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TRIBAL CANNABIS: SOLUTION TO OKLAHOMA PUBLIC EDUCATION UNDERFUNDING

*Kaimbri White**

Introduction

Oklahoma public education, along with the educational systems in every state, experienced a huge cut in funding after the recession of 2008.¹ While many states rebounded after the recession, Oklahoma continues to cut funding, resulting in one of the lowest average per pupil budgets in the country.² This Comment proposes a progressive solution to Oklahoma's shortage in public education funding, which consists of anticipating the inevitable legalization of cannabis in the State of Oklahoma and monopolizing on state-tribal relationships beforehand.³ While focusing on tribes' unique sovereign and exemption status in respect to state taxation and regulation, Oklahoma has in the past successfully orchestrated agreements with tribes for gaming.⁴ Today, Oklahoma has a unique opportunity to model marijuana compacts after the state's successful gaming compacts in order to create a new revenue stream that bridges the gap in educational funding. By signing compacts and effectively creating quasi-state law to legalize cannabis in Indian Country, Oklahoma would benefit from a percentage of tribal cannabis sales, much like its current receipt of tribal gaming fees. If, however, Oklahoma waits until cannabis legalization in the state, it will forfeit this advantageous position. Once

* Third year student, University of Oklahoma College of Law. This piece was written and selected for publication prior to Oklahoma becoming the thirty-first state in the United States to legalize medical marijuana, on June 26, 2018.

1. Gene Perry, *Oklahoma Continues to Lead U.S. for Deepest Cuts to Education*, OKLA. POL'Y INST. (Oct. 16, 2014), <https://okpolicy.org/oklahoma-continues-lead-u-s-deepest-cuts-education/>.

2. *Id.*

3. Melinda Smith, Comment, *Native Americans and the Legalization of Marijuana: Can the Tribes Turn Another Addiction into Affluence?*, 39 AM. INDIAN L. REV. 507, 519 (2014-2015); Lauren Adornetto, Comment, *Indian Country Complexities and the Ambiguous State of Marijuana Policy in the United States*, 65 BUFF. L. REV. 329 (2017). The background for this Comment has been based upon the historical summaries provided by these earlier articles.

4. OKLA. INDIAN GAMING ASS'N, 2016 ANNUAL IMPACT: STATEWIDE ECONOMIC IMPACTS FROM OKLAHOMA TRIBAL GOVERNMENT GAMING 8 (2016), <https://oiga.org/wp-content/uploads/2018/01/OIGA-Impact-Report-2016.pdf>; see Model Tribal Gaming Compact, 3A OKLA. STAT. § 281 (2011 & Supp. 2013).

Oklahoma legalizes cannabis, tribes who grow on tribal lands will be exempt from paying taxes on any revenue generated under the umbrella protections of tribal sovereignty. There are many obstacles standing between Oklahoma tribes and tribal cannabis, but none of these obstacles are insurmountable, especially when tribal cannabis serves as a potential solution to Oklahoma's underfunded public education issues. Lawmakers could find immense motivation to back a responsible and highly regulated tribal cannabis program if it meant funding for public education in Oklahoma and giving Oklahoma children an education they deserve.

I. The Problem

A state's power over school finance is derived from the education clause in each state's constitution, which establishes the legal standard for the quality of public education in that state and, as a minimum, mandates that public schools be free.⁵ States' sole authority over education traces back to federalism and separation of powers. However, even though states are responsible for implementing their own budgets, certain public-school systems previously have sought legal action, in both state and federal courts, disputing budget allocations.⁶ The main claim in these lawsuits is that state legislators responsible for public school funding have "failed to fulfill [their] constitutional obligation to provide for adequate education" as enumerated in the education clause of that state's constitution.⁷

A. State of Public Education in Oklahoma

Last summer, the Oklahoma City Public Schools district announced its intention to sue the state of Oklahoma for educational underfunding after the release of the 2017 state fiscal budget cuts.⁸ Public school officials unanimously voted in a board meeting to pursue legal action against the Oklahoma Legislature for ignoring its "'constitutional responsibility' to

5. *The State Role in Education Finance*, NAT'L CONF. OF ST. LEGISLATURES (Aug 20, 2018, 7:05 AM), <http://www.ncsl.org/research/education/state-role-in-education-finance.aspx>.

6. John Dayton, Serrano *and Its Progeny: An Analysis of 30 Years of School Funding Litigation*, 157 Educ. L. Rep. (West) 447, 448-49 (2001).

7. See William F. Dietz, *Manageable Adequacy Standards in Education Reform Litigation*, 74 WASH. U. L.Q. 1193, 1194 (1996).

8. Associated Press, *Oklahoma City Public Schools to Sue State Legislature*, U.S. NEWS & WORLD REP.: BEST STATES (Aug. 22, 2017, 6:15 PM), <https://www.usnews.com/news/best-states/oklahoma/articles/2017-08-22/oklahoma-city-public-schools-to-sue-state-legislature> [hereinafter *Oklahoma City Public Schools to Sue*].

provide textbooks for every child by eliminating funding for instructional materials.”⁹ The district claims that, due to budget cuts, schools are unable to make ends meet, important programs are being cut, and the standard of public education in Oklahoma public schools is suffering.¹⁰

According to the Bureau of Labor Statistics,¹¹ Oklahoma pays its teachers less than any other state with an average salary of \$42,460, as compared to neighboring states such as Texas, whose median salary is \$55,500.¹² The many teachers leaving Oklahoma to pursue teaching opportunities and increased salaries in neighboring states has left Oklahoma with an ever-increasing teacher shortage.¹³ Shawn Hime, the Executive Director of the Oklahoma State School Boards Association, described Oklahoma’s “hemorrhaging” of teachers to neighboring states as a shining example of “what it looks like when a state fails its schools *and* its children.”¹⁴ When states have a shortage of qualified teaching applicants, its schools grow “increasingly reliant on filling vacancies with teachers who have not yet completed the state’s requirements for . . . certification.”¹⁵ This means that in states with major shortages, like Oklahoma, the state Board of Education committee is forced to approve “emergency teaching certifications” to fill the vacancies.¹⁶

Unfortunately, Oklahoma’s public education funding issues continue to worsen. After the 2008 recession, many states cut education budgets and as a result, lawmakers temporarily suspended their states’ standards for class sizes and up-to-date textbooks.¹⁷ Since 2008, Oklahoma legislators “have repeatedly voted to suspend the [educational] standards because schools

9. *Id.*

10. *See generally id.*

11. *High School Teachers: Pay*, BUREAU OF LAB. STAT., <https://www.bls.gov/ooh/education-training-and-library/high-school-teachers.htm#tab-5> (last modified May 4, 2018).

12. Abigail Hess, *The 5 Highest and Lowest Paying States for Teachers in the US*, CNBC: MAKE IT (July 14, 2017, 4:47 PM), <https://www.cnbc.com/2017/07/14/the-5-highest-and-lowest-paying-states-for-teachers-in-the-us.html>.

13. *Oklahoma Schools Struggle with Teacher Shortage Despite Cutbacks*, *Survey Shows*, OKLA. ST. SCH. BOARDS ASS’N, <http://www.ossba.org/2016/08/22/oklahoma-schools-struggle-with-teacher-shortage-despite-cutbacks> (last visited Apr. 2, 2018) [hereinafter *Oklahoma Schools Struggle*].

14. *Id.* (alteration in original).

15. Andrea Eger, *Teacher Shortage: Oklahoma Hits Record for Emergency Certifications After Just 3 Months*, TULSA WORLD (Aug. 24, 2017), http://www.tulsaworld.com/news/education/teacher-shortage-oklahoma-hits-record-for-emergency-certifications-after-just/article_63d0250f-1530-56d6-937e-d45ef4410eb5.html.

16. *Id.*

17. Perry, *supra* note 1.

still can't afford to meet them.”¹⁸ This downward trend is evidenced by the fact that the Oklahoma State Board of Education, which issued only 32 emergency teaching certificates for 2011-12, had already issued 1429 by August of 2017 for the 2017-18 academic year.¹⁹ The approval of emergency teaching certifications to untrained applicants is in direct response to the State's widespread teaching shortage.²⁰ In yet another compromise to the State's teaching standards, Oklahoma legislators passed a law last year extending the length of emergency certifications from one year to two years in an effort to bridge the ever-increasing gap.²¹

Surprisingly, even with this exorbitant increase in emergency certifications, Oklahoma still had over 800 teaching vacancies throughout its public education system for the 2016-17 year.²² To make matters worse, these vacancies did not include the number of teaching positions eliminated altogether by districts who cited budget cuts as the “primary factor” in their decisions.²³ According to surveys conducted by the Oklahoma State School Boards Association, in which 83% of Oklahoma school districts participated in 2015 and 2016, and 74% participated in 2017, school officials admitted to eliminating 589 teaching positions in 2015,²⁴ 1530 in 2016,²⁵ and another 480 in 2017.²⁶ With 3399 losses in the last three years, Oklahoma truly seems to be “hemorrhaging” teachers to neighboring states offering higher pay and better benefits.²⁷

The main concern with education underfunding is that by hiring untrained teachers or increasing class sizes to help mitigate the number of teaching vacancies, the quality of an Oklahoma child's education decreases. Speaking on her growing concern for children being taught by these unproven teachers, State Superintendent Joy Hofmeister said that most emergency-certified teachers “walk[] in the door without the training or

18. *Id.*

19. Eger, *supra* note 15.

20. *Id.*

21. *Id.*

22. *Id.*

23. *Oklahoma Schools Struggle*, *supra* note 13.

