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# Tribes and Cannabis:

## SEEKING PARITY WITH STATES AND CONSULTATION AND AGREEMENT FROM THE U.S. GOVERNMENT

BRAD A. BARTLETT AND GARRETT L. DAVEY

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**S**ales of legal cannabis reached nearly \$7 billion in 2016 and are expected to eclipse \$20 billion by 2021. Despite their efforts, and an overarching trust obligation owed by the U.S. government to Indian nations, American Indian tribes adopting state “go-it-alone” models of cannabis legalization have failed to receive parity in treatment with states on cannabis issues and have been met with threats or actions by law enforcement. Because of their complex jurisdictional circumstances, tribes may ultimately need to consider implementing different strategies than their pioneering state counterparts.

### **The Good, the Bad, the Ugly: Tribes and Cannabis**

Fiscal year 2015 proved to be an important, if mixed, year for Indian tribes entering the cannabis<sup>1</sup> industry, especially given marijuana’s continued illegality under federal law. *Cannabis sativa L.* is the genus of flowering plants that includes both marijuana and hemp. The marijuana plant is known to produce the psychoactive ingredient tetrahydrocannabinol (THC), as well as the non-psychoactive ingredient cannabidiol (CBD), which is widely touted for its medical benefits including reducing symptoms of intractable epilepsy. Hemp, by comparison, is a non-psychoactive cannabis plant that can be used to make more than 25,000 products ranging from clothing to dynamite.<sup>2</sup>

Despite the fact that 23 states and the District of Columbia legalized marijuana for medical or recreational purposes in 2015, it was (and is) still illegal to possess, use, buy, sell, or cultivate marijuana under the 1970 federal Controlled Substances Act (CSA), which classifies marijuana as a Schedule I drug.<sup>3</sup> Despite federal illegality, marijuana businesses in Colorado and Washington, the first two states to authorize the use of recreational marijuana under their laws, sold more than \$2.3 million worth of legal marijuana *per day* and \$100 million worth of marijuana *per month* in the 2015 fiscal year, all while swelling state coffers with tens of millions of dollars in tax revenues.<sup>4</sup>

On the other hand, tribes looking to replicate states’ lucrative experiment in legalization and enter the booming cannabis market resembled something more akin to the good, the bad, and the ugly—a narrative with which tribes are all too familiar and have had difficulty transcending with the passage of time.

### **The Good**

On the good side, fiscal year 2015 saw two tribes in the state of Washington, the Suquamish Tribe and Squaxin Island Tribe, separately sign compacts with the state, thereby giving the tribe, a tribal entity, or tribal member business a green light to cultivate, process, and sell marijuana on tribal lands and enter the state’s burgeoning marijuana marketplace.<sup>5</sup> Both tribes now operate successful tribally owned marijuana retail stores.<sup>6</sup> And a third tribe, the Puyallup Tribe of Indians, signed a compact with the state in 2016, paving the way for the first tribally affiliated cannabis testing lab.<sup>7</sup>

Further, 2015 saw the National Congress of American Indians pass a resolution calling for favorable marijuana and hemp policies in Indian country.<sup>8</sup>

### **The Bad**

On the bad side, fiscal year 2015 evidenced a disparity in federal enforcement between tribes looking to legalize cannabis in some form and states that have already legalized cannabis under state law. This disparity in treatment has been especially problematic for tribes situated in states maintaining cannabis prohibitions. For example, in May 2015, the Menominee Indian Tribe of Wisconsin passed a tribal ordinance legalizing the cultivation of industrial hemp on its reservation. Thereafter, the tribe entered into an agreement with the tribal college, the College of Menominee Nation, to research the viability of industrial hemp. The tribe issued a license to the college, which planted a hemp crop on tribal lands for research purposes.<sup>9</sup>

Despite the Menominee’s efforts to exercise its sovereignty and regulate industrial hemp on tribal homelands, the U.S. Drug Enforcement Administration (DEA), in October 2015, raided the tribe’s crop of 30,000 hemp plants. The tribe challenged the seizure in the U.S. District Court for the Eastern District of Wisconsin seeking a declaratory judgment that the tribe could produce industrial hemp “as a state” under the exception provided by the Agricultural Act of 2014 (Farm Bill) to the federal CSA for industrial hemp.<sup>10</sup> However, the court rejected this argument, ruling instead that the tribe was not a “state,” within the meaning of the hemp exception to the CSA, and that be-

cause Wisconsin law did not authorize hemp cultivation, the tribe was precluded from cultivating hemp under the Farm Bill exception.<sup>11</sup>

Similarly, in June 2015, the Flandreau Santee Sioux Tribe of South Dakota passed a Marijuana Control Ordinance, which laid out a regulatory scheme to engage in recreational marijuana commerce on the reservation, including legalizing marijuana use at an entertainment venue located adjacent to the tribe's 25-year-old casino and hotel. Before the tribe could get its business off the ground, however, tribal officials, in November 2015, voluntarily destroyed nearly \$1 million in marijuana grown in preparation of opening the marijuana resort. The tribe made this decision after receiving warnings from law enforcement officials of potential raids similar to those conducted on the Menominee Nation.<sup>12</sup>

### The Ugly

Then there is the downright ugly side of tribal entry into the cannabis industry, with alleged meddling by county law enforcement in matters of tribal enterprise. In 2015, the Pinoleville Pomo Nation entered California's medical marijuana market with its Pinoleville Medical Cannabis Project, a "cannabis collective" organized as a non-profit under tribal law. The collective is wholly owned by the tribe, which created a tribal ordinance for the project as well as a regulatory agency to oversee all aspects of the operation. Organized solely for the production of medical marijuana, the project involved the assistance of out-of-state cannabis consultants, including FoxBarry Companies out of Kansas and United Cannabis Corporation out of Colorado. The tribe sought to devote 2.5 acres of its 99-acre tribal land rancheria to the venture, which included 90,000 square feet of greenhouse for marijuana production and distribution.

