexico tribal medical cannabis bills, moving forward, New Mexico legislators should consider alternative approaches to drafting tribal medical cannabis legislation.

B. New Mexico Tribal Cannabis Legislative and Compact-Drafting Recommendations

Effectively approaching the task of drafting future New Mexico tribal medical cannabis compacting legislation and negotiation of intergovernmental

258. It should be noted that a reasonable reading of this language implies that by entering into an agreement with the state to establish a medical cannabis program, Tribes submit to the authority of DOH to regulate the program on Tribal lands—an implication likely unwelcome by many tribal governments. In particular, DOH regulation of cannabis on tribal lands could colorably implicate *Cabazon*, 480 U.S. at 218–22, which, as previously noted, has been used to support the proposition that states generally lack civil/regulatory authority over Indian tribes on tribal lands. *See id.* at 208–09; Montour, *supra* note 127, at 229–31. As a result, in a dispute over whether tribes or the state has jurisdiction to enforce cannabis regulations on tribal lands under the New Mexico tribal medical cannabis bills, it is uncertain whether a court, state or federal, would void a state-tribal intergovernmental agreement to permit the state to regulate on tribal lands on its face under *Hammer*, 2012 WL 12874349, apply *Cabazon* to determine the validity of such regulation on tribal lands, or adopt a novel approach.

cannabis agreements begins from a synthesis of the CSA and DOJ policy, the 2017 New Mexico medical tribal cannabis legislation, the state of Washington and Nevada's tribal cannabis compacting laws, compacts, and Indian cannabis case law issues. The following discussion is a distillation of this approach.

1. Cannabis Compacting Legislation-Drafting Guidance

There are three key features of effective cannabis compacting legislation that New Mexico legislators should draft into future tribal medical cannabis bills. The first is a broad delegation of authority to representatives of the state with the requisite expertise to negotiate with tribes in the domain of cannabis on a government-to-government basis. An effective bill would confer on the governor of New Mexico the broad authority to negotiate or appoint a team of representatives to negotiate with tribal officials for the establishment of tribal medical cannabis programs. In particular, including input from DOH, the Office of the Attorney General, Office of the Governor, and Office of Indian Affairs would go far towards ensuring that the representatives at the negotiation table are those in the best position to resolve the substantive issues likely to arise in the formation of an intergovernmental cannabis agreement (state criminal jurisdiction in Indian Country, tribal sovereign immunity, state taxation on tribal lands, and state-tribal dispute resolution).

Second, an effective bill should be open-ended and not constrain the issues on the table for negotiation in the formation of state-tribal medical cannabis compacts. For example, instead of compacting language presupposing that the tribes must opt into the New Mexico medical cannabis program to establish a tribal program, a more effective bill would leave open the issues of: how any particular tribal medical cannabis program must be structured; under what authority it must be administered; and under what circumstances the state or tribe may walk away from a particular agreement and renegotiate. These policies are both consistent with the "Brandt Amendment," which amended SB 345 to provide DOH "may" (not "shall") enter into intergovernmental agreements with tribes to establish medical cannabis programs, and also leaves open the opportunity for the state and tribes to explore, at arm's length, the complex legal and political issues attendant to entry into the cannabis arena. Issues like whether it may be a *de facto* tax on tribes to require tribal medical cannabis patients or caregivers to pay licensing or registration fees to the state in order to benefit from a tribal medical cannabis program, or whether or to what extent the tribes have the sovereign authority to exclude state regulators from tribal medical cannabis enterprises governed by tribal ordinances consistent with New Mexico medical cannabis laws.

Third, language should be incorporated that demonstrates clear legislative intent to emphasize cooperation and negotiation for the mutual benefit of the state and tribes. Mutual values held by the state and tribes are likely to include: enhancement of state and tribal public health and safety, well-regulated cannabis markets, and economic development.

With the design for a model New Mexico tribal medical cannabis bill sketched, this discussion now turns to recommendations for the drafting of effective state-tribal cannabis compact terms based on the legislative drafting guidance proposed above.

2. Cannabis Compact-Drafting Recommendations[259]

These compact drafting recommendations proceed from two general assumptions. First, tribes will generally favor medical cannabis compact terms maximizing reservation of their authority to regulate conduct that occurs on tribal lands, but that also operates to cultivate a strong cooperative relationship with the state in the field of cannabis. Second, an effectively drafted state-tribal cannabis compact will contain terms equitably addressing the four central Indian cannabis law issues (criminal jurisdiction in Indian Country, state taxation on tribal lands, tribal sovereign immunity, and state-tribal dispute resolution).

