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TRIBAL CANNABIS AGRICULTURE LAW

Ryan B. Stoa*

Abstract

Indian tribes have some freedom to develop their own approach to cannabis agriculture, but what is the nature of that freedom, and how have tribes acted upon it?

This Article investigates the current legal framework surrounding tribal cannabis agriculture and tribal participation in legal cannabis markets. It is generally believed that tribes have some authority to determine the legality of cannabis cultivation on their lands, and to create rules and regulations governing that practice. However, this freedom is nascent and inconsistently granted by the federal government. In addition, the legal frameworks tribes are developing with respect to cannabis agriculture are still evolving and poorly understood, since each tribe is free to craft their own unique approach to the cannabis industry.

This Article examines the current tribal cannabis agriculture landscape in several ways. First, a big-picture snapshot of the U.S. cannabis industry in 2023 is provided in order to place tribal cannabis policies in an appropriate context. Second, the Article attempts to discern the federal government’s opaque perspective on tribal cannabis law, including the contours of tribal freedom to self-regulate in this area. Third, the Article identifies trends and approaches to tribal cannabis agriculture that have emerged to date, with examples of cannabis policies from tribes around the country. Finally, a case study of the Hoopa Valley Tribe is presented in order to bring to life the legal complexities of this topic.

INTRODUCTION

On the surface, the cannabis legalization movement appears to be securing a bright future for itself. Each election cycle, more and more states legalize the medicinal or recreational use of cannabis, while the federal government seems content to let prohibition enforcement slip further and further down the priority list.

* © 2023 Ryan B. Stoa. Associate Professor of Law, Southern University Law Center; Fellow, Cannabis Compliance, Law, and Policy Institute; ryan.stoa@sulc.edu. This Article is dedicated to the late Sonny Jackson, who passed away in 2021. Sonny was a member and respected leader of the Hoopa Tribe of California and was instrumental in deepening my knowledge of tribal cannabis law and policy. I am grateful to my colleagues Adam Crepelle and Michael D.O. Rusco, of the SULC Native American Law and Policy Institute, for their insights that contributed to the development of these ideas. I am also grateful to Fevean Siyoum, for her research assistance, and to my colleague Marla Dickerson, Director of the SULC Cannabis Compliance, Law, and Policy Institute, for her continued support in the area of cannabis research and underrepresented communities.
Beneath the surface, however, it is clear to many cannabis industry stakeholders that the post-legalization landscape has become chaotic and unjust. Legalization initiatives were the easy part. Regulation of this multi-billion-dollar industry, however, is proving to be incredibly difficult.

Since the federal prohibition remains in place, each state that legalizes cannabis must create, for the first time in its history, its own regulatory framework for the cannabis industry. This framework must, at a minimum, develop regulations that address the industry’s major sectors, including agriculture, labor, manufacturing, energy and the environment, distribution, public health, marketing and intellectual property, retail sale, and public use, among others.

The interplay between these new regulations and overlapping or conflicting state and federal regulations that already address these sectors has proved challenging for many stakeholders, particularly underfunded government agencies and eager-but-overwhelmed cannabis businesses. Navigating both these jurisdictional conflicts and the many new regulatory requirements that pop up on a regular basis has become a painful reality for any business trying to survive in this new legal marketplace.

And if this state-federal dynamic isn’t chaotic enough, the complexities faced by tribal governments and their aspiring cannabis businesses adds a third layer of confusion. Tribal governments have some leeway to develop their own regulatory frameworks for the cannabis industry, but their freedom to do so is ambiguous vis-à-vis the federal government, and the scope or extent of tribal cannabis operations is often limited by state governments.

The tribal cannabis industry is being held back by these limitations. Some nascent research has begun to address these limitations and the potential path forward for tribes and tribal cannabis businesses. This Article builds on that research by bringing to light and analyzing the challenges faced by tribal cannabis agriculture businesses, including tribal governments, tribal farmers, and other industry stakeholders that hope to do business with tribal entities in the cannabis space.

In Part II, the Article situates subsequent analyses by providing a big-picture snapshot of the cannabis industry of the 2020s. While legalization has spread across the United States in recent years, regulatory complexity has made life difficult for small businesses, and communities hit the hardest by the war on drugs are mostly on the outside looking in.¹ In Part III, the Article lays out the current regulatory landscape for tribes and the tribal cannabis industry. It is clear that that landscape is opaque at best and limited by both state and federal roadblocks. Part IV dives deeper into the agricultural implications of these limitations, exploring the historic role agriculture and farmland has played on tribal lands, and how cannabis agriculture

¹ Part II of this Article adopts and adapts, with permission, the author’s research published in: Ryan B. Stoa, Emerging Issues in Cannabis Law: 2022 and Beyond, 46 SETON HALL LEGIS. J. 469 (2022). Parts of this research will also appear in a forthcoming peer-reviewed article for Clinical Therapeutics.
can fit into this complex dynamic. Part V concludes with a brief case study of Northern California’s Hoopa Tribe. The Hoopa’s recent history with cannabis agriculture is contentious yet may provide useful lessons for future stakeholders.