However, in September 2015, the Mendocino County Sheriff raided the grow operation under the cloak of Public Law 83-280 (PL 280), a controversial law transferring legal authority and jurisdiction from the federal government to state governments.<sup>13</sup> Law enforcement confiscated and destroyed nearly 400 marijuana plants, an amount exceeding Mendocino County's legal limit of 25 plants per lot. Some press accounts suggest the raid by the county sheriff was the result of a tip from one of the tribe's 70 tribal members.<sup>14</sup> The tribe filed an illegal search and seizure claim in Mendocino County in March 2016, which is still pending.<sup>15</sup>

### Navigating a Path Forward

As these examples illustrate, 2015 was not only a mixed year for tribes experimenting with cannabis legalization, but often a volatile one. Unlike states, tribes on the whole were unable to break through and achieve a level of success similar to the states—especially in states maintaining some form of cannabis prohibition. Furthermore, Congress demonstrated a continued willingness to provide favorable treatment to states legalizing medical marijuana with the passage of § 538 of the Consolidated and Further Continuing Appropriations Act of 2015, which prohibits spending on federal enforcement in states implementing a legal medical marijuana system. The amendment, which Congress renewed in 2016, is up for renewal again in April 2017.<sup>16</sup>

Three more states, including California, a state that legalized medical use of marijuana more than two decades ago, have now legalized recreational cannabis. States embracing cannabis legalization continue to collect even greater revenues in the form of sales tax, business taxes, or even payroll taxes. The landscape for tribes,

in contrast, has not changed and many tribes remain uncertain as to how best to legalize cannabis, launch cannabis ventures, and collect revenues from cannabis operations.

Despite their efforts, and an overarching trust obligation owed by the U.S. government to Indian nations, tribes adopting state "go-it-alone" models of legalization have failed to receive parity in treatment with states on cannabis issues and have been met with threats or actions by law enforcement. Because of their complex jurisdictional circumstances, tribes may ultimately need to consider implementing different strategies than their pioneering state counterparts.

This article evaluates options for tribes looking to break into the seemingly ever-burgeoning cannabis market and suggests that tribes look to and embrace consultation, transparency, and agreement as one potential avenue for achieving parity in treatment with states on cannabis issues. Such a framework could prove valuable as the nation moves forward under new leadership bringing with it the possible resurrection of more conservative attitudes toward cannabis and renewed risks of greater federal intervention and enforcement.

### The Big Experiment: States and Cannabis

As of January 2017, 26 states and the District of Columbia have legalized cannabis under state law either for recreational or medical use, and more states are embracing cannabis legalization and reform with each election cycle. Additionally, another 16 states have legalized CBD for use in treating medical ailments such as extreme seizures. As a result of state leadership in the cannabis experiment, 85 percent of the U.S. population now has access to medical cannabis, and nearly 20 percent of the country's population has access to the recreational cannabis market. Sales of legal cannabis reached nearly \$7 billion in 2016 and are expected to eclipse \$20 billion by 2021.<sup>17</sup>

Not only has consumer access to cannabis increased exponentially since California first legalized medical cannabis under state law in 1996, but states that have legalized cannabis for recreational use under state law have experienced a revenue boon that, in the short term, shows no signs of abating. For example, cannabis businesses in Colorado, the first state to open its doors to recreational cannabis, earned over \$1 billion in 2016, and the state took in over \$155 million from taxes and fees associated with cannabis business in the state.<sup>18</sup> Broken down by store, Colorado sales of recreational cannabis averaged \$1.98 million per location, and sales of medical cannabis averaged \$896,000 per location.<sup>19</sup>

In Washington, where voters voiced their support for legalizing recreational cannabis the same year as Colorado, the state took in \$34 million from sales of recreational cannabis in 2015. Local governments and municipalities took in an additional \$11.2 million in revenue.<sup>20</sup> Retail cannabis businesses in Washington earned, on average, \$1.55 million per location.<sup>21</sup> Oregon, Washington's neighbor to the south, collected over \$60 million in cannabis tax revenue, and its retail and medical cannabis stores earned, on average, \$672,000 and \$294,000, respectively.<sup>22</sup> Finally, in California, where voters approved the Adult Use of Marijuana Act in November 2016, the state and local governments are slated to collect additional revenues between the high hundreds of millions to over \$1 billion annually.<sup>23</sup>

As this data demonstrates, states have a lot of skin in the game when it comes to cannabis. These states stand to lose tax revenue from legitimate businesses should the federal government decide to reject states' rights and modify its cannabis enforcement policies in these states in favor of greater federal enforcement. But states are not

alone in expanding their revenue streams as a result of legal cannabis.