Concerning state criminal jurisdiction on tribal lands, a term should be incorporated in any state-tribal cannabis compact providing that tribal police and tribal authorities are vested with ensuring compliance with the tribe's cannabis laws and regulations. However, a term providing for state inspections of tribal cannabis enterprises should also be negotiated to serve as a reasonable check on the tribal cannabis regulatory system and to promote the general public welfare of the state. An equitable term would provide that: 1) the state shall be permitted to inspect tribal cannabis enterprises upon "reasonable notice"; 2) tribal police may be involved in the inspections; and 3) the results of the state's inspections are timely provided to the tribe. In a cooperative, co-regulatory system, under which the tribes have primary authority over regulation of cannabis on their lands with state inspections serving as a check, circumstances triggering the federal law enforcement priorities outlined in the Wilkinson Memo and Cole II Priorities are likely to be avoided.

Concerning the issue of state taxation of medical cannabis on tribal lands, a term should be incorporated explicitly providing that the state may not levy any tax, fee, assessment, or other charge to be assessed against or collected from the tribe, tribal cannabis enterprise, or tribal member patients related to any activity involving the production, processing, sale, and possession of medical cannabis products. However, it would be prudent for the tribes to provide in their compacts that they agree to collect and use proceeds from fees for medical cannabis card registration and cultivation licensure, as well as fines assessed for rule violations to support implementation of strong medical cannabis regulatory regimes in tribal governments.

Concerning tribal sovereign immunity, a clear, express, and unambiguous provision should be incorporated making clear and unequivocal each tribe's intent to reserve its sovereign immunity in all aspects of its agreement with the state, and that no term in the compact should be interpreted to imply a waiver of a tribe's sovereign immunity.

Finally, concerning dispute resolution, an effective provision will anticipate the reality of judicial litigation, but also employ a multi-step non-judicial process aimed at avoiding that result in the event of disputes arising under the compact. To address the reality of judicial litigation, an equitable choice of law,

259. Joel H. Mack, *Cooperative Agreements: Government-To-Government Relations to Foster Reservation Business Development*, 20 PEPP. L. REV. 1295, 1329-32 (1993) (discussing terms, such as severability, waiver of sovereign immunity, and remedies in the event of default, typically considered by the parties in negotiating state-tribe agreements).

forum selection, venue, and limited waiver of sovereign immunity clause should be negotiated. Based on the state and tribes' mutual interest in avoiding application of federal law and federal courts' interpretation of state cannabis laws and state-tribal cannabis compacts, as well as litigating in a community with ties to the parties, a state court forum located in the judicial district in which the tribal cannabis enterprise at issue lies is a logical and generally equitable choice for forum and venue selection. It also follows from the above-mentioned interests of states and tribes that any such litigation should be governed by the law of the state and tribe that are parties to the compact. The state and tribe(s) that are parties to the compact, in addition, should agree in this clause to a limited waiver of sovereign immunity. This waiver should be limited to matters involving declaratory and injunctive relief concerning the subject-matter of the state-tribal cannabis compact, in which proceeding each party agrees to bear the cost of their own attorneys' fees and costs. To establish an effective non-judicial dispute resolution process, notice and face-to-face negotiation stand out as a natural starting point for dispute resolution procedures, and mediation and binding arbitration can provide alternative mechanisms in the event that negotiation fails. Additionally, language should be included providing that the state and tribes agree to defend their authority to enter into and execute the terms of their cannabis compacts in the context of suits brought by third parties, including the federal government.

Applying these legislative and compacting recommendations, New Mexico state legislators and tribal leaders can fashion a tribal medical cannabis compacting bill that lays the foundation for strong state-tribal cooperative relationships and medical cannabis compacts. The remainder of this article is dedicated to illustrating how the legislative and compacting guidance and recommendations proposed in Parts I–IV may be translated into a future tribal cannabis bill and cannabis compact terms that could garner bipartisan state and tribal support and result in mutual and significant economic benefits for New Mexico and Indian communities in the state.

V. Model New Mexico Tribal-State Cannabis Legislation and Compact Terms

What follows in Part V is intended to serve as a policy resources for New Mexico legislators and as a proposal of model legislation and compact terms for the drafting of a future effective tribal medical cannabis bill and state-tribal cannabis compacts. A model New Mexico tribal medical cannabis bill is presented first, followed by model state-tribal cannabis compact terms.