24. OKLA. STATE SCH. BDS. ASS'N, 2016 OSSBA TEACHER SHORTAGE SURVEY (n.d.), <https://www.ossba.org/wp-content/uploads/2016/08/2016-OSSBA-Teacher-Shortage-Report.pdf>.

25. *Oklahoma Schools Struggle*, *supra* note 13.

26. *Oklahoma's Teacher Shortage Deepens*, OKLA. ST. SCH. BOARDS ASS'N, <https://www.ossba.org/2017/08/22/oklahomas-teacher-shortage-deepens/> (last visited Apr. 2, 2018).

27. *Oklahoma Schools Struggle*, *supra* note 13.

experience to be able to meet the needs of students,” showing that the lack of people applying to become teachers in the state of Oklahoma is “a true crisis.”²⁸

The effects of low educational expenditures directly correlate to the average scores on state standardized tests. According to an annual Quality Counts report released by Education Week, “[j]ust 2.7% of eighth graders achieve[d] advanced scores in math,” ranking Oklahoma students’ scores as “nearly the worst standardized test performance of all states.”²⁹ The report, which assessed metrics such as “school finances, student achievement, and environmental factors” to “determine the strength of [the] school system,” ranked Oklahoma forty-sixth out of the fifty states studied.³⁰ Oklahoma has one of the lowest-performing public education systems in the country, which comes as no surprise considering that for the 2017 fiscal year, “public education received \$43.1 million less than the Legislature appropriated” due to inadequate revenue collections.³¹ Ultimately, something must change for Oklahoma to rebound its budget and make public education a priority again.

B. Financial Status of Oklahoma Tribes

Native American poverty is a national issue. While Oklahoma tribes, such as the Cherokee Nation, are generally more prosperous than other American tribes, they still often fall below the state’s median annual household income.³² Through the high success of state gaming compacts, Oklahoma tribes have proven their resourcefulness and ability to manage large gaming and hospitality operations.³³ Gaming has afforded Oklahoma’s tribes the ability to provide better jobs and to attract tourists to various parts of Oklahoma’s rural Indian Country.³⁴ This economic influx

28. Eger, *supra* note 15.

29. *The States with the Best (and Worst) Schools*, HUFFINGTON POST (Jan. 26, 2017), https://www.huffingtonpost.com/entry/states-with-the-best-and-worst-schools_us_588a38db e4b0628ad613dee1.

30. *Id.*

31. *Id.*; Eger, *supra* note 15.

32. Gaby Galvin, *Tribal Housing Reveals Inequalities in Indian Country*, U.S. NEWS & WORLD REP.: BEST STATES (Sept. 23, 2017, 12:00 AM), <https://www.usnews.com/news/best-states/articles/2017-09-23/across-the-us-disparities-in-indian-country-emerge-through-tribal-housing>.

33. See Randy Ellis, *Oklahoma Indian Gaming Revenues Soar* (Aug. 15, 2010), NEWSOK, <https://newsok.com/article/3485404/oklahoma-indian-gaming-revenues-soar>.

34. *See id.*

has resulted in the excess gaming funds being used to finance tribal education, health, and social services programs.³⁵

Oklahoma tribes stand in stark contrast from other tribes that still rely heavily on the federal government to fund reservation activities. In 1996, the federal government passed the Native American Housing Assistance and Self-Determination Act (“NAHASDA”), which allocates housing aid distribution to tribes through block grants and loan guarantees.³⁶ Congress recognized the correlation between deficient housing on tribal lands and poverty levels and enacted the NAHASDA to help tribal governments use federal funds to pull themselves out of poverty. In 2015, the Cherokee Nation of Oklahoma received \$28.5 million from the Department of Housing and Urban Development and used these funds to build 277 homes for tribal members.³⁷ This successful utilization of federal funds becomes obvious when juxtaposed with the Navajo Nation, which received nearly three times the funds and only built approximately one-third of the houses the Cherokee built.³⁸ These figures, acquired through an investigation by Senator John McCain's office and the Senate Committee on Indian Affairs,³⁹ show that Oklahoma tribes are excellent at allocating funds towards the specific goal of self-sufficiency.

It is Oklahoma tribes' resourcefulness and ability to be self-sufficient that show their capability of responsibly legalizing tribal cannabis by working with state officials in a non-legal state. A new, monopolized revenue stream from cannabis could be the ultimate solution to ending tribal poverty in Oklahoma. Tribes in Oklahoma have already exhibited success in business and in working hand-in-hand with state regulators to form gaming compacts. Therefore, if tribes can replicate the agreements used for gaming, which is also still illegal in the State of Oklahoma, state-tribal cannabis compacts are conceivable.

35. *See id.*

36. *See* Pub. L. No. 104-330, 110 Stat. 4016 (1996) (codified at 25 U.S.C. §§ 4101-4212 (2012)).

37. OFFICE OF SENATOR JOHN MCCAIN, INVESTIGATION OF MISMANAGEMENT OF FEDERAL HOUSING FUNDING BY THE NAVAJO HOUSING AUTHORITY 4 (2017), https://www.mccain.senate.gov/public/_cache/files/d43099a1-d0e9-4f51-95ef-367bcb7de1bd/investigation-of-mismanagement-of-federal-housing-funding-by-the-navajo-housing-authority.pdf.

38. *Id.*

39. *See id.*

II. The Obstacles

Underfunding in Oklahoma's public education system could be solved by the legalization of tribal cannabis, as tribes would be motivated to cooperate if it also meant a permanent solution to tribal poverty. However, there are many obstacles around which the parties would have to maneuver in order for such a proposition to become reality. This Section seeks to outline the potential roadblocks for the legalization of tribal cannabis in Oklahoma. Section III then explores how the proposed solution will successfully surmount the obstacles explained herein.

A. Jurisdiction

The most complex aspect of legalizing tribal cannabis is the jurisdictional overlaps that arise between the respective state, federal, and tribal governments. The federal government historically views American Indian tribes as "domestic dependent nations," meaning that their independence is not completely free of federal governance.⁴⁰ Rather, their relationship with the United States more closely "resembles that of a ward to [its] guardian."⁴¹ In support of this notion, the Supreme Court of the United States in *Worcester v. Georgia* found that the federal government has sole authority over "Indian country," indicating that states have no jurisdiction over tribes or tribal members on tribal land because that power is exclusively reserved for the federal government.⁴² Indian Country is defined as all "land within the limits of any Indian reservation," "all dependent Indian communities within the borders of the United States," and "all Indian allotments" whose titles "have not been extinguished."⁴³

Another well-established maxim speaking to the exclusivity of federal control over Indian affairs is Congress's plenary power over tribes.⁴⁴ This means that "state laws may be applied to tribal Indians on their reservations [where] Congress has expressly . . . provided" in federal law.⁴⁵ The traditional idea is that states, whose power parallels that of tribes, cannot enforce state laws upon tribal lands. However, Congress changed this

40. *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831).

41. *Id.*

42. *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 518 (1832).

43. 18 U.S.C. § 1151 (2012).

44. U.S. CONST. art. I, § 8, cl. 3; *see also Lone Wolf v. Hitchcock*, 187 U.S. 553, 565 (1903).

45. *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 207 (1987).

notion with the enactment of section 7 of Public Law 280 (“PL 280”).⁴⁶ Codified as 18 U.S.C. § 1162, PL 280 effectively transfers jurisdiction of law enforcement in Indian Country from the federal government to the states.⁴⁷ PL 280 renders tribes and tribal lands subject to state jurisdiction via the express “federal consent” of Congress.⁴⁸

When PL 280 was initially enacted, it was applied in a mandatory fashion to the following six states: California; Minnesota (except the Red Lake Reservation); Nebraska, Oregon (except the Warm Springs Reservation); Wisconsin; and upon its statehood, Alaska.⁴⁹ Within these mandatory states, however, some tribes proved the existence of their own “satisfactory law enforcement mechanisms,” which exempted them from PL 280’s application.⁵⁰ Since the primary congressional goal behind PL 280 was to ensure adequate policing on tribal lands, these tribes proved the capability of their own tribal police.⁵¹

Subsequently, Congress amended the bill to include the option for states to relinquish jurisdiction back to the federal government.⁵² Additionally, any non-PL 280 state that seeks to have PL 280 apply must receive consent of the tribes before assuming jurisdiction.⁵³ These amendments have resulted in many states converting to PL 280 areas by assuming at least some jurisdiction over crimes committed by tribal members on tribal land.⁵⁴ States added after the initial mandatory six include: Nevada, South Dakota, Washington, Florida, Idaho, Montana, North Dakota, Arizona, Iowa, and Utah.⁵⁵ Note though, “not a single Indian Nation has consented” to being jurisdictionally subject to PL 280 since the amendment mandating tribal consent, evidencing a strong disfavor of state authority over Indian

46. Act of Aug. 15, 1953, Pub. L. No. 83-280, 67 Stat. 588 (codified as amended at 18 U.S.C. § 1162, 25 U.S.C. §§ 1321-1326, and 28 U.S.C. § 1360).