It is estimated that the federal government collects approximately \$1.5 billion in income and payroll taxes from cannabis businesses throughout the United States.<sup>24</sup> Importantly, under the Internal Revenue Code, cannabis businesses may not deduct ordinary business expenses from gross income associated with the “trafficking in controlled substances” as defined by the CSA.<sup>25</sup> This tax treatment equates to a payment of federal taxes between 50 percent to 70 percent of total earnings by cannabis businesses, as compared with the approximately 30 percent faced by non-cannabis businesses.<sup>26</sup>

### Federal Reaction to the State Experiment

While marijuana remains illegal as a Schedule I controlled substance under the federal CSA, the U.S. government has largely taken a hands-off approach to CSA enforcement in states that have legalized cannabis under state law. In 2009, the U.S. Department of Justice (DOJ) issued a memo addressing *Investigations and Prosecutions in States Authorizing the Medical Use of Marijuana*, authored by Deputy Attorney General David W. Ogden, which states that while the “prosecution of significant traffickers of illegal drugs ... continues to be a core priority ... pursuit of these priorities should not focus federal resources ... on individuals whose actions are in clear and unambiguous compliance with existing state laws providing for the medical use of marijuana.”<sup>27</sup>

Subsequent DOJ memoranda further clarified prosecution and law enforcement priorities regarding cannabis enforcement. In 2013, the DOJ issued *Guidance Regarding Marijuana Enforcement* authored by Deputy Attorney General James M. Cole (hereinafter *Marijuana Enforcement Guidance*). The DOJ’s *Marijuana Enforcement Guidance* highlighted eight federal enforcement priorities vis-à-vis cannabis:

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

The *Marijuana Enforcement Guidance* further states that the DOJ, which also houses the DEA, should focus its enforcement efforts on these priorities, and not on states that have “implemented strong and effective regulatory and enforcement systems to control the cultivation, distribution, sale, and possession of marijuana,” compliance with which would be less likely to interfere with any of the aforementioned federal priorities.<sup>28</sup>

Noticeably absent from the 2013 DOJ’s memorandum was any discussion of cannabis enforcement priorities within areas of Indian country.<sup>29</sup> Thus, in 2014, the agency issued a *Policy Statement Re-*

*garding Marijuana Issues in Indian Country* (hereinafter *Indian Country Marijuana Policy*).

In addition to DOJ guidance vis-à-vis cannabis in states and Indian country, Congress further modified and limited federal cannabis enforcement in favor of states. Section 538 of the Consolidated and Further Continuing Appropriations Act of 2015 protects medical marijuana states from unwarranted federal interference. In essence, the legal provision, drafted with broad bipartisan support, prohibits federal law enforcement agencies from prosecuting individuals and/or entities whose conduct is compliant with state medical marijuana laws.<sup>30</sup> Congress last renewed the amendment, which was upheld by the U.S. Court of Appeals for the Ninth Circuit in *U.S. v. McIntosh*,<sup>31</sup> in December 2015. Absent further congressional renewal, however, the amendment expires on April 28, 2017.<sup>32</sup>

### Opening the Door to Industrial Hemp Production

Finally, Congress passed the so-called Farm Bill in 2014, which includes a cannabis exemption to the CSA, albeit for hemp, rather than the psychoactive variety.<sup>33</sup> The Farm Bill, which received broad bipartisan support, authorized the cultivation of industrial hemp in states that had legalized hemp under state law. Under the Farm Bill, institutions of higher education or state agricultural departments may cultivate industrial hemp for research purposes in connection with an agricultural pilot program or other agricultural or academic research.<sup>34</sup>

Industrial hemp is another sector of the larger cannabis industry that states have rapidly entered. To date, 32 states now define industrial hemp as distinct from marijuana and have removed barriers to its production—an exercise in sovereignty unavailable to tribes under the current Farm Bill.<sup>35</sup> Seven states produced research crops in 2015 in accordance with the 2014 Farm Bill and another five states have licensed or registered farmers to grow it under state law only. Colorado and Kentucky, the two state frontrunners in hemp, now have some form of DEA registration for institutional growers, but not, however, for private farmers.<sup>36</sup>

While the hemp industry in the United States is still very much in the nascent stages of development—the United States still imports all commercial hemp products sold or used for manufacturing—the variety of uses for hemp presents a lucrative market with substantial growth potential.<sup>37</sup> Market analysts estimate nearly \$593 million in sales of hemp products in 2015—up 33 percent from 2013-14—and predict a \$1.8 billion market by 2020.<sup>38</sup>

### Consultation, Transparency, and Agreement: a Model for Achieving Parity in Treatment With States

While in recent years states have enjoyed broad latitude to effectuate marijuana reform policies under the political triumvirate of states’ rights, evolved public and voter attitudes, and an executive and congressional branch with more restrained and pragmatic views of enforcement of federal cannabis prohibitions, tribes, on the other hand, have oftentimes served as the proverbial “low-hanging fruit” for federal enforcement actions. This despite the U.S. government’s trust responsibility, which, at a minimum, places tribes *on equal footing* with their state counterparts.

For this reason, and because of the complex jurisdictional circumstances in Indian country, tribes seeking to enter the cannabis industry should consider a more cautious approach and should explore consultation, transparency, and agreement as a potential avenue for achieving parity in treatment with states on cannabis issues.

## Consultation

As recognized by the DOJ, government-to-government consultation forms the scaffolding for achievement of parity with states on cannabis issues as well as ensuring that the eight federal enforcement priorities with regard to cannabis are not impacted.