I. THE CANNABIS INDUSTRY IN 2023

Ten years have passed since Colorado and Washington became the first U.S. states to legalize the recreational use of cannabis.2 Today, twenty-three states allow recreational cannabis use.3 In the twenty-six years since California became the first state to legalize the medicinal use of cannabis, thirty-eight states have followed suit.4 Twenty-seven states have decriminalized cannabis possession to some degree.5 Only three states—Idaho, Kansas, and Nebraska—still maintain a more or less traditional prohibition on cannabis.6 These states collectively account for only 2 percent of the United States’ population.7 The legalization movement has evolved quickly and continues to gain steam.

And yet, the above figures do not paint a complete picture. First, the federal prohibition remains in force, meaning that psychoactive marijuana is a Schedule I drug per the Controlled Substances Act.8 That listing creates an assortment of restrictions and prohibitions. In short, while cannabis remains a prohibited substance under federal law, Congress and federal agencies have been loosening some restrictions.

Second, while legalization moves forward and the legal cannabis industry is minting new beneficiaries, the process has not been equitable, and the benefits have not been evenly distributed. Many people convicted with non-violent cannabis-related charges, which would not be illegal today due to legislative changes, remain...

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4 Marijuana Legality, supra note 3.
5 Hartman, supra note 2.
6 Id.
incarcerated. Further, the legal industry’s myriad regulatory requirements are becoming increasingly difficult for small businesses to navigate.

Nonetheless, the tide is turning toward legal cannabis markets, and with it, the need to scrutinize how states are legalizing and regulating their industries. As these new markets begin to take shape, it is important to understand the state of the industry.

This Part will provide an overview of the United States cannabis industry as it exists today. First, attention is given to challenges and cross-cutting themes that relate to many states and legal markets by providing a big-picture analysis of the state of legalization in the United States. While the focus is on state-level legalization efforts, this Part also considers the subtler ways in which the federal government is easing restrictions. The next section of this Part addresses the business of cannabis, including early data on legal markets and estimates of the continued role of illicit or unregulated markets. Finally, the last section of this Part delves into the challenges stakeholders continue to face with respect to equity and participation. While the legalization trend is exciting for many, the reality is that many others are excluded from the benefits of legal markets. This discussion of cannabis equity sets the stage for the analysis of tribal cannabis agriculture that follows.

A. Cannabis Legalization and Prohibition

The twenty-first century has been marked by a wave of state-level legalization efforts throughout the United States. Legalization efforts have been remarkably successful, primarily taking place by voter or ballot initiatives, rather than by legislative, executive, or judicial initiatives. As of July 2023, twenty-three states

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10 A short note from the author on the subject of nomenclature: I have been researching, writing, and speaking about cannabis since 2015. In that short time, the language of cannabis has transformed and reimagined itself many times. The nomenclature used by cannabis industry stakeholders is not yet agreed upon or solidified. I have listened to advocates push for the industry to use “marijuana” instead of “cannabis,” and vice versa. To some, cannabis is more professional and less stigmatized, to others marijuana is more specific to psychoactive cannabis strains and also honors the Hispanic origins of the word. In this Article, I refer broadly to the cannabis industry as “cannabis,” understanding that it is often more precise to refer to psychoactive strains as marijuana and non-psychoactive strains as hemp.

allow recreational cannabis use,\textsuperscript{12} thirty-eight states allow medical cannabis use,\textsuperscript{13} and twenty-seven states have decriminalized cannabis possession to some degree.\textsuperscript{14} The cannabis prohibition era has loosened rapidly and across jurisdictions.\textsuperscript{15}

Legalization efforts first gained traction in the American West, where recreational use of cannabis is legal in most states.\textsuperscript{16} These recreation-legal states include California, Oregon, Washington, Nevada, Arizona, New Mexico, Montana, Alaska, and Colorado.\textsuperscript{17} California first legalized medicinal cannabis use in 1996, while Colorado and Washington legalized recreational use in 2012.\textsuperscript{18} It is unclear why the American West legalized cannabis so quickly relative to the rest of the United States. Explanations informally proposed to the author of this Article include the west's historic role in cannabis cultivation, California's place as the country's hotbed of counterculture and drug positivism, and other western states' libertarian ethos.