47. *See id.*

48. *See Three Affiliated Tribes of Fort Berthold Reservation v. Wold Eng’g*, 476 U.S. 877, 879 (1986).

49. *See* 18 U.S.C. § 1162 (2012); 28 U.S.C. § 1360 (2012). These states are often referred to as “mandatory Public Law 280” jurisdictions because the majority of jurisdiction has been transferred from federal to state governments without consent of either the tribes or the states.

50. Ada Pecos Melton & Jerry Gardner, *Public Law 280: Issues and Concerns for Victims of Crime in Indian Country*, AM. INDIAN DEV. ASSOCIATES, LLC, <http://www.aidainc.net/publications/pl280.htm> (last visited Sept. 24, 2017).

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.*

Country.⁵⁶ For tribes situated within PL 280 states, the state has concurrent criminal jurisdiction with tribal police over Indian reservations.⁵⁷

As for states that PL 280 does not apply to, including Oklahoma, it is the Bureau of Indian Affairs (“BIA”) police who respond to most major crimes committed on reservations.⁵⁸ In the case of any crime listed in the Major Crimes Act (“MCA”), which focuses on serious crimes such as kidnapping or murder, the Federal Bureau of Investigation (“FBI”) also assumes jurisdiction.⁵⁹ The jurisdictional complexities intersect and overlap, with federal law outranking the tribes’ and states’ retained powers. Tribes cannot enact tribal laws that violate the federal government’s laws because federal law is “the supreme [l]aw of the [l]and.”⁶⁰ The dependency of tribes’ sovereign status comes from the Supremacy Clause of the United States Constitution, which states that in the case of a conflict between federal, state, or tribal law, federal law reigns supreme.⁶¹ The Supremacy Clause gives the federal government a power that is absolute in respect to conflicts between laws of tribes, states, and the federal government, with an example being laws over cannabis.⁶²

Tribal sovereignty refers to the inherent authority of Native American tribes to govern themselves within the borders of the United States because they possess aspects of sovereignty not withdrawn by treaty or statute.⁶³ Because of the complex framework, this definition does not illuminate exactly what benefits tribal sovereignty affords tribes. Tribal sovereign interests include the ability to exercise “inherent sovereignty” over tribal members and even non-tribal members within tribal territory.⁶⁴ This sovereignty means that tribal governments dictate both the laws and who they apply to in Indian Country with their “powers of self-government,” but

56. *Id.*

57. *Id.*

58. *Id.*

59. 18 U.S.C.A. § 1153 (Westlaw through Pub. L. No. 115-185); OFFICE OF THE INSPECTOR GEN., U.S. DEP’T OF JUSTICE, REVIEW OF THE DEPARTMENT’S TRIBAL LAW ENFORCEMENT EFFORTS PURSUANT TO THE *TRIBAL LAW AND ORDER ACT OF 2010*, at 1, 4 (Dec. 2017), <https://oig.justice.gov/reports/2017/e1801.pdf>.

60. U.S. CONST. art. VI, cl. 2.

61. *Id.*

62. *Id.*

63. See 25 U.S.C.A. §§ 5101-5129 (Westlaw through Pub. L. No. 115-185). Title 25 U.S.C.A. chapter 45 details the protection of Indians and the conservation of tribal land resources, illustrating that these rights have not been withdrawn and have instead been codified as a form of further protection.

64. *Montana v. United States*, 450 U.S. 544, 563 (1981).

this is limited to only what is “necessary to protect tribal self-government.”⁶⁵ Two of the benefits tribes receive from sovereign status include their exemption status from taxes, in regards to both state and federal taxes on revenue generated by the tribe on tribal lands, and their immunity from lawsuits.⁶⁶ Both of these benefits have immense implications in the cannabis realm because not only are the proceeds from tribal cannabis sales non-taxable, but the tribes are also immune from lawsuits.⁶⁷ Additionally, federal courts have held that tribal immunity extends beyond the tribe itself to “tribal enterprises,” such as casinos or theoretically cannabis grows, should courts determine that the grows are an “arm of [the nation].”⁶⁸ In order to qualify as an “arm” of a tribe, the purpose of the business in question cannot merely be to generate money.⁶⁹ Instead, the respective business has to further a tribe’s “governmental objectives” of “health and welfare” of its members.⁷⁰

B. Federal Marijuana Policy

Historically, the possession, cultivation, distribution, and sale of marijuana has been illegal everywhere in the United States, including Indian Country, due to the Controlled Substances Act (“CSA”).⁷¹ Under the CSA, which outlines the federal government’s drug policy, marijuana remains a Schedule 1 substance.⁷² The federal government classifies Schedule 1 substances, like cannabis, as having a “high potential for abuse” and “no currently accepted medical use in treatment in the United States.”⁷³ Despite its Schedule 1 status, many states have sought and successfully

65. *Id.* at 564.

66. Rev. Rul. 67-284, 1967-2 C.B. 55, https://www.irs.gov/pub/irs-tege/rr67_284.pdf; *Kiowa Tribe of Okla. v. Mfg. Tech., Inc.*, 523 U.S. 751, 754 (1998).

67. *Freemanville Water Sys., Inc. v. Poarch Bank of Creek Indians*, 563 F.3d 1205, 1207-08 (11th Cir. 2009) (explaining that tribes, as governments, enjoy immunity from lawsuits much like the federal government, states, and foreign powers).

68. *Inyo Cty. v. Paiute-Shoshone Indians of Bishop Cmty. of the Bishop Colony*, 538 U.S. 701, 705 n.1 (2003); *see Kiowa Tribe of Okla.*, 523 U.S. at 757-58.

69. *See Ransom v. St. Regis Mohawk Educ. & Cmty. Fund, Inc.*, 658 N.E.2d 989, 992 (N.Y. 1995).

70. *See id.*

71. 21 U.S.C.A. §§ 801-971 (Westlaw through Pub. L. No. 115-185); *Menominee Indian Tribe of Wisconsin v. Drug Enf’t Admin.*, 190 F. Supp. 3d 843, 849, 854 (E.D. Wis. 2016).

72. 21 U.S.C.A. § 812(b)(1); *see U.S. DRUG ENF’T ADMIN.*, 2017 NATIONAL DRUG THREAT ASSESSMENT 100 n. 34 (Oct. 2017), https://www.dea.gov/sites/default/files/2018-07/DIR-040-17_2017-NDTA.pdf.

73. 21 U.S.C.A. § 812(b)(1).

legalized the possession, cultivation, or selling of marijuana within their respective borders.⁷⁴

States that have legalized marijuana were warned by the Department of Justice (“DOJ”) in a 2013 memorandum to adequately protect against what the federal government considers to be the eight most pressing threats of cannabis regulation.⁷⁵ The eight threats include:

- Preventing the distribution of marijuana to minors;
- Preventing revenue from the sale of marijuana from going to criminal enterprises, gangs, and cartels;
- Preventing the diversion of marijuana from states where it is legal under state law in some form to other states;
- Preventing state-authorized marijuana activity from being used as a cover or pretext for trafficking of other illegal drugs or other illegal activity;
- Preventing violence and the use of firearms in the cultivation and distribution of marijuana;
- Preventing drugged driving and exacerbation of other adverse public health consequences associated with marijuana use;
- Preventing the growing of marijuana on public lands and the attendant public safety and environmental dangers posed by marijuana production on public lands and;
- Preventing marijuana possession or use on federal property.⁷⁶

Deputy Attorney General James Cole instructed federal prosecutors nationwide to focus their prosecutorial efforts and resources on these threats rather than singling out those within state compliance.⁷⁷ Due to confusion

74. See generally *30 Legal Medical Marijuana States and D.C.: Laws, Fees, and Possession Limits*, PROCON.ORG, <https://medicalmarijuana.procon.org/view.resource.php?resourceID=000881> (last updated July 28, 2018).

75. Memorandum from James M. Cole, Deputy Att’y Gen., U.S. Dep’t of Justice, to All United States Attorneys (Aug. 29, 2013) [hereinafter Cole Memo] (“Guidance Regarding Marijuana Enforcement”), <https://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf>.

76. *Id.* at 1-2.

77. *Id.*

surrounding how the implications outlined in the Cole Memo applied to Indian Country, Monty Wilkinson, the Director of the DOJ, issued a subsequent memorandum on October 28, 2014, known as the “Wilkinson Memo,” addressing these issues.⁷⁸ The Wilkinson Memo reiterated that the eight threats outlined in the Cole Memo should guide U.S. Attorneys in their prosecutorial efforts against cannabis in Indian Country.⁷⁹ It is important to note that neither the Cole Memo nor the Wilkinson Memo forfeit the federal government’s inherent right to raid any cannabis operation throughout the country, including those on tribal lands.⁸⁰ These memos merely indicate the willingness of the federal government to focus its efforts elsewhere.