A. Model New Mexico Tribal Medical Cannabis Legislation

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF NEW MEXICO:

Section 1. The legislature intends to build upon the government-to-government relationship between the State of New Mexico and Indian nations, tribes, and pueblos located in the state by authorizing the governor, or his or her designee(s), to enter into agreements concerning the regulation of cannabis on Indian nation, tribal, and pueblo lands. Such agreements may include, but are not limited to including, provisions pertaining to:

(a) Criminal and civil law enforcement;

(b) Regulatory issues relating to the possession, delivery, production, processing or use of medical cannabis in its various forms;

(c) Medical and pharmaceutical research involving cannabis;

(d) The administration of laws relating to taxation;

(e) Any immunity, preemption or conflict of law relating to the possession, delivery, production, processing, transportation or use of medical cannabis; and;

(f) The resolution of any disputes between tribal government and this State, which may include, without limitation, the use of mediation, arbitration, or other non-judicial processes.

Section 2. The legislature finds that these agreements will facilitate and promote a cooperative and mutually beneficial relationship between the state and the tribes in the domain of cannabis regulation. Such cooperative agreements shall aspire to enhance public health and safety and ensure a lawful and a well-regulated cannabis sector in this State.

B. Model New Mexico State-Tribal Compact Terms

Safety and Enforcement.

The Tribe shall address safety and enforcement issues in accordance with tribal law, this Compact, and the internal policies and controls of the tribe or tribal cannabis enterprise.

1. Premises Checks.

a. By the Tribe. The Tribal Police Department or authorized agency may conduct its own premises checks on tribal lands to observe compliance with tribal law and this Compact and to provide support and education to tribal cannabis enterprises and staff. The tribe shall also make the results of tribal police premises checks available to the state upon request.

b. By the State. The state of New Mexico, through its staff, may also conduct premises checks at tribal cannabis enterprises. Prior to conducting a premises check, the state will contact the tribal police to provide reasonable notice of its intent to conduct a premises check. Except as provided in Section 3, below, the tribal police shall observe and participate in all premises checks conducted by the state. The state will share the results of such premises checks with the tribal police in a timely manner.

2. Compliance Checks-Non-Patients

a. By the Tribe. The tribe shall conduct compliance checks of tribal cannabis enterprises using individuals without a medical cannabis card through the tribal police department or other authorized agency in accordance with tribal law to ensure compliance with cannabis card requirements.

b. By the State. The state of New Mexico, through its staff, may also conduct compliance checks at tribal cannabis enterprises to ensure compliance with medical cannabis card requirements. Prior to conducting a compliance check, the state will contact the tribal police to provide reasonable notice of its intent to conduct a compliance check. The state will share the results of such compliance checks with the tribal police in a timely manner.

3. Cooperation. Both parties will cooperate in good faith to undertake all state-requested checks jointly. The tribal police department will make reasonable efforts to arrange and conduct all state-requested premises checks within 48 hours of being provided with written notice of such request by the state. All such notice shall be sent to the chief of the tribal police department and chief tribal executive. However, if the tribal police department is unable or unwilling to arrange or conduct a properly invoked premises check in 96 hours, the state may then perform the premises check on its own without tribal police. Should either party have any concerns arising out of a premises or compliance check or the results thereof, the parties will meet in good faith to discuss any suggested changes to protocols of the premises and compliance checks or tribal cannabis enterprise operations.

Taxes.

No state tax or fee, assessment, or other charge imposed under the New Mexico medical cannabis program, pursuant to the Lynn and Erin Compassionate Use Act, may be assessed against or collected from the tribe, tribal cannabis enterprise(s), tribal member business, state licensee, or medical cannabis patient related to any activity related to the cultivation, processing, and possession of medical cannabis governed by this Compact. Any amounts received by the tribal government through the process of permitting and licensure of medical cannabis patients and cultivators shall be used by the tribe to fund enforcement of the tribal medical cannabis program.

Sovereign Immunity.

The state and tribe agree that, except for the limited purpose of resolving disputes in accordance with this compact, the signing of this compact by the tribe does not imply a waiver of sovereign immunity by the tribe or any of its subdivisions or enterprises and is not intended as a waiver of sovereign immunity and that any action by the state in regard to cannabis regulation shall be in accord with this compact.

Dispute Resolution.