In recent years, major cities and states in the northeast began to follow the west's lead. Notably, legislatures in the northeast have been more proactive in

\begin{figure}[h]
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\caption{Where marijuana is legal in the United States}
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\textsuperscript{13} Id.
\textsuperscript{14} Hartman, supra note 2.
\textsuperscript{15} Marijuana Legality, supra note 3.
\textsuperscript{16} See Hartman, supra note 2.
\textsuperscript{17} Id.
\textsuperscript{18} Id.; Marijuana Legality, supra note 3.
legalizing cannabis use than their counterparts in the rest of the country. Vermont became the first state to legalize recreational cannabis use by legislative enactment in 2018.\textsuperscript{19} The New York legislature passed recreational use measures in 2021, creating a legal cannabis market in the country’s second most populous state.\textsuperscript{20}

The Midwest and the South lag behind. Other than Virginia, no southern state has legalized recreational cannabis use.\textsuperscript{21} Oklahoma, however, has embraced cannabis cultivation for medical purposes, perhaps capitalizing on the regulatory burdens being felt by cannabis businesses elsewhere in the country.\textsuperscript{22} In the Midwest, recreational use is legal only in Illinois, Michigan, Minnesota, and Missouri.\textsuperscript{23} Perhaps the slower pace of legalization in the Midwest and South can be attributed to those regions’ traditional embrace of social conservatism despite cannabis legalization enjoying bipartisan support in many states and on the federal level.

Part of the bipartisan support for cannabis legalization is likely due to the fact that legalization has never been more popular with voters.\textsuperscript{24} Each election year, legalization initiatives receive more votes than many politicians. Indeed, it appears that cannabis legalization enjoys broad support from Americans. A 2021 Gallup poll found that 68 percent of Americans support cannabis legalization, the highest level of support since the group’s polling began in 1969.\textsuperscript{25} The 2021 poll shows slight majorities of Republicans and religious service attendees support legalization as well.\textsuperscript{26} According to a 2021 Pew Research Center poll, 59 percent of Americans support cannabis legalization for both recreational and medical use, while another

\textsuperscript{19} HARTMAN, supra note 2.
\textsuperscript{20} Id.
\textsuperscript{21} See Marijuana Legality, supra note 3. Note that recreational marijuana was also legalized in Missouri in 2022 and in Minnesota beginning in August 2023. Id.
\textsuperscript{23} See Marijuana Legality, supra note 3.
\textsuperscript{25} Id.
\textsuperscript{26} Id.
30 percent support legalization only for medical use.\(^{27}\) Only 10 percent of Americans prefer to maintain cannabis prohibition as traditionally conceived.\(^{28}\)

Although the big-picture is encouraging for legalization advocates, progress has been uneven. While the decision to legalize cannabis use for adults is relatively straightforward for voters, the mechanics of doing so, including the regulatory infrastructure that must be devised and developed, is much more confounding. Since the federal government has not participated in the development of cannabis industry regulations, states have been forced to create—for the first time in modern administrative agency history—regulatory frameworks for the billion-dollar (and growing) cannabis industry. This has been challenging for many.

The next Section describes the challenges faced by stakeholders across the board, including overburdened regulators ill-equipped to regulate a brand new and rapidly changing industry, and cannabis businesses collapsing under the weight of an opaque maze of regulatory requirements. What is important to recognize is that after legalization is championed and applauded across the country, the messier work of creating rules and regulations still awaits. This is the state of development states now find themselves in—for many states, these regulatory frameworks are not working and are instead fostering a thriving unregulated market.\(^{29}\)

Of course, an understanding of cannabis legality in the United States requires a look at the state of prohibition at the federal level. It is well understood that marijuana is a Schedule I drug under the Controlled Substances Act (“CSA”), meaning that, according to the CSA, it has a high potential for abuse and no “currently accepted medical use.”\(^{30}\) This listing requires that the federal government strictly regulates cannabis and the cannabis industry.\(^{31}\)

Nonetheless, the federal prohibition is not as ironclad as it may seem. Congress lifted most restrictions on hemp (non-psychoactive products derived from cannabis plants) and its production in the 2018 Farm Bill.\(^{32}\) Every year since 2014, Congress has restricted the Department of Justice from spending federal funds on cannabis-related prosecutions that would comply with state law.\(^{33}\) Attorneys General of the


\(^{28}\) Id.

\(^{29}\) See, e.g., infra notes 47–49 and accompanying text.

\(^{30}\) 21 U.S.C. § 812(b)(1), (c).


\(^{33}\) See, e.g., Consolidated Appropriations Act of 2021, H.R. 133, 116th Cong. § 531
United States Department of Justice have broad discretion to direct enforcement priorities away from state-legal cannabis markets, as explained in the 2013 Cole Memorandum.34

The federal administrative state does not speak with a united voice on cannabis, as many agencies attempt to navigate the murky waters of state and federal cannabis policy. The United States Patent and Trade Office (“USPTO”) has signaled an openness to issuing cannabis-related patents and trademarks,35 and the possibility of owning intellectual property in the cannabis industry is attractive to many investors.36 And, naturally, the Internal Revenue Service is happy to provide guidance to cannabis businesses seeking to report cannabis income (and therefore, tax obligations).37 As the cannabis industry touches so many sectors and communities, it requires administrative agencies to reckon with its growth and development, the CSA’s prohibition notwithstanding.