One practical implication of the Wilkinson Memo is that the federal government and its agents will treat tribal governments that decide to legalize marijuana the same as state governments and will respect their decision to legalize.⁸¹ So long as tribal regulations are strict enough to adequately protect against the Cole Memo threats, tribes and states should escape federal intrusion into their cannabis operations.⁸²

The main question that looms over the legalization of tribal cannabis in Oklahoma is whether the DOJ will work with Oklahoma tribes willing to adhere to the Cole Memo Guidelines despite their tribal cannabis plans conflicting with state laws. One answer could be that tribes whose reservations are located in states where cannabis remains illegal will be left to fend for themselves by attempting to obtain a DEA Registration (historically unlikely) or to pass state legislation/ballot initiatives. In the context of possible solutions, Oklahoma tribes have the best shot at legalizing cannabis and working with state government officials to enter into state compacts, therefore “adopt[ing] a mutually satisfactory regime for the collection of” a cannabis tax or exclusivity fee.⁸³

78. Memorandum from Monty Wilkinson, Director, U.S. Dep’t of Justice, to All United States Attorneys et al. (Oct. 28, 2014) [hereinafter Wilkinson Memo] (“Policy Statement Regarding Marijuana Issues in Indian Country”), <https://www.justice.gov/sites/default/files/tribal/pages/attachments/2014/12/11/policystatementregardingmarijuanaissuesiniandiancountry2.pdf>.

79. *Id.* at 2.

80. *See id.*; Cole Memo, *supra* note 75, at 4.

81. *See* Wilkinson Memo, *supra* note 78, at 2.

82. *See id.*; Cole Memo, *supra* note 75, at 2.

83. 25 U.S.C. § 5123(e) (2012); *see* Oklahoma Tax Comm’n v. Citizen Band Potawatomi Indian Tribe of Okla., 498 U.S. 505, 514 (1991) (finding states and tribes could reach mutual agreements for the collection of cigarette sales taxes).

C. State Opposition to Marijuana

While Oklahoma does not have a PL 280 problem, the state, which has voted Republican in every election since 1968, likely holds a traditionally conservative stance against cannabis.⁸⁴ However, the tides are turning in Oklahoma, which is evidenced by the fact that 2018 marks the first year in history that medical marijuana will appear on an Oklahoma ballot.⁸⁵ State Question 788—the Medical Marijuana Legalization Initiative—garnered enough votes to require its appearance on the state ballot in 2017, but there was some pushback from state officials.⁸⁶ In fact, while enough votes were secured and certified in September of 2016, a vote on marijuana was noticeably absent on the ballot in 2017.⁸⁷

The reason for State Question 788's absence from the ballot was the alleged rewording of the Question's title by Oklahoma Attorney General Scott Pruitt, arguably making a vote for medical marijuana seem as though the vote was for recreational use.⁸⁸ Pruitt's rewrite stated that a vote "yes" would legalize the "licensed use, sale and growth of marijuana in Oklahoma," changing the original title from "medical" to "licensed."⁸⁹ Oklahomans for Health filed a lawsuit against Pruitt in the Supreme Court of Oklahoma challenging the rewrite.⁹⁰ Pruitt was later replaced as a defendant in the lawsuit by the current Oklahoma Attorney General Mike Hunter.⁹¹ The Supreme Court of Oklahoma ruled in favor of Oklahomans for Health on March 27, 2017, restoring State Question 788's title to its original form.⁹² Most likely, State Question 788 will appear on 2018's general election ballot. However, the Governor might require a special

84. See generally *Oklahoma Election Results 2016*, N.Y. TIMES (Aug. 1, 2017, 11:22 AM), <https://www.nytimes.com/elections/results/oklahoma>.

85. See generally *Oklahoma State Question 788, Medical Marijuana Legalization Initiative (June 2018)*, BALLOTPEdia, [https://ballotpedia.org/Oklahoma_State_Question_788_Medical_Marijuana_Legalization_Initiative_\(June_2018\)](https://ballotpedia.org/Oklahoma_State_Question_788_Medical_Marijuana_Legalization_Initiative_(June_2018)) (last visited Oct. 27, 2017) [hereinafter *Oklahoma State Question 788*].

86. See *Steele v. Pruitt*, 378 P.3d 47 (Okla. 2016).

87. *Oklahoma State Question 788*, *supra* note 85.

88. *Id.*

89. Petitioner's Application to Assume Original Jurisdiction and Combined Petition to Review the Ballot Title of Initiative Petition 412, at 4, *Paul v. Hunter*, 2017 OK 25, 393 P.3d 202 (Okla. 2017) (No. 115322), <http://www.oscn.net/dockets/GetCaseInformation.aspx?db=appellate&number=O-115322&cmid=119867>. Pruitt was replaced as a defendant in the lawsuit by the current Oklahoma Attorney General Mike Hunter.

90. *Id.*

91. *Id.*

92. *Id.*

election for the initiative. This special election would require voters to show up on a completely separate day to cast their votes for the medical marijuana initiative; no governor of Oklahoma has used this tactic since 2005.⁹³

One of the main reasons state actors have fought against marijuana legislation reform is the fear of voter disapproval. However, according to SoonerPoll, “Oklahoma’s only independent, non-partisan pollster[,]”⁹⁴ state support for medical marijuana legalization is a strong 62%.⁹⁵ In addition, in 2013 one survey showed that 81.6% of Oklahoman voters agreed that laws regulating marijuana should be decided by the state government rather than the federal government,⁹⁶ echoing the position of the twenty-nine other states in the nation that have already legalized medical marijuana.⁹⁷ In response to the polling data and echoing the sentiments of the majority of her constituents, Oklahoma State Senator Constance Johnson remarked that “the results make you wonder what these elected officials are afraid of.”⁹⁸ With voter disapproval no longer a key concern, Oklahoma governmental actors should be motivated to approve a solution to education funding that involves cannabis.

State actors might be resistant towards cannabis for politically conservative reasons, but they have already evidenced a strong motivation to solve Oklahoma’s funding problem by somewhat liberal means. In fact, public education underfunding has concerned Oklahoma legislators for many years. This concern is evidenced by previous unsuccessful attempts to solve the state’s budget issues through various means, such as the Oklahoma One Percent Sales Tax initiative. The Oklahoma One Percent Sales Tax Bill, otherwise known as State Question 779, called for a liberal increase of the state sales tax by one percent and an allocation of all

93. See *Oklahoma State Question 788*, *supra* note 85.

94. *History of SoonerPoll*, SOONERPOLL.COM, <https://soonerpoll.com/history/> (last visited Dec. 28, 2017).

95. Bill Shapard, *Absent Any Funded Opposition, Medicinal Marijuana Headed for Passage*, SOONERPOLL (Jan. 12, 2018), <https://soonerpoll.com/absent-any-funded-opposition-medical-marijuana-headed-for-passage>.

96. Bill Shapard, *Poll: Oklahoman Views of Marijuana Are Changing*, SOONERPOLL (Sept. 23, 2013), <https://soonerpoll.com/poll-oklahomans-views-of-marijuana-are-changing/> [hereinafter Shapard, *2013 SoonerPoll*].

97. *30 Legal Medical Marijuana States and D.C.: Laws, Fees, and Possession Limits*, *supra* note 74.

98. Shapard, *2013 SoonerPoll*, *supra* note 96.

revenue generated from the tax to go directly to public education funding.⁹⁹ Though the tax was estimated to bring in approximately \$615 million per year, Oklahoma voters rejected the proposal in 2016.¹⁰⁰ Nearly sixty percent of Oklahomans voted against State Question 779, indicating voters' strong disapproval for the increase of the state sales tax as a solution to the state's education funding issues.¹⁰¹ However, voter opposition related to increasing state sales tax does not correlate to the proposed solution of an Oklahoma tribal cannabis regime. While voters may be reluctant to increase general sales taxes, it seems unlikely that Oklahoma's voters would reject a tax on cannabis sales. Tribes would be the ones paying the exclusivity fees for cannabis, so voters would have to find other grounds for disapproval of tribal cannabis.

In sum, the two obstacles for state opposition include pushback from state legislators and rejection by Oklahoma's voters. As for the first obstacle, Oklahoma legislators have already proven their willingness to solve the state's budget issues by initiating the One Percent Sales Tax in 2016. Though Oklahoma is a fiscally conservative state and most of its elected officials are Republicans, state officials still pushed for an increase in taxation. This shows that state actors take public education underfunding seriously and are willing to reach compromises to progress toward a long-term solution. As for the second obstacle, voter polls and the certification of State Question 788 prove voters do not disapprove of legalization. Oklahoma voters are supportive of the idea of medical cannabis. Therefore, if the vote for tribal cannabis is premised on the idea that it would help public education, it may motivate voters enough to pass the resolution. If state legislators use the movement away from the state's traditional anti-cannabis stance to redirect from the idea of absolute legalization and instead focus on a more intermediate step, such as legalization restricted to tribal lands, tribal cannabis is possible.

D. The Commerce Clause and Tribal Sovereignty

Due to its inherent Commerce Clause implications, the third threat mentioned in the DOJ memos, which calls for protection against cannabis traveling from an area where it is legal into areas where it is not,¹⁰² is the

99. *Oklahoma One Percent Sales Tax, State Question 779 (2016)*, BALLOTPEdia, [https://ballotpedia.org/Oklahoma_One_Percent_Sales_Tax,_State_Question_779_\(2016\)](https://ballotpedia.org/Oklahoma_One_Percent_Sales_Tax,_State_Question_779_(2016)) (last visited Dec. 28, 2017).