As discussed above, on Oct. 28, 2014, the DOJ issued the *Indian Country Marijuana Policy*, authored by Monty Wilkinson, director of the Executive Office for United States Attorneys. The policy extends the DOJ's eight marijuana prosecution and law enforcement priorities to tribes and, importantly, adds a government-to-government consultation requirement grounded in U.S. trust responsibilities.

The DOJ's *Indian Country Marijuana Policy* recognizes tribes as "sovereign governments, many of which traverse state borders and federal districts." As such, "the United States attorneys recognize that effective federal law enforcement in Indian country, including marijuana enforcement, *requires consultation with our tribal partners ... and flexibility to confront* the particular, yet sometimes divergent, *public safety issues* that can exist on any single reservation." It also contains a provision that nothing in the policy "alters the authority or jurisdiction of the United States to enforce federal law in Indian country."

With regard to the DOJ's eight priority enforcement areas, the *Indian Country Marijuana Policy* states that these areas will serve to "guide United States attorneys' marijuana enforcement efforts in Indian country, *including in the event that sovereign Indian nations seek to legalize the cultivation and use of marijuana in Indian country.*" Finally, the policy requires that, "in evaluating marijuana enforcement activities in Indian country, *each United States attorney should consult with the affected tribes on a government-to-government basis.*"<sup>39</sup>

The DOJ's *Indian Country Marijuana Policy* is important in that it affirms the U.S. government's trust obligation to consult with tribes as "sovereign governments" in confronting "public safety issues" around marijuana enforcement. It also establishes a consultation process on a government-to-government basis should tribes seek to follow states down the road of cannabis legalization.

Further, the policy is significant in that it extends the DOJ's eight marijuana law enforcement priorities to Indian country. In so doing, it affirms parity in treatment for tribes in matters of law enforcement and views the government-to-government consultation process as the means to get there.

The DOJ's *Indian Country Marijuana Policy* suggests that the starting point for a tribe looking to enter the cannabis industry on tribal lands is to conduct government-to-government consultation with the U.S. attorney in the district in which tribal lands are situated. Such an approach is bolstered by the fact that the attorney general, and by extension the DOJ, has the authority under the CSA to "enter into contractual agreements" with law enforcement agencies "to provide for *cooperative* enforcement and regulat[ion]" of controlled substances.<sup>40</sup>

Consultation with the U.S. government should be the beginning point, not the end. Ultimately, the interested tribe should also consult with state and local law enforcement, especially in PL 280 states where states assert criminal jurisdiction over tribal members, but lack civil regulatory jurisdiction over tribes and tribal affairs. It may also be necessary to consult with the U.S. Bureau of Indian Affairs (BIA) and where the BIA serve as tribal law enforcement.

In sum, regardless of the jurisdictional circumstances faced by a

particular tribe, the consultation process and early engagement with U.S. and state governments is key to ensuring parity with states on cannabis issues. The consultation process should be used to ensure that tribes do not run afoul of either state criminal law in PL 280 states, or the eight marijuana law enforcement priorities identified by the DOJ in its *Indian Country Marijuana Policy*.

## Transparency

In most states, grassroots movements used statewide voter initiatives to reform state cannabis prohibition laws and policies. Thereafter, state agencies created and adopted regulations to implement voter-approved changes in the law using public notice and comment procedures. These processes, while not always perfect, nonetheless allow for a great deal of transparency and public participation in the decision-making process.

A tribe's decision to legalize cannabis is a matter of sovereignty and tribal self-governance. That said, tribal lands still traverse state borders and federal districts and a decision by a tribal government behind closed doors to legalize marijuana and create a cannabis enterprise could implicate the DOJ's eight marijuana enforcement priorities and raise legitimate concerns from a tribe's neighbors about possible distribution to minors, criminal enterprises, diversion to areas where marijuana is prohibited, and drugged driving, among others.

For this reason, tribes should consider vetting their cannabis program by allowing for a voluntary input process and before adopting laws legalizing cannabis, and certainly before beginning cultivation and sale. By way of example, the St. Croix Chippewa Indians of Wisconsin voluntarily subjected its draft tribal ordinance for control and regulation of CBD to notice and comment procedures.

Wisconsin is a PL 280 state that legalized CBD in 2014, but prohibits all other forms of cannabis. In legalizing CBD, however, the state created few mechanisms for development of a state CBD marketplace. St. Croix sought to fill this void by using tribal lands to cultivate and distribute CBD for medical use. Although St. Croix has a right to exercise its sovereignty through the regulation of conduct on tribal land, being situated in a PL 280 state meant that its tribal ordinance, and subsequent conduct, could run afoul of Wisconsin's criminal code.

Given the jurisdictional complexities faced by St. Croix, the tribe, in late 2016, elected to make its draft CBD ordinance available for comment from federal and state officials alike. While government-to-government consultation is ongoing, St. Croix's efforts toward transparency likely served to avoid costly intervention by federal law enforcement as occurred to the Menominee Nation.<sup>41</sup>

## Agreement

To date, the only tribes to successfully enter the cannabis industry have done so through execution of agreements with other governments. Agreements, such as a memorandum of understanding (MOU), can be made with federal, state, and local governments and can provide a measure of confidence and certainty for tribes looking to enter the cannabis industry regardless of varying state and overarching federal prohibitions. Models of MOUs executed between the DOJ and tribal nations can be found in cooperative agreements for reporting and investigating child abuse criminal offenses,<sup>42</sup> to prosecute Violence Against Women Act cases,<sup>43</sup> and to manage and protect natural resources and sacred sites.<sup>44</sup>