B. The Business of Cannabis—Legal and Otherwise

Having explored the state of cannabis legality in the United States, this Article now explores: (1) what legalization means for the growth and development of both regulated (legal) and unregulated (illegal) markets; and (2) what challenges remain to move the industry from the latter to the former?


It is clear that the cannabis industry, as a whole, is thriving. Both the regulated and unregulated markets are large and growing larger. With respect to the global legal cannabis industry, consumer spending grew 46 percent in 2019 to a record high of $14.8 billion, with $12.4 billion coming from United States legalized sales alone.\textsuperscript{38} One cannabis industry market research firm believes United States sales will reach $33.9 billion by 2025.\textsuperscript{39}

Nonetheless, the landscape of legal cannabis business is volatile. In 2019, publicly traded cannabis businesses in the United States crashed by over 80 percent, one of the largest sector crashes in modern history.\textsuperscript{40} One of the central challenges for cannabis businesses seeking to scale up is maintaining the quality of production while keeping prices competitive.\textsuperscript{41} So far, most big firms have struggled to do so.\textsuperscript{42} Many of these publicly traded companies jostle to become the next “Starbucks of Weed,” but the resilience of small businesses and craft operators may prove enduring, not to mention a compelling alternative for consumers.\textsuperscript{43} A central question facing the cannabis industry is whether it will be dominated by a few large companies, or whether it will continue to be served by tens of thousands of small businesses.\textsuperscript{44}

While legal markets appear to be taking off, the “legacy” or “unregulated” market remains as resilient and robust as ever. In states where cannabis remains prohibited for most consumers, the unregulated market provides the product. But even in states where legal markets have emerged, they struggle to compete with legacy networks.\textsuperscript{45} In California—the state considered by most to be the largest player in the cannabis industry—80 to 90 percent of the cannabis industry is not part of the new, legal market.\textsuperscript{46} Perhaps as little as 7 percent of global cannabis consumer spending is done through legal channels.\textsuperscript{47}

One wonders why legal markets are making such little headway into total market share. Possible explanations include excessive taxes, confusing regulatory requirements for consumers, and a lack of trust in, or familiarity with, new cannabis

\textsuperscript{39} Id. at 35.
\textsuperscript{40} Id. at 14.
\textsuperscript{41} See id. at 14–15.
\textsuperscript{42} Id. at 15 (“Few cannabis companies have ever turned a profit.”).
\textsuperscript{43} See generally RYAN STOA, CRAFT WEED: FAMILY FARMING AND THE FUTURE OF THE MARIJUANA INDUSTRY 194 (2018) (“I can’t think of a more responsible approach to marijuana agriculture than a vigorous and cooperative community of family farms, supplying consumers with sustainable, high-quality marijuana, right here in the U.S.A.”).
\textsuperscript{44} Id.
\textsuperscript{46} Id.
\textsuperscript{47} ARCVIEW, supra note 38, at 12.
companies. Many cannabis businesses attempting to gain a foothold in legal markets complain of the increasingly byzantine nature of state regulatory frameworks.\footnote{As reported to the author in original research in California and Oregon, 2020–2022.}

The nascent state of the cannabis industry presents an opportunity for stakeholders to create a regulatory framework that promotes their values. Every state is experimenting with new regulations, and in many cases, regulators do not have experience in regulating cannabis. From the perspective of many cultivators, states are introducing far too much complexity into the regulatory process.\footnote{See generally Symposium, Equity in Cannabis Agriculture, 101 B.U. L. REV. 1135 (2021) (adapting and building upon material published in this Symposium). One of the themes of the symposium was the challenges faced by cannabis businesses trying to navigate the path to licensure.}

There is strong evidence that California, for example, has created a regulatory system so opaque and unpredictable that businesses who initially expressed enthusiasm for legalization and applied for licenses have since given up.\footnote{See Natalie Fertig, How Legal Weed Is Killing America’s Most Famous Marijuana Farmers, POLITICO MAG. (June 4, 2019), https://www.politico.com/magazine/story/2019/06/04/humboldt-county-marijuana-farmers-regulations-227041/ [https://perma.cc/J3S4-2ZYY].}

It is becoming clear that if states create unrealistic regulatory burdens for small businesses that cannot afford teams of lawyers and consultants, those businesses will not be capable of operating in the legal market. Therefore, in order to incentivize participation in the cannabis industry, regulators must create regulatory frameworks that small businesses can navigate.


Small businesses are being pushed out of the industry (or back onto the illicit market) due to the unrealistic regulatory hoops they must jump through.\footnote{Id.}

report provided detailed suggestions for cutting back on regulatory requirements, though it remains to be seen whether or not the state’s regulators will implement any changes.  