100. *Id.*

101. *See id.*

102. Cole Memo, *supra* note 75, at 1; Wilkinson Memo, *supra* note 78, at 2.

most important issue with respect to the legalization of cannabis in Indian Country.¹⁰³ Interstate commerce, or in this case, commerce between tribal and nontribal lands, puts the third Wilkinson threat within the federal government's exclusive jurisdiction "to regulate [c]ommerce . . . among the several [s]tates, and . . . Indian [t]ribes."¹⁰⁴ Tribes do not want to trigger federal intrusion because cannabis remains wholly illegal under federal law.

This threat has already had the greatest impact on governmental scrutiny for tribes who have employed cannabis operations on tribal lands.¹⁰⁵ The fear of scrutiny is evidenced by the fact that most tribes who have started cannabis businesses have already set up strict regulatory schemes to prevent this sort of off-reservation transfer.¹⁰⁶ The concern with off-reservation implications is that when tribes enact laws that go "beyond matters of internal self-governance" and extend to "off-reservation business transaction[s] with non-Indians, their claim of sovereignty is at its weakest."¹⁰⁷ The Cole Memo further clarifies that agents with the federal Drug Enforcement Agency ("DEA") will not focus on state-regulated protocols and will instead work to prevent the above mentioned threats.¹⁰⁸ If states can provide sufficiently robust regulations that satisfy federal authorities, the federal government will cooperate with state officials to block efforts by those who violate the state guidelines.¹⁰⁹

In 2015, a federal circuit court solidified the "allowance" attitude of the federal government in regards to effective state cannabis protocols in *United States v. Marin Alliance for Medical Marijuana*.¹¹⁰ The *Marin* court held that the Rohrabacher Amendment to a 2015 Appropriations Act prevented "the [DOJ] from expending any funds in connection with the enforcement of any law that interferes with [the state's] ability to 'implement [its] own state law[]'" regarding cannabis.¹¹¹ This decision was the first case to support the DOJ memos and the federal government's

103. See U.S. CONST. art. I, § 8, cl. 3.

104. *Id.*

105. See Marijuana Compact Between the Suquamish Tribe and the State of Washington (Sept. 15, 2015), <https://lcb.wa.gov/publications/Marijuana/Compact-9-14-15.pdf> [hereinafter Washington Marijuana Compact].

106. *See id.*

107. *San Manuel Indian Bingo & Casino v. NLRB*, 475 F.3d 1306, 1312–13 (D.C. Cir. 2007) (citing *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148–49 (1973)).

108. Cole Memo, *supra* note 75, at 1.

109. *See id.*

110. 139 F. Supp. 3d 1039, 1047-48 (N.D. Cal. 2015).

111. *Id.* at 1040 (quoting Consolidated and Further Continuing Appropriations Act of 2015, Pub. L. 113–235, § 538, 128 Stat. 2130, 2217 (2014)).

desire to support effective state cannabis regulation. *Marin* stands for the contention that the federal government should respect state sovereignty instead of hindering it. The federal government's efforts and resources are better utilized towards preventing and detecting criminal activity that is not in accordance with either state or federal law. The federal government's attitude towards effective state regulation could be considered foreshadowing for how it might treat a tribe who is able to effectively regulate tribal cannabis operations. It must be noted, however, that subsequent decisions have treated *Marin* negatively, making it hard to know if this case provides a concrete rule barring federal prosecution of those in compliance with state regulatory schemes.¹¹²

Another key issue to consider is tribal sovereignty and what that means for the existence of tribal cannabis in Oklahoma or any other state. While nothing in the U.S. Constitution explicitly grants tribes sovereign immunity, the Supreme Court has ruled that tribal powers are a "limited sovereignty [that have] never been extinguished."¹¹³ Others argue that because tribes are mentioned in Article I, Section 8 of the Constitution alongside two other types of government, their status as independent government entities is similar to the several states and foreign nations.¹¹⁴ Indian tribes are "domestic dependent nations" that exercise inherent sovereign authority over their members and territories.¹¹⁵ Lawsuits against Indian tribes "are thus barred by sovereign immunity absent a clear waiver by the tribe or congressional abrogation."¹¹⁶

Although a tribe's sovereign immunity bars Oklahoma from pursuing a lawsuit to enforce its rights, adequate alternatives may exist. Individual Indians employed in "smoke shops" may not enjoy the protection of tribal sovereign immunity, as evidenced by the ability of states to collect sales tax from cigarette wholesalers or to enter into mutually satisfactory agreements with tribes for the collection of taxes.¹¹⁷ However, the Supreme Court has

112. *See* *United States v. Chavez*, No. 2:15-cr-210-KJN, 2016 WL 916324 (E.D. Cal. Mar. 10, 2016) (distinguishing from *Marin* as it did not involve the dismissal of criminal charges as a remedy for alleged violations of the appropriations acts).

113. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 4.01, at 207 (Nell Jessup Newton et al. eds., 2012 ed.) (quoting *United States v. Wheeler*, 435 U.S. 313, 322–23 (1978)).

114. *Id.* § 4.01, at 208.

115. *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831).

116. *Okla. Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Okla.*, 498 U.S. 505, 509 (1991) (citing *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58, 98 (1978)).

117. *Potawatomi*, 498 U.S. at 514.

“never held that individual agents or officers of a tribe are not liable for damages in actions brought by the State.”¹¹⁸

In *Oklahoma Tax Commission v. Citizen Band, Potawatomi Indian Tribe of Oklahoma*, the Supreme Court clarified the doctrine of Indian tribal sovereignty.¹¹⁹ The Court held that, under the doctrine of tribal sovereignty, a state that has not asserted jurisdiction over Indian lands pursuant to PL 280 can collect sales taxes from sales made on Indian lands to nonmembers of the tribe.¹²⁰ However, while the Court said that tribes are expected to tax sales to non-tribal members, the Court effectively reinforced tribal sovereignty by reiterating that tribes still enjoy immunity from suit.¹²¹ Therefore, a state has the right to impose sales tax on Indian sales to nontribal members, but a state may not bring suit against a tribe to enforce that right.

In the *Potawatomi* case, the court of appeals concluded that “Oklahoma did not elect to assert jurisdiction under PL 280,” and as such, “the Potawatomis were immune from any requirement of Oklahoma state tax law.”¹²² Though this lower court seemed to suggest that the power of states to tax came from PL 280, the Supreme Court clarified that while PL 280 might subject a tribe to state taxation if it sold to non-tribal members, the state still has no right to enforce the taxation scheme due to the tribe’s sovereign immunity.¹²³ The Court held that while sovereign immunity precluded the state from taxing sales of goods to tribal members, the state was “free to collect taxes on sales to nonmembers.”¹²⁴ Therefore, while Oklahoma may have a right to tax gaming or cannabis if sales to non-tribal members generate the revenue, the state still cannot sue the tribes for noncompliance. States essentially have a right without a remedy because the Supreme Court is unwilling to alter the doctrine of tribal sovereignty.

The main reasons Congress enacted PL 280 was to limit illegal activity occurring on certain reservations while also supporting potentially inadequate tribal law enforcement.¹²⁵ Congress was concerned that Indian tribes were not adequately organized to enforce law and order.¹²⁶ Due to

118. *Id.* (citing *Ex parte Young*, 209 U.S. 123 (1908)).

119. 498 U.S. at 512-13.

120. *See id.* at 513-14.

121. *See id.*

122. *Id.* at 513.

123. *Id.*

124. *Id.* at 507.

125. *Bryan v. Itasca Cty.*, 426 U.S. 373, 379-80 (1976).

126. *Id.* (citing H.R. REP. NO. 848, 83d Cong. 5-6 (1953)).

state governments' proximity and interest in crime prevention within their borders, Congress thought the problem "could best be remedied by conferring criminal jurisdiction" to the states.¹²⁷ Importantly, however, while PL 280 transferred criminal jurisdiction to states, neither the Committee Reports, nor the floor discussions on PL 280, exhibited congressional intent to allow states to tax Indian sales.¹²⁸ Therefore, Oklahoma's status as a non-PL 280 state does not affect taxing Indian sales.¹²⁹ In the context of tribal cannabis, if an Oklahoma tribe sold to non-tribal members on Indian lands, the state government would have an interest in taxation for these sales but would lack an available remedy to collect these taxes based on the doctrine of tribal sovereignty. A state compact would be an equitable solution to this problem, giving Oklahoma motivation to agree to a state compact on these grounds.

In sum, the inapplicability of PL 280 to Oklahoma tribes is beneficial rather than detrimental. Even if marijuana remains illegal under state law, due to the inapplicability of PL 280 to Oklahoma and the doctrine of tribal sovereignty, tribes can still enact their own laws without being subject to the Oklahoma criminal law regime.

