

# Tribes & Cannabis

## WHERE THINGS STAND

By Adam Crepelle

**C**annabis is the most exciting economic opportunity for tribes since gaming. The cannabis industry is expected to grow by up to 700% by 2020.<sup>1</sup> Some project the market will be worth \$50 billion by 2026.<sup>2</sup> However, raids on tribal cannabis operations have dampened the enthusiasm that originally surrounded the industry. This article discusses major events in the tribal cannabis industry to date and provides policy recommendations for tribes.

### Tribal Cannabis Basics

At the outset, it is important to note that the cannabis industry is about more than getting high. Though marijuana is a schedule I drug under federal law,<sup>3</sup> the U.S. government holds a patent on medical marijuana,<sup>4</sup> and 28 states permit medical marijuana.<sup>5</sup> Hemp comes from the same plant as marijuana but contains minimal levels of tetrahydrocannabinoids (THC), the substance that gets people high. Hemp has countless industrial uses and is nutritious too.<sup>6</sup>

Though federally recognized tribes have a direct government-to-govern-

ment relationship with the United States, tribal marijuana policy will likely be driven by states. If a state prohibits an activity, tribes within its borders are forbidden from partaking in it. If a state regulates an activity, tribes within the state are allowed to craft their own rules for it. This is how tribes got into gaming.

An analogy between cannabis and gaming can be made, but it probably does not work. Gaming is not prohibited by federal law. “All parts” of cannabis plants are.<sup>7</sup> Nevertheless, a few tribes have entered the cannabis industry.

### Tribes and Cannabis so far

In 2015, the Flandreau Santee Sioux Tribe attempted the most ambitious tribal foray into the cannabis industry. The tribe is located in South Dakota—a state that prohibits marijuana in all forms.<sup>8</sup> Undaunted, the Santee Sioux attempted to open the United States’ first marijuana resort. A bitter standoff with the state attorney general and federal law enforcement ensued. It resulted in the Santee Sioux agreeing to destroy their crop. Chillingly, two non-Indian consultants who worked with the tribe on the venture were indicted by South Dakota on conspiracy charges.<sup>9</sup>

Federal, state, and local law enforcement raided the Pit River Tribe and Alturas Indian Rancheria marijuana operations in July of 2015.<sup>10</sup> Pit River met with state and local officials about their crop, but the meetings were not fruitful. Indeed, Pit River was accused by a tribal government insider of “thumbing their nose at the Modoc County

Sheriff.”<sup>11</sup> The local U.S. Attorney’s Office also advised the tribes against cultivating marijuana.<sup>12</sup> The operation did not have the support of tribal citizens either; in fact, an Alturas citizen asked the federal government to terminate the crop.<sup>13</sup> Moreover, the amount of marijuana grown by the tribes greatly surpassed the legal amount in nearby counties.<sup>14</sup>

A federal court struck down the Menominee Indian Tribe’s hemp venture in 2016. The Menominee legalized hemp production and were cultivating it for research in conjunction with the College of the Menominee Nation as states are allowed to do under the Agricultural Act of 2014. The tribe allowed a BIA agent to collect samples of the crop. The agent’s observations during the collection caused the feds to raid the Menominee. The tribe argued it should be treated as a state, but the court ruled that tribes were not defined as states for purposes of the Act. Additionally, the tribe argued that Wisconsin law did not apply on its reservation. The court agreed; nevertheless, the court held that the tribe could not cultivate hemp because it is illegal in Wisconsin.<sup>15</sup> However, the court did note that the federal government’s raid and destruction of the tribe’s crop seemed “abrupt” since injunctive relief was available.<sup>16</sup>

Alexander White Plume succeeded in having a decade long injunction prohibiting him from cultivating hemp lifted—“the only one of its kind in history”—in 2016. The court based its decision on the changing national view of hemp “as a viable agricultural crop.” It did not address whether the 1868 Treaty of Fort Laramie granted White Plume the right to grow hemp. It also did not examine whether the Agricultural Act equivocates tribes with states.<sup>17</sup>

Some tribes have entered the marijuana industry with little controversy. Washington has legalized recreational marijuana, and three tribes have entered recreational marijuana compacts with the state.<sup>18</sup> The Passamaquoddy Tribe has received a hemp cultivation license from Maine.<sup>19</sup> The Navajo are cautiously entering the hemp industry,<sup>20</sup> and the Las Vegas Paiute Tribe is in the process of opening a medical marijuana center.<sup>21</sup> Both tribes are carefully crafting cannabis regulations.