The complexity of regulation in the cannabis industry has entered the national consciousness as well. A recent Politico article revealed a startling pattern of corruption cases being brought against local officials overseeing cannabis legalization and licensing. It notes that because so many states put regulatory authority over cannabis in the hands of local officials, the fate of a billion-dollar industry—including its winners and losers—is being decided by relatively low-level officials. So far, there appear to be many instances in which licenses are being awarded or regulations are being ignored due to favoritism or corruption.

Yet, in 2023 some things are clear. Demand for cannabis products is high and consumer spending is likely to continue; for that reason, the cannabis industry will continue to thrive. What is not clear is what types of businesses will meet those demands—regulated or unregulated, big or small. For the time being, demand is being met from both legal and illegal markets and from both large publicly traded companies and small businesses. But which of those forces will prevail?

C. Equity and Participation in the Legal Cannabis Industry

In the years since the initial wave of successful recreational legalization initiatives, it has become increasingly apparent that the benefits of legalization are not being shared equitably. In general, the first wave of legal cannabis businesses does not represent the demographics of communities hit the hardest by prohibitionist policies.

There are many equity challenges facing the cannabis industry today. This Article addresses some of those challenges while acknowledging that neither the author nor the industry has settled on a definitive conception of what “equity” would mean. Nor does the author purport to write with authority or experience on this question. To some, equity means righting the wrongs of the past; for cannabis, this means correcting the harms inflicted by the war on drugs. To others, equity means a forward-facing policy framework that ensures equitable participation and distribution of benefits. A broad understanding of equity surely incorporates both, and a holistic approach to equity in cannabis will require a multidimensional and evolving understanding of what equity means and, perhaps more importantly, what equity requires.

A strong theme in the push for equity in the cannabis industry is the desire to use the catalytic potential of legalization to right the wrongs of the war on drugs.

54 CAL. CANNABIS ADVISORY COMM., supra note 53, at 5–22.
56 Id.
57 Id.
This conception of equity points out that because low-income and minority communities were hit the hardest—and disproportionately—by prohibition, legalization efforts should first attempt to rehabilitate or acknowledge these communities by ensuring that they enjoy some of the benefits of legalization. This vision of cannabis equity would harness the power of legalization to promote rehabilitation and growth in vulnerable communities.

The war on drugs has negatively and disproportionately impacted communities of color.58 Cannabis prohibition has had this effect as well.59 While White communities report similar or increased rates of cannabis use, Black or Brown communities experience much higher rates of arrest for cannabis possession.60 For example, in Buffalo, New York, total arrest rates for cannabis possession were cut in half from 2017 to 2018, while arrest rates for people of color during the same period increased.61 According to the American Civil Liberties Union in 2020, “black people are 3.6 times more likely to be arrested for marijuana, despite similar usage rates.”62

The full extent of the impact of cannabis prohibition on communities of color is outside the scope of this introductory piece. Still, if the cannabis industry is going to enjoy an equitable future, it must reckon with its inequitable past. Efforts toward this goal tend to fall into two camps: (1) those focused on restorative justice and revitalizing communities hit hardest by prohibitionist policies; and (2) those focused on inclusion and minority participation in a more general sense.63

Many advocates recognize the hypocrisy of operating a legal cannabis market while inmates languish in state prisons for acts that no longer violate the law.64

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60 Crystal Peoples-Stokes, People of Color Were Targeted by the War on Drugs. They Must Benefit from Marijuana Legalization, Opinion, NEWSWEEK (Apr. 8, 2019, 6:00 AM), https://www.newsweek.com/people-color-marijuana-legalization-opinion-1381990 [https://perma.cc/5ZLK-UDA2].
61 Id.
63 These camps do not necessarily work at cross purposes, but rather focus on different social justice goals. The Last Prisoner Project, for example, works to free those incarcerated by prohibition era cannabis prosecutions by using legal efforts. See Last Prisoner Project Home Page, https://www.lastprisonerproject.org/ [https://perma.cc/K4E3-5ZQU] (last visited June 15, 2022). The licensing programs described in this Article, meanwhile, aim to increase minority participation in the cannabis industry of tomorrow.
Therefore, an equitable cannabis industry would need a holistic expungement mechanism to address the disproportionately low-income and minority populations incarcerated for cannabis-related offenses. In addition, while it is important to prioritize the participation of businesses of color in the newly legal cannabis industry, as discussed later in this Article, it may be necessary to target specific communities that continue to suffer from prohibitionist policies.66

One think tank has proposed channeling state or federal funding for community development, such as that which might be generated by cannabis tax revenue, to communities based on the severity of disproportionate incarceration. Illinois, for example, has identified “Disproportionately Impacted Areas” based on factors such as rates of arrest and incarceration for cannabis-related offenses, unemployment, and poverty.68 Whatever factors are appropriate in a given context to determine the disproportionate impact of prohibitionist policies, it may be necessary for cannabis legalization laws to target those communities hit the hardest by such policies.

