



Tribes and Cannabis: Reaching New Highs in the Burgeoning Cannabis Marketplace

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U.S. sales of legal cannabis reached \$9.2 billion in 2017—a 33 percent increase over 2016—and are on track to reach \$24.5 billion by 2021. After initially receiving unwarranted state and federal interference in tribal cannabis operations in 2015, American Indian tribes have now made significant inroads into the domestic cannabis market notwithstanding the continued federal illegality of “marihuana” under the Controlled Substances Act of 1970. From the Las Vegas Paiute Tribe’s establishment of the “world’s largest marijuana dispensary” on the Las Vegas strip to the St. Croix Chippewa Indians of Wisconsin’s legal victory in defense of its industrial hemp control program, tribes are embracing the “new cannabis economy” in their own way and on their own terms.

Tribes, Cannabis, and the Law

Fiscal years 2017 and 2018 proved to be seminal years for tribal involvement and interest in the burgeoning U.S. cannabis industry. Using state-tribal compacts, numerous tribes opened tribally owned and operated cannabis businesses in states that have legalized adult-use or medical marijuana and a tribe in Wisconsin, the St. Croix

Chippewa Indians, reached a landmark federal court settlement with the state’s chief law enforcement officer allowing the tribe’s industrial hemp business to move forward without interference from law enforcement.

Cannabis sativa L. is the genus of flowering plants that includes both marijuana and hemp. Hemp and marijuana serve different purposes. Marijuana is used primarily for its psychoactive properties—the pain-relieving euphoria or “high” produced from its inhalation or consumption. Hemp, on the other hand, is used in a variety of other applications including dietary supplements, food products, clothing, and construction materials. However, both marijuana and hemp have medical applications, but for different constituents: marijuana for delta-9 tetrahydrocannabinol (THC) and hemp for cannabidiol (CBD).

Legally speaking, what distinguishes marijuana from hemp is the presence of the psychoactive constituent THC.

In 1970, Congress listed “marihuana”¹ and “tetrahydrocannabinols” as Schedule I “hallucinogenic substances” under the Controlled Substances Act—the most stringent legal classification available under law and the first federal law to impose criminal sanctions on the cannabis plant.² However, in 2014 with passage of the Agricultural Act (a.k.a., Farm Bill), Congress authorized the creation of “agricultural pilot programs” for the “growth, cultivation, or marketing” of “industrial hemp,” which Congress defined as “the plant *Cannabis sativa L.* and any part of such plant, whether growing or not, with a delta-9 tetrahydrocannabinol concentration of not more than 0.3 percent on a dry weight basis.”³

Thus, and generally speaking, products produced from *Cannabis sativa L.* with 0.3 percent or below THC are considered “industrial hemp” and, if produced pursuant to an agricultural pilot program, are

legal under federal law while cannabis products with a THC percentage of 0.3 percent and above are considered Schedule I controlled substances and illegal under federal law.⁴

Beginning in 1973, states began to push back against onerous federal prohibitions on cannabis and marijuana in particular. Oregon became the first state to decriminalize marijuana, followed by California, which became the first state to legalize medical marijuana in 1996. In 2012, Colorado and Washington became the first states to legalize “recreational” or adult-use marijuana. As of Oct. 31, 2018, 33 states, the District of Columbia, Guam, and Puerto Rico have legalized medical marijuana, 13 states have decriminalized marijuana possession, 10 states and the District of Columbia have legalized adult-use marijuana, and 41 states have set up some form of industrial hemp program.⁵

Over 60 percent of the U.S. population now lives in states that have legalized some form of cannabis use and sales, illustrating the rising acceptance of cannabis nationwide and highlighting the industry’s potential for future growth—seemingly irrespective of marijuana’s continued illegality as a Schedule I controlled substance under the Federal Controlled Substances Act. Further, U.S. sales of legal cannabis (primarily medical and adult-use marijuana) reached \$9.2 billion in 2017, a 33 percent increase over 2016, and are on track to reach \$24.5 billion by 2021.⁶ Finally, legalization of cannabis opened a door to a massive, new source of revenue for state governments.⁷

And while former U.S. Attorney General Jeff Sessions rescinded the U.S. Department of Justice’s marijuana enforcement policies in January 2018, Sessions’ rescission has not resulted in a federal crackdown on states that have legalized marijuana or had a discernable impact or slowdown on lawful marijuana businesses licensed under state law.⁸ Instead, under Sessions’ policy, local U.S. attorneys are empowered to set their own marijuana enforcement priorities and have largely respected state marijuana taxation and licensing programs consistent with the Republican Party’s platform on states’ rights and recognition of states as “laboratories of democracy.”⁹