1. Oklahoma's Exclusivity Fee Benefits Both State and Tribe

By working together to form a state marijuana compact, the tribes will benefit from a monopoly on Oklahoma's marijuana market while the state brings an end to the shortage of public education funding. In 2015, the Suquamish Tribe of Washington was the first tribe to successfully enter into a state marijuana compact for the growth, sale, and distribution of tribal cannabis while it remained illegal at the federal level.¹³⁰ The first of its kind, the compact directly referenced both the Cole and Wilkinson memos and their focus on the need for "strict regulation and control over the production, possession, delivery, distribution, sale, and use of marijuana in Indian Country."¹³¹

While the compact notably recognizes the inability of the state to tax tribal businesses, including cannabis, it does mandate a "tribal tax" in its

127. *Id.* at 380.

128. *Id.* at 381; Stacy L. Cook, *Indian Sovereignty: State Tax Collection on Indian Sales to Nontribal Members - States Have a Right Without a Remedy* [Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe of Oklahoma, 111 S. Ct. 905 (1991)], 31 WASHBURN L.J. 130, 137 (1991).

129. Cook, *supra* note 128.

130. Washington Marijuana Compact, *supra* note 105.

131. *Id.* at 2.

place.¹³² The tribal tax must be “at least 100 percent of the [s]tate [t]ax on all sales of marijuana products in Indian country.”¹³³ Under normal circumstances, the state cannot tell tribes how to allocate their tribally-generated funds, but under the compact, the tribe must specifically “agree[] to use the proceeds of the Tribal Tax for Essential Government Services.”¹³⁴ Importantly, while most states charge an exclusivity fee for gaming that is paid directly to the respective state governments, tribal cannabis is different. “Taxed” funds derived from tribal cannabis are allocated directly back into the tribe’s own pocket for the specific purpose of strengthening their ability to successfully run and regulate all tribal matters, including cannabis operations.

To date, other marijuana compacts have followed Washington’s lead and required that the funds garnered from cannabis taxation be directed back into respective tribal governments.¹³⁵ While tribes favorably view most states that direct cannabis exclusivity fees back to the tribes for the purpose of strengthening tribal self-governance, it is uncertain if that would be the case in Oklahoma. Would the State of Oklahoma look like the bad guys for taking the taxed percentage? Today, it is not likely that the State would be viewed negatively for taking such action. The key distinction between Oklahoma and every other state that has entered into state compacts, such as Nevada, California, Washington, and Oregon, is that cannabis remains illegal in Oklahoma. While state governments where cannabis is already legal have followed the trend of allowing the tribes to keep any taxed revenues from cannabis sales, Oklahoma’s situation is completely different. Oklahoma tribes will get to monopolize the cannabis market in the state; this includes income generated from residents of neighboring states like Texas, who already make up a large percentage of gambling patrons in Oklahoma. Tribes would still have the option to wait until full legalization if they wanted to avoid any sort of taxation or exclusivity fee payment. But, since the fee would be similar to what tribes already pay for gaming and

132. *Id.* at 7-8.

133. *Id.* at 7.

134. *Id.* at 8; *see also* WASH. REV. CODE § 43.06.490 (2015).

135. *See* K. Alexa Koenig, *Gambling on Proposition 1A: The California Indian Self-Reliance Amendment*, 36 U.S.F. L. REV. 1033, 1043-44 (2002); *see also* Marijuana Compact Between the Yerington Paiute Tribe and the State of Nevada (2017), [http://marijuana.nv.gov/uploadedFiles/marijuanangov/Content/Stay_Informed/Yerington-Paiute-Tribe-Fully-Executed\(1\).pdf](http://marijuana.nv.gov/uploadedFiles/marijuanangov/Content/Stay_Informed/Yerington-Paiute-Tribe-Fully-Executed(1).pdf) (showing that while California did require a percentage of tribal gaming revenue be paid to the state, those funds were then injected back into tribal governments). Nevada followed Washington’s exact formula by requiring the tribal tax to be spent strengthening the tribe’s own self-governance.

would provide a monopolized market, it would be advantageous for tribes to enter into the cannabis market prior to its legalization in Oklahoma.

2. *The Trump Administration's Stance on Marijuana*

The Trump administration's views on marijuana legalization are starkly different than those of the Obama administration. Since President Trump appointed Jeff Sessions as the Attorney General of the United States, he has repeatedly announced and directed local district attorneys and the DOJ to spearhead the fight against legal marijuana. In fact, Attorney General Sessions is so opposed to the legalization of marijuana that he joked at his 1986 Senate confirmation hearing that pot was worse than racism.¹³⁶ Even though Sessions has since referred to that comment as something he “do[es] not recall [saying],”¹³⁷ it still represents an administrative stance on cannabis that is starkly different than that of the Obama administration, which issued both the Cole and Wilkinson memos.¹³⁸

Given the current political climate, one must wonder how Trump and Sessions might try to impede Oklahoma tribal cannabis in the future. However, this issue will not have a solution until the current administration reveals plans to move forward with combatting current cannabis regulation and legalization. As recently as November of 2017, Sessions testified before the House Judiciary Committee that both he and the Trump administration plan to continue the Obama-era policy of respecting state sovereignty and disallowing federal intrusion into state-legalized cannabis operations and grows.¹³⁹ Sessions initially said that “[the Trump administration’s] policy is the same . . . as the Holder-Lynch policy, which is that the federal law remains in effect and a state can legalize marijuana for its law enforcement purposes but it still remains illegal with regard to federal purposes.”¹⁴⁰ However, Sessions backtracked this stance when he released a memo in January of 2018 directed towards U.S. Attorney’s

136. Michelle Ye Hee Lee, *Jeff Sessions's Comments on Race: For the Record*, WASH. POST (Dec. 2, 2016), https://www.washingtonpost.com/news/fact-checker/wp/2016/12/02/jeff-sessions-comments-on-race-for-the-record/?utm_term=.5676c1fb2994 (noting that at the hearing, Sessions said, “I thought those guys [the Ku Klux Klan] were OK until I learned they smoked pot.”).

137. *Id.*

138. See Cole Memo, *supra* note 75; Wilkinson Memo, *supra* note 78.

139. Tom Angell, *Sessions: Obama Marijuana Policy Remains in Effect*, MARIJUANA MOMENT (Nov. 14, 2017), <https://www.marijuanamoment.net/sessions-obama-marijuana-policy-remains-effect/>.

140. *Id.* Holder and Lynch were both attorneys general under President Obama.

offices nation-wide essentially repealing both the Cole and Wilkinson memos.¹⁴¹

The practical effect of Sessions' memo is that he placed the prosecutorial discretion directly back into the hands of each state's U.S. Attorney's office.¹⁴² While this might seem like a drastic change in stance, states like Colorado have already released statements indicating that their prosecution efforts will continue to focus on those breaking their state's regulatory guidelines on marijuana rather than prosecuting individuals trying to abide by their respective state laws.¹⁴³

Though this particular area of cannabis law might change in the future, for now, states like Washington are leading by example of how to satisfy federal standards for tribal cannabis operations. Ultimately, their success comes from the fact that their agreements are the mutual production of state and tribal governments. State-tribal marijuana compacts seem to remain the best move forward, no matter the shifting pieces of prosecutorial guidelines.

III. The Solution

Oklahoma tribes should enter into state-tribal marijuana compacts that are modeled after Oklahoma's current tribal gaming compacts. In order to motivate state actors, the compact should provide for a percentage of all sales of tribal cannabis to be paid to the state as an exclusivity fee that is similar to the fee paid for gaming. This will help to both smooth over conservative concerns about cannabis legalization while providing a solution to the problem of public education underfunding. Additionally, to ensure the financial benefits of tribal cannabis go directly to the public education system, the compact should include a clause similar to the one present in the tribal gaming agreement that requires funds to be allocated specifically to the state's public education system. It is imperative to the overall acceptance of the tribal cannabis regime that the funds be directly allocated to Oklahoma's education funding source. While tribal cannabis would have its own unique benefits for both tribal members and state citizens, the benefit it would provide to Oklahoma's budget problem would ensure that tribal cannabis was a success for everyone involved.

141. Laura Jarrett, *Sessions Nixes Obama-Era Rules Leaving States Alone That Legalize Pot*, CNN (Jan. 4, 2018), <https://www.cnn.com/2018/01/04/politics/jeff-sessions-cole-memo/index.html>.

142. *Id.*

143. *Id.*

A. A Previous Gamble That Paid Off: Indian Gaming Act of 1988

In order to achieve similarly successful results, Oklahoma should model tribal cannabis after tribal gaming. In 2004, Oklahoma passed the Oklahoma State Tribal Gaming Act (“Gaming Compact”), a pre-approved gaming compact that allowed gaming on tribal lands despite the fact that gaming remains illegal in other areas of the state.¹⁴⁴ According to the most current annual impact report by the Oklahoma Indian Gaming Association, the direct impact of tribal gaming on Oklahoma’s economy was \$4.75 billion in 2015.¹⁴⁵ Tribal gaming also stimulates the economy in indirect ways by driving tourism and providing additional jobs through the construction of gaming facilities.¹⁴⁶ These indirect sources of revenue brought in an additional \$2.2 billion in 2015, bringing the total impact of tribal gaming on the State of Oklahoma to \$7.2 billion since its creation.¹⁴⁷

Under the terms of the current Gaming Compact, Oklahoma tribes must pay the state a fee based on a percentage of the revenue earned from certain classes of games.¹⁴⁸ Oklahoma State Treasurer Scott Meacham “said the percentage fee assessed by the [S]tate was determined by looking at what comparable states were receiving” at the time the compact was made.¹⁴⁹ According to Meacham, none of the thirty Oklahoma tribes who participate in gaming are subject to state taxation on their gaming revenues.¹⁵⁰ In lieu of this tax, the state gaming compact provides for the annual fee to be an “exclusivity payment” owed to the state in varying percentages.¹⁵¹ The exclusivity payment has binary benefits: it encourages state officials to work with tribes to create and maintain gaming pacts while also benefitting tribes by giving them “a protected market for this economic activity.”¹⁵² In other words, Oklahoma tribes currently have a monopoly on the gaming industry in Oklahoma because the compact only legalized gambling on tribal lands.