A second strong theme in the cannabis equity discourse focuses on what the cannabis industry of the future will look like and how to distribute its benefits. This notion stems from a recognition that the winners of early legalization efforts tend to be well-capitalized, White, and/or male. An equitable cannabis industry surely requires broad participation and representation across demographic spectrums.

Early trends of representation show that White men predominantly own legal cannabis businesses. A 2019 report on women and minorities in the cannabis industry revealed a startling lack of diversity in legal markets. In Massachusetts, for example, only 1.2 percent of permitted cannabis businesses are owned by racial and ethnic minorities, compared to 11.5 percent of businesses in other industries. Moreover, only 4.7 percent of cannabis businesses are owned by women in the state, compared to 19.3 percent of businesses in other industries. In Maryland, minority-owned businesses did not receive any of the state’s fifteen initial cultivation licenses. As of 2019, 15.3 percent of cultivation licenses are held by racial and ethnic minority owners, while 23.1 percent of cultivation license holders are women.

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66 See infra notes 82–89 and accompanying text.

67 Henry-Nickie & Hudak, supra note 65, at 3.

68 Id.


70 See id. at 3.

71 Id. at 4.

72 Id. at 6.

73 Id. at 7.

74 Id.
Among others, two of the most significant reasons for these disparities are historic incarceration rates and a lack of access to capital. First, many minority communities may not be participating in the legal cannabis industry because cannabis business owners of those communities have historically been incarcerated at disproportionate rates. Many states that have legalized cannabis refuse to issue permits to individuals with past drug convictions, which tends to limit the ability of low-income communities to participate. Second, the federal prohibition on cannabis dramatically limits access to traditional capital-raising measures. Accordingly, cannabis businesses will, in most cases, need to be funded by an individual’s own wealth or that of their personal network. This too disadvantages historically low-income communities.

The frustrating permitting processes described above may ultimately exclude or frustrate all but the largest, wealthiest cannabis businesses. However, regulators can also harness the process to address and reverse inequities in the industry. Already some states are experimenting with licensing programs that prioritize underrepresented groups such as low-income and minority communities. In these jurisdictions, priority in licensing is given to communities hit hardest by prohibitionist policies. These permitting programs can serve as a model for other states to enact similar policies that ensure that the cannabis industry is represented by a diversity of voices and communities.

In Massachusetts, for example, regulators have given priority of review to license applicants who qualify as “Economic Empowerment Applicants.” Applicants must meet certain criteria, such as majority ownership by an individual living in a community disproportionately impacted by the prohibition era.

In addition, Massachusetts has developed a social equity program for cannabis business owners. The program provides training and technical assistance to would-

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76 Id.

77 See Sam Kamin, Marijuana Law Reform in 2020 and Beyond: Where We Are and Where We’re Going, 43 SEATTLE U. L. REV. 883, 889 (2020) (“[W]hen marijuana businesses are unable to gain banking services, they must pay things like payroll, taxes, and licensing fees in cash. . . .”).

78 See Johnson, supra note 75.


80 Id.

be licensees to understand the regulatory process and move through it effectively. The program recognizes that navigating the regulatory landscape is challenging to begin with and many applicants may require assistance to demonstrate their business meets regulatory requirements.

California and its local jurisdictions have taken admirable steps in this regard as well. In 2020, the state set aside $23 million to be disbursed directly to low-income and minority licensees in the form of low-interest or no-interest loans and grants. Loan or grant programs such as these may be necessary in order to address the lack of start-up capital available in the cannabis industry, particularly for low-income or minority-owned start-up businesses.

The city of Oakland has committed to issuing half of all cannabis business licenses to “Equity Applicants.” These are applicants who were convicted of a cannabis crime or reside in the hardest hit areas of the city during the prohibition era and whose income is below 80 percent of the city’s median income. The program represents one of the strongest commitments to allocating the benefits of legalization to those hit hardest by the prohibition era.

These early attempts to use state or local government licensing authority to address inequities in emerging legal cannabis markets should be applauded. It is possible that, in the future, evidence or rumors of foul play will emerge as future applicants try to abuse the system. And of course, more is needed to address these inequities. But these programs—by providing regulatory assistance, start-up capital, or simply priority in licensing—offer a promising toolkit for regulatory authorities across the country.

Of course, while equity is at the forefront of many stakeholders’ minds, cannabis regulators face other challenges as well. Among other matters, cannabis implicates agriculture and the environment, law enforcement, incarceration and restorative justice, regulation and taxation, intellectual property, labor, transportation, manufacturing, marketing, consumption, and public health. Regulators and other stakeholders must overcome many obstacles on the road to a prosperous and equitable legal cannabis marketplace.