State experiments in marijuana legalization coupled with Congress’ legalization of industrial hemp under the 2014 Farm Bill present continued opportunities for American Indian tribes interested in pursuing cannabis businesses. However, tribes, unlike states, have to undertake a different calculus and implement different strategies than their pioneering state counterparts. Further, new opportunities appear on the horizon for tribes in the newest iteration of Congress’ Farm Bill—which, unlike the 2014 Farm Bill, expressly includes Indian tribes in the bill’s hemp program.

Tribal Marijuana Businesses

Tribes that have successfully opened marijuana businesses have done so almost exclusively in states that have legalized medical or adult-use marijuana.¹⁰ While not legally necessary, many tribes have turned to tribal-state compacts as one vehicle for carrying out and implementing the tribe’s marijuana regulatory program and business enterprise. Other tribes, particularly in California, have not been so fortunate and have seen the state eschew compacting and require a waiver of tribal sovereign immunity in order to participate in the state’s regulated marijuana marketplace.

Tribal-state compacts have been used with success in the states of Washington and Nevada. There are 29 federally recognized tribes in Washington, a state that legalized adult-use (e.g., recreational) marijuana in 2012. Since legalization, four tribes in the state of Wash-

ington—Muckleshoot, Port Gamble S’Klallam, Puyallup, and Squaxin Island—have executed state-tribal compacts and opened successful cannabis businesses in the state.

Nevada, a state that legalized adult-use marijuana in 2017, has 17 federally recognized tribes. Since legalization, five Nevada tribes—Las Vegas Paiute, Pyramid Lake, Lovelock Paiute, Ely Shoshone, Yerington Paiute—have executed state-tribal compacts. For various reasons, not all compacting tribes have opened cannabis businesses in the state.

The Las Vegas Paiute presents a case study for compacting and opening a tribally owned and operated marijuana business. After legalizing the adult use of marijuana at the ballot box, Nevada passed Senate Bill 375 in June 2017, which authorized the governor to negotiate and sign marijuana compacts with all Nevada tribes.¹¹ Shortly thereafter on July 18, 2017, the Las Vegas Paiute and the governor of Nevada executed a 10-year marijuana compact that, among other things:

1. Recognizes the tribe’s “full sovereign powers of a government”;
2. Recognizes the need for state/tribe “cooperation with regard to marijuana in Indian country”;
3. Recognizes the tribe’s ability to sell marijuana products on tribal land pursuant to the Las Vegas Paiute Tribal Code;
4. Obligates the tribe to notify the state of changes in the tribe’s code provisions;
5. Authorizes the tribe to purchase marijuana products from or sell tribal marijuana products to state licensees;
6. Exempts the tribe from state taxation;
7. Obligates the tribe to impose a tribal tax “equal to at least 100 percent” of the state tax on all sales of marijuana products;
8. Authorizes state “premise checks” with 72-hour written notice; and
9. Establishes a dispute resolution process and limited waiver of sovereign immunity by both parties for purposes of compact enforcement.

Execution of the state-tribal marijuana compact led to the opening of the tribe’s 15,800-square-foot NuWu Cannabis Marketplace on Oct. 16, 2017. Billed as the “largest recreational marijuana store on the planet,”¹² the store is located in downtown Las Vegas and claims to have the capacity to serve up to 2,500 customers per day.

California tribes, by contrast, have not been so fortunate. California is viewed as the largest marijuana market in the United States and perhaps the world and has 105 American Indian tribes recognized by the federal government, the most of any state in the nation. In November 2016, California voters approved the Adult Use of Marijuana Act (the so-called Proposition 64) to legalize the recreational use of marijuana. However, unlike Nevada, California failed to adopt compacting legislation and issued regulations requiring tribes to waive sovereign immunity to participate in the state licensing system.¹³

Tribal Hemp Businesses

While less prominent than tribal marijuana businesses, tribes have also begun to make inroads into the industrial hemp industry again and after a high-profile raid by federal authorities.