Tribes in Washington, a state in which medical and recreational

cannabis are legal, recognized—along with the state—that cooperation and collaboration with regard to marijuana legalization in Indian country were necessary for effective regulation and control. To this end, Washington passed compacting legislation in 2015 authorizing the governor to enter into agreements with tribes for the regulation of marijuana.<sup>45</sup> Thereafter, the Suquamish and Squaxin Island Tribes entered into government-to-government compacts with the state, clearing the way for the tribes to enter Washington's cannabis market and to cultivate, process, and sell cannabis on tribal lands.<sup>46</sup>

Consistent with terms established by compact, both the Suquamish and the Squaxin Island Tribes have opened retail locations for the sale of cannabis and cannabis products on their reservations.<sup>47</sup> Similar to federal policy regarding marijuana enforcement in Indian country, built into each agreement is a duty of good-faith cooperation between tribes and state and local authorities over the life of the compact. Cooperation involves conducting compliance checks as well as measures for resolving disputes when one party violates the compact or state cannabis regulations.<sup>48</sup>

Additionally, the compacts recognize that the tribes, as sovereign governments, are not subject to state taxation. However, the tribes went one step further and agreed to earmark proceeds from their cannabis businesses for essential government services. In other words, the tribes are reinvesting cannabis proceeds for the benefit of tribal members, in much the same way states use their substantial cannabis revenues to fund state education programs and other services.

A third tribe, the Puyallup Tribe of Indians, entered into a compact with the state of Washington to begin operation of the first commercial cannabis testing lab in Indian country. PTIO Testing Lab Inc., a wholly owned tribal corporation chartered under tribal law, operates a “commercial testing lab that will for a fee conduct scientific and safety testing services for substances, including cannabis.” The Puyallup tribe's compact with Washington allows the tribe's lab to test products from “state-licensed producers, processors, and retailers of marijuana, marijuana concentrates, and marijuana-infused products.”<sup>49</sup>

While reaching agreement with states can be important, especially for tribes located in PL 280 states, agreements may also be possible with the DOJ. The CSA contemplates a mechanism through which tribes and the DOJ may enter into cooperative agreements, such as an MOU, for the regulation of cannabis in Indian country.<sup>50</sup> Agreements with the U.S. government can be used to ensure achievement of federal enforcement priorities for marijuana, while allowing tribes parity with states on cannabis issues and chilling federal law enforcement intervention in tribal affairs.<sup>51</sup>

### **Reading the Cannabis Leaves: the Future of Marijuana Under President Trump**

Cannabis is on track to become a \$21 billion industry by year 2021, according to ArcView Market Research.<sup>52</sup> However, with the swearing in of Donald J. Trump on Jan. 20, 2017, as the 45th president of United States and the Republican party in control of both chambers of Congress, there is little doubt that changes are on the horizon. Whether those changes will ultimately be good or bad for the industry is more difficult to speculate.

Former U.S. Sen. Jeff Sessions was sworn in to head the DOJ. Sessions, a conservative Republican from Alabama where all forms of cannabis are illegal, is not known for his support of the marijuana

plant. As a part of his Senate confirmation hearing in January 2017, Sessions' written responses for the record indicated his intent to “review and evaluate [DOJ marijuana] policies, including the original justifications for the memorandum, as well as any relevant data and how circumstances may have changed or how they may change in the future.”<sup>53</sup> Sessions also stated that he was committed “to enforcing federal law with respect to marijuana, although the exact balance of enforcement priorities is an ever-changing determination based on the circumstances and the resources available at the time.”<sup>54</sup>

While review of a prior administration's policies on cannabis is an acceptable practice for any incoming U.S. attorney general, eliminating those policies altogether could ultimately do more harm than good, especially for American Indian tribes who have historically found themselves a prime target for high-profile law enforcement actions. At a minimum, the DOJ would need to adhere to the policy-making criteria set forward in Executive Order 13175.<sup>55</sup>

A more sensible approach would be to leave existing DOJ policies in place and to work with states, tribes, and industry to determine whether any federal priority areas for marijuana law enforcement need to be added or reprioritized. For example, prioritizing enforcement directed against diversion of state legalized cannabis products, and marijuana edibles in particular, to teenagers and children living on tribal homelands and within states maintaining prohibitions.<sup>56</sup>

With regard to tribes in particular, changes in marijuana policy would not alter the U.S. government's trust obligation to American Indian nations, nor the requirement to conduct government-to-government consultation and provide tribes parity in treatment with states on cannabis issues. However, by maintaining the DOJ's *Indian Country Marijuana Policy*, both the federal government and tribes will be much better poised to confront public safety issues around marijuana enforcement and to create a more lasting trust around cannabis legalization by tribes should the consultation process be more accurately exercised by both parties.

Ultimately, however, a legislative fix will be necessary. In the near term, tribes should focus on seeking inclusion in the definition of “state” under the 2014 Farm Bill and for purposes of hemp research and production on tribal lands. Further, tribes seeking to enter the medical marijuana marketplace, should advocate for inclusion in any reauthorization of § 538 of the Consolidated and Further Continuing Appropriations Act of 2015, which prohibits spending on federal enforcement in states implementing a legal medical marijuana system.