This Part provided a big-picture snapshot of the cannabis industry in 2023, as well as a selection of the existential challenges the industry must address. First and

82 Id.
83 Id.
84 CAL. CANNABIS ADVISORY COMM., supra note 53, at 3.
86 Id.
foremost, it is important to recognize the steady but uneven march toward legalization while keeping an eye on the federal prohibition and the disruptive force federal legalization would represent. Thirty-eight states have legalized medicinal cannabis use, while twenty-three have legalized recreational use.\textsuperscript{88} The era of prohibition is coming to a close, but that does not mean that the new era of legal markets will be an easy one for stakeholders.

Equity and participation in legal markets are at the forefront of these challenges. As states create new regulatory frameworks, many small businesses struggle to keep up with or navigate new requirements. And while the war on drugs hit low-income and minority communities the hardest, those communities are not proportionately represented in the legal cannabis business community.

The year 2024 will be exciting for the cannabis industry as it heads for another round of voter initiatives that November, and with them, the potential for new entrants in the legal cannabis landscape. But, as industry stakeholders know all too well, legalization is only the beginning of the story. The rest of the story is sure to present many obstacles to overcome.

II. FEDERAL CANNABIS POLICY FOR INDIAN TRIBES

Of the 56.6 million acres of tribal or native-owned lands in the United States, approximately 3 million acres are agricultural lands.\textsuperscript{89} Compare that to California’s cannabis footprint—approximately 2,000 acres of land is dedicated to outdoor cannabis agriculture—and it is clear that tribal agricultural lands have the capacity to become a major player in the cannabis industry.\textsuperscript{90} Of course, not all tribal agricultural lands are suitable to growing cannabis, and a significant amount of cannabis in California and elsewhere is grown indoors. Nonetheless, if there is a limiting factor concerning tribal cannabis development, it is unlikely to be a lack of space for warehouses or land for agriculture. Instead, the current tribal cannabis landscape is influenced and shaped by a mixture of Federal Indian law, federal cannabis policies related to tribes, and tribal policies with respect to cannabis. The first two of these factors are explored in this Part. Tribal cannabis policies and trends are analyzed in Part IV below.

A. Federal Indian Law in the Cannabis Legalization Era

To analyze the contours of federal Indian law during the cannabis legalization era requires an understanding of when the cannabis legalization era began. Unfortunately, cannabis legalization has been a patchwork process, and the

\textsuperscript{88} NAT’L CONF. STATE LEGISLATURES, supra note 12.

\textsuperscript{89} Debra L. Donahue, \textit{A Call for Native American Natural Resources in the Law School Curriculum}, 24 J. LAND RES. & ENV’T L. 211, 211 (2004).

legalization era does not have a consensus starting point. The first sign of détente between governments and cannabis users may have come as early as 1973, when Oregon became the first state to decriminalize marijuana possession.\(^91\) California’s medical marijuana legalization initiative in 1996 represents the first major breakthrough for the cannabis industry as it established a somewhat legal market for cannabis businesses to develop.\(^92\) The 2012 election cycle, when Colorado and Washington became the first states to legalize recreational cannabis use, kick-started the modern wave of legalization initiatives that have produced the patchwork state of legalized cannabis in the United States today.\(^93\) Each of these milestones could arguably represent the beginning of the modern cannabis industry. But because of its out-sized impact on the development of the modern legal cannabis industry, California’s 1996 legalization initiative will serve as a reference point when compared to federal Indian policies of the twenty-first century.

\[Figure 2.\] The Federal Bureau of Indian Affairs’ map of the Indian Lands of Recognized Tribes. Comparing this map of tribal lands with the jurisdictions shown in Figure 1 makes clear the potential conflicts between tribal and state cannabis policies.\(^94\)

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92 HARTMAN, supra note 2.
93 Id.
A complete history of federal Indian law is beyond the scope of this Article, not to mention the author’s expertise. However, in this Part, a very brief synthesis of federal Indian law is introduced in order to place tribal cannabis agriculture policies in an appropriate context. Klein et al. provide a helpful introduction:

Throughout the history of the United States, federal policy toward Native Americans has shifted many times, oscillating between the often-conflicting goals of recognizing and protecting tribal autonomy, on the one hand, and assimilating Native Americans into the majority society primarily shaped by European norms, on the other. . . . One legacy of these drastic shifts in federal policy toward Native Americans is that the question of jurisdiction lies at the heart of many disputes about American Indian natural resources—whether the federal, state, or tribal government has authority to make resource decisions, and within what bounds.95

The impact of these oscillations has been profound, divesting many tribal lands from the tribes themselves. For better or for worse, the current dynamic between tribes and the federal government is one that recognizes the general autonomy of tribes to govern themselves and manage their resources, while the federal government maintains a trustee role, holding land in trust for the benefit of recognized tribes.96 This trustee relationship means that tribes do not have full autonomy over their lands or resources, and ensures that federal agencies will continue to dictate policies that influence tribal economic activity. The uncertainty created by this dynamic often means that tribes do not have the freedom to rapidly adapt to changing economic environments.97