In October 2015, U.S. Drug Enforcement Administration agents raided the Menominee Indian Nation in Wisconsin and confiscated 30,000 cannabis plants—despite the fact that the tribe had its own agriculture pilot project under the 2014 Farm Bill, had been

in consultation with the U.S. government, and there were no lab results indicating exceedance of the 0.3 percent THC statutory limit for hemp. After the raid, the tribe sued in U.S. District Court for the Eastern District of Wisconsin for declaratory relief arguing that the tribe's cultivation of industrial hemp for agricultural or academic research purposes in connection with the College of Menominee Nation is lawful under the 2014 Farm Bill.¹⁴ In ruling against the tribe, the court rejected the tribe's argument that American Indian tribes are included in the Farm Bill's broad definition of "states." No tribal members were criminally prosecuted. At the time of the raid, all forms of cannabis (including industrial hemp) were illegal in Wisconsin.

The St. Croix Band of Chippewa Indians of Wisconsin, which unlike Menominee is a Public Law 280 tribe, used a different route. After the state of Wisconsin legalized CBD, a hemp derivative, without providing a means for production, the tribe developed its own ordinance for the control of industrial hemp and CBD on tribal land. Thereafter, the tribe provided a voluntary comment period on the tribe's draft ordinance to relevant state and federal authorities. In response, the tribe received threats from the state attorney general, which has criminal jurisdiction over the tribe under Public Law 280. The tribe sued the Wisconsin attorney general in U.S. District Court for the Western District of Wisconsin on the grounds that Wisconsin's hemp and CBD laws are civil regulatory in nature and therefore have no applicability on St. Croix Tribal lands.¹⁵ On July 26, 2018, the tribe reached a judicially enforceable consent decree with the state attorney general that allowed the tribe's hemp and CBD regulatory program to move forward without interference by state law enforcement.

Many questions created by the U.S. government's seemingly disparate treatment of the Menominee Tribe's hemp operation are likely to be resolved with the latest iteration of the Farm Bill. As of this writing, the latest iteration of the 2018 Farm Bill before Congress expressly allows tribes to create their own hemp program and, in so doing, gives tribes parity in treatment with states.¹⁶ If passed, tribes will be placed on equal footing with their state counterparts. ☐



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Endnotes

¹⁴"Marihuana" and "marijuana" are generally used interchangeably and appear to have originated, in whole or in part, from Mexican Spanish.

²See 21 U.S.C. § 802(16); 21 C.F.R. § 1308.11(d)(23), (31). The statutory definition of marijuana is "all parts of the plant *Cannabis sativa* L., whether growing or not; the seeds thereof; the resin extracted from any part of such plant; and every compound, manufacture, salt, derivative, mixture, or preparation of such plant, its seeds or resin. Such term does not include the mature stalks of such plant, fiber produced from such stalks, oil or cake made from

the seeds of such plant, any other compound, manufacture, salt, derivative, mixture, or preparation of such mature stalks (except the resin extracted therefrom), fiber, oil, or cake, or the sterilized seed of such plant which is incapable of germination." 21 U.S.C. § 802(16).
³⁷ U.S.C. § 5940.

⁴There are two notable exceptions to this general proposition. First, the definition of "marihuana" under the Controlled Substances Act "does not include the mature stalks of such plant, fiber produced from such stalks, oil or cake made from the seeds of such plant, any other compound, manufacture, salt, derivative, mixture, or preparation of such mature stalks (except the resin extracted therefrom), fiber, oil, or cake, or the sterilized seed of such plant which is incapable of germination." 21 U.S.C. § 802(16). Second, on Dec. 14, 2016, the Drug Enforcement Agency (DEA) promulgated a rule for the *Establishment of a New Drug Code for Marihuana Extract*, 81 Fed. Reg. 90194 (Dec. 14, 2016), *codified at* 21 C.F.R. § 1308.11(d)(58), which creates a new "Administrative Controlled Substances Code Number" for purposes of tracking "marihuana extracts" in order to "aid in complying with relevant treaty provisions." The rule defines "marihuana extract" as "an extract containing one or more cannabinoids that has been derived from any plant of the genus *Cannabis*, other than the separated resin (whether crude or purified) obtained from the plant."