In the long run, however, tribes, as well as states, may need to pursue legislative changes to the CSA. One potential legislative fix is an “opt-out” provision whereby states and tribes who have legalized cannabis in some form would have the option of not being subject to the federal prohibition.<sup>57</sup> Existing federal statutes, such as the Clean Air Act (CAA) and the Clean Water Act (CWA), provide examples of how an “opt-out” may function in the cannabis context. Both statutes operate under a framework of cooperative federalism in which the federal government and states work collaboratively to prevent and mitigate pollution.<sup>58</sup>

Within the context of the CSA, the federal government could create minimum standards for state and tribal cannabis regulation, similar to the prosecution and law enforcement priorities laid out in the Cole and Wilkinson memoranda. States and tribes choosing to “opt-out” of the CSA would be required to create robust legal regimes to regulate cannabis within the state or tribal nation, while at the same time meeting federal standards or requirements. Federal

agencies would continue to enforce the CSA in states choosing to not “opt-out,” as well as in “opt-out” states failing to meet minimum requirements. Such a cooperative framework could further federal objectives and priorities with regard to cannabis, while ameliorating the tension that currently exists between the CSA and states with legal cannabis. ☺



*Brad A. Bartlett is an assistant professor at the University of Denver, Sturm College of Law, in the environment and natural resources law program where he also serves as co-director of the*

*schools' environmental law clinic. Additionally, Bartlett serves as special counsel to the tribal cannabis law group at McAllister Garfield, P.C., in Denver and is admitted to practice before federal courts in Colorado and Wyoming as well as the Ninth and Tenth Circuit Courts of Appeals. Bartlett graduated from the University of Colorado School of Law's environmental and American Indian Law program in 1998. Garrett L. Davey is an attorney with the tribal cannabis law group at McAllister Garfield, P.C., in Denver where he specializes in federal Indian law issues, industrial hemp, and CBD. Davey is admitted to practice in Colorado and is a May 2016 graduate of the University of Denver, Sturm College of Law. He is an avid supporter of Arsenal Football Club in London.*

## Endnotes

<sup>1</sup>For the purposes of this article, the terms “cannabis” and “marijuana” are used interchangeably. Cannabis is a Latin term for the plant and is the term that has been used in medical journals for many years to describe the plant more commonly known as marijuana. The term marijuana, or “marihuana,” is the term used during the passage of the Marihuana Tax Act of 1937.

<sup>2</sup>See RENEE JOHNSON, CONG. RESEARCH SERV., RL32725, HEMP AS AN AGRICULTURAL COMMODITY 5-6 (2015).

<sup>3</sup>Under the CSA, Schedule I drugs are categorized as having a high potential for abuse and no acceptable medical use. 21 U.S.C. § 812(b)(1) (2012). The CSA was enacted as Title II of the Comprehensive Drug Abuse Prevention and Control Act of 1970 (Pub. L. No. 91-513).

<sup>4</sup>See ARCVIEW MKT. RESEARCH, THE STATE OF LEGAL MARIJUANA MARKETS, EXEC. SUMMARY 17 (5th ed. 2016); COLORADO DEP'T OF REV., ANN. REP. 2016 30 (2016); WASH. DEP'T OF REV., RECREATIONAL MARIJUANA TAXES (Aug. 12, 2016); see also Keegan Hamilton, *2015 Was a Huge Year for Weed—and 2016 Will Be Even Bigger*, VICE (Dec. 29, 2015), <https://news.vice.com/article/2015-was-a-huge-year-for-weed-and-2016-will-be-even-bigger>.

<sup>5</sup>MARIJUANA COMPACT BETWEEN THE SUQUAMISH TRIBE & THE STATE OF WASH. (Sept. 15, 2015); MARIJUANA COMPACT BETWEEN THE SQUAXIN ISLAND TRIBE & THE STATE OF WASH. (Sept. 23, 2015).

<sup>6</sup>Agate Dreams is a retail cannabis shop operated by the Suquamish Evergreen Corp., a wholly owned subsidiary of Port Madison Enterprises, an agency of the Suquamish Tribe. See AGATE DREAMS, <http://www.agatedreams.com> (last visited Mar. 9, 2017). Elevation is a retail cannabis shop operated on the Squaxin Island Indian Reservation. See ELEVATION, <https://high-elevation.com> (last visited Mar. 9, 2017).

<sup>7</sup>MARIJUANA COMPACT BETWEEN THE STATE OF WASH. & THE PUYALLUP TRIBE OF INDIANS (Jan. 2016). Medicine Creek Analytics is a tribally

sanctioned lab that came about in part to ensure safe medical marijuana for cancer patients within the Puyallup tribe. The lab is located within the tribe's cancer center.

<sup>8</sup>NCAI Res. #SD-15-047 (Oct. 2015).

<sup>9</sup>See Menominee Nation, Industrial hemp containing a THC concentration of .3% or less by weight, § 307-1 *et seq.*, Tribal Ord. 15-06 (May 7, 2015).

<sup>10</sup>Pub. L. No. 113-79, § 7606, 128 Stat. 649, 912-913 (2014) (codified at 7 U.S.C. § 5940).

<sup>11</sup>*Menominee Indian Tribe of Wis. v. D.E.A.*, No. 15-CV-1378, 2016 WL 2997499 \*6-8 (May 23, 2016).

<sup>12</sup>Flandreau Santee Sioux, Marijuana Control Ordinance, 29-1-1 *et seq.* (2015); see also Sarah Sunshine Manning, *Flandreau Santee Sioux Tribe Burns Crop, Suspends Marijuana Operation*, INDIAN COUNTRY MEDIA NETWORK (Nov. 8, 2015), <https://indiancountrymedianetwork.com/news/native-news/flandreau-santee-sioux-tribe-burns-crop-suspends-marijuana-operation>.