## Moving Forward with Cannabis

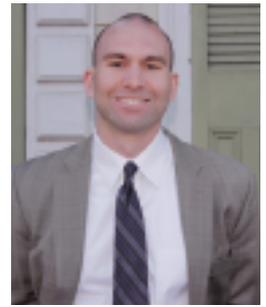
Tribes must develop robust regulatory frameworks for their cannabis operations. To date, the only federal guidance tribes have received on cannabis is the Wilkinson Memorandum.<sup>22</sup> It provides tribes with eight general principles to apply to their cannabis ventures. The following guidelines for tribes are drawn from the tribal cannabis projects discussed above:

- The cannabis operation needs to be supported by the tribe’s citizens.<sup>23</sup>
- Local non-Indian law enforcement must support the tribal cannabis operation, at least tacitly.<sup>24</sup>
- Cannabis must be legally transported off the reservation.<sup>25</sup>
- Indian consultants are preferable to non-Indian consultants.<sup>26</sup>
- Cannabis cultivation conditions must meet safe workplace standards.<sup>27</sup>
- Environmental conditions must be controlled in order to regulate cannabis THC levels.<sup>28</sup>
- Out of state vehicles on a reservation where cannabis is being grown suggests leakage.<sup>29</sup>
- Armed security guards should not be used to protect cannabis ventures.<sup>30</sup>

Even if a tribe manages to avoid having its cannabis growth raided, conflicts between tribal and state cannabis law are likely to arise. Indian country criminal jurisdiction is already convoluted, so it is difficult to imagine cannabis law enforcement going smoothly absent inter-governmental cooperation. Taxation has long been a source of contention between tribes and states; accordingly, tribal-state disputes over cannabis taxes are easy to envision.

Until Congress or the courts provide clear rules, tribes interested in pursuing cannabis related ventures should compact with the surrounding state. Having to compact undermines tribal sovereignty, but the compact can be cooperative rather than adversarial. For exam-

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ple, the compacts Washington has entered with tribes create an alliance whereby the tribes and state will defend the compacts against third party challenges.<sup>31</sup>

## Conclusion

Tribes looking to enter the cannabis industry must weigh several policy considerations. Substance abuse is a plague upon Indian country. Increasing the availability of marijuana could exacerbate the problem; alternatively, marijuana could be viewed as a lesser evil than other drugs. The cannabis industry is predominately cash due to banking

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laws, and large amounts of cash floating around a reservation could spark crime. Many tribes have outrageous poverty and unemployment rates, so the risk may be worth the revenue. Each tribe

will have to answer these questions for itself.

Cannabis can further the federal Indian policy objectives of promoting tribal sovereignty and economic development—just like gaming.<sup>32</sup> Success in the cannabis industry is not predicated on tribes being located near large population centers. Moreover, it is the only viable crop on some reservations.<sup>33</sup> Cannabis also offers tribes the ability to return to their agricultural ways and develop natural products. Tribes transformed the gaming industry. They can transform the cannabis industry too. ♣

<sup>1</sup> <http://www.forbes.com/sites/debraborchardt/2016/12/12/the-cannabis-market-that-could-grow-700-by-2020/#55976d971ed3>

<sup>2</sup> <https://www.bloomberg.com/news/articles/2016-09-12/cannabis-industry-to-expand-to-50-billion-by-2026-analysts-say>

<sup>3</sup> <https://www.dea.gov/divisions/hq/2016/hq081116.shtml>

<sup>4</sup> <http://patft.uspto.gov/netacgi/nph-Parser?Sect1=PTO1&Sect2=HITOFF&d=PALL&p=1&u=%2Fnetathtml%2FPTO%2Fsrchnum.htm&r=1&f=G&l=50&s1=6630507.PN.&OS=PN/6630507&RS=PN/6630507>; <http://www.denverpost.com/2016/08/28/what-is-marijuana-patent-6630507/>

<sup>5</sup> <http://www.ncsl.org/research/health/state-medical-marijuana-laws.aspx>

<sup>6</sup> <http://www.forbes.com/sites/phillempert/2015/04/20/do-you-really-know-the-differences-between-hemp-and-weed/#645571255963>

<sup>7</sup> 21 USC 802(16).