⁵Medical Marijuana: Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Hawaii, Illinois, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, Utah, Vermont, Washington, and West Virginia. *State Medical Marijuana Laws*, NAT'L CONF. STATE LEG., <http://www.ncsl.org/research/health/state-medical-marijuana-laws.aspx> (last updated Nov. 8, 2018).
Decriminalized Marijuana Possession: Connecticut, Delaware, Illinois, Maryland, Minnesota, Mississippi, Missouri, Nebraska, New Hampshire, New York, North Carolina, Ohio, and Rhode Island. *Marijuana Overview*, NAT'L CONF. STATE LEG., <http://www.ncsl.org/research/civil-and-criminal-justice/marijuana-overview.aspx> (last updated Nov. 13, 2018).
Adult Use: Alaska, California, Colorado, Maine, Massachusetts, Michigan, Nevada, Oregon, Vermont, and Washington. *Id.* Legalized Industrial Hemp: Alabama, Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Hawaii, Illinois, Indiana, Kansas, Kentucky, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Mexico, New York, North Carolina, North Dakota, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, Tennessee, Utah, Vermont, Virginia, Washington, West Virginia, Wisconsin, and Wyoming. *State Industrial Hemp Statutes*, NAT'L CONF. STATE LEG., <http://www.ncsl.org/research/agriculture-and-rural-development/state-industrial-hemp-statutes.aspx> (last updated Aug. 8, 2018).

⁶See ARCVIEW, THE ROADMAP TO A \$57 BILLION WORLDWIDE MARKET (2018).

⁷See Andrew DePietro, *Here's How Much Money States are Raking in From Legal Marijuana Sales*, FORBES (May 4, 2018), <https://www.forbes.com/sites/andrewdepietro/2018/05/04/how-much-money-states-make-cannabis-sales/#1ad35cb2f181>.

⁸Press Release, Dep't of Justice, Justice Department Issues Memo on Marijuana Enforcement, Press Release No. 18-8 (Jan. 4, 2018), <https://www.justice.gov/opa/pr/justice-department-issues-memo>

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AM. INDIAN L. REV. 1, 47 (2017) (arguing that ICRA's federal habeas corpus provision on the right to stay sentencing provides non-Native American defendants with greater protection than similarly situated Native American defendants).

¹⁹*United States v. Bryant*, 519 U.S. ___, 136 S. Ct. 1954, 1963 (2016).

²⁰*Id.* at 1964.

²¹*Id.* at 1966.

²²VAWA 2013, *supra* note 12, § 901, 127 Stat. 118.

²³*Id.* §§ 901-02, 127 Stat. 118-19.

²⁴NAT'L CONG. OF AM. INDIANS, VAWA 2013'S SPECIAL DOMESTIC VIOLENCE CRIMINAL JURISDICTION FIVE-YEAR REPORT 6 (2013).

²⁵*Id.* at 7.

²⁶*Id.*

²⁷*See* VAWA 2013, *supra* note 12.

²⁸*See* FIVE-YEAR REPORT, *supra* note 24, at 23.

²⁹*Id.*

³⁰*Id.* at 29.

³¹*Id.*

³²Alfie Ellis, *A Roadmap for Making Native America Safer*, 37 WYO. LAW. 20, 21-22 (2014).

³³Catherine M. Redlingshafer, *An Avoidable Conundrum: How American Indian Legislation Unnecessarily Forces Tribal Governments to Choose Between Cultural Preservation and Women's Preservation*, 93 NOTRE DAME L. REV. 393, 396 (2017).

³⁴Frank Pommersheim, *At the Crossroads: A New and Unfortunate Paradigm of Tribal Sovereignty*, 55 S.D. L. REV. 48, 57 (2010).

³⁵Violence Against Women Act of 2018, H.R. 6545, § 906(1) [hereinafter VAWA 2018]. This is proposed legislation for which Congress has until Dec. 7, 2018, to enact.

³⁶*Id.*

³⁷*Id.* at § 906(3).

³⁸*Id.* at § 906(4)(b).

³⁹FIVE YEAR REPORT, *supra* note 24, at 24.

⁴⁰*Id.*

⁴¹VAWA 2018, *supra* note 35, § 906(2)(g).

⁴²*Id.*

⁴³*Id.*

⁴⁴*Id.* § 906(4).

⁴⁵*Id.* § 906(4)(c).

⁴⁶*See, e.g.*, MAJOR CRIMES ACT, 18 U.S.C. § 1153 (1994) (enumerating child sexual abuse as a crime of federal jurisdiction but not child violence); *United States v. Lara*, 541 U.S. 193 (2004) (holding that tribal courts may exercise criminal jurisdiction over non-member

Indians); *Oliphant*, 435 U.S. 191 (holding that tribal courts may not exercise criminal jurisdiction over non-Indian defendants).