<sup>13</sup>Pub. L. No. 83-280, 67 Stat. 588 (1953).

<sup>14</sup>See Joseph Serna, *Mendocino County Sheriff Raids Native American Pot Farm That Tribe Says is Legal*, L.A. TIMES (Sep. 23, 2015), <http://www.latimes.com/local/lanow/la-me-ln-mendocino-county-tribe-pot-seizures-20150923-story.html>.

<sup>15</sup>See Notice of Claim Against the City of Mendocino from Pinoleville Pomo Nation (Mar. 4, 2016), available at <https://www.co.mendocino.ca.us/bos/meetings/29216/29257/29259/29340/29411/Claim29411.pdf> (last visited Mar. 9, 2017).

<sup>16</sup>Consolidated Appropriations Act, 2015, Pub. L. No. 113-235, § 538, 128 Stat. 2217 (2014); see also Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, § 542, 129 Stat. 2242, 2332-33 (2015); *U.S. v. McIntosh*, No. 15-10117, 2016 WL 4363168 (9th Cir. 2016).

<sup>17</sup>See ARCVIEW MKT. RESEARCH, *supra* note 4 at 9-10.

<sup>18</sup>COLORADO DEP'T OF REV., ANN. REP. at 30, available at <https://www.colorado.gov/pacific/sites/default/files/2016%20Annual%20Report.pdf> (last visited Mar. 9, 2017); see also Tom Huddleston Jr., *Colorado Topped \$1 Billion in Legal Marijuana Sales in 2016*, FORTUNE (Dec. 13, 2016), <http://fortune.com/2016/12/13/colorado-billion-legal-marijuana-sales>.

<sup>19</sup>See ARCVIEW MKT. RESEARCH, *supra* note 4 at 17.

<sup>20</sup>WASH. DEP'T OF REV., RECREATIONAL MARIJUANA TAXES (Aug. 12, 2016), available at [http://dor.wa.gov/Content/AboutUs/StatisticsAndReports/stats\\_RMJTaxas.aspx](http://dor.wa.gov/Content/AboutUs/StatisticsAndReports/stats_RMJTaxas.aspx) (last visited Mar. 9, 2017).

<sup>21</sup>See ARCVIEW MKT. RESEARCH, *supra* note 4 at 17 (Unlike Colorado, Washington does not impose a tax on sales of medical cannabis, therefore there is no tax revenue data for medical sales in the state.).

<sup>22</sup>OR. DEP'T OF REV., OREGON MARIJUANA TAX STATISTICS: ACCOUNTING INFORMATION (Jan. 18, 2016), available at <http://www.oregon.gov/DOR/programs/gov-research/Pages/research-marijuana.aspx> (last visited Mar. 9, 2017).

<sup>23</sup>Letter from Mac Taylor & Michael Cohen, California Legislative Analyst's Office, to Kamala D. Harris, California State Attorney General (Dec. 22, 2015).

<sup>24</sup>Gavin Ekins & Joseph Henchman, *Marijuana Legalization and Taxes: Federal Revenue Impact*, TAX FOUND. (May 12, 2016), <https://taxfoundation.org/marijuana-legalization-and-taxes-federal-revenue-impact> (The Tax Foundation estimates an additional \$5.5 billion in federal tax revenue should Congress eventually impose a federal excise tax on cannabis analogous to cigarettes.).

<sup>25</sup>26 U.S.C. § 280E (1982); *see also* I.R.S. GEN. COUNS. MEMO 201504011 (Jan. 23, 2015).

<sup>26</sup>NAT'L CANNABIS INDUS. ASS'N, *Internal Revenue Code Section 280E: Creating an Impossible Situation for Legitimate Businesses* (April 2015), <https://thecannabisindustry.org/uploads/2015-280E-White-Paper.pdf>.

<sup>27</sup>U.S. DEP'T OF JUSTICE, MEMORANDUM FOR SELECTED U.S. ATTORNEYS: INVESTIGATIONS AND PROSECUTIONS IN STATES AUTHORIZING THE MEDICAL USE OF MARIJUANA (Oct. 19, 2009).

<sup>28</sup>U.S. DEP'T OF JUSTICE, MEMORANDUM FOR ALL U.S. ATTORNEYS: GUIDANCE REGARDING MARIJUANA ENFORCEMENT (Aug. 29, 2013).

<sup>29</sup>18 U.S.C. § 1151 (1948) (“the term ‘Indian country,’ as used in this chapter, means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same”).

<sup>30</sup>Consolidated Appropriations Act 2015, *Supra* note 16.

<sup>31</sup>*U.S. v. McIntosh*, 2016 WL 4363168 (2016).

<sup>32</sup>*See* ARCVIEW MKT. RESEARCH, *supra* note 4 at 11.

<sup>33</sup>The Farm Bill defines industrial hemp as “the plant *Cannabis sativa L.* and any part of such plant, whether growing or not, with a delta-nine tetrahydrocannabinol [THC] concentration of not more than 0.3 percent on a dry weight basis.” The industry threshold for psychoactive effect is a THC concentration below 1 percent. 7 U.S.C. § 5940(b)(2); *See also* Johnson, *supra* note 2 at 1-2.