144. OKLA. INDIAN GAMING ASS’N, *supra* note 4, at 8; *see* 3A OKLA. STAT. ANN. § 281 (West 2012).

145. OKLA. INDIAN GAMING ASS’N, *supra* note 4, at 4.

146. *Id.*

147. *Id.* at 5.

148. Randy Ellis, *Revenue from Tribal Gaming in Oklahoma Sets Record*, NEWSOK (Oct. 17, 2016), <http://newsok.com/article/5522808>.

149. Michael McNutt, *Tribal Gaming Fees Continue to Grow for Oklahoma*, NEWSOK, (June 3, 2010), <http://newsok.com/article/3465693>.

150. *Id.*

151. *Id.*; *see also* OKLA. INDIAN GAMING ASS’N, *supra* note 4, at 8.

152. McNutt, *supra* note 149 (internal quotations omitted).

While gaming has provided a substantial financial boost to the Oklahoma economy, equally important is the location where the money is generated. While most Oklahoma businesses are able to thrive more easily in densely-populated cities like Oklahoma City and Tulsa, tribal gaming is thriving in rural markets. Gaming can only occur on tribal lands, which are mostly rural. Tribal gaming has greatly benefitted rural areas by generating the majority (64%) of its earnings impact.¹⁵³ According to the 2016 U.S. Census, over 1.3 million Oklahoma residents live in rural areas.¹⁵⁴ By creating and making jobs available to these rural residents, who make up a third of the state's population, tribal gaming has helped lower the state's unemployment rate.¹⁵⁵ Since its inception thirteen years ago, the success of tribal gaming has led to increased job creation for Oklahomans. Currently, the direct effect of tribal gaming equates to 27,944 people being employed by the gaming industry.¹⁵⁶ When that figure is added to the number of jobs indirectly provided by the gaming industry, the total impact of gaming on employment in Oklahoma amounts to 48,942 people.¹⁵⁷ In total, Oklahoma casino employees' earnings have injected \$2.3 billion into the State's economy.¹⁵⁸

Tribes have also used their current monopoly on gaming to secure a brighter future for tribal members. For many Oklahoma tribes, like the Cherokee, Chickasaw, and Choctaw,¹⁵⁹ gaming has proven itself as a means to strengthen tribal self-governance by using gaming revenues to enhance tribal capability to provide "essential functions," such as tribal schools and tribal utilities.¹⁶⁰

Gaming revenues provide obvious benefits to the state's economy and to rural Oklahomans, but other state programs also benefit because gaming funds have been allocated to them directly. While the exclusivity payments are divided between "education, mental health services and state agencies,"

153. OKLA. INDIAN GAMING ASS'N, *supra* note 4, at 5.

154. *State Fact Sheets: Oklahoma*, ECON. RES. SERV., U.S. DEP'T OF AGRIC., <https://data.ers.usda.gov/reports.aspx?StateFIPS=40&StateName=Oklahoma&ID=17854> (last updated Sept. 5, 2018).

155. *See id.*

156. OKLA. INDIAN GAMING ASS'N, *supra* note 4, at 4.

157. *Id.* at 5.

158. *Id.*

159. *See Ellis, supra* note 148.

160. *Tribal Economic Impact in Oklahoma*, SOUTHEASTERN OKLAHOMA STATE UNIVERSITY, (Sept. 1, 2017), <https://online.se.edu/articles/nal/tribal-economic-impact-in-oklahoma.aspx>.

the vast majority of the funds go towards public education.¹⁶¹ After setting aside \$250,000 for the Oklahoma Department of Mental Health and Substance Abuse Services, 88% of the remaining revenues go directly into the state's education fund, known as the Education Reform Revolving Fund or 1017 fund.¹⁶² In total, Oklahoma tribes "have paid more than \$1.123 billion in exclusivity fees to the State" since 2006.¹⁶³ As of 2015, Indian gaming had contributed over \$1 billion to Oklahoma's public education system.¹⁶⁴ Clay Pope, a former member of the Oklahoma House of Representatives, described tribal gaming as "one of the best moves" the legislature has made thus far in terms of benefiting the economy.¹⁶⁵

With a huge portion of the state's educational funding relying on these exclusivity payments, Oklahoma cannot afford to see decreases in the amount being paid by the tribes to the state. However in 2014, the state saw a \$5.5 million decrease in payments from the 2013 fiscal year.¹⁶⁶ The decline was thought to be the product of tribes diversifying casinos with non-Class III games, such as electronic slot machines, that are not subject to fees.¹⁶⁷ Though the payments have made a rebound in the last two years, Class II games are growing at a faster rate than Class III games,¹⁶⁸ making the future of gaming exclusivity payments somewhat undetermined. The gaming compact will be revisited in 2018, so the types of games charged or the percentage cut allocated to the state in payments may change, potentially affecting the future of tribal gaming's contribution to public education in Oklahoma.

As a solution to the unknown future of gaming payments, introducing a state marijuana compact could bridge the gap in educational funding while still remaining one step removed from full cannabis legalization. The success of tribal gaming indicates that modeling a tribal cannabis operation after the current gaming regulations in Oklahoma could prove beneficial to both tribes and the state. Though cannabis remains illegal at the federal level, tribes should be able to enjoy the development of a productive and

161. Ellis, *supra* note 148.

162. *Id.*

163. OKLA. INDIAN GAMING ASS'N, *supra* note 4, at 8.

164. Brianna Bailey, *American Indian Gaming Contributed \$1 Billion to Oklahoma Education over Past Decade, Study Shows*, NEWSOK (Nov. 18, 2015), <http://newsok.com/article/5461063>.

165. McNutt, *supra* note 149.

166. Bailey, *supra* note 164.

167. *Id.*

168. Ellis, *supra* note 148.

safe marijuana industry. Importantly, however, PL 280 provides one major restriction that could cause disparate treatment to state and tribal cannabis grows. While PL 280 puts tribes at the mercy of the laws of the states in which their reservation is located, Oklahoma fortunately is not a PL 280 state. While this restriction could lead to complex issues for tribes like the Navajo, whose reservation sits in three states, Oklahoma tribes would have the advantage of being exempt from this particular complication.

B. What Would an Oklahoma Marijuana State Compact Look Like?

Since the issuance of the Wilkinson Memo, there has been disparate treatment of federal intrusion on tribal cannabis grows.¹⁶⁹ Many tribes have been successful in cooperating with their respective state governments to form state compacts the federal government has, so far, respected.¹⁷⁰ Conversely, some other tribes have been subject to federal raids, the burning of their grow sites, and even arrests of their non-tribal consultants who are not shielded from prosecution under the umbrella of tribal sovereignty.¹⁷¹ Due to PL 280, states and their inherent police powers have assumed criminal jurisdiction over tribal lands situated within PL 280 states.¹⁷² Therefore, if cannabis is legalized in a PL 280 state, subsequent tribal cannabis operations will be subject to the full extent of the state's criminal laws, highlighting the need for strong legislative relationships to ensure adequate adherence to emerging regulations.¹⁷³

In a move consistent with the federal government's policy reasons for implementing PL 280, the federal government also seems to be transferring jurisdiction for tribal cannabis regulation to the states via the Wilkinson Memo.¹⁷⁴ Because of this transfer of jurisdictional authority, it seems the only

169. Amber Cortes, *Cannabis on Tribal Land a '50/50' Gamble for Native Americans in Washington*, GUARDIAN (May 29, 2016), <https://www.theguardian.com/us-news/2016/may/29/cannabis-native-american-marijuana-sales-farming-washington>.

170. WASH. REV. CODE § 43.06.490 (2015); Rob Hotakainen, *Indian Tribes Fear Trump Will Be a Buzzkill for Their Marijuana Business*, SACRAMENTO BEE (Apr. 28, 2017), <http://www.sacbee.com/news/nation-world/national/article146881809.html>.

171. *See Menominee Indian Tribe of Wis. v. Drug Enforcement Admin.*, 190 F. Supp. 3d 843 (E.D. Wis. 2016); Steven Nelson, *DEA Raid on Tribe's Cannabis Crop Infuriates and Confuses Reformers*, U.S. NEWS & WORLD REP. (Oct. 26, 2015), <https://www.usnews.com/news/articles/2015/10/26/dea-raid-on-wisconsin-tribes-cannabis-crop-infuriates-and-confuses-reformers>.