1. Neither the state nor tribe, nor officers or representatives working on either party's behalf, may petition any court to enforce this compact unless: a) the dispute resolution process described in Section 2 has been followed in good faith to completion without successful resolution, or b) the other party fails to enter into the dispute resolution process. Any litigation commenced upon exhaustion of the dispute resolution process described in Section 2 will be governed as follows:

a. Litigation shall be governed by the laws of New Mexico and the tribe, and pursued in District Court for the State of New Mexico, and any court having appellate jurisdiction thereover;

b. Venue for said litigation shall be in the District Court for the State of New Mexico in which the tribe sits, and in which proceeding forum nonconveniens shall not be asserted by either party;

c. The parties waive their sovereign immunity from suit, only in said New Mexico State District Court and any court having appellate jurisdiction thereover and only for declaratory and injunctive relief brought by the parties to this Compact. This waiver of sovereign immunity is limited and does not extend to monetary relief of any kind or nature whatsoever, including but not limited to any award of attorneys' fees and costs, which the parties also agree, shall be borne by each party, respectively.

2. Should a dispute arise between the parties regarding compliance with this compact by either party, or by their officers, employees, representatives, or agents, the parties will attempt to resolve the dispute though the following non-judicial dispute resolution process:

a. Notice. Either party may invoke the dispute resolution process by notifying the other, in writing, of its intent to do so. The notice must set out the issues in dispute and identify the party's position on each issue.

b. Meet and Confer. The first stage of the process will include a face-to-face meeting between representatives of the parties to attempt to resolve the dispute by negotiation. The meeting must be convened within thirty (30) days after a party's receipt of the written notice described in subsection (a). The representatives of each party will come to the meeting with the authority to settle the dispute. If the dispute is resolved, the resolution will be memorialized in a writing signed by the parties.

c. Mediation. The second stage of the process will be that if the parties are unable to resolve the dispute within sixty (60) days after a party's receipt of written notice under subsection (a) above, the parties will engage the services of a mutually agreed upon qualified mediator to assist them in attempting to negotiate the dispute. Costs for the mediator will be borne equally by the parties. The parties will pursue the mediation process in good faith until the dispute is resolved or until the mediator determines that the parties are not able to resolve the dispute. If the dispute is resolved, the resolution will be memorialized by the mediator in a writing signed by the parties, which will bind the parties.

d. Arbitration.

(1) If a party terminates the dispute resolution process before completion, or if the mediator determines that the dispute cannot be resolved in the mediation process, or if the dispute is not resolved within one hundred and twenty (120) days after the date the mediator is selected, either party may initiate binding arbitration proceedings under the rules of the American Arbitration Association (AAA), but AAA need not administer the arbitration. If the arbitrator determines that a party is in violation of a material provision of this compact, and such violation is not or cannot be cured within thirty (30) days after the arbitrator's decision, then the other party may terminate this compact within sixty (60) days' prior written notice.

(2) The arbitrator shall have no authority to award monetary damages or issue injunctive or other equitable relief.

(3) Each party will bear its own legal costs incurred under this section. All costs of the arbitrator will be shared equally.

2. In any action filed by a third party challenging either the tribe's or the state's authority to enter into or enforce this compact, the parties each agree to support the compact and defend each of their authority to enter into and implement this compact; provided, however, that this provision does not waive, and must not be construed as a waiver of, the sovereign immunity of the tribe or any of its subdivisions or enterprises.

CONCLUSION

The legal and political issues surrounding tribal cultivation, possession, and use of cannabis in Indian Country form a complex and winding trail. Thus, tribes considering the prospect of establishing medical or recreational cannabis programs on their lands must consider strategies for protecting their tribal cannabis enterprises from federal intervention; guarding against state attempts to enforce state law or regulations against tribal members or tribal cannabis enterprises; and establishing tribal cannabis regulatory regimes that are tailored to tribes' unique public health and safety concerns. As a result, close state-tribal cooperation is key for the success of any tribal cannabis program. In New Mexico, Representative Lente and Senator Shendo's introduction of HB 348 and SB 345 in the first regular session of the 2017 New Mexico Legislature constituted a constructive attempt toward opening the door in New Mexico to state-tribal discussions concerning medical cannabis on tribal lands. However, the 2017 tribal medical cannabis bills contained key legal vulnerabilities likely to render them ineffective. As a result, it will be crucial for New Mexico to pass medical cannabis compacting legislation drafted with sufficient breadth to permit the state and tribes with latitude to negotiate medical cannabis compacts, on equal footing, based on the central Indian cannabis law issues that are likely to arise. It is also of the utmost importance that the policy underling any state-tribal cannabis compacting legislation reflects the establishment of cooperative and mutually beneficial relationships concerning cannabis in an environment where both governments have strong and vested interests in the long-term prosperity of their medical cannabis programs. As a result, and to this end, New Mexico legislators should introduce the model New Mexico tribal cannabis bill proposed in this article, or one that is substantially similar, which will lay a strong foundation for future state-tribal cannabis compacting negotiations.