<sup>8</sup> <https://www.mpp.org/states/south-dakota/>

<sup>9</sup> <http://www.thecannabist.co/2016/08/15/south-dakota-tribe-marijuana-consultants-jonathan-hunt-plea/61130/>

<sup>10</sup> <https://indiancountrymedianetwork.com/news/politics/pot-raid-has-pit-river-tribe-fuming-rips-bia/>

<sup>11</sup> [http://www.huffingtonpost.com/entry/pit-river-marijuana-raid\\_us\\_55a938cfe4b0f904bebf52a](http://www.huffingtonpost.com/entry/pit-river-marijuana-raid_us_55a938cfe4b0f904bebf52a)

<sup>12</sup> <http://www.cannalawblog.com/cannabis-on-native-american-lands-lessons-from-the-pit-river-raid/>

<sup>13</sup> <https://turtletalk.files.wordpress.com/2015/07/affidavit-in-support-of-alturas-pit-river-search-warrant-7-8-2015.pdf>

<sup>14</sup> <https://indiancountrymedianetwork.com/news/politics/pot-raid-has-pit-river-tribe-fuming-rips-bia/>

<sup>15</sup> *Menominee Indian Tribe of Wisconsin v. Drug Enforcement Administration and United States Department of Justice*, Case No. 15-CV-1378 (E.D. Wis. 2016).

<sup>16</sup> *Id.* at n.1.

<sup>17</sup> *United States v. Alexander White Plume, et al.*, Civ. No. 02-5071-JLV (D. S. Dakota).

<sup>18</sup> <https://www.newcannabisventures.com/washington-signs-3rd-tribal-compact-as-puyallup-tribe-to-open-cannabis-testing-lab/>

<sup>19</sup> <http://www.pressherald.com/2016/07/11/development-of-hemp-as-cash-crop-in-maine-starts-slowly/>

<sup>20</sup> <http://www.forbes.com/sites/debraborchardt/2016/10/24/navajo-tribe-signs-its-first-hemp-growing-contract/#26720b551585>

<sup>21</sup> <https://www.merryjane.com/news/las-vegas-paiutes-tribe-gets-into-the-medical-marijuana-game>; <http://www.ktnv.com/news/paiute-tribe-close-to-launching-large-scale-marijuana-operation>

<sup>22</sup> <https://www.justice.gov/sites/default/files/usao-wdwa/legacy/2014/02/14/DAG%20Memo%20-%20Guidance%20Regarding%20Marijuana%20Related%20Financial%20Crimes%20%2014%2014%20%282%29.pdf>

<sup>23</sup> <https://turtletalk.files.wordpress.com/2015/07/affidavit-in-support-of-alturas-pit-river-search-warrant-7-8-2015.pdf> at 7-8 (9).

<sup>24</sup> <https://turtletalk.files.wordpress.com/2015/07/affidavit-in-support-of-alturas-pit-river-search-warrant-7-8-2015.pdf> at 7 (8)

<sup>25</sup> <https://turtletalk.files.wordpress.com/2015/07/affidavit-in-support-of-alturas-pit-river-search-warrant-7-8-2015.pdf> at 10 (14) (noting a driver leaving the Altruras grow site had marijuana in the vehicle on a California roadway, but he did not have a valid medical marijuana authorization)

<sup>26</sup> <https://turtletalk.files.wordpress.com/2015/10/menominee-hemp-warrant.pdf> at 11 (f)

<sup>27</sup> <https://turtletalk.files.wordpress.com/2015/10/menominee-hemp-warrant.pdf> at 12 (m)

<sup>28</sup> <https://turtletalk.files.wordpress.com/2015/10/menominee-hemp-warrant.pdf> at (r and s)

<sup>29</sup> <https://turtletalk.files.wordpress.com/2015/10/menominee-hemp-warrant.pdf> at 16 (z)

<sup>30</sup> <https://turtletalk.files.wordpress.com/2015/10/menominee-hemp-warrant.pdf> at 14(u)

<sup>31</sup> <http://lcb.wa.gov/publications/Marijuana/Compact-9-14-15.pdf> at p.10 H.3.; <https://assets.documentcloud.org/documents/2699297/Puyallup-Tribal-Compact.pdf> at p.10. C.

<sup>32</sup> 25 USC 2701(4).

<sup>33</sup> *See for example*, *U.S. v. White Plume*, 447 F.3d 1067, 1076 (8<sup>th</sup> Cir. 2006) (noting, “We are not unmindful of the challenges faced by members of the Tribe to engage in sustainable farming on federal trust lands. It may be that the growing of hemp for industrial uses is the most viable agricultural commodity for that region.”).