⁴⁷*See* 18 U.S.C. § 1153(a) (conferring jurisdiction over any Indian who is charged with an assault of a child younger than 16 years old).

⁴⁸VAWA 2018, *supra* note 35 § 906(c).

⁴⁹*Id.* § 101(a)(1).

⁵⁰Carolyn B. Ramsey, *Firearms in the Family*, 78 OHIO ST. L. J. 1257, 1274-75 (2017).

⁵¹*See, e.g., In re Jayl.S.A.*, 2018 IL App (5th) 180299-U, ¶ 56 (holding that where a parent did not comply with domestic violence counseling services, termination of parental rights was appropriate); *Rice v. McDonald*, 390 P.3d 1133 (Ala. 2017) (discussing a matter where domestic violence led to the death of one parent, the incarceration of the other, and foster care needs for the children).

⁵²*Rice*, 390 P.3d at 1135.

⁵³*Id.*

⁵⁴*Id.*

⁵⁵*Id.*

⁵⁶*Id.*

⁵⁷*Rice*, 390 P.3d at 1137-38.

⁵⁸*Id.*

⁵⁹Chris Calton, "The People v..."—*Why the State Claims to be the Victim of Crime*, MISES INST. (Nov. 15, 2017), <https://mises.org/wire/people-vs-why-state-claims-be-victim-crime>.

⁶⁰*See* Orly Rachmilovitz, *Bringing Down the Bedroom Walls: Emphasizing Substance Over Form in Personalized Violence*, 14 WM. & MARY J. WOMEN & L. 495, 504-05 (2008) (discussing the power imbalance in the cycle of domestic violence).

⁶¹AMY L. CASSELMAN, INJUSTICE IN INDIAN COUNTRY: JURISDICTION, AMERICAN LAW, AND SEXUAL VIOLENCE AGAINST NATIVE AMERICAN WOMEN 6 (2015).

⁶²Indian Child Welfare Act of 1978, 25 U.S.C. § 1902 (2012).

⁶³*Id.*

⁶⁴*Id.* § 1911, § 1912.

⁶⁵*Id.* § 1911(a).

⁶⁶*See* U.S. CONST. amend. X (leaving rights not enumerated in the Constitution to the states); *see also* 25 U.S.C. § 1911(a) (vesting tribes with exclusive jurisdiction over child welfare cases where the child lives within their reservation boundaries); *Ankenbrandt v. Richards*, 504 U.S. 689, 706 (1992) (discussing federal abstention in domestic relations matters such as child custody).

⁶⁷*See People v. Johnson*, 718 N.Y.S.2d 1, 3 (N.Y. 2000) (holding that there is a likelihood that a jury could reasonably determine the act of domestic violence caused mental harm to the child).

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marijuana-enforcement.

⁹*See* REPUBLICAN NAT'L CONVENTION, REPUBLICAN PLATFORM 2016 15-16 (2016), https://prod-cdn-static.gop.com/media/documents/DRAFT_12_FINAL%5B1%5D-ben_1468872234.pdf.

¹⁰*See generally*, Brad Bartlett & Garrett Davey, *Tribes and Cannabis: Seeking Parity with States and Consultation and Agreement with the U.S. Government*, FED. LAW. (April 2017).

¹¹S.375, NEV. LEGIS., <https://www.leg.state.nv.us/Session/79th2017/Reports/history.cfm?ID=836> (last visited Dec. 3, 2018).

¹²NUWU CANNABIS MARKETPLACE, <https://www.nuwucannabis.com> (last visited Dec. 3, 2018).

¹³*See* Cal. Code. Regs. tit. 16, § 5009 (2018); Cal. Code Regs. tit. 17, § 40133 (2018); Cal. Code Regs. tit. 3, § 8102(z)(1) (2018).

¹⁴*Menominee Indian Tribe of Wis. v. Drug Enf't Admin.*, 190 F.Supp. 3d 843 (E.D. Wis. 2016).

¹⁵*St. Croix Chippewa Indians of Wis. v. Schimel*, No. 18-cv-88 (W.D. Wis.).

¹⁶Hemp Farming Act of 2018, H.R. 5485, 115th Cong. (2017-2018), <https://www.congress.gov/bill/115th-congress/house-bill/5485r=2>; Hemp Farming Act of 2018, S.2667, 115th Cong. (2017-2018), <https://www.congress.gov/bill/115th-congress/senate-bill/2667r=3>.