<sup>34</sup>7 U.S.C. § 5940(a).

<sup>35</sup>*See* Menominee Indian Tribe of Wis., 2016 WL 2997499 \*6-8.

<sup>36</sup>21 U.S.C. § 802(16) (2012) (stating the requirement for a DEA registration to grow industrial hemp); *see also* Johnson *supra* note 2 at 13.

<sup>37</sup>Johnson, *supra* note 2 at 14.

<sup>38</sup>HEMP BUS. J., ISSUE 1 (2016), <https://www.hempbizjournal.com>.

<sup>39</sup>U.S. DEP'T OF JUSTICE, MEMORANDUM FOR ALL U.S. ATTORNEYS: POLICY STATEMENT REGARDING MARIJUANA ISSUES IN INDIAN COUNTRY (Oct. 28, 2014).

<sup>40</sup>21 U.S.C. § 873(a)(7).

<sup>41</sup>Interview with Jeffrey Cornell, General Counsel for St. Croix Chippewa Indians of Wis. (Feb. 9, 2017).

<sup>42</sup>*See* U.S. ATTORNEY'S OFFICE, FED. DIST. OF S.D., MEM. OF UNDERSTANDING BETWEEN THE ROSEBUD SIOUX TRIBE & THE U.S. ATTORNEY'S OFFICE (Oct. 10, 2014); *see also* U.S. ATTORNEY'S OFFICE, FED. DIST. OF OKLA., MEM. OF UNDERSTANDING FOR REPORTING & INVESTIGATING CHILD ABUSE CRIMINAL OFFENSES IN INDIAN COUNTRY (Sept. 15, 2007).

<sup>43</sup>U.S. DEP'T OF JUSTICE, *Historic Agreement Places New Prosecutor on Standing Rock Reservation to Prosecute Violence Against Women Cases* (Mar. 12, 2013).

<sup>44</sup>*Brendan v. Johnson*, U.S. ATTORNEY'S OFFICE, FED. DIST. OF S.D., COMMUNITY PROSECUTION STRATEGY 8 (Aug. 5, 2010).

<sup>45</sup>H.B. 2000, CH. 207 (Wash. 2015).

<sup>46</sup>*See* SUQUAMISH TRIBE MARIJUANA COMPACT, *supra* note 5; SQUAXIN ISLAND TRIBE MARIJUANA COMPACT, *supra* note 5.

<sup>47</sup>*See* discussion of marijuana retail locations in Indian country within the state of Washington, *supra* notes 6-7.

<sup>48</sup>*See* SUQUAMISH TRIBE MARIJUANA COMPACT, *supra* note 5; SQUAXIN ISLAND TRIBE MARIJUANA COMPACT, *supra* note 5.

<sup>49</sup>*See* PUYALLUP TRIBE OF INDIANS MARIJUANA COMPACT, *supra* note 7.

<sup>50</sup>21 U.S.C. § 873(a)(7) (2010). While the CSA focuses primarily on agreement formation with states and local law enforcement agencies, the provision should be harmonized with U.S. trust obligations, the DOJ's *Indian Country Marijuana Policy*, as well as the DOJ's 2010 *Indian Country Law Enforcement Initiative* requiring development of district-level operational plans in consultation with tribes.

<sup>51</sup>It should be noted, while the attorney general has the authority to enter into cooperative enforcement agreements, it is unclear whether this authority would extend to an agreement *not* to enforce federal law.

<sup>52</sup>ARCVIEW MKT. RESEARCH, *supra* note 4 at 3.

<sup>53</sup>Written Responses from Sen. Jeff Sessions to Questions for the Record from Sen. Chris Coons, Nomination of Sen. Jeff Sessions to be Attorney General of the United States (Jan. 17, 2017), *available at* <https://www.judiciary.senate.gov/imo/media/doc/Sessions%20Responses%20to%20Coons%20QFRs.pdf> (last visited Mar. 9, 2017).

<sup>54</sup>Written Responses from Sen. Jeff Sessions to Questions for the Record from Sen. Dianne Feinstein, Nomination of Hon. Sen. Jeff Sessions to be Attorney General of the United States (Jan. 17, 2017), *available at* <https://www.judiciary.senate.gov/imo/media/doc/Sessions%20Responses%20to%20Feinstein%20QFRs.pdf> (last visited Mar. 9, 2017).

<sup>55</sup>65 Fed. Reg. 67249 (Nov. 6, 2000) (Consultation and Coordination with Indian Tribal Governments).

<sup>56</sup>Troy A. Eid, *Indian Youth Hurt by Colorado's Marijuana Experiment*, DENVER POST (July 25, 2014), <http://www.denverpost.com/2014/07/25/indian-youth-hurt-by-colorados-marijuana-experiment> (arguing that marijuana legalization in Colorado and Washington has hurt tribal youth in surrounding states and citing the lack of uniform federal enforcement as the root of the marijuana diversion problem facing Indian country).

<sup>57</sup>Erwin Chemerinsky, Jolene Forman, Allen Hopper, & Sam Kamin, *Cooperative Federalism and Marijuana Regulation*, 62 UCLA L. REV. 74 116-122 (2015).

<sup>58</sup>*See* Clean Air Act, 42 U.S.C. § 7402 (2012) (“The administrator shall encourage cooperative activities by the states and local government for the prevention and control of air pollution...”); Clean Water Act, 33 U.S.C. § 1251 (2012) (“It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of states to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources...”).