Recent federal court decisions have added additional uncertainty with respect to state authority in Indian country. Historically, the U.S. Supreme Court has limited state authority in Indian country absent congressional authorization.98 In White Mountain Apache Tribe v. Bracker, for example, the Court held that state jurisdiction in Indian country is preempted when it interferes with tribal self-governance.99 Similarly, the Court ruled in California v. Cabazon Band of Mission Indians that states do not have the authority to regulate non-criminal activity (such as, in the case

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of Cabazon, gaming) on tribal lands. Bracker and Cabazon would suggest that tribes should have similar regulatory freedoms over the cannabis industry in states where cannabis economic activity has been decriminalized.

However, the Supreme Court’s most recent case on the subject, Oklahoma v. Castro-Huerta, casts doubt on tribes’ freedom to regulate cannabis without state interference. In Castro-Huerta, the Court ruled that states have concurrent jurisdiction (along with the federal government) over crimes committed by non-Indians in Indian country. The ruling suggests that states may have authority to regulate cannabis activities by non-Indians in Indian country, notwithstanding conflicting tribal laws purporting to do the same.

The full implications of Castro-Huerta are not yet known. However, the uncertainty created by the federal government’s trustee role, and the Supreme Court’s recent Indian law decisions, has become an evident shortcoming in the rapidly evolving legal cannabis landscape. As explored below, it does not help that the federal government’s stance with respect to cannabis grown on tribal lands has been ambiguous at best.

B. Federal Cannabis Policy for Indian Tribes

Until 2013, federal cannabis policy as it related to Native American Indian tribes was fairly straightforward: the national marijuana prohibition created by the Controlled Substances Act applied to Native Americans and tribal lands as it did for any other individuals or jurisdictions in the United States. Marijuana’s listing as a Schedule I drug under the CSA did not create exemptions for tribes or their citizens. That is in contrast to the CSA’s Schedule I listing for peyote, which does provide an exemption for American Indian ceremonial use. The marijuana listing requires that the federal government strictly regulate cannabis and the cannabis industry, whether or not cannabis-related activities are taking place on federal, state, tribal, or private lands. In other words, prior to 2013, the federal government’s stance toward tribal cannabis activity was that it was prohibited.

1. Cole Memorandum

In 2013, the U.S. Department of Justice published the “Cole Memorandum,” a memo from Deputy Attorney General James Cole to the Department’s attorneys that outlined the federal government’s “enforcement priorities” with respect to cannabis activity. These priorities asked U.S. attorneys to focus on the more egregious

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104 Native American Church, 21 C.F.R. § 1307.31 (2005).
105 SACCO, supra note 31, at 1–3.
106 Cole Memorandum, supra note 34 (providing guidance on marijuana enforcement).
harms of cannabis activity, including sales to minors, public health and environmental damage, and the funding of “gangs and cartels.”

The memo’s more symbolic aim was perhaps to signal that the federal government would be stepping back from the business of cannabis prohibition enforcement and leaving regulatory activity to the states—so long as these enforcement priorities were kept under control. The Cole Memo suggested that an individual or business in compliance with state cannabis laws and not in conflict with the Cole Memo’s enforcement priorities would not be prosecuted by the federal government.

Notably, however, the Cole Memo did not mention Indian tribes or provide any assurance that the freedoms the federal government were giving to the states were also being given to the tribes. In fact, several of the Cole Memo’s enforcement priorities implied the opposite. Priority 3 asks U.S. attorneys to enforce the prohibition on cannabis commerce between states where cannabis is legal and states where it is illegal. Would that prohibit cannabis activity on Indian reservations that cross state lines? More alarmingly, Priority 8 prevents “marijuana possession or use on federal property.” Federal property is defined by federal law to include Indian trust land such as reservations. Without an exemption for Indian country, the Cole Memo could reasonably be interpreted to prioritize U.S. enforcement of cannabis prohibition in Indian country. These ambiguities raised alarms in tribal communities, many of whom sought clarification.

2. Wilkinson Memorandum

Fourteen months later, some tribes breathed a sigh of relief when the DOJ released the Wilkinson Memorandum. The 2014 Wilkinson Memo directly addressed federal cannabis policy as it related to tribes and tribal lands. Though short on specifics, the Wilkinson Memo clarified that the eight enforcement priorities of the Cole Memo would remain enforcement priorities with respect to cannabis activities in Indian country.

This might suggest that tribes were free to legalize and regulate cannabis cultivation and sale so long as those activities did not conflict with the DOJ’s enforcement priorities. However, the memo reserved the federal government’s right to “enforce federal law in Indian country,” and required U.S. attorneys to consult with tribes regