

American Indian Law Review

Volume 39 | Number 2

2016

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Recommended Citation

Melinda Smith, *Native Americans and the Legalization of Marijuana: Can the Tribes Turn Another Addiction into Affluence?*, 39 AM. INDIAN L. REV. 507 (2015), <http://digitalcommons.law.ou.edu/ailr/vol39/iss2/3>

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COMMENTS

NATIVE AMERICANS AND THE LEGALIZATION OF MARIJUANA: CAN THE TRIBES TURN ANOTHER ADDICTION INTO AFFLUENCE?

*Melinda Smith**

Introduction

For decades, Congress has enacted legislation without a fleeting thought of the impact it will have on Native Americans. Today is no different. Federal decriminalization of marijuana, with the apparent end-goal of federal taxation of marijuana, is on the horizon. The multi-billion dollar industry is not only home to large corporate interests, it has been an abundant source for the startup of the ever idealized small businesses of America. Unsurprisingly public opinion favoring decriminalization of marijuana is at an all time high.

This comment explores the possibility of tribal involvement¹ in the thriving and ever-growing marijuana industry, and seeks to answer when, if ever, it may be economically feasible for the tribes to enter the marijuana market from a legal perspective. This article also posits that the same restraints of American law that work to prevent tribal nations from enjoying lucrative opportunities in the business of marijuana also work to deprive tribes of the means to make any meaningful marijuana policy decisions within their own communities. Ultimately, the best course of action begins with the decriminalization of marijuana at the federal level through legislation that expressly states how and when Congress intends the law to apply to American Indians. This piece suggests, at the very least, the enactment of a comprehensive piece of legislation that specifically addresses the legal consequences and internal conflicts that result from the application of ambiguous federal law to both sovereign Indian Nations and sovereign states. This comment further proposes that Congress seize this opportunity to create a framework under which federally recognized tribes

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1. The scope of this comment is limited to the “official activities of federally recognized Tribes” within “Indian Country.” The legal ambiguity of classification within these terms is extensive and beyond the consideration of the present piece.

will have a chance to attain economic independence through meaningful participation in a growing American industry.

Part I discusses the history and current status of marijuana law in the United States, including the Controlled Substances Act, the Consolidated and Further Continuing Appropriations Act of 2015, state decriminalization and regulation of marijuana, the policies of the Department of Justice, marijuana related issues raised in Indian Country, and the legal difficulties faced by those in an industry prohibited by federal statute. Part II examines possible models for tribal involvement in the marijuana industry by examining the current status and continuing viability of Indian gaming, tobacco, and hemp production. Part III gives an overview of proposed federal legislation to end the federal prohibition of marijuana, tax marijuana, and, less ambitiously, exclude industrial hemp from the definition of marijuana within the Controlled Substances Act. Part IV analyzes tribal involvement in the marijuana industry under both the Controlled Substances Act and proposed federal legislation with an emphasis on ambiguities likely to fuel litigation in the absence of express congressional intent. Finally, Part V provides a new model for legislative and judicial policy within the federal government regarding marijuana that adequately and sufficiently balances state, federal, and tribal interests.

I. A Brief History of Marijuana Law and Policy

Although possession, manufacture, and sale of marijuana are illegal under federal law,² decriminalization is on the rise among states³ where the industry has substantially spurred the economic growth of state treasuries and private businesses alike.⁴ Those charged with enforcing the federal marijuana prohibition have recently been acquiescent, but the possibility that the Department of Justice (DOJ) may seek criminal recourse, or that the United States might sue to enjoin the implementation of state regulation preempted by federal law, leaves the legal future of the marijuana industry

2. 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 §§ 801-889 (2012)).

3. See *infra* Part I.B.

4. Jack Healy & Kirk Johnson, *Next Gold Rush: Legal Marijuana Feeds Entrepreneurs' Dreams*, N.Y. TIMES, July 18, 2014, http://mobile.nytimes.com/2014/07/19/us/new-gold-rush-legal-marijuana-feeds-entrepreneurs-dreams.html?hp&action=click&pgtype=Homepage&version=HpSum&module=first-column-region®ion=top-news&WT.nav=top-news&_r=5&referrer. The industry is projected to grow \$2.6 billion this year. *Id.*

in the dark.⁵ In an effort to cash in on recent events, federal legislation to decriminalize and tax marijuana has been proposed, but has yet to be enacted.⁶

A. The Controlled Substances Act

The use and sale of marijuana became federally prohibited in 1970 when Congress enacted the Comprehensive Drug Abuse Prevention and Control Act,⁷ commonly known as the Controlled Substances Act (CSA).⁸ The act classifies certain substances into one of five schedules based on “potential for abuse”⁹ and “currently accepted medical use in treatment in the United States.”¹⁰ Congress categorizes “[m]arihuana” as a Schedule I narcotic.¹¹ Today, this unaltered classification continues to federally prohibit doctors from prescribing marijuana,¹² and provides a number of felony penalties for the manufacture, distribution, and possession of marijuana.¹³ Penalties for simple possession of marijuana range from civil penalties¹⁴ to felony criminal penalties.¹⁵

5. See Sam Karmin, *Cooperative Federalism and State Marijuana Regulation*, 85 U. COLO. L. REV. 1105 (2014).

6. See H.R. 4046, 113th Cong. (2014) (amending Office of National Drug Control Policy Reauthorization Act of 1998 by striking provisions which prohibit the Director of the Office of National Drug Control Policy from studying the legalization of marijuana and requires the Director to oppose any attempt to legalize marijuana); H.R. 499, 113th Cong. (2013) (decriminalizing marijuana on the federal level, leaving states “a power to regulate marijuana that is similar to the power they have to regulate alcohol”); H.R. J. Res. 79, 113th Cong. (imposing a 50% federal tax on the sale of marijuana, by the producer or importer thereof); H.R. 5226, 113th Cong. (2014) (“Charlotte’s Web Medical Hemp Act of 2014” amending the Controlled Substances Act to exclude therapeutic hemp and cannabidiol from the definition of marihuana).

7. 21 U.S.C §§ 801-889 (2012).

8. See Karmin, *supra* note 5.

9. See 21 U.S.C. § 812.

10. *Id.*

11. *Id.*

12. Karmin, *supra* note 5, at 1106.

13. 21 U.S.C. § 841.

14. *Id.* § 844a. In assessing civil penalties the Attorney General has defined “Personal Use Amount” as “possession of controlled substances in circumstances where there is no other evidence of an intent to distribute, or to facilitate the manufacturing, compounding, processing, delivering, importing or exporting of any controlled substance.” 28 C.F.R. § 76.2 (2014). Relevant evidence of a lack of this intent is the possession of a mixture or substance containing detectable amounts of marijuana that does not exceed “one ounce.” *Id.*

15. 21 U.S.C. § 844.

Not all enumerated controlled substances are illegal in every context, in fact many of the substances are permitted in legitimate medical, scientific and commercial channels. For example, Vicodin, a schedule II narcotic, commonly prescribed to alleviate pain, may be possessed and ingested by a person that has a valid prescription from a licensed physician. Under the CSA, the Attorney General is authorized to “assist State, tribal, and local governments in suppressing the diversion of controlled substances” from legitimate channels into illegal channels and may make grants to these governments to assist in meeting the costs of improving anti-diversion regulatory controls.¹⁶ The Attorney General is similarly authorized to “enter into contractual agreements with State, tribal, and local law enforcement agencies to provide for cooperative enforcement” of the CSA.¹⁷

In lieu of legislative amendment or repeal, the CSA likewise authorizes the Attorney General to remove substances from the established schedules, by rules promulgated in accordance with the procedures set out in the Act, should he or she find that the substance fails to “meet the requirements for inclusion in any schedule.”¹⁸ The Attorney General may promulgate a rule to remove a listed substance if the substance’s potential for abuse is outweighed by the substance’s accepted medical use.¹⁹ In making this determination, the Attorney General must consider: (1) the drug’s actual or relative potential for abuse; (2) scientific evidence of its pharmacological effects, if known; (3) the state of current scientific knowledge regarding the drug or other substance; (4) its history and current pattern of abuse; (5) the scope, duration, and significance of abuse; (6) what, if any, risk there is to the public health; (7) its psychological or physiological dependence liability; and (8) whether the substance is an immediate precursor of a controlled substance.²⁰

The CSA provides that it shall not preempt state law “*unless there is a positive conflict between that provision of this subchapter and that State*

16. *Id.* § 873(a), (d). In addition to grants, the AG may assist by:

(A) making periodic assessments of the capabilities of State, tribal, and local governments to adequately control the diversion of controlled substances;

(B) providing advice and counsel to State, tribal, and local governments on the methods by which such governments may strengthen their controls against diversion; and

(C) establishing cooperative investigative efforts to control diversion

Id. § 873(a)(6).

17. *Id.* § 873(a)(7).

18. 21 U.S.C. § 811 (2012).

19. *Id.*

20. *Id.*

law so that the two cannot consistently stand together."²¹ Given that this provision was simply intended to provide concurrent state and federal jurisdiction for criminal prosecution under both federal and state law, it is unlikely Congress contemplated that this would be as controversial as it has proven to be.²²

In interpreting this provision, courts have generally established that a state medical marijuana law is in "positive conflict" with the CSA if it is "physically impossible" to comply with both the state and federal law, or where the state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."²³

In *Gonzales v. Raich*,²⁴ a 6-3 decision, the U.S. Supreme Court held that "the Commerce Clause permitted Congress to prohibit the wholly intrastate possession and use of marijuana."²⁵ However, the Court failed to consider whether the CSA preempted the state law at issue,²⁶ leaving the question of the effect of the Supremacy Clause unanswered.

B. State Decriminalization and Regulation of Marijuana

In 2013, Deputy Attorney General Cole issued a memorandum to all U.S. Attorneys announcing that although the DOJ retains the power and conviction to enforce the CSA, it will leave marijuana law enforcement to the local authorities if the states carefully regulate the marijuana market in accordance with federal priorities.²⁷ In order to tentatively avoid prosecution and enjoinder for violating the CSA, a state's marijuana regulatory scheme must include legal and enforcement mechanisms that adequately address the following eight federal priorities: (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

21. 21 U.S.C. § 903 (2012) (emphasis added).

22. *See, e.g.*, *People v. Sheppard*, 432 N.Y.S.2d 467 (N.Y. Sup. Ct. 1980).

23. TODD GARVEY, CONG. RESEARCH SERV., R42398, MEDICAL MARIJUANA: THE SUPREMACY CLAUSE, FEDERALISM, AND THE INTERPLAY BETWEEN STATE AND FEDERAL LAWS (2012) (referencing the differing holdings between *Emerald Steel Fabricators, Inc. v. Bureau of Labor & Indus.*, 230 P.3d 518 (Or. 2010), and *County of San Diego v. San Diego Norml*, 165 Cal. App. 4th 798 (2008)).

24. 545 U.S. 1 (2005).

25. *See* GARVEY, *supra* note 23, at 5 (citing *Gonzales*, 545 U.S. 1).

26. *Id.*

27. *See* Memorandum from James M. Cole, Office of the Attorney Gen., U.S. Dep't of Justice, to U.S. Attorneys (Aug. 29, 2013), *available at* <http://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf>.

state law in some form to other states; (4) preventing drugged driving (5) preventing the exacerbation of other adverse public health consequences associated with marijuana use; (6) preventing the growing of marijuana on public lands; (7) preventing the attendant public safety and environmental dangers posed by marijuana production on public lands; and (8) preventing marijuana possession or use on federal property.²⁸

To date, the use of marijuana for medical purposes has been decriminalized in twenty-three states²⁹ and the District of Columbia.³⁰ Seventeen other states have approved non-comprehensive medical marijuana programs where, for example, the state permits only the use of products that are less psychoactive than recreational marijuana, meaning the products contain low amounts of tetrahydrocannabinol (THC) and contain high amounts of cannabidiol (CBD).³¹ In 2012, Colorado³² and Washington³³ enacted legislation decriminalizing the recreational use of

28. *Id.* These same eight guidelines apply to the growth and use of marijuana in Indian Country under a similar memorandum issued by the DOJ on October 28, 2014. *See infra* note 45.

29. States with comprehensive legislation legalizing marijuana for medicinal purposes include Alaska, Arizona, California, Colorado, Connecticut, Delaware, Hawaii, Illinois, Maine, Massachusetts, Maryland, Michigan, Montana, Nevada, New Hampshire, New Jersey, New Mexico, Oregon, Rhode Island, Vermont, and Washington. *See State Medical Marijuana Laws*, NAT'L CONF. OF ST. LEGISLATURES (Mar. 16, 2015), <http://www.ncsl.org/research/health/state-medical-marijuana-laws.aspx>.

30. Prior to 2014, twenty-one states and D.C. had decriminalized and regulated medicinal marijuana in some way. *Id.* In 2014, New York and Minnesota joined the ranks. *Id.* There is widespread global advocacy for the medicinal use of marijuana. *Quick Reference*, NORML, http://norml.org/marijuana/item/quick-reference?category_id=734 (last visited Sept. 27, 2014) (providing a list of health organization that support immediate legal access to medical marijuana).

31. *State Medical Marijuana Laws*, *supra* note 29. Recent Research suggests that the medicinal benefits of non-psychoactive CBD include the reduction of anxiety, nausea, seizure activity, tumors and cancer cells. *5 Must-Know Facts About Cannabidiol (CBD)*, LEAF SCIENCE (Feb. 23, 2014), <http://www.leafscience.com/2014/02/23/5-must-know-facts-cannabidiol-cbd/>.

32. COLO. CONST. art. XVIII, § 16 (“[T]he following acts are not unlawful and shall not be an offense under Colorado law or the law of any locality within Colorado or be a basis for seizure or forfeiture of assets under Colorado law for persons twenty-one years of age or older . . . [p]ossessing, using, displaying, purchasing, or transporting marijuana accessories or one ounce or less of marijuana.”).

33. WASH. REV. CODE ANN. § 69.50.4013 (West 2014) (“The possession, by a person twenty-one years of age or older, of useable marijuana or marijuana-infused products in amounts that do not exceed those set forth in RCW 69.50.360(3) is not a violation of this section, this chapter, or any other provision of Washington state law.”).

marijuana by adults over the age of twenty-one. Similar measures to legalize recreational marijuana passed in Alaska³⁴ and Oregon³⁵ in November of 2014.³⁶

C. The Consolidated and Further Continuing Appropriations Act, 2015³⁷

In December of 2014, Congress strengthened the administration's implied promise to decline federal prosecution under the CSA for the sale of medicinal marijuana by providing that DOJ funds cannot be used to enforce the federal marijuana prohibition in states which have legalized medical marijuana.³⁸ In the same appropriations act, Congress made an additional implied policy statement regarding hemp production, by preventing the DOJ and Drug Enforcement Administration from using appropriated funds to prosecute those 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 2014.³⁹

D. Indian Country: Monkey in the Middle

The registration requirements⁴⁰ and civil penalties⁴¹ of the CSA apply to "any person," and arguably as a function of the Supremacy Clause,⁴² apply

34. *Alaska Marijuana Legalization, Ballot Measure 2 (2014)*, BALLOTPEdia, http://ballotpedia.org/Alaska_Marijuana_Legalization_Ballot_Measure_2_%282014%29 (last visited Jan. 7, 2015) ("As a result of its passage, the measure allowed people age 21 and older to possess up to one ounce of marijuana and up to six plants. It also made the manufacture, sale and possession of marijuana paraphernalia legal.").

35. Noelle Crombie, *Marijuana legalization Q&A: What's Next for Oregon?*, OREGONLIVE (Nov. 05, 2014, 6:30 AM), http://www.oregonlive.com/politics/index.ssf/2014/11/marijuana_legalization_oregon.html ("[In July of 2015] [p]eople 21 and older will be allowed to possess up to 1 ounce of marijuana in a public place and up to 8 ounces in their home. The law also allows up to four marijuana plants per household.").

36. Healy & Johnson, *supra* note 4.

37. Pub. L. No. 113-235, 128 Stat. 2130.

38. *Id.* tit. V, § 538, 128 Stat. at 2217.

39. *Id.* at tit. V, § 539, 128 Stat. at 2217. The Legitimacy of Industrial Hemp Research section requires that sites used for growing or cultivating industrial hemp be in states where hemp is legal and certified by, and registered with, the State department of agriculture. 7 U.S.C. § 5940(a) (2012).

40. *See* Controlled Substances Act, 21 U.S.C. § 822(a)(1) (2012) ("Every person who manufactures or distributes any controlled substance or list I chemical, or who proposes to engage in the manufacture or distribution of any controlled substance or list I chemical, shall

to all tribal members, even those in states which have assumed criminal jurisdiction over tribal land within the state.⁴³ However the CSA does not appear to apply to the official activities of the tribes themselves, leaving them with their sovereign power, buttressed by immunity from suit, to enact tribal ordinances that differ from the CSA.⁴⁴

In 2014, in response to “requested guidance on the enforcement of the Controlled Substance Act (CSA) on tribal lands by the United States Attorneys’ offices,”⁴⁵ the DOJ issued a memorandum to all U.S. Attorneys, Assistant Attorneys, Criminal Chiefs, Appellate Chiefs, Organized Crime Drug Enforcement Task Force Coordinators and Tribal Liaisons stating that, on a case-by-case basis, the “eight priorities in the Cole Memorandum will guide United States Attorneys’ marijuana enforcement efforts in Indian Country, including in the event that *sovereign Indian Nations* seek to legalize *the cultivation or use of marijuana in Indian Country*.”⁴⁶ The memo further provides that “[c]onsistent with the Attorney General’s 2010 Indian Country Initiative,” U.S. Attorneys should consult with tribes on a government-to-government basis when evaluating a tribe’s marijuana

obtain annually a registration issued by the Attorney General in accordance with the rules and regulations promulgated by him.”).

41. See Food and Drug Act, 21 U.S.C. § 841(a) (2012) (“[I]t shall be unlawful for any person knowingly or intentionally—(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance . . .”).

42. See GARVEY, *supra* note 23.

43. See *Fed. Power Comm’n v. Tuscarora Indian Nation*, 362 U.S. 99, 116 (1960) (holding that “a general statute in terms applying to all persons includes Indians and their property interests”); *Vandever v. Osage Nation Enter., Inc.*, No. 06-CV-380-GKF-SAJ, 2007 WL 6139198, at *2 (N.D. Okla. Aug. 6, 2007) (“This general rule, known as the *Tuscarora* rule, ‘presumes that when Congress enacts a statute of general applicability, the statute reaches everyone within federal jurisdiction not specifically excluded, including Indians and Tribes.’ Broad application of the *Tuscarora* rule, however, has been whittled down over the years.”) (internal citations omitted); see Robin Lash, *Industrial Hemp: The Crop for the Seventh Generation*, 27 AM. INDIAN L. REV. 313, 344 (2002-2003).

44. See, e.g., Oglala Sioux Tribal Council Ordinance No. 98-27 (July 28, 1998), available at <https://www.votehemp.com/PDF/OrdinanceNo9827.pdf>; *United States v. White Plume*, 447 F.3d 1067, 1069 (8th Cir. 2006) (demonstrating that the United States acts to enjoin individual members of a tribe from violating the CSA while avoiding the issue of the tribe’s authority to pass an ordinance in direct contradiction with the CSA).

45. See Monty Wilkinson, Office of the Attorney Gen., U.S. Dep’t of Justice, Policy Statement Regarding Marijuana Issues in Indian Country (Oct. 28, 2014), available at <http://www.justice.gov/sites/default/files/tribal/pages/attachments/2014/12/11/policystatementregardingmarijuanaissuesinindiancountry2.pdf>.

46. *Id.* at 2 (emphasis added). For the Cole Memorandum standards, see discussion *supra* Part I.B.

enforcement activities, and should inform the executive before making any determination on how to proceed when tribal regulation does not meet the eight Cole Memorandum standards.⁴⁷ The 2014 memorandum was not the first instance of a federal Native American exemption from the CSA; the Native American Church has received an exemption allowing peyote use—a Schedule I narcotic—for the past forty-three years.⁴⁸ In 1994, Congress further exempted “the use, possession, or transportation of peyote by an Indian for bona fide traditional ceremonial purposes in connection with the practice of a traditional Indian religion” from the CSA’s criminal penalties,⁴⁹ providing that such activity shall not be prohibited by the United States *or any State*.⁵⁰

The impact of the memorandum in Indian Country is not immediately clear. At least one tribe, the Oglala Sioux of Pine Ridge Reservation in South Dakota, has taken steps toward legalization of marijuana on the reservation. In 2015 the Wounded Knee district of the Pine Ridge Reservation passed a motion legalizing “the sale of medicinal and recreational marijuana as well as industrialized hemp” but the remaining nine districts and the tribal council have yet to weigh in on the issue.⁵¹ In addition, a recent Indian Country Today Media Network article claims that some tribal members are currently cultivating, using, and selling 100% organic marijuana on a rancheria in Northern California.⁵² One of the anonymous tribal members growing marijuana on the reservation stated that he was a recovering alcoholic and meth addict, and that smoking marijuana

47. Wilkinson, *supra* note 45, at 2-3.

48. *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 433 (2006) (citing 21 C.F.R. § 1307.31 (2005)).

49. 42 U.S.C. § 1996a(b)(1) (2012).

50. *Id.* (“Notwithstanding any other provision of law, the use, possession, or transportation of peyote by an Indian for bona fide traditional ceremonial purposes in connection with the practice of a traditional Indian religion is lawful, and shall not be prohibited by the United States or any State. No Indian shall be penalized or discriminated against on the basis of such use, possession or transportation, including, but not limited to, denial of otherwise applicable benefits under public assistance programs.”) (emphasis added).

51. Brandon Ecoffey, *Oglala Sioux District Endorses Marijuana*, LAKOTA COUNTRY TIMES, Apr. 15, 2015, <http://www.indianz.com/News/2015/017115.asp>; see also Joe O’Sullivan, *Pine Ridge Reservation Considers Legalizing Marijuana*, RAPID CITY J., Feb. 2, 2014, 5:00 AM, http://rapidcityjournal.com/news/local/pine-ridge-reservation-considers-legalizing-marijuana/article_af9b0f7c-cb6b-504a-a11a-6e8da8005087.html.

52. See Ruth Hopkins, *Cannabis on the Rez: When Will It Be Legal?*, INDIAN COUNTRY TODAY MEDIA NETWORK (Apr. 25, 2014), <http://indiancountrytodaymedianetwork.com/2014/04/25/cannabis-rez-when-will-it-be-legal>.

prevented him from relapsing.⁵³ When asked how so much marijuana could be illegally grown, he pointed out that the rancheria is located in California, a Public Law 280 (PL 280) state where, in the absence of tribal law enforcement, state law enforcement was lax.⁵⁴ A second grower discussed his hopes for promoting tribal sovereignty through tribal taxation of marijuana produced and sold on the reservation, and was actively lobbying his tribal council to legalize cannabis so that the tribe could have its own nursery.⁵⁵ Dismayed at the wasteful agricultural methods of other marijuana producers, he also hoped to teach others how to grow marijuana in a more environmentally friendly way, specifically more efficient water irrigation systems and safer waste disposal methods.⁵⁶

Conversely, many Native Americans remain staunchly opposed to tribal legalization of marijuana, even while supporting federal decriminalization.⁵⁷ For example, Troy A. Eid, chair of the National Indian Law and Order Commission, recently authored an opinion piece discussing the detrimental effects of diversion into tribal communities and concluding that “[o]nly federally authorized decriminalization of marijuana that respects the prerogatives of states and tribes can ensure a concerted national enforcement strategy against marijuana diversion.”⁵⁸

In Indian communities in those states where marijuana is legal under state law, tribal courts struggle to balance tribal, state, and federal law.⁵⁹ For example, in the Swinosh Indian Tribal Community, located in Washington, under the Swinosh Code, “‘if there is . . . any doubt as to whether a substance is illegal or not’ the tribal court may turn to [the laws of the state of Washington] for guidance.”⁶⁰ In addition, under Swinosh law, “[a]n independent sovereign may fully incorporate by reference the laws of another sovereign.”⁶¹ Despite these attempts at uniformity among state and tribal criminal law, the incongruence with federal law creates an interesting conundrum. Under Washington state law, the possession of

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.*

57. Troy A. Eid, *Indian Youth Hurt by Colorado's Marijuana Experiment*, DENVER POST, July 26, 2014, 5:01 PM, http://www.denverpost.com/opinion/ci_26216404/indian-youth-hurt-by-colorados-marijuana-experiment.

58. *Id.* (emphasis added).

59. *See, e.g., Swinomish Indian Tribal Cmty. v. McLeod*, 11 Am. Tribal Law 187 (2012).

60. *Id.* at 188 (citing SWINOMISH TRIBAL CODE 4.10.020(B)).

61. *Id.* at 189 (citing *Wiley v. Colville Confederated Tribes*, 2 C.C.A.R. 60 (1995)).

certain amounts of marijuana is authorized for those with a *written authorization for medical use* of marijuana from a medical provider.⁶² Under Swinosh law possession of marijuana is authorized only for those with a *valid prescription* from a medical provider.⁶³ However, as the tribal court in *Swinomish Indian Tribal Community v. McLeod* points out, “[m]arijuana . . . may not be prescribed under Federal law,”⁶⁴ and therefore its possession remains illegal under the tribal statute.

E. The Persistent Legal Consequences of Federal Half-Measures

Despite the DOJ’s declarations that U.S. Attorneys will likely turn a blind eye to marijuana use if decriminalizing states and tribes maintain a tight ship, and a 2015 federal appropriations act that ensures the DOJ will not prevent states from implementing their medical marijuana laws, in the shadow of uncertainty cast by the CSA, significant challenges continue to plague the \$1.5 billion marijuana industry.⁶⁵ Notably, courts may deem a contract for a cannabis-related transaction, including business loan agreements, to be void as against public or federal policy because marijuana remains a federally prohibited Schedule I narcotic.⁶⁶ Because contract law applies to tribal-state compacts, which serve to enforce agreements between tribes and states in the areas of self-governance, taxation, and criminal jurisdiction,⁶⁷ cannabis related compacts would likely face similar barriers to enforceability in a court of law.⁶⁸ Banks and other financial institutions often refuse to do business with the marijuana industry for fear of federal prosecution for money laundering,⁶⁹ and adequate legal advice may be hard

62. *Id.* at 188.

63. *Id.*

64. *Id.*

65. Healy & Johnson, *supra* note 4.

66. Karmin, *supra* note 5, at 1113.

67. See Jeff Corntassel, *Indigenous Governance Amidst the Forced Federalism Era*, KAN. J.L. & PUB. POL’Y 47 (2009).

68. See, e.g., *Idaho v. Shoshone-Bannock Tribes*, 465 F.3d 1095, 1098 (9th Cir. 2006).

69. *Id.* The threat of prosecution for money laundering has rendered the marijuana business a cash-only business, making it a target for violent crime. *Id.* “A financial institution that knowingly processes transactions for marijuana-related businesses commits the crime of money laundering.” Jacob Sullem, *Marijuana Money Is Still a Pot of Trouble for Banks*, FORBES (Sept. 28, 2014, 5:26 AM), <http://www.forbes.com/sites/jacobsullum/2014/09/18/local-banks-terrified-by-friendly-neighborhood-marijuana-merchants/> (quoting Julie Anderson Hill, J.D.). However,

[t]he Obama administration on [Feb. 14, 2014] issued new law-enforcement guidelines aimed at encouraging banks to start doing business with state-licensed marijuana suppliers

to come by because rules of professional conduct prohibit legal counsel from “knowingly facilitating criminal conduct.”⁷⁰

In addition to these inherent legal complications, those involved in the marijuana industry incur substantial expenses, payable to the state, in licensing fees⁷¹ and taxes.⁷² For example, “Colorado voters approved a 15% excise tax on marijuana producers . . . and a 10% special sales tax on consumers.”⁷³

Finally, the discord between states which have legalized marijuana and states and tribes which continue to prohibit its production, use, and possession, remains an extremely hot political topic that fuels litigation not easily resolved in light of the glaring contradiction within the federal position on marijuana. The prominent issue is what is known as “diversion,”⁷⁴ the leakage of state-legalized cannabis products into states and territories that continue to outlaw marijuana.

.....
The guidance stopped short of promising immunity for banks. But it said criminal prosecution for money laundering and other crimes is unlikely if banks meet a series of conditions, such as avoiding business with marijuana operations that sell to minors or engage in illegal drug trafficking.

David Ingram & Jason Lange, *U.S. to Let Banks Do Business with Licensed Pot Shops*, REUTERS, Feb. 14, 2014, <http://www.reuters.com/article/2014/02/15/us-usa-marijuana-banking-idUSBREA1D11520140215>.

70. *Shoshone-Bannock Tribes*, 465 F.3d at 1116-17.

71. *See, e.g.*, WASH. ADMIN. CODE § 314-55-075 (2015) (“The annual fee for issuance and renewal of a marijuana producer license is one thousand dollars.”).

72. Jolie Lee, *Colorado Makes \$3.5M in Pot Revenue in January*, USA TODAY, Mar. 11, 2014, 11:39 AM, <http://www.usatoday.com/story/news/nation-now/2014/03/10/marijuana-revenue-colorado-taxes/6261131/>.

73. *Id.*

74. The prevention of diversion is one of the eight priorities listed on the Cole Memorandum, which, in order to avoid prosecution by U.S. Attorneys, those states and tribes who wish to legalize marijuana in any form must enforce through an effective regulatory scheme. *See* discussion *supra* Part I.B. In the context of diversion from states to Indian Country,

[t]he promoters of both [Colorado and Washington measures permitting recreational use and sales] vowed that marijuana wouldn't be diverted to places where it's still illegal. Places like Pine Ridge, or the Yakima Nation in central Washington State. The Washington marijuana initiative, incidentally, exempted Yakima and other tribes from state marijuana legalization because Indian nations are sovereign — governments entitled to make and enforce their own laws that meet the needs of their citizens. Still, Washington-labeled marijuana is reportedly showing up at Yakima, too. Tribal leaders are so outraged they want to extend their marijuana ban to all areas of Washington State covered by the Yakima Nation's original treaty with the United States.

For example, in December of 2014, the Attorney Generals of Nebraska and Oklahoma filed a lawsuit in the U.S. Supreme Court asking the Court to declare Colorado's legalization of marijuana in violation of the Constitution.⁷⁵ Released to the press, an unsigned and unstamped copy of the Motion for Leave to File Complaint, Brief in Support of Motion to File Complaint, and Complaint assert that Colorado's cannabis legalization laws are preempted by federal law (the CSA) and thus violate the Supremacy Clause.⁷⁶ As a somewhat secondary argument, the complaint attacks the adequacy of Colorado's regulatory scheme as failing to "ensure marijuana cultivated and sold in Colorado is not trafficked to other states."⁷⁷ Until the federal government solidifies and communicates a consistent federal marijuana policy, pro-legalization governmental interests will continue to increasingly face off with anti-legalization governmental interests in court systems across the country. Although this dispute initially took root in highly polarized public opinion concerning drug policy, it is now cultivated by the significant financial interests of governmental and private commercial interests.

II. Possible Models for Tribal Marijuana Revenue: Tobacco Sales, Indian Gaming, and Industrial Hemp Production

As of June 2014, total revenue from marijuana taxes, licenses, and fees in Colorado "topped 7 million dollars" and is projected "to keep rising as more retail outlets enter the market."⁷⁸ In contrast, "[t]he poverty and unemployment rates on Indian reservations are significantly greater than the national average. As a result, 'there is no stable tax base on most

Eid, *supra* note 57.

75. John Ingold, *Nebraska and Oklahoma Sue Colorado over Marijuana Legalization*, DENVER POST, Dec. 18, 2014, 1:12 PM, http://www.denverpost.com/news/ci_27163543/nebraska-and-oklahoma-sue-colorado-over-marijuana-legalization?source=infinite.

76. Complaint at ¶ 4, *Nebraska & Oklahoma v. Colorado*, No. 144 (U.S. Dec. 18, 2014) ("The Constitution and the federal anti-drug laws do not permit the development of a patchwork of state and local pro-drug policies and licensed-distribution schemes throughout the country which conflict with federal laws.").

77. *Id.* ¶ 5.

78. Christopher Ingraham, *Colorado Marijuana Tax Revenues Surge as Recreational Sales Surpass Medical*, WASH. POST, Sept. 11, 2014, <http://www.washingtonpost.com/blogs/wonkblog/wp/2014/09/11/colorado-marijuana-tax-revenues-surge-as-recreational-sales-surpass-medical-for-the-first-time/>.

reservations.”⁷⁹ With money flowing to the pockets of private industry,⁸⁰ as well as to the twenty-four states and the District of Columbia which have legalized marijuana use in the face of federal prohibition,⁸¹ it is no surprise that some tribal members are considering entering into the “Wild West” that is the marijuana industry.⁸² In analyzing the economic feasibility of tribal participation in the marijuana market, it is beneficial to examine the successes, failures and mechanics of similar tribal ventures in Indian gaming, Indian tobacco and hemp production.

A. Indian Gaming

The revenue-generating power of Indian casinos rests on the principles of tribal sovereign immunity from the civil regulatory power of the states. In the 1980s, “numerous Indian tribes [became] engaged in or [licensed] gambling activities in Indian country as a means of generating tribal government revenue.”⁸³ In response, many states attempted to prevent tribes from engaging in gaming altogether or imposed restrictions on tribal gaming.

Eventually the question of immunity from state regulation reached the U.S. Supreme Court in the influential case *California v. Cabazon Band of Mission Indians*,⁸⁴ in which the Court held “the State’s interest in preventing the infiltration of the tribal bingo enterprises by organized crime d[id] not justify state regulation of the tribal bingo enterprises in light of the compelling federal and tribal interests supporting [the continued operation of the tribal bingo enterprises].”⁸⁵ Underlying the Court’s decision was the distinction between “criminal/prohibitory” and “civil/regulatory” laws in PL 280 states.⁸⁶ The Court reasoned that PL 280⁸⁷ permitted these states

79. *Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2045 (2012) (Sotomayor, J., concurring) (quoting Matthew L.M. Fletcher, *In Pursuit of Tribal Economic Development as a Substitute for Reservation Tax Revenue*, 80 N.D. L. REV. 759, 774).

80. Healy & Johnson, *supra* note 4.

81. *See State Medical Marijuana Laws*, *supra* note 29.

82. *See, e.g., O’Sullivan*, *supra* note 51.

83. *Id.* at 3.

84. 480 U.S. 202 (1987).

85. *Id.* at 221-22.

86. *Id.* at 208 (“[W]hen a State seeks to enforce a law within an Indian reservation under the authority of Pub.L. 280, it must be determined whether the law is criminal in nature, and thus fully applicable to the reservation under § 2, or civil in nature, and applicable only as it may be relevant to private civil litigation in state court.”).

87. 18 U.S.C. § 1162 (2014). “In Pub.L. 280, Congress expressly granted six States, including California, jurisdiction over specified areas of Indian country within the States and

broad criminal jurisdiction over Indian Country within the State, as well as civil jurisdiction over private litigation involving reservation Indians in state court, but that the statute did not grant general civil regulatory authority.⁸⁸ More recently, the Supreme Court proclaimed that *Cabazon* “held that States lacked regulatory authority over gaming on Indian land[s].”⁸⁹

Despite this favorable ruling, some tribes expressed concern that their tribal regulatory schemes and limited enforcement powers were insufficient to adequately protect their gambling operations from “the influence of organized crime, racketeers, [and] professional gamblers.”⁹⁰ In response, Congress enacted the Indian Gaming Regulatory Act (IGRA).⁹¹ Of notable import, the legislative history of the IGRA provides that “tribal operation and licensing of gambling activities [was in fact] a legitimate means of generating revenues for governmental operations and programs.”⁹²

The IGRA applies only to gaming on “Indian lands,” which is defined as lands within reservation boundaries, lands held in trust, and allotment lands.⁹³ The IGRA establishes the National Indian Gaming Commission (NIGC) within the Department of the Interior (DOI), which is authorized to promulgate regulations, conduct investigations, adjudicate, and approve an annual budget for the Commission.⁹⁴ As the statutory backbone of the federal regulatory scheme, the IGRA is predominantly enforced through the administrative approval or denial of statutorily requisite tribal ordinances or resolutions,⁹⁵ operational or management contracts to which the tribes are a party,⁹⁶ and tribal-state compacts.⁹⁷ Tribal ordinances or resolutions must

provided for the assumption of jurisdiction by other States.” *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 207 (1987).

88. *Id.* at 209.

89. *Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2034 (2014).

90. *Indian Gambling Control Act: Hearing on H.R. 4566 Before the H. Comm. on Interior and Insular Affairs*, 98th Cong. 9-10 (1984) [hereinafter *Hearing on H.R. 4566*].

91. Indian Gaming Regulatory Act, Pub. L. No. 100-497, 102 Stat. 2467 (1988) (codified as amended at 25 U.S.C. §§ 2701-2721 (2013)).

92. *Hearing on H.R. 4566, supra* note 90, at 9-10.

93. 25 U.S.C. § 2703(4).

94. *Id.* § 2706. Although one might imagine that federal oversight of such a specifically tribal activity would be conducted by a branch, division, office, or agency within the Bureau of Indian Affairs, IGRA established the National Indian Gaming Commission as a separate entity within the Department of the Interior. *Id.* § 2704.

95. *Id.* § 2710(b).

96. *Id.* §§ 2710(d)(9), 2711(g), 2711(a)(1). “By regulation, unapproved management contracts are deemed ‘void.’” *Catskill Dev., L.L.C. v. Park Place Entm’t Corp.*, 547 F.3d 115, 120 (2d Cir. 2008) (citing 25 C.F.R. § 533.7 (2008)).

conform to the IGRA and require the approval of the Chairman of the NIGC.⁹⁸ While tribal-state compacts require the approval of the Secretary of the Interior, the IGRA transfers the authority to approve gaming related management contracts from the Secretary of the Interior to the NIGC.⁹⁹

The core regulatory framework of the IGRA divides Indian gaming activities into three classes. Class I gaming, which is either traditional gaming associated with tribal ceremonies or social gaming for prizes of only minimal value,¹⁰⁰ enjoys immunity from both state and federal regulation.¹⁰¹ Class II gaming, “essentially bingo and certain card games can be regulated on Indian lands by states only if those games are prohibited for everyone under all circumstances.”¹⁰² The real revenue, as well as the most substantial risk of unfavorable state regulation, lies in Class III gaming, which consists of all forms of gaming not included in Class I or II.¹⁰³ Under the IGRA, the most significant state involvement in Class III gaming occurs primarily through two legal avenues: first, the drafting and enforcement of tribal-state compacts; and second, federal preemption workarounds.

To engage in Class III gaming, a tribe must first, pass an ordinance or resolution to legalize gaming;¹⁰⁴ second, be “located in a state that permits such gaming for any purpose by any person, organization, or entity”; and third, negotiate a compact agreement between the tribe and the state.¹⁰⁵ The

97. 25 U.S.C. § 2710(d)(8)(A).

98. *Id.* § 2710(b). Tribal ordinances or resolutions must include provisions specifying the use of net revenue in accordance with the statutory requirements. *Id.*

99. *Id.* § 2711; *see also* United States *ex rel.* Mosay v. Buffalo Bros. Mgmt., Inc., 20 F.3d 739, 741 (7th Cir. 1994) (citing 25 U.S.C. § 81 (1992)).

100. 25 U.S.C. § 2703(6).

101. Kurtis A. Kemper, *Preemption of State Law by Indian Gaming Regulatory Act*, 27 A.L.R. FED. 2D 93, § 2 (2008).

102. *Id.*

103. *Id.*

104. 25 U.S.C. § 2710(d)(2)(A) (2012). The section provides:

If any Indian tribe proposes to engage in, or to authorize any person or entity to engage in, a class III gaming activity on Indian lands of the Indian tribe, the governing body of the Indian tribe shall adopt and submit to the Chairman [of the National Gaming Commission] an ordinance or resolution that meets the requirements of subsection (b) of this section [which includes conditions on the spending of revenue, the requirement of a specific tribal regulatory scheme and the imposition of National Gaming Commission audits and oversight].

Id.

105. Kemper, *supra* note 101 (citing 25 U.S.C. § 2701(d) (2012)).

Any Tribal-State compact negotiated under [IGRA] may include provisions

IGRA section 2701(d)(3)-(9) provides the procedure, scope, and general requirements of tribal-state gaming compacts. In sum:

A tribe seeking to conduct class III gaming on Indian land must request that the state negotiate with the tribe in an attempt to develop a tribal-state compact. The state must negotiate in good faith to enter into a compact, and any tribal-state compact is subject to approval by the National Indian Gaming Commissioner. It is through the compacting process that the Indian Gaming Regulatory Act (IGRA) (25 U.S.C.A. §§ 2701 et seq.) allows states to have input into how class III gaming will be conducted—authority that is limited in that if the state does not negotiate or fails to negotiate in good faith, a tribe may bring suit in federal district court, the parties will be ordered to conclude a compact within a 60-day period, if the parties do not agree to a compact, mediation is required, and if the state still does not agree or invokes its 11th Amendment immunity, the Secretary of the Interior and the tribe will decide upon procedures for conducting class III gaming.¹⁰⁶

The Supreme Court clarified the scope of state Eleventh Amendment immunity under the IGRA in *Seminole Tribe of Florida v. Florida*.¹⁰⁷ The Seminole Tribe filed suit to compel Florida to negotiate a tribal-state

relating to:

(i) the application of the criminal and civil laws and regulations of the Indian tribe or the State that are directly related to, and necessary for, the licensing and regulation of such activity;

(ii) the allocation of criminal and civil jurisdiction between the State and the Indian tribe necessary for the enforcement of such laws and regulations;

(iii) the assessment by the State of such activities in such amounts as are necessary to defray the costs of regulating such activity;

(iv) taxation by the Indian tribe of such activity in amounts comparable to amounts assessed by the State for comparable activities;

(v) remedies for breach of contract [including waivers of sovereign immunity];

(vi) standards for the operation of such activity and maintenance of the gaming facility, including licensing; and

(vii) any other subjects that are directly related to the operation of gaming activities.

25 U.S.C. § 2710(d)(3)(C).

106. Kemper, *supra* note 101 (citing 25 U.S.C. § 2710(d)(3); 25 U.S.C. § 2710(d)(7); Dalton v. Pataki, 5 N.Y.3d 243 (2005)).

107. 517 U.S. 44 (1996).

gaming compact in good faith pursuant to the IGRA.¹⁰⁸ The Court held that not only did Congress lack the authority to abrogate the state's Eleventh Amendment immunity, the doctrine of *Ex parte Young* is likewise unavailable to tribes seeking enforcement of the IGRA's requirements.¹⁰⁹ Ultimately, a tribe may not compel a state to negotiate under the IGRA's remedial scheme because the state is immune from suit. Because the IGRA provides the remedial scheme specifically designed for enforcement of the right to compel the state to negotiate, a tribe cannot sue a state official in their official capacity to enforce that right under the *Ex parte Young* exception to Eleventh Amendment immunity.¹¹⁰

In contrast, the IGRA section 2710(d)(7)(A)(ii) expressly abrogates tribal sovereign immunity for Class III gaming on Indian lands which violates a tribal-state compact.¹¹¹ In *Michigan v. Bay Mills Indian Community*,¹¹² the state sought to enjoin a tribe from operating an off-reservation casino that the tribe had purchased.¹¹³ Michigan contended that the casino was not on "Indian lands" for purposes of the IGRA, and as a consequence it violated the tribal-state compact that prohibited off-reservation gaming facilities within the state.¹¹⁴ The DOI issued an opinion confirming Michigan's claim that because the off-reservation casino could not be converted into a casino on "Indian lands" simply because it was purchased by the tribe with Land Trust earnings.¹¹⁵ In a nearly comical twist at Michigan's expense, the Court held that the IGRA expressly abrogates tribal sovereign immunity only for gaming activities occurring on Indian lands, and thus sovereign immunity barred the state from enjoining the tribe from operating the casino because it was located off of Indian lands.¹¹⁶

108. *Id.* at 51-52. Title 25 U.S.C. § 2710(d)(7)(A)(i) authorizes a tribe to bring an action to compel negotiations if the state fails to respond in good faith within 180 days of the tribe's request to negotiate.

109. *Seminole Tribe of Fla.*, 517 U.S. at 76.

110. *See id.*

111. *See Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2032 (2014); *see also Kiowa Tribe of Okla. v. Mfg. Technologies, Inc.*, 523 U.S. 751, 758 (1998) (citing the provision as an example of federal legislation "restrict[ing] tribal immunity from suit in limited circumstances").

112. 134 S. Ct. 2024 (2014).

113. *Id.* at 2029.

114. *Id.*

115. *Id.*

116. *Id.* at 2034 ("Everything—literally everything—in IGRA affords tools (for either state or federal officials) to regulate gaming on Indian lands, *and nowhere else.*") (emphasis added).

In the absence of express and unequivocal congressional abrogation,¹¹⁷ tribal immunity applies whether a suit is brought by a state,¹¹⁸ or arises from a tribe's commercial activities off Indian lands.¹¹⁹ Although sovereign immunity may protect the tribe itself from suit, individuals¹²⁰ and entities¹²¹ engaged in Indian gaming enterprises are often not afforded the same protections. Individual tribal members are not immune and, unlike state officers under the IGRA,¹²² tribal officers are subject to suit for injunctive relief under the *Ex Parte Young* doctrine.¹²³

With the foreclosure of IGRA's enforcement mechanism, the doctrine of federal preemption developed as a separate and independent defense against interference at the state level,¹²⁴ but the preemptive scope of IGRA is not immediately clear.¹²⁵

117. *Id.* at 2027 (referencing *C & L Enterprises, Inc. v. Citizen Band Potawatomi Tribe of Okla.*, 532 U.S. 411, 418 (2001)).

118. *Id.* (referencing *Puyallup Tribe, Inc. v. Dep't of Game of Wash.*, 433 U.S. 165 (1977)).

119. *Id.* (referencing *Kiowa Tribe of Okla. v. Mfg. Technologies, Inc.*, 523 U.S. 751 (1988)).

120. *Id.* at 2035 (“[A]nalogizing to *Ex parte Young*, tribal immunity does not bar such a suit for injunctive relief against *individuals*, including tribal officers, responsible for unlawful conduct.”) (emphasis added) (citations omitted).

121. *See Cook v. AVI Casino Enters., Inc.*, 548 F.3d 718, 725 (9th Cir. 2008) (“[T]he settled law of our circuit is that tribal corporations acting as an arm of the tribe enjoy the same sovereign immunity granted to a tribe itself. . . . whether tribal immunity extends to a tribal business entity depends [on] . . . whether the entity acts as an arm of the tribe so that its activities are properly deemed to be those of the tribe.”) (citations omitted).

122. *See Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 76 (1996).

123. *See Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2035 (2014).

124. *See, e.g., Great W. Casinos, Inc. v. Morongo Band of Mission Indians*, 88 Cal. Rptr. 2d 828, 831 (Ct. App. 1999) (holding that state law claims against the tribe, its tribal council, the individual tribal council members, numerous individual tribal members, counsel for the tribe, a law firm, and a member of that firm were barred by the separate and independent grounds of federal preemption and sovereign immunity).

125. For example IGRA's legislative history suggests that IGRA is “intended to expressly preempt the field in the governance of gaming activities on Indian lands.” *See Kemper, supra* note 101, § 2 (citing S. REP. NO. 100-446 (1988)) (emphasis added). Nevertheless, § 1166(a) of the United States Code expressly provides that “all State laws pertaining to the licensing, regulation, or prohibition of gambling, including but not limited to criminal sanctions applicable thereto, shall apply in Indian country” 18 U.S.C. § 1166(a) (2012). Yet a careful reading reveals that approved class III gaming is not subject to such state laws because approved class III gaming activities are not considered “gambling” for purposes of the federal statute. *Id.* § 1166(c).

In addition, PL 280, enacted before the IGRA, confers broad criminal jurisdiction to certain states over Indian Country within a state.¹²⁶ However, the IGRA maintains that the federal government has “exclusive jurisdiction over criminal prosecutions of violations of State gambling laws . . . unless an Indian tribe pursuant to a Tribal-State compact . . . has consented to the transfer to the State of criminal jurisdiction with respect to gambling on the lands of the Indian tribe.”¹²⁷ A majority of authority recognizes that in all states, including PL 280 states,¹²⁸ in the absence of a tribal-state compact to the contrary,¹²⁹ the United States has exclusive jurisdiction over criminal prosecutions of violations of state gambling laws that occur on Indian lands,¹³⁰ but not for those violations that occur in Indian gaming facilities located outside of Indian lands.¹³¹

Beyond the confounds of the IGRA’s statutory construction, “[i]n determining whether federal law preempts a state’s authority to regulate gaming activities on tribal lands, different standards apply than in other areas of federal preemption.”¹³² Specifically, the IGRA preempts those disputes and state regulations that threaten or interfere with federal and tribal interests,¹³³ unless the tribe has consented to state regulation by tribal-

126. *See id.* § 1162.

127. *Id.* § 1166(d).

128. *See Lac du Flambeau Band v. Wisconsin*, 743 F. Supp. 645, 646 (W.D. Wis. 1990) (determining that Wisconsin had lost its PL 280 authority to prosecute Indian gambling after the passage of IGRA).

129. *See Wyandotte Nation v. Sebelius*, 337 F. Supp. 2d 1253, 1273 (D. Kan. 2004) (“The structure of the IGRA permits assertion of state civil or criminal jurisdiction over Indian gaming *only* when a tribal-state compact has been reached to regulate Class III gaming.”); *Lac du Flambeau Band v. Wisconsin*, 743 F. Supp. 645, 646 (W.D. Wis. 1990) (“Unless and until the state negotiates a tribal-state compact in which [the tribe] consents to the exercise of such jurisdiction, the United States has the exclusive authority to enforce violations of state gambling laws on plaintiffs’ reservations . . .”).

130. “IGRA limits the state’s regulatory authority to that expressly agreed upon in a compact. Outside the express provisions of a compact, the enforcement of IGRA’s prohibitions on class III gaming remains the exclusive province of the federal government.” *Dewberry v. Kulongoski*, 406 F. Supp. 2d 1136, 1142 (D. Or. 2005) (citing *Cabazon Band of Mission Indians v. Wilson*, 124 F.3d 1050, 1059 (9th Cir. 1997)).

131. *See, e.g., State ex rel. Nixon v. Coeur D’Alene Tribe*, 164 F.3d 1102 (8th Cir. 1999).

132. 116 AM. JUR. *Trials* 395 (2010). “Even state law passed in accordance with a state’s police power is held inoperative where it impairs or obstructs the exercise of any power which the federal government possesses.” 2 J.D. SHAMBIE SINGER, *SUTHERLAND STATUTORY CONSTRUCTION* § 36:8 (7th ed. 2007) (citing *Askew v. Am. Waterways Operators, Inc.*, 411 U.S. 325 (1973)).

133. 116 AM. JUR. *Trials* 395; *see, e.g., Sycuan Band of Mission Indians v. Roache*, 788 F. Supp. 1498, 1504 (S.D. Cal. 1992) (“[A] finding of preemption does not require an

state compact¹³⁴ or if the state interests at stake are sufficient to justify the assertion of state authority.¹³⁵

The IGRA's statutory language does not expressly prohibit a state's power to tax. The trend has been to apply traditional jurisprudence concerning state taxation of tribal activities and land,¹³⁶ rather than to apply the preemption doctrine as a bar to the imposition of all state taxes.¹³⁷ For example, when the gaming facility is located on land held in trust, the gaming related income of tribal members who live within Indian Country is exempt from state income tax whereas the same income of tribal members who live outside of Indian Country is not.¹³⁸ Despite the labyrinth of caveats and ambiguities, the states continue to stand to benefit from the exercise of taxing power over gaming operations. In particular "income earned by employees living off the reservation, money or prizes won by non-reservation residents, and goods and services provided by non-tribal vendors" remain subject to state taxation.¹³⁹

Nevertheless, "[a]lthough some states welcome the economic boost that Indian gaming provides, there has also been a considerable backlash to its development."¹⁴⁰ "States over-whelmingly [sic] attempt to mitigate this

express statement of congressional intent to preempt. A federal statute will be preemptive if the 'state law conflicts with the purpose or operation of a federal statute' . . . the IGRA creates a comprehensive jurisdictional framework for the regulation of gaming activities on Indian lands. The regulation of gaming by states outside the framework of the IGRA would frustrate this framework and Congress's careful balancing of the competing interests involved in Indian gaming.") (internal citations omitted).

134. *Gaming Corp. of Am. v. Dorsey & Whitney*, 88 F.3d 536, 545 (8th Cir. 1996) ("Congress did not intend to transfer any jurisdictional or regulatory power to the states by means of IGRA unless a tribe consented to such a transfer in a tribal-state compact.")

135. *See New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 334 (1983) ("State jurisdiction is preempted by the operation of federal law if it interferes or is incompatible with federal and tribal interests reflected in federal law, unless the State interests at stake are sufficient to justify the assertion of State authority."); *Cabazon Band of Mission Indians v. Wilson*, 37 F.3d 430, 433 (9th Cir. 1994) (citing *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 334 (1983)).

136. *See discussion infra* Part II.B (discussing Indian tax immunity).

137. *See Kemper, supra* note 101, §§ 17-18.

138. *See McClanahan v. State Tax Comm'n of Ariz.*, 411 U.S. 164 (1973); *accord Tunica-Biloxi Tribe v. Louisiana*, 964 F.2d 1536 (5th Cir. 1992); *accord Dark-Eyes v. Comm'r of Revenue Servs.*, 887 A.2d 848 (Conn. 2006).

139. Alan P. Meister et al., *Indian Gaming and Beyond: Tribal Economic Development and Diversification*, 54 S.D. L. REV. 375, 397 (2009).

140. Matthew Murphy, *Betting the Rancheria: Environmental Protections as Bargaining Chips Under the Indian Gaming Regulatory Act*, 36 B.C. ENVTL. AFF. L. REV. 171, 173

backlash by demanding large revenue-sharing agreements in the tribal-state compacting process.”¹⁴¹ “Under such an arrangement, a tribe hands over to the state a fixed sum or a percentage of its gaming revenues. . . it is estimated that the Seminole Tribe, for example, produces over \$1 billion in gaming revenues annually, \$100 million of which it now shares with the State of Florida under those parties’ January 2008 compact.”¹⁴²

Indian gaming has facilitated the improvement of economic conditions for many tribes,¹⁴³ however, the legislative gaps in IGRA have rendered it, and consequently its beneficial impact, susceptible to butchery by the courts. In addition to permitting the imposition of state regulation and taxation under certain and somewhat ambiguous circumstances, IGRA’s abrogation of tribal sovereignty in contrast to the strength of state Eleventh Amendment immunity creates a grievous imbalance of bargaining power.

This imbalance became notably evident after the *Seminole* decision rendered IGRA’s compulsory tribal-state compacting provision moot. As a practical matter, revenue-sharing agreements became the sole “mechanism by which tribes [could] induce states to conclude class III gaming compacts,”¹⁴⁴ forcing many tribes to choose between forfeiting a portion of gaming revenue to the state or forgoing highly profitable gaming operations altogether.

B. Indian Tobacco

Traditionally, Native Americans managed to profit from the sale of tobacco products because, as dependent nations who enjoy sovereign immunity, “[s]tate sales taxes [were generally] not applicable on Indian reservations, and many smokers [went] to them in order to buy cigarettes

(2009) (citing Matthew L.M. Fletcher, *Bringing Balance to Indian Gaming*, 44 HARV. J. ON LEGIS. 39, 69 (2007)).

141. *Id.*

142. Courtney J. A. DaCosta, *When "Turnabout" Is Not "Fair Play": Tribal Immunity Under the Indian Gaming Regulatory Act*, 97 GEO. L.J. 515, 543 (2009) (citing Notice of Deemed Approved Tribal-State Class III Gaming Compact, 73 Fed. Reg. 1229, 1229 (Jan. 7, 2008); John Holland, *Gambling Compact Challenged: House Speaker Asks Court To Block Seminoles Deal*, SUN-SENTINEL (Fort Lauderdale, Fla.), Nov. 20, 2007, at 1A).

143. For example “[o]ne recent study found that between 1990 and 2000, the presence of a tribal casino increased average per capita income by 7.4%.” *Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2045 (2014) (Sotomayor, J., concurring).

144. Courtney J. A. DaCosta, Note, *When "Turnabout" Is Not "Fair Play": Tribal Immunity Under the Indian Gaming Regulatory Act*, 97 GEO. L.J. 515, 543 (2009).

and other products at a discount.”¹⁴⁵ However, a sordid history of federal legislation and Supreme Court jurisprudence has chipped away at the scope of the tribal exemption from state tax.¹⁴⁶ In addition, state legislation enacted in many states to “more stringently regulate the sale of tobacco products” has worked to decrease the profitability of Indian tobacco sales.¹⁴⁷

Although Congress has not expressly abrogated tribal sovereign immunity from state taxation of tobacco, it has demonstrated intent to forestall tribal circumvention of state tobacco taxes. Under the “Prevent All Cigarette Trafficking Act of 2009” (PACT Act), all Indian tobacco businesses must comply with reporting requirements to state tax administrators, regulations of shipments of cigarettes and smokeless tobacco, and state stamping (taxation) requirements.¹⁴⁸ Noncompliant Indian vendors are subject to both civil and criminal penalties under the federal enforcement statute.¹⁴⁹

In addition, the tribal tobacco market is complicated by the passage of the Master Settlement Agreement (MSA), a settlement agreement entered into between forty-six states (as well as the District of Columbia and five U.S. territories) and several major domestic tobacco companies resolving litigation over the health problems caused by tobacco.¹⁵⁰ The MSA requires tobacco companies to pay approximately \$10 billion per year to the settling

145. Shihoko Goto, *American Indians Fear Tobacco Tax Fixes May Hurt Them*, CONGRESSDAILY, May 1, 2008, at 16.

146. See *Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2043 (2014) (Sotomayor, J., concurring).

147. Patricia Molteni, *Regulating Tribal Cigarette Sales Under the Master Settlement Agreement*, NAT’L ASS’N OF ATTORNEYS GEN. GAZETTE (Jan. 24, 2012), <http://www.naag.org/publications/naagazette/volume-6-number-1/regulating-tribal-cigarette-sales-under-the-master-settlement-agreement.php>.

148. Kathryn A. Mayer, *Negotiating Past The Zero-Sum Of Intractable Sovereignty Positions by Exploring the Potential of Possible Party Interests: A Proposed Dispute Resolution Framework for the Tobacco Tax Debacle Between the State Of New York & the Seneca Nation of Indians*, 28 OHIO ST. J. ON DISP. RESOL. 771, 803 (2013).

149. *Id.*

150. See *Master Settlement Agreement*, PUB. HEALTH L. CENTER, <http://publichealthlawcenter.org/sites/default/files/resources/master-settlement-agreement.pdf> (last visited Oct. 1, 2014). The four tobacco companies, frequently referred to as Participating Manufacturers (“PMs”) or Original Participating Manufacturers (“OPMs”) in the context of the MSA and related state legislation, and “the majors” in the context of case law, include Philip Morris, Inc., R.J. Reynolds Tobacco Company, Brown & Williamson Tobacco Corp. and Lorillard Tobacco Company. Molteni, *supra* note 147.

states¹⁵¹ and substantially restricts future tobacco marketing, but it also ensures the tobacco market is foreclosed to competitors who did not enter the MSA.¹⁵² In effect, the MSA ultimately requires all tobacco manufacturers “selling cigarettes to consumers within the [settling] state, whether directly or through a distributor, retailer or similar intermediary or intermediaries,” to pay a specified dollar amount per unit sold for the benefit of that state.¹⁵³

In addition, most of the settling states have enacted additional complementary legislation or regulation in order to prevent tobacco companies who have not agreed to follow the MSA from selling their products within the state.¹⁵⁴ Oklahoma, for example, publishes and maintains the Directory of Compliant Tobacco Product Manufacturers and Brand Families (Directory), which lists the tobacco product manufacturers that have been certified by the state as compliant with Oklahoma tobacco laws.¹⁵⁵ In order to enforce the payment requirements, Oklahoma legislation prohibits the sale or possession of tobacco products made by entities not listed in the Directory.¹⁵⁶ In order to “avoid having their products deemed ‘contraband,’” which is subject to seizure by the state (and may entitle the settling state to any gross proceeds realized from the sale of contraband tobacco products), tribes can only sell tobacco products made by manufacturers listed in the state’s Directory.¹⁵⁷

151. *Master Settlement Agreement*, *supra* note 150.

152. *Id.*

153. 37 OKLA. STAT. § 600.23 (2011).

154. As the Second Circuit observed:

After enactment of the Escrow Statutes, New York and the other states passed “Contraband Statutes,” or “Certification Statutes,” to help ensure compliance with the Escrow Statutes. These laws require cigarette manufacturers, other than OPMs [Original Participating Manufacturers], that sell products in a state to certify annually to the state attorney general that they are either (1) meeting their obligation as an SPM [Subsequent Participating Manufacturer] under the MSA or (2) making escrow deposits as an NPM.

Grand River Enters. Six Nations, Ltd. v. Pryor, 425 F.3d 158, 164 (2d Cir. 2005).

155. *Molteni*, *supra* note 147.

156. *Id.*; *see also* 68 OKLA. STAT. § 360.4(C) (2011); *id.* § 360.8(G).

157. *Muscogee (Creek) Nation v. Pruitt*, 669 F.3d 1159 (10th Cir. 2012). In this case the plaintiff, as a tribal tobacco retailer, was not directly regulated as a “tobacco product manufacturer” in Oklahoma, and the Tenth Circuit “rejected the tribe’s argument that government seizure of unstamped cigarettes outside Indian territory affects the tribe as it restricts the brands of cigarettes tribal members can buy inside the territory.” *10th Circuit Rejects Oklahoma Tribe’s Challenge to Tobacco Laws*, WESTLAW J. TOBACCO INDUSTRY, Mar. 23, 2012, 27 No. 14 WJTOB 7 (Westlaw).

Although the contours of Indian sovereign immunity from state taxation are not perfectly clear, the argument that tribal sovereign immunity insulates Indian tobacco from state regulation has been all but foreclosed, if only because its protection is limited to circumstances that, for most tribes, are not economically feasible. “The modern-day jurisdictional framework housing the dispute over state taxation of [tribal] tobacco sales to non-Indians on reservation land reflects both a controversy over competing claims of Indian sovereignty, and state complaints of unfair competition that are entrenched in both politics and economics.”¹⁵⁸ As a result, the judicial dissemination of tribal sovereign immunity protection from state taxation and regulation has been more or less consistent while still maintaining enough fact-specific ambiguity to keep state and tribal interests wrestling in court.¹⁵⁹

The Supreme Court maintains a “unique Indian tax immunity jurisprudence,”¹⁶⁰ which rests on two pertinent principles: first, “[a]bsent express federal law to the contrary, Indians going beyond reservation boundaries have generally been held subject to non-discriminatory state law otherwise applicable to all citizens of the State”;¹⁶¹ and second, a state may “impose a nondiscriminatory tax on non-Indian customers of Indian retailers doing business on the reservation,”¹⁶² unless the tribe actually bears the incidence of the tax.¹⁶³ Slowly chipping away at the traditional understanding of tribal immunity from state taxation, the Supreme Court has held that states may collect taxes on: sales to non-Indians on Indian Land;¹⁶⁴ companies owned by non-Indians on Indian Land;¹⁶⁵ property owned by non-Indians on Indian Land;¹⁶⁶ and allotment lands.¹⁶⁷

158. Mayer, *supra* note 148, at 803.

159. *See generally* Dep’t of Taxation & Fin. of N.Y. v. Milhelm Attea & Bros., 512 U.S. 61, 73 (1994) (“Resolution of conflicts of this kind does not depend on ‘rigid rule[s]’ or on ‘mechanical or absolute conceptions of state or tribal sovereignty,’ but instead on ‘a particularized inquiry into the nature of the state, federal, and tribal interests at stake, an inquiry designed to determine whether, in the specific context, the exercise of state authority would violate federal law.’”) (quoting *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 142, 145 (1980)); *see also* Mayer, *supra* note 148, at 803-05.

160. *Wagon v. Prairie Band Potawatomi Nation*, 546 U.S. 95, 112 (2005).

161. *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148-49 (1973).

162. *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 151 (1980).

163. *Id.*; *see also* *Moe v. Salish & Kootenai Tribes*, 425 U.S. 463 (1976); *Wagon v. Prairie Band Potawatomi Nation*, 546 U.S. 95, 101 (2005).

164. *Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2043 (2014) (Sotomayor, J., concurring) (referencing *Oklahoma Tax Comm’n v. Citizen Band Potawatomi Tribe of Okla.*, 498 U.S. 505 (1991)).

An illustrative example of jurisprudence regarding the relationship of tribes and taxes lies in the recent *King Mountain Tobacco* litigation. King Mountain Tobacco Company is owned and operated by an enrolled member of the Yakima reservation, and located on trust lands within the Yakima reservation.¹⁶⁸ The Yakima Nation contended that their tobacco products were exempt from both a Washington state escrow statute¹⁶⁹ and federal excise taxes.¹⁷⁰ During processing, King Mountain ships its tobacco to Tennessee, and then to North Carolina where it is blended with tobacco grown off-reservation. The tobacco is sent back to the reservation for final processing before it is distributed for sale throughout Washington and in about sixteen other states.¹⁷¹

In *King Mountain Tobacco Co. v. McKenna*,¹⁷² the district court found that King Mountain's "operations involve[d] extensive off-reservation activity," and that "the tobacco products produced by King Mountain [were] not principally generated from the use of reservation land and resources."¹⁷³ In light of these factual findings, the Ninth Circuit upheld the district court's ruling that Washington's non-discriminatory state escrow statute was fully enforceable against the company just as a state sales tax on the tobacco would have been.¹⁷⁴ On the other hand, in *King Mountain Tobacco Co. v. Alcohol & Tobacco Tax & Trade Bureau* (2013), the district court found that the trust-land grown tobacco was not itself subject to a federal excise tax.¹⁷⁵ In fact, if the tobacco had simply been grown on

165. *Id.* (referencing *Arizona Dep't of Revenue v. Blaze Constr. Co.*, 526 U.S. 32 (1999)).

166. *Id.* (referencing *Thomas v. Gay*, 169 U.S. 264 (1898)).

167. *Id.* (referencing *Cass Cnty. v. Leech Lake Band of Chippewa Indians*, 524 U.S. 103 (1998); *County of Yakima v. Confederated Tribes & Bands of Yakima Nation*, 502 U.S. 251 (1992)). Allotment lands are reservation land that Congress has authorized individuals to hold in fee when made subject to sale under the General Allotment Act of 1887. *Id.*

168. *King Mt. Tobacco Co., Inc. v. Alcohol & Tobacco Tax & Trade Bureau*, 996 F. Supp. 2d 1061, 1062 (E.D. Wash. 2014) (finding the lands held in trust under IRA).

169. *King Mountain Tobacco Co., Inc. v. McKenna*, 768 F.3d 989 (9th Cir. 2014).

170. *King Mt. Tobacco Co., Inc. v. Alcohol & Tobacco Tax & Trade Bureau*, 923 F. Supp. 2d 1280 (E.D. Wash. 2013); *King Mt. Tobacco Co.*, 996 F. Supp. 2d at 1064.

171. *McKenna*, 768 F.3d at 994 (quoting *King Mountain Tobacco Co., Inc. v. McKenna*, No. CV-11-3018-LRS, 2013 WL 1403342 (E.D. Wash. Apr. 5, 2013)).

172. 768 F.3d 989 (9th Cir. 2014).

173. *Id.* at 992 (internal citations omitted).

174. *Id.* at 996-97.

175. 923 F. Supp. 2d 1280, 1283 (E.D. Wash. 2013).

reservation lands and then sold, “those sales, and the income derived therefrom, would be tax free.”¹⁷⁶

The possibility of future litigation in favor of meaningful tribal immunity from state tax seems unlikely. Moreover, under the current framework, sovereign immunity from state tax would be applicable only where: (1) federal law expressly exempts a tribe from state taxation;¹⁷⁷ (2) the state has exempted a particular tribe from state tax by statute, regulation, or contract;¹⁷⁸ or (3) a company is wholly owned by a single federally recognized tribe,¹⁷⁹ produces, manufactures and conducts sales¹⁸⁰ (only to members of the same tribe)¹⁸¹ exclusively on property that is owned wholly by the tribe and located on reservation land.¹⁸² As a result, many states have taken advantage of the tribe’s disadvantaged position, commonly renegotiating tobacco compacts and raising tax rates,¹⁸³ effectively

176. *Id.* at 1284.

177. *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148–49 (1973); *Wagnon v. Prairie Band Potawatomi Nation*, 546 U.S. 95, 113 (2005) (quoting *Mescalero*).

178. *See generally* WASH. REV. CODE § 82.24.020 (West 2010) (providing that the terms of a contract between the state and tribe take precedence over any conflicting statutory provisions regarding restricted tribal exemption from state tax on the “sale, use, consumption, handling, possession or distribution of all cigarettes”).

179. *See Edmondson v. Native Wholesale Supply*, 2010 OK 58, 237 P.3d 199, 210 (holding that sovereign immunity does not automatically extend to “every business that happens to be tribally chartered or owned by individuals of Native-American ancestry,” but rather the entity must “act[] as an arm of the tribe so that its activities are properly deemed to be those of the tribe”); *see also King Mountain Tobacco Co., Inc. v. McKenna*, No. CV-11-3018-LRS, 2013 WL 1403342 (E.D. Wash. Apr. 5, 2013), *aff’d*, 768 F.3d 989 (9th Cir. 2014).

180. *King Mountain Tobacco Co., Inc. v. McKenna*, 768 F.3d 989 (9th Cir. 2014).

181. *See Edmondson*, 2010 OK 58, 237 P.3d at 215 (“When [tribal cigarette commerce] occurs off the reservation or among more than one tribe, this conduct is generally subject to all non-discriminatory state laws so long as they are not expressly prohibited by federal law.”); *see also* WASH. REV. CODE § 82.24.020 (exempting from state taxes cigarette sales from federally recognized tribal organizations to members of their own tribe under the jurisdiction of their own tribe for their own use).

182. *See, e.g., Edmondson*, 2010 OK 58, 237 P.3d at 215. The General Allotment Act and later amendments worked to exempt the following tribes from the imposition of state civil jurisdiction, including imposition of state taxes: Cherokee, Creek, Choctaw, Chickasaw, Seminole Osage, Sac and Fox, in the Oklahoma Territory, any of the reservations of the Seneca Nation of New York, and a strip of territory in the State of Nebraska adjoining the Sioux Nation. *See* 25 U.S.C. § 340 (2012); 25 U.S.C. § 339 (2012).

183. In Oklahoma, for example:

Oklahoma officials are pushing to raise taxes on tribal tobacco sales to a level that would reduce or wipe out the competitive price advantage tribal smoke shops have enjoyed for decades. . . Gov. Mary Fallin’s general council . . . said

foreclosing the possibility of a tribal economic advantage over non-tribal tobacco retailers in the state.

C. Hemp Production: Pine Ridge and the White Plume Controversy

More recently, tribes have considered hemp production as an alternative to the tobacco market. Unlike tobacco, which “wears out the land, exhausting minerals and nutrients from the soil,”¹⁸⁴ hemp actually improves the soil in which it is grown.¹⁸⁵ In addition, industrial hemp cultivation requires virtually no pesticides and minimal fertilizer to grow successfully in many different soils and climates and provides abundant alternative sources for the production of paper, clothing and fossil fuels.¹⁸⁶

The Pine Ridge Reservation, home of the Oglala Sioux in South Dakota, encompasses the entirety of Shannon County,¹⁸⁷ “the poorest county in America.”¹⁸⁸ As of 2002, “[f]orty percent of reservation housing [was] listed as substandard, and one-fifth of the homes [did] not have indoor plumbing or telephone services.”¹⁸⁹ Only 84,000 acres of the 2.1 million acres of reservation land are suitable for agriculture.¹⁹⁰

The CSA makes it illegal to manufacture, distribute, dispense, or possess hemp¹⁹¹ without a “DEA Certificate of Registration” (DEA registration).¹⁹²

the main goal of negotiations with tribes over new tobacco compacts is not to improve health outcomes, but to make tobacco taxes more consistent in the state.

Clifton Adcock, *Oklahoma Pushes to Boost Taxes on Tribal Tobacco Sales*, NEWSOK (July 5, 2013), <http://newsok.com/oklahoma-pushes-to-boost-taxes-on-tribal-tobacco-sales/article/3859155>.

184. Charles A. Grymes, *Tobacco in Virginia*, VIRGINIA PLACES, <http://www.virginiaplaces.org/agriculture/tobacco.html> (last visited Jan. 3, 2015).

185. *See* Lash, *supra* note 43, at 335-37.

186. *See id.*

187. *Pine Ridge Indian Reservation – Civic Life and History*, BLACK HILLS KNOWLEDGE NETWORK, <http://blackhillsknowledgenetwork.org/pine-ridge/pine-ridge-civic-life-and-history> (last visited Aug. 24, 2015).

188. Lash, *supra* note 43, at 334 (citing *Pine Ridge Reservation*, HECCEL OYAKAPI, <https://web.archive.org/web/20010218003320/http://lakotastory.org/pineridge.html> (last visited Aug. 24, 2015)).

189. *Id.*

190. *See Pine Ridge Indian Reservation – Civic Life and History*, *supra* note 187.

191. The Act defines marijuana as “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.” 21 U.S.C. § 802(16) (2012).

192. *United States v. White Plume*, 447 F.3d 1067, 1069 (8th Cir. 2006).

The CSA's registration requirements¹⁹³ and penalties¹⁹⁴ apply to "any person," including tribal members.¹⁹⁵ Even so, in 1998, the Oglala Sioux Tribe passed an ordinance to amend the Tribal Penal Code to specifically exclude industrial hemp from the definition of marijuana.

In 2000, Alex White Plume, a member of the Lakota nation¹⁹⁶ who believed that the tribe retained the right to cultivate hemp under the Treaty of Fort Laramie (Treaty),¹⁹⁷ ceremonially planted his first crop of industrial hemp on 1.5 acres¹⁹⁸ of federal trust land¹⁹⁹ with wild seeds found on Pine Ridge on the 132nd anniversary of the signing of the Treaty.²⁰⁰ Although Alex White Plume announced the planting of his crop on the local reservation radio and invited representatives from the Bureau of Indian Affairs (BIA) and State Attorney's office to attend the ceremony,²⁰¹ he did not apply for a DEA registration.²⁰² After Alex White Plume contracted to sell the crop, the U.S. government "obtained samples of it under a search warrant, and, pursuant to court order, destroyed it."²⁰³

In 2001, Percy White Plume likewise planted a crop of hemp on federal trust land without a DEA registration, and again the government destroyed the crop.²⁰⁴ In 2002, Alex White Plume planted another crop of industrial hemp, prompting "the government [to] ask[] the district court to declare

193. See 21 U.S.C. § 822(a)(1) ("Every person who manufactures or distributes any controlled substance or list I chemical, or who proposes to engage in the manufacture or distribution of any controlled substance or list I chemical, shall obtain annually a registration issued by the Attorney General in accordance with the rules and regulations promulgated by him.").

194. See 21 U.S.C. § 841(a) ("[I]t shall be unlawful for any person knowingly or intentionally—(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance . . .").

195. See *United States v. Native Wholesale Supply Co.*, 822 F. Supp. 2d 326, 337 (W.D.N.Y. 2011) (citing *United States v. White*, 237 F.3d 170, 173 (2d Cir. 2001)); Lash, *supra* note 43, at 344.

196. See Lash, *supra* note 43, at 337 (quoting Alex White Plume, *Lakota*).

197. See *White Plume*, 447 F.3d at 1074.

198. Lash, *supra* note 43, at 340.

199. See *White Plume*, 447 F.3d at 1069.

200. Lash, *supra* note 43, at 340.

201. See *id.* at 340-41 (explaining that White Plume was celebrating the 132nd anniversary of the signing of the Fort Laramie Treaty which he believed granted the tribe the right to cultivate hemp).

202. *White Plume*, 447 F.3d at 1069.

203. *Id.* But see Lash, *supra* note 43, at 341 (asserting that the lab test revealed that the plants contained no detectable quantity of THC).

204. See *White Plume*, 447 F.3d at 1069-70.

them [the White Plumes] in violation of the [CSA] and permanently enjoin them from manufacturing or distributing cannabis.”²⁰⁵ After finding that the White Plumes violated the CSA by growing hemp, a type of marijuana, and that no treaty right to grow hemp existed, the district court granted the government summary judgment and ordered the White Plumes “permanently enjoined from cultivating *Cannabis sativa* L. without a valid DEA registration.”²⁰⁶ In *United States v. White Plume*,²⁰⁷ the Eighth Circuit affirmed, stating:

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. And we do not doubt that there are a countless number of beneficial products which utilize hemp in some fashion. Nor do we ignore the burdens imposed by a DEA registration necessary to grow hemp legally, such as the security measures required by the regulations But these are policy arguments better suited for the congressional hearing room than the courtroom. Today we fulfill our role to interpret and apply the statute as written by Congress, and affirm the district court.²⁰⁸

Although Indian gaming, Indian tobacco and tribal hemp production do not provide a complete framework that is perfectly analogous to Indian marijuana, the legal issues raised by tribal involvement in these commercial activities provide a useful context for a potential tribal marijuana market.

III. Proposed Federal Legislation: A Pro-Marijuana Policy Statement?

In addition to the marijuana policy implicit in the Consolidated Further and Continuing Appropriations Act of 2015,²⁰⁹ several pieces of proposed legislation suggest that Congress has finally heard the cry of public opinion in favor of legalizing marijuana.²¹⁰

205. *Id.* at 1070.

206. *Id.*

207. 447 F.3d 1067.

208. *Id.* at 1076.

209. See discussion *supra* Part I.C.

210. “[F]or the first time, a clear majority of Americans (58%) say the drug should be legalized. This is in sharp contrast to the time Gallup first asked the question in 1969, when only 12% favored legalization.” Art Swift, *For First Time, Americans Favor Legalizing*

On February 5, 2013, the “Ending Federal Marijuana Prohibition Act of 2013” was proposed in the House of Representatives.²¹¹ The bill seeks to “decriminalize marijuana at the Federal level, to leave *to the States* a power to regulate marijuana that is similar to the power they have to regulate alcohol.”²¹² The bill specifies that the term “state” includes territories and possessions of the United States.²¹³ Under the Act, which was referred to the Subcommittee on Crime, Terrorism, Homeland Security, And Investigations in February of 2013, “[i]t shall be unlawful, except pursuant to a [federal] permit . . . to engage in the business of cultivating, producing, manufacturing, packaging, or warehousing marijuana.”²¹⁴ The bill further makes it unlawful to transport marijuana from a state where it is legal to another state which still prohibits marijuana.²¹⁵ However penalties for the import of marijuana into a state where marijuana remains illegal are expressly provided within the proposed federal law, and include a fine and/or imprisonment for less than one year.²¹⁶ In addition, import, production, manufacture and sale of marijuana is unlawful “except pursuant to a permit issued . . . by the Secretary of the Treasury.”²¹⁷

On the very same day, the “Marijuana Tax Equity Act of 2013” hit the House floor, setting forth to “amend the Internal Revenue Code of 1986 to provide for the taxation of marijuana.”²¹⁸ The proposed act imposes a tax on producers and importers of marijuana of 50% of the sales price of marijuana.²¹⁹ Pursuant to regulations prescribed by the Secretary, no tax shall be imposed on the sale by the producer or importer unless the purchaser is a retailer, distributor, or consumer.²²⁰ In other words, a

Marijuana, GALLUP (Oct. 22, 2013), <http://www.gallup.com/poll/165539/first-time-americans-favor-legalizing-marijuana.aspx>.

211. *H.R. 499 – Ending Federal Marijuana Prohibition Act of 2013*, CONGRESS.GOV, <https://www.congress.gov/bill/113th-congress/house-bill/499/text> (last visited Aug. 24, 2015).

212. *Id.* at pmb1. (emphasis added).

213. *Id.* sec. 201, § 303.

214. *Id.* sec. 201, § 301.

215. *Id.* sec. 201, § 302.

216. *Id.* sec. 102, § 103.

217. *Id.* sec. 201, § 301.

218. *H.R. 501 – Marijuana Tax Equity Act of 2013*, CONGRESS.GOV, <https://www.congress.gov/bill/113th-congress/house-bill/501/text> (last visited Aug. 24, 2015).

219. *Id.* sec. 2, § 5901.

220. *See id.* sec. 2, § 5902. In pertinent part section 5902(a) reads:

(a) General Rule. Under regulations prescribed by the Secretary, no tax shall be imposed under this subchapter on the sale by the producer or importer of an article-

producer is not liable for the 50% excise tax if the purchaser intends to export, produce, or resale the product for the purposes of export or production. The proposed tax act does not define “exporter,” but this term likely includes those who ship marijuana *to a possession of the United States*.²²¹ An “importer” is *a person* in the United States who receives non-tax-paid marijuana or marijuana products shipped from a foreign country or U.S. territory.²²²

Still further, the Industrial Hemp Farming Act of 2013 was introduced in the House on February 6, 2013, seeking to amend section 102 of the CSA by excluding hemp from the definition of marijuana.²²³ This provision legalizes the production, possession and sale of a particular species of cannabis that is not psychoactive.²²⁴ Because of environmental and economic benefits, many states, including South Dakota, are considering legalizing hemp.²²⁵

IV. Legal Analysis: Tribal Involvement in the Marijuana Industry Under the CSA and Proposed Legislation

The status quo, namely a federal prohibition of marijuana in juxtaposition to an administration permitting states and tribes to legalize marijuana, offsets the stage for conflict between states and tribes regardless of whether they are for or against marijuana legalization. For example, both states and Indian nations that are opposed to marijuana legalization will find that their ability to prohibit marijuana from entering their community is ultimately hindered by the double-edged doctrine of sovereign immunity. Concerning Native Americans, in the absence of federal decriminalization and regulation that permits a concerted national enforcement strategy, tribes that are harmed by the diversion of marijuana products onto their lands will

(1) for use by the purchaser for further production, or for resale by the purchaser to a second purchaser for use by such second purchaser in further production, or

(2) for export, or for resale by the purchaser to a second purchaser for export.

Id. However, § 5902(f) provides: “For purposes of this chapter, a producer to whom an article is sold or resold free of tax under subsection (a)(1) for use by him in further production shall be treated as the producer of such article.” *Id.*

221. *Id.* (emphasis added).

222. *Id.* sec. 2, § 5904.

223. *S. 359 – Industrial Hemp Farming Act of 2013*, CONGRESS.GOV, <https://www.congress.gov/bill/113th-congress/house-bill/359/text> (last visited Aug. 24, 2015).

224. *See id.*

225. Hopkins, *supra* note 52.

continue to suffer without a means of redress because the states retain Eleventh Amendment immunity from suit.²²⁶ Concerning the states, the DOJ's announcement that the federal government will not prosecute Native Americans growing and selling marijuana on tribal lands has been commonly understood to mean that it "will not prosecute Native Americans who grow and sell marijuana on tribal lands, even in states where the drug is illegal."²²⁷ Because a state's interest in preventing marijuana production on tribal lands will likely be insufficient to overcome tribal immunity from state regulation,²²⁸ if Congress has any interest in preventing tribes from engaging in the marijuana industry in states where marijuana remains prohibited, it must expressly abrogate such tribal immunity.

Despite the potential conflicts between communities that stand on opposing sides of the marijuana-legalization debate, it is evident that many states have considered the potential cost of litigation to be minimal when compared to the potential of marijuana related revenue.²²⁹ "Like the gaming industry, the cannabis industry has the potential to provide Native Americans with more jobs, capital, and sovereignty."²³⁰ So why have tribes not followed the example of the states, ignore the CSA, decriminalize and tax marijuana, and perhaps even grow marijuana? The answer is simple. The ambiguity and confusion in American Indian law coupled with the unpredictability and uncertainty of marijuana law²³¹ creates a singular inevitability: a real and substantial risk.

For example, while those private businesses in the marijuana industry risk finding themselves unable to enforce marijuana related business

226. See discussion *supra* Part I.A (discussing *Seminole Tribe of Florida v. Florida*). Unlike Oklahoma and Nebraska, tribes affected by diversion cannot sustain an action against a state that asserts Eleventh Amendment immunity. Compare *Colorado v. New Mexico*, 459 U.S. 176, 182 n.9 (1982) (disregarding claim of state immunity from suit because the Eleventh Amendment does not bar suits against a state by another state that has a substantial interest in the outcome of the suit), with *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996) (holding that the Eleventh Amendment prohibits suits against a state by Native American Tribes). See also *supra* Part I.E. for a discussion of the recent marijuana diversion suit brought by Oklahoma and Nebraska against Colorado.

227. Amanda Lewis, *Why Did the Feds Just Legalize Cannabis on Native American Lands?*, LA WEEKLY (Dec. 16, 2014), <http://www.laweekly.com/music/why-did-the-feds-just-legalize-cannabis-on-native-american-lands-5290569>.

228. See *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987).

229. See discussion *supra* Part I.B.

230. *Native American Tribes Consider Legalizing Marijuana*, VIRDIS LAW GROUP (July 17, 2014), <http://viridislawgroup.com/native-american-tribes-consider-legalizing-marijuana/>.

231. See discussion *supra* Part I.E.

agreements,²³² if a tribe were a party to a marijuana related tribal-state compact lacking waivers of sovereign immunity, both tribal and state sovereign immunity would stand as an additional hurdle to contract enforcement and serve as yet another deterrent to tribal-state compacting and government-to-government cooperation.²³³

Nevertheless, Congress' first attempts to decriminalize and tax marijuana do little to solve the problem of legal confusion for Native Americans. The proposed federal legislation seeks to amend both the CSA and the IRS code, both of which are statutes of general applicability that apply to Native Americans.²³⁴ Under the current proposed legislation, the lack of any Congressional reference to the acts' intended application in Indian Country, specifically the intended civil regulatory and criminal prohibitory relationship between the tribes and the states, creates a new problem for the courts to attempt to solve.

A. Is the Preemptive Effect of the CSA Enough to Protect the White Plumes and Others if the CSA Is Amended to Exclude Industrial Hemp from the Definition of Marijuana?

As a general matter, the questions of choice of law and criminal jurisdiction elicit imprecise answers in the context of Indian law because American Indian law is the confluence of and interaction between the policy, statutory law, and common law of three different overlapping sovereigns: the federal government, the states, and the tribes. Because the Supreme Court has yet to specifically weigh in whether or not the CSA preempts state law under the Supremacy Clause,²³⁵ additional uncertainties have arisen now that new questions concerning the legality of marijuana on reservation land that is located in a state that is implementing its own marijuana policy that is itself located within a country where marijuana is illegal pursuant to a federal statute that remains unenforced due to federal policy considerations. Although the Supremacy Clause question has been raised in pending litigation,²³⁶ Congress may enact proposed marijuana legislation before an opinion is rendered. Proposed legislation to remove industrial hemp from the definition of marijuana under the CSA is likely to

232. *Id.*

233. *See* discussion *supra* Parts I.A, E.

234. *See supra* note 43.

235. *See* discussion *supra* Part I.A.

236. *See* discussion *supra* Part I.E. (discussing *Nebraska & Oklahoma v. Colorado*, No. 144 (U.S. Dec. 18, 2014)).

be the first step towards federal decriminalization because it comprises the least ambitious piece of pro-marijuana legislation on the floor.

Although in theory this amendment to the CSA will finally give power to the Oglala Sioux tribal ordinance that likewise excludes industrial hemp from the definition of marijuana,²³⁷ the possession, and therefore the production and sale, of “all parts of any plant of the genus cannabis”²³⁸ remains criminally proscribed under the laws of South Dakota.²³⁹ Even though the possession of hemp fiber, oil, or cake made from hemp seeds is not prohibited under the laws of South Dakota,²⁴⁰ and South Dakota does not exercise criminal jurisdiction on Indian lands because it is not a PL 280 state,²⁴¹ any unaltered hemp transported to or from the Pine Ridge reservation will remain subject state criminal sanctions and confiscation unless South Dakota amends its criminal code²⁴² or the U.S. Supreme Court holds that the CSA preempts state law.²⁴³

B. Are Domestic Dependent Nations “Territories or Possessions of the United States”?

Proposed legislation to tax marijuana applies to producers or importers engaged in retail or distribution, but provides an importer or producer tax exemption from the 50% federal excise tax.²⁴⁴ If federally recognized tribes, as sovereign nations are deemed to fall outside of the definition of “territory or possession of the United States,” they may be able to use the exporter status to gain an economic advantage over businesses within the states.

However, while “Congress has unambiguously intended for the word ‘person,’ as used in the Internal Revenue Code, to encompass all legal entities, including Indian tribes and tribal organizations, that are the subject of rights and duties,”²⁴⁵ there is no clear case law determining whether tribes are considered a possession or territory of the United States.²⁴⁶

237. See Oglala Sioux Tribal Council Ordinance No. 98-27 (July 28, 1998), available at <https://www.votehemp.com/PDF/OrdinanceNo9827.pdf>.

238. S.D. CODIFIED LAWS § 22-42-1 (2015).

239. See, e.g., *id.* § 22-42-6 (“No person may knowingly possess marijuana.”).

240. *Id.* § 22-42-1.

241. See 18 U.S.C. § 1162 (2012).

242. South Dakota has considered legalizing industrial hemp. See Hopkins, *supra* note 52.

243. See discussion *supra* Parts I.A, E.

244. See discussion *supra* Part III.

245. 41 AM. JUR. 2d *Indians; Native Americans* § 36 (2010).

246. See *Wilson v. Marchington*, 127 F.3d 805, 808 (9th Cir. 1997) (“Because Indian nations are not referenced in the statute, the question is whether tribes are ‘territories or

Despite the fact that nearly all federal environmental laws expressly treat tribes as states,²⁴⁷ the current bills leave much unresolved for Native Americans. Specifically, whether or not the tribes will be treated as states and permitted to independently regulate marijuana in Indian Country, and whether or not the tribes can take advantage of the importer-producer excise tax exemption, remains unclear.

C. What Is “A Power to Regulate Marijuana That Is Similar to the Power States Have to Regulate Alcohol”?

The bill to end federal prohibition of marijuana, leaving to the states the power to regulate marijuana like they currently regulate alcohol,²⁴⁸ prohibits the import of marijuana into a state where marijuana remains illegal, penalizes such violations under federal law,²⁴⁹ and provides that the Secretary of the Treasury will not permit a marijuana business in a *state* where such business is unlawful.²⁵⁰ As domestic dependent nations, federal law is clear that tribal lands are subject to the jurisdiction of the United

possessions’ of the United States under the statute. . . . [I]n *United States ex rel. Mackey v. Coxe*, 59 U.S. (18 How.) 100, 103-04, 15 L.Ed. 299 (1855), the Court held the Cherokee nation was a territory as that term was used in a federal letters of administration statute. By contrast, in *New York ex rel. Kopel v. Bingham*, 211 U.S. 468, 474-75, 29 S.Ct. 190, 191-92, 53 L.Ed. 286 (1909), the Court cited with approval *Ex Parte Morgan*, 20 F. 298, 305 (W.D.Ark.1883) in which the district court held that the Cherokee nation was not a ‘territory’ under the federal extradition statute. State courts have reached varied results, citing either *Mackey* or *Morgan* as authority, depending on the outcome.” (citations omitted)); Heidi McNeil Staudenmaier & Anne W. Bishop, *The Three-Billion-Dollar Question*, 57 *DRAKE L. REV.* 323, 344 (2009); see also *United States v. White*, 237 F.3d 170, 173 (2d Cir. 2001) (“It is well settled that American Indian reservations have been ‘incorporat[ed] within the territory of the United States,’ *United States v. Wheeler*, 435 U.S. 313, 323, 98 S.Ct. 1079, 55 L.Ed.2d 303 (1978), and thus are not foreign territory, see *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 165, 100 S.Ct. 2069, 65 L.Ed.2d 10 (1980) (Brennan, J., concurring in part, dissenting in part) (‘While they are sovereign for some purposes, it is now clear that Indian reservations do not partake of the full territorial sovereignty of States or foreign countries.’)); *United States v. Wadena*, 152 F.3d 831, 847 (8th Cir.1998), *cert. denied*, 526 U.S. 1050, 119 S.Ct. 1355, 143 L.Ed.2d 517 (1999); (‘[T]ribal governments are dependent sovereigns-not independent foreign ones.’); *White v. Califano*, 437 F. Supp. 543, 547 (D.S.D.1977) (‘The Indian tribes have vestiges of sovereignty which must be guarded carefully, but reservations are not analogous to foreign states.’), *aff’d*, 581 F.2d 697 (8th Cir.1978).”).

247. Note, *Intergovernmental Compacts in Native American Law: Models for Expanded Usage*, 112 *HARV. L. REV.* 922, 924-35 (1999).

248. See discussion *supra* Part III.

249. See discussion *supra* Part III.

250. See *H.R. 499 – Ending Federal Marijuana Prohibition Act of 2013*, *supra* note 211.

States.²⁵¹ But without clear case law on whether or not domestic dependent nations are territories or possessions of the United States, one must ask: under this Act will tribes, states, and/or the federal government retain jurisdiction over criminal marijuana offenses on Indian land? Further, will this legislation preempt the enforcement of state criminal law in the same manner as IGRA?²⁵²

“[I]n theory, if the federal government truly respected the rights and will of our nation’s original inhabitants, it would respect tribal nations’ choice to legalize [or prohibit] marijuana.”²⁵³ Without an express statement that tribes are to be treated as states under proposed legislation, the prospect of authoritative tribal marijuana law remains tenuous at best. At present, the federal government exercises exclusive jurisdiction to regulate liquor on Indian lands.²⁵⁴ States regulate liquor sales on tribal land under a federal statute that permits liquor sales in Indian Country but only “in conformity both with the laws of the State . . . and with an ordinance duly adopted by the tribe having jurisdiction over such area of Indian country.”²⁵⁵ Moreover, the U.S. Supreme Court has held that tribes have no inherent power to regulate liquor because of their status as domestic dependent nations.²⁵⁶

251. See discussion *supra* Part I.D.

252. See discussion *supra* Part II.A.

253. *Native American Tribes Consider Legalizing Marijuana*, VIRIDIS LAW GROUP (July 17, 2014), <http://viridislawgroup.com/native-american-tribes-consider-legalizing-marijuana/>.

254. As the Supreme Court stated in *United States v. Mazurie*:

Article I, § 8, of the Constitution gives Congress power “(t)o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.” This Court has repeatedly held that this clause affords Congress the power to prohibit or regulate the sale of alcoholic beverages to tribal Indians, wherever situated, and to prohibit or regulate the introduction of alcoholic beverages into Indian country.

419 U.S. 544, 555 (1975) (citing *United States v. Holliday*, 70 U.S. (3 Wall.) 407, 417-18 (1866); *United States v. Forty-Three Gallons of Whiskey*, 93 U.S. 188, 194-95 (1876); *Ex parte Webb*, 225 U.S. 663, 683-84 (1912); *Perrin v. United States*, 232 U.S. 478, 482 (1914); *Johnson v. Gearlds*, 234 U.S. 422, 438-39 (1914); *United States v. Nice*, 241 U.S. 591, 597 (1916)).

255. See 18 U.S.C. § 1161 (2012).

256. Thomas H. Oehmke with Joan M. Brovins, *Business Activities on Reservation—Tribal Taxation—Liquor Control*, in 2 THOMAS H. OEHMKE, *COMMERCIAL ARBITRATION* § 40:112 (citing *Rice v. Rehner*, 463 U.S. 713, 726 (1983)).

D. Economic Feasibility Hinges on Tax Exemption: What Is the Best Way to Balance State, Federal and Tribal Interests?

In light of the illustrative model of Indian tobacco, under the currently proposed statutory framework of federally legalized and taxed marijuana, the only feasible means for the tribes to profit from the marijuana industry would be through the avoidance of state and/or federal taxes.²⁵⁷ Without express congressional intent to exempt tribes from the proposed, and crippling, 50% federal tax²⁵⁸ on top of state taxes,²⁵⁹ the realization of tribal self-sufficiency through marijuana revenues is achievable only in specific circumstances. First, under a revival of the vanishing doctrine of sovereign immunity from non-discriminatory state taxes, tribes may achieve self-sufficiency.²⁶⁰ Second, if tribes and tribal organizations are not considered a “possession” of the United States, they can increase the demand for marijuana produced, manufactured, or resold for production on Indian lands with the bargaining power of the proposed importer tax exemption.²⁶¹ Third, if tribes produce marijuana on tribal land and sell it to a purchaser for the purpose of production or export by that purchaser, the transaction would be exempt from the proposed federal excise tax.²⁶² Fourth, through the production of marijuana exclusively on trust lands,²⁶³ which are exempt from state and local taxes, as well as federal income taxes under the U.S. Supreme Court’s holding in *Capoeman*, tribes could bypass federal and

257. See text accompanying *supra* note 79 and discussion *supra* Part II.B.

258. See 41 AM. JUR. 2d *Indians; Native Americans* § 36 (2010) (“Indians, like all other citizens, are subject to federal income tax, unless some provision of a statute or treaty expressly and specifically confers an exemption.”).

259. See, e.g., Lee, *supra* note 72 (discussing Colorado’s marijuana excise tax).

260. See text accompanying *supra* note 79 and discussion *supra* Part II.B.

261. See discussion *supra* Part III.

262. See *id.*

263. Title 25 U.S.C. § 465 states:

The Secretary of the Interior is authorized, in his discretion, to acquire, through purchase, relinquishment, gift, exchange, or assignment, any interest in lands, water rights, or surface rights to lands, within or without existing reservations, including trust or otherwise restricted allotments, whether the allottee be living or deceased, for the purpose of providing land for Indians. Title to any lands or rights acquired pursuant to this Act or the Act of July 28, 1955 (69 Stat. 392), as amended (25 U.S.C. 608 et seq.) shall be taken in the name of the United States in trust for the Indian tribe or individual Indian for which the land is acquired, and such lands or rights shall be exempt from State and local taxation.

25 U.S.C. § 465 (2012).

state taxation.²⁶⁴ Lastly, tribes can bypass these taxes through express exemption from state tax in state statute or by entering a controlling tribal-state compact.²⁶⁵

Even in the case of marijuana grown on tax-exempt lands, concerns of marketability in those twenty-three states that currently regulate marijuana remain. The U.S. Supreme Court continues to expressly provide states seeking to litigate their grievances in court with alternative methods to circumvent the advantages of tribal immunity. For example, in *Oklahoma Tax Commission v. Citizen Band Potawatomi Tribe of Oklahoma*,²⁶⁶ the Supreme Court found that although the state could not sue the tribe itself for recovery of monies or for specific performance of its obligation to collect state sales taxes from non-member tobacco purchasers on reservation land, the state was not completely without remedy because “[s]tates may of course collect the sales tax from cigarette wholesalers, either by seizing unstamped cigarettes off the reservation,²⁶⁷ or by assessing wholesalers who supplied unstamped cigarettes to the tribal stores.”²⁶⁸

V. A New Model for Federal Marijuana and Indian Policy: A Federal Regulatory Framework for Tribal Marijuana Production, Manufacture, and Retail

While the above-mentioned mechanisms for the avoidance of tax exist, their implementation comes with a very probable side dish of extensive and costly litigation. As domestic dependent nations, Congress has the responsibility to enact restrictions on the rights and responsibilities of federally recognized tribes, and the role of determining the scope of federal Indian policy cannot be left to the courts.

When taken at face value, the flashing lights and packed parking lots of the ever expanding Indian casinos appear to be economically benefitting the tribes. However, “[n]early half of federally recognized Tribes in the United

264. See *Squire v. Capoeman*, 351 U.S. 1 (1956) (holding that income derived from products grown on or contained within trust land is not taxable).

265. See *Lee*, *supra* note 72. In light of the many ways a state may circumvent a tribe’s immunity from taxation, the difficulty of enforcing tribal-state compacts, and the lack of tribal bargaining power, it is likely that states will not contract to exempt the tribes from any marijuana related taxes applicable therein.

266. 498 U.S. 505 (1991).

267. *Id.* at 514 (citing *Washington v. Confederated Tribes of Colville Reservation*, 447 U.S. 134, 161–62 (1980)).

268. *Id.* (citing *City Vending of Muskogee, Inc. v. Oklahoma Tax Comm’n*, 898 F.2d 122 (10th Cir. 1990)).

States do not operate gaming facilities at all,²⁶⁹ and “[g]ambling revenue at tribal casinos slowed in 2012, growing at a slower pace than non-tribal casinos for the first time in nearly 20 years.”²⁷⁰ Of those tribes operating successful gaming operations, there remains the possibility that some tribal members may never receive any direct financial benefit whatsoever.²⁷¹

Notwithstanding such legislative oversights, as a whole the IGRA was a good idea and an effective means of promoting tribal economic development. However, the IGRA’s disappointing impact on poverty and unemployment among Native Americans²⁷² is due in large part to the development of Supreme Court jurisprudence creating what is essentially a standoff of sovereign immunity,²⁷³ establishing an unjust application of the *Ex Parte Young* Doctrine,²⁷⁴ and fostering hostility between states and tribes by leaving states without a remedy when a tribe’s breach of a tribal-state gaming compact occurs off Indian lands.²⁷⁵ This jurisprudence undermines the tribal-state compacting process and thus undermines Congress’ careful and thoughtful balance of state and tribal interests.²⁷⁶

In a similar vein, profit from Indian tobacco sales has been significantly reduced as a result of the federal PACT Act,²⁷⁷ state legislation relating to the MSA,²⁷⁸ judicial foreclosure of tribal sovereign immunity from taxation²⁷⁹ judicial refusal to recognize federal preemption protecting the tribal tobacco market from state tax regulation.²⁸⁰ In addition, despite the undaunted efforts of the White Plumes on the Pine Ridge reservation, the

269. *Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2043 (2014) (Sotomayor, J., concurring) (citing ALAN P. MEISTER, CASINO CITY’S INDIAN GAMING REGISTRY REPORT 28 (2009-2010 ed.)).

270. Stuart Pfeifer, *Indian Casino Gambling Revenue Growth Is Slowing, Report Says*, L.A. TIMES, Mar. 26, 2014, <http://articles.latimes.com/2014/mar/26/business/la-fi-mo-indian-casino-gambling-20140326>.

271. IGRA regulations do not require tribes to make per capita payments to tribe members. See 25 C.F.R. § 290.8 (2015); see also discussion *supra* Part II.A (discussing tribal-state gaming revenue sharing).

272. See discussion *supra* Parts II-II.A.

273. See, e.g., *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 77-100 (1996) (Stevens, J., dissenting).

274. See *id.* at 76.

275. See *Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024 (2012).

276. See Murphy, *supra* note 142, at 172.

277. See discussion *supra* Part II.B.

278. *Id.*

279. *Id.*

280. See generally *Dep’t of Taxation & Fin. of N.Y. v. Milhelm Attea & Bros., Inc.*, 512 U.S. 61 (1994).

production of industrial hemp remains prohibited under what appears to be an unequivocal application of the CSA,²⁸¹ making the possibility of government confiscation and destruction of crops far too likely to support hemp nor the taxes derived thereof as a sound investment decision.

In light of these and other similar legal doctrines that tend to favor state and federal interests over their tribal counterparts, it is unsurprising that tribes are in desperate need of a stable tax base.²⁸² Fortunately, it is in the federal government's interest to promote tribal economic self-sufficiency and independence from federal expenditures.²⁸³

Any decriminalization of marijuana at the federal level would certainly be beneficial to Native American marijuana interests because marijuana related contracts would be deemed enforceable, any uncertainties concerning jurisdiction, choice of law, and mutually satisfactory regimes for the collection of marijuana excise and retail taxes as between tribes and states could be negotiated and memorialized in tribal-state compacts.²⁸⁴

In order to successfully balance federal interests in fostering tribal independence with state interests in maintaining the revenue they currently enjoy under state-legalization of marijuana, and to avoid costly litigation that could give rise to a new body of convoluted Indian law, Congress must get creative and do something unprecedented—something more than simply amending the CSA or copy-and-pasting the IRS tobacco tax code, substituting “tobacco” for “marijuana.”²⁸⁵

Because more than half of the states in the union are currently in violation of federal law,²⁸⁶ Congress is in the unique position to condition a state's involvement in the marijuana industry on its agreement to tribal-state compacting and waivers of immunity. Tribes, many in possession of extensive land that may only viably produce cannabis,²⁸⁷ a historical connection to the land, and potentially more environmentally friendly

281. See discussion *supra* Part II.C.

282. See *supra* note 79 and accompanying text.

283. For example, Congress enacted IGRA after finding that “a principal goal of Federal Indian policy is to promote tribal economic development, tribal self-sufficiency, and strong tribal government.” Indian Gaming Regulatory Act, Pub. L. No. 100-497, § 2, 102 Stat. 2467, 2467 (1988) (codified as amended at 25 U.S.C. § 2701 (2012)).

284. See discussion *supra* Parts I.E-D, II.A.

285. The language of the proposed legislation is remarkably similar to that of the provisions of the Internal Revenue Code that impose an excise tax on the sale of tobacco. Compare H.R. 501 – *Marijuana Tax Equity Act of 2013*, discussion *supra* Part III, sec. 2, §§ 5901-5908, with 26 U.S.C. §§ 5701-5708 (2012).

286. See discussion *supra* Part I.A-B.

287. See discussion *supra* Part II.C.

manners of production,²⁸⁸ have a unique ability and opportunity to facilitate widespread, successful, and green marijuana production.

The most desirable outcome, and a clear and simple way to mitigate the effects of jurisprudence that deters tribal-state compacting, is for Congress to create a new regulatory framework for the tribal marijuana market enacted pursuant to the Indian Commerce Clause. “[T]he Indian Commerce Clause, like the Interstate Commerce Clause, is a grant of authority to the Federal Government at the expense of the States. . . . the Indian Commerce Clause accomplishes a greater transfer of power from the States to the Federal Government than does the Interstate Commerce Clause.”²⁸⁹ As a result, keeping all of the future federal marijuana tax revenue and lessons from Indian tobacco and gaming in mind, the federal regulatory scheme should seek to accomplish eight goals. First, under a comprehensive Marijuana act, Congress should establish a commission within the Department of Treasury that is authorized to issue permits to marijuana businesses in a particular state. The current proposed federal legislation prohibits any person from growing, manufacturing or selling marijuana without a permit issued by the Secretary of Treasury,²⁹⁰ however an ideal act would condition the issuance of such permits after a cooperative, but independently established commission within the BIA coordinates with local, state, and tribal governments and certifies that the particular state either has made a good faith effort to enter into a tribal-state compact with any federally recognized tribes located within the state, or that no such tribes exist in the state.²⁹¹ This scheme of collaboration between the BIA and other federal agencies has been well established and is similar to IGRA under which the NIGC works with the Office of Indian Gaming to facilitate Indian gaming while ensuring the balanced protection of state and local interests.²⁹² Furthermore, concerning the potential backlash of applicant-states opposed to the good-faith negotiation requirement, at least in those twenty-three states currently licensing and gaining tax revenue from the marijuana industry in violation of federal controlled substance and money

288. See discussion *supra* Part I.D.

289. *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 62 (1996).

290. *H.R. 499 – Ending Federal Marijuana Prohibition Act of 2013*, CONGRESS.GOV, <https://www.congress.gov/bill/113th-congress/house-bill/499/text> (last visited Aug. 24, 2015).

291. See discussion *supra* Part II.A (discussing the tribal-state compacting requirement of IGRA).

292. See discussion *supra* Part II.A.

laundrying laws,²⁹³ such protestations ought to carry little weight and in theory should be estopped all together.

Second, this new BIA commission must be granted the authority to certify whether an applicant-state has in fact made a good-faith effort to negotiate tribal-state marijuana compacts with any federally recognized tribe within its borders, authority to promulgate marijuana related regulations that are in the best interest of tribal self-sufficiency and economic independence, and authority to permit applicant-tribes to produce, manufacture and sell marijuana on Indian lands upon the tribe's demonstrated ability to enforce the eight priorities in the Cole Memorandum.²⁹⁴

Third, the federal government needs to address several interrelated issues. These include taking land into trust solely for purposes of marijuana production. Permitting the BIA to take land into trust only for purposes of production rather than retail or manufacture will work to cool any backlash from the states and other private interests, and is easily justified by cultural considerations buttressed by the fact that tribes are often rich in land that may be suitable only for the growth of cannabis.²⁹⁵ The federal government also needs to address issuing business grants for the development of compliant regulatory schemes and tribal marijuana business enterprises capable of considerable competition in the national market. In consideration of the poverty that remains among tribes and the growing concerns about diversion, it is essential that the federal government recognize Indian marijuana enterprises as legitimate businesses, and accordingly issue substantial business grants to ensure that tribes have the tools necessary to create and enforce tribal marijuana regulation to prevent diversion, while developing product that is capable of meaningfully competing in the market.²⁹⁶

Fourth, any federal act needs to provide a mandatory model tribal-state compact²⁹⁷ that expressly waives any claims of sovereign immunity from

293. See discussion Parts I.A-B.

294. See discussion *supra* Part I.B.

295. See discussion *supra* Parts I.D, II.C.

296. See discussion *supra* Parts I.B, I.D, II.

297. Much like the Model Escrow Statute of the Master Settlement Agreement, the issuance of permits to marijuana businesses in a particular state containing federally recognized tribes interested in the industry ought to be conditioned upon the enactment of a model tribal-state compact in order to facilitate an enforcement mechanism for the promotion of federal interests and to foster uniformity which will ultimately work to reduce litigation. See discussion *supra* Part II.A.

compulsory dispute resolution within the Commission's federal administrative forum;²⁹⁸ permits tribal-state revenue sharing only within modest parameters which benefit tribes and are established by the Secretary of the Interior and approved by the Commission;²⁹⁹ allows the imposition of state regulation, including taxation, only with the consent of the tribe manifest by the passage of a tribal ordinance;³⁰⁰ and subjects both tribal and state officials to *Ex Parte Young* actions, but does not abrogate the sovereign immunity of either sovereign from any private cause of action outside of the designated administrative forum.³⁰¹

Fifth, any federal legislation needs to expressly exempt compacting tribes from any federal excise or income tax for a period of fifty years.³⁰² Exemption from federal income and excise taxes, especially if the tax remains at the proposed 50% of the sales price, will substantially improve tribes' ability to enter and remain in the marijuana market. The fifty year limitation provides a meaningful reprise from federal tax permitting the Indian marijuana industry to grow, while ensuring that the exemption will not stand to be a permanent source of natural market frustration or tribal dependence, again justifying the promotion of tribal self-sufficiency while balancing state interests.

Sixth, any act should work to improve the economics of tribal populations by expressly requiring compacting tribes to allocate income first to per capita payments, second to the maintenance of the requisite robust regulatory scheme, and finally to the infrastructure of the tribal government. The requirement of revenue allocation first to per capita payments is likely to be more directly impactful on the members of the tribe, and consequently do more to foster tribal financial independence, than the reverse revenue allocation provisions of the IGRA.³⁰³

Seventh, any federal legislation should expressly preempt all state criminal jurisdiction to prosecute any and all violations of state marijuana law by any member of a federally recognized tribe in those states certified to receive federal permits, whether the violation occurred on Indian Lands or otherwise. Rather than rehashing the question of criminal jurisdiction in Indian Country that arises nearly every time Congress enacts legislation pursuant to the Indian Commerce Clause, an express assumption of

298. See discussion *supra* Part II.

299. *Id.*

300. See discussion *supra* Part II.A.

301. *Id.*

302. See discussion *supra* Parts II, II.A-B.

303. See discussion *supra* Part II.A.

exclusive federal jurisdiction over all violations of marijuana law committed by members of federally recognized tribes will hopefully reduce the incidence of litigation.³⁰⁴

Lastly, federal legislation should expressly provide that the possession, sale, manufacture, production of marijuana within, or the diversion of marijuana into, any state or domestic dependent nation where such conduct or substance is unlawful shall be unlawful, and penalized solely and explicitly under federal law. This last proposal is of utmost importance in an ideal model. Specifically, because (in theory) state laws decriminalizing marijuana are preempted by the CSA,³⁰⁵ because it will be a provision of an Act enacted pursuant to the Indian Commerce Clause which authorizes the stripping of more state power than does the Interstate Commerce Clause,³⁰⁶ because it leaves to the states and tribes the power to choose to legalize and regulate or criminalize marijuana,³⁰⁷ and because it establishes a concerted national enforcement strategy that can utilize the already existing and robust federal drug enforcement infrastructure and employees, the assumption of exclusive federal criminal jurisdiction over violations of state and tribal marijuana laws after lifting the federal marijuana prohibition is not completely without merit and further forecloses litigation over any questions concerning the preemptive scope and force of the model Act.³⁰⁸

Conclusion

Currently, immense uncertainty exists in both Indian law and marijuana law. For Native Americans, under proposed federal legislation to decriminalize and tax marijuana, confusion will remain as to whether the federal government has preempted state regulation, including state taxation and the enforcement of state criminal laws. Permitting the tribes to take part in the marijuana industry is necessary to achieve the connected goals of promoting tribal financial independence and reducing the federal deficit, because profit from tobacco sales free of state tax has been essentially foreclosed, Indian Gaming operations have been reduced to profit-sharing with states and subject to constant expensive litigation, and the CSA prevents tribes from cultivating industrial hemp, one of the few crops that is sustainable in much of Indian Country.

304. See, e.g., discussion *supra* Part I.D.

305. See generally GARVEY, *supra* note 23.

306. See *supra* note 291 and accompanying text.

307. See discussion *supra* Part I.D.

308. See discussion *supra* Parts II.A-B.

In order to realize the federal goal of promoting tribal self-sufficiency while maintaining a balance between states and tribes in general, and in regard to the growing marijuana industry, the federal government must at the very least specify intended criminal and civil implications, and the role of tribes within federal legislation decriminalizing and taxing marijuana. Ideally, Congress will take advantage of the unique inconsistency between federal law and state conduct to enact a comprehensive regulatory marijuana scheme that simultaneously lifts the federal marijuana prohibition and designates a meaningful role for federally recognized tribes by providing a legally and fiscally sound means for interested tribes to viably enter and compete within the growing national marijuana market.