172. Melton & Gardner, *supra* note 50.

173. *See id.*

174. *See* 18 U.S.C. § 1162 (2012); 28 U.S.C. § 1360 (2012); Wilkinson Memo, *supra* note 78.

way for tribes to avoid federal intrusion into reservation land containing cannabis grows is to enter into a compact with their respective state in which they agree on terms and regulations of said operation. As for Oklahoma tribes, the previous treatment of cannabis grows in other states serves as a warning. The main objective of state compacts is for tribal governments to work hand-in-hand with the attorneys general in their respective jurisdictions to come to a contracted agreement that aligns the tribal operations with state regulations.¹⁷⁵ If Oklahoma tribes can find common ground with government officials, it would be possible to legalize cannabis on reservation lands by entering into a state compact.

Signing this sort of compact would mean that the details of the compact would become quasi-state law, requiring state law enforcement officials to abide by the terms in the compact.¹⁷⁶ Because signing the compact effectuates it into state law, Oklahoma has little to lose with respect to federal prosecution, provided that the compact adequately protects against the threats headed in the Cole and Wilkinson memos.¹⁷⁷ In reality, Oklahoma would have everything to gain, at least in this short window of opportunity. The state could theoretically position a compact to outlive the illegality of cannabis and reap the financial benefits all the while. This type of deal also provides insulation and protection to tribes from state intrusion, so long as they honor the terms set forth by the state in the compact.¹⁷⁸ Again, the federal government still reserves the right to intervene if the state does not adequately protect against the Cole Memo threats.¹⁷⁹ It is important to note, though, that the presence of a state compact with sufficient protections against these threats has so far resulted in the federal government leaving alone tribes and states with progressive cannabis regulations.¹⁸⁰

Because of the complex jurisdictional and sovereignty issues discussed in earlier portions of this Comment, it follows that Oklahoma tribes must fully cooperate with state government officials and prosecutors to avoid federal intrusion and ensure success of cannabis compacts. One example of a tribe

175. See Hilary Bricken, *The Suquamish Marijuana Compact: First in the State, First in the Nation*, CANNA L. BLOG (Sept. 21, 2015), <http://www.cannalawblog.com/the-suquamish-marijuana-compact-first-in-the-state-first-in-the-nation/>.

176. See *id.*

177. See *Okla. Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Okla.*, 498 U.S. 505 (1991) (holding that Indian tribes are not subject to lawsuits because they are domestic dependent nations which possess sovereign immunity).

178. See Washington Marijuana Compact, *supra* note 105.

179. See Cole Memo, *supra* note 75; Wilkinson Memo, *supra* note 78.

180. See Washington Marijuana Compact, *supra* note 105.

that cooperated with state officials but fell short of actually entering into a binding state compact is the Flandreau Santee Sioux Tribe of South Dakota. The Tribe had an ambitious goal to open the world's first marijuana resort in South Dakota.¹⁸¹ The Tribe planned to permit sales and consumption of marijuana to persons over twenty-one years of age within tribal lands in accordance with a tribal vote held to legalize both medical and recreational use.¹⁸² The Tribe stated that its intention was to open a cannabis resort where buyers could purchase and consume cannabis on tribal property but would not be allowed to take any cannabis off-reservation in accordance with the third threat of the DOJ memos. Though the tribe was not officially raided, it unilaterally chose to burn its entire crop in November of 2015 after discussions with state and federal authorities indicating the Tribe was at risk of being raided.¹⁸³

The Menominee Tribe of Wisconsin serve as another example of a failed attempt at approving and commoditizing tribal cannabis. The Menominee Tribe's government voted with a 77% approval rate to allow the cultivation of medical marijuana and 58% approval for recreational marijuana.¹⁸⁴ The Tribe then began growing industrial hemp as a research project and was subsequently raided by the DEA in October of 2015, resulting in the seizure of over 30,000 plants by federal authorities.¹⁸⁵

However, there is still hope for successful tribal-state compacts in Oklahoma if tribal governments create and enforce sufficiently strict regulations that satisfy the requirements of the DOJ memos. The most important assurance Oklahoma tribes would need to make would be that marijuana, even if legal on the reservation, could only be consumed on tribal lands and could not be transported to any other areas of the state. The "off-reservation" flowing of cannabis into states where it is still illegal will assuredly trigger federal intrusion.

Both the Flandreau Santee Sioux and Menominee made fatal mistakes that Oklahoma tribes should avoid at all cost. Neither of these tribes entered into state compacts, and they relied solely on tribal sovereignty as support for the legalization of cannabis on their lands, despite residing in states where

181. Emmett Reistroffer, *State Forces Santee Sioux Tribe to Burn \$1MM Worth of Marijuana*, MERRY JANE (Jan. 14, 2016), <https://merryjane.com/news/state-forces-santee-sioux-tribe-to-burn-1mm-worth-of-marijuana>.

182. *Id.*

183. *Id.*

184. *Id.*

185. Nelson, *supra* note 171.

marijuana remained illegal.¹⁸⁶ It would be a fatal mistake for Oklahoma tribes to not enter into state compacts to work out the jurisdictional and regulatory complexities involved in a cannabis operation. Tribal lands are very fractionalized, so even if tribes legalize marijuana on tribal lands specifically, it would be nearly impossible for residents of the state to buy or consume cannabis on tribal lands and return home without crossing over state land. Additionally, because driving while under the influence is also a major threat listed in the DOJ memos, Oklahoma tribes would need to work with state officials in order to remain in compliance with the DOJ's standards and prevent inevitable federal intrusion for noncompliance. Oklahoma, if successful, would be the first state to enter into marijuana compacts with tribes while the substance remains illegal in all areas of the state.

Additionally, in Oklahoma, both the tribes and the state government are in a unique and advantageous position to achieve success in state-tribal cannabis compact negotiations. Tribes in Oklahoma should keep in mind that their main goal for self-regulation is to ensure that if they sell to members of the public, they do not allow them to consume off tribal lands. This allowance would directly conflict with the main threat mentioned in the Cole and Wilkinson memos, which essentially prohibits the traveling of marijuana from areas where it is legal (tribal lands) to areas where it is not. Tribes have a unique advantage with their sovereign status in the non-PL 280 state of Oklahoma, which has yet to enact its own robust regulation for the legalization of marijuana. In Oklahoma, the state could capitalize and immensely benefit from entering into a state compact with tribes before cannabis is officially legalized in the state. Entering into state cannabis compacts with Oklahoma tribes could benefit the State of Oklahoma in the same way that gaming did, by providing a lucrative source of revenue directed to a specific use, such as education.

As long as the state and tribes work together to come to a formal agreement, state officials could ensure that the federal initiatives are satisfied while also making a revenue percentage part of the compact. It is important that tribes act before marijuana is actually legalized in the state in order to capitalize on the tribes' unique exemption status. The downside of potentially paying some sort of percentage to the state, even though tribes are tax exempt, would be the price tribes are willing to pay to monopolize the Oklahoma cannabis industry.

186. *See id.*

Conclusion

In conclusion, the DOJ's memos urge tribal governments to work hand-in-hand with their respective state governments in order to enact cannabis regulations that comply with the Cole and Wilkinson memos and avoid the need for federal intrusion. While federal, state, and tribal governments all reserve their own respective rights and immunities, each are trying to work together in a cohesive manner to establish safe cannabis operations throughout the United States. The main question examined in this Comment was whether tribes in Oklahoma, where cannabis is still illegal, could use a state compact modeled after gaming compacts to cultivate cannabis on tribal lands. This cultivation would present a unique solution to both issues of tribal poverty and the immense underfunding to Oklahoma's public education system. As a solution to this crisis, Oklahoma could benefit from receiving a percentage of the revenues from tribal cannabis. The State and tribes must realize this benefit while they still can through the incorporation of an exclusivity fee into cannabis compacts modeled after Oklahoma's gaming compacts. There is currently a \$40 million gap in funding for Oklahoma public education, which only seems to grow each fiscal year, despite tribal gaming contributions to the state. Because exclusivity fees from gaming are decreasing, and therefore becoming unreliable for budgeting purposes, a cannabis exclusivity fee could be just the ticket to bridge the funding gap. Eventually, when states like Oklahoma legalize cannabis, the state will not be able to use "exclusivity" or a monopoly on the market as a bargaining chip, given tribes are exempt from federal taxes and from state taxes on revenues made on tribal lands.

State-tribal cannabis compacts could make a huge difference in the quality of public education in Oklahoma, should the state government choose to allocate the funds where they are most needed. The biggest obstacle currently standing in the way of tribal cannabis is the reluctance of state actors to move towards any legalization of marijuana in the state. However, state actors could be motivated by the lessons they learned in their dealings with the legalization of tribal gaming in the state. By utilizing the undeniable revenue stream tribal cannabis could provide for Oklahoma public education, it is possible for state actors, who would otherwise oppose such an action, to support the legalization of marijuana on tribal lands because it would ensure a brighter future for education in the state.

Even though many obstacles stand between tribes and the legalization of tribal cannabis in Oklahoma, none are insurmountable. Tribal cannabis is an intermediate solution that is available to Oklahoma, should it decide that the

need for adequately-funded public education outweighs the state's current ban on cannabis. It remains to be seen whether Oklahoma will consider this unique solution to its most evident problem, the underfunding of public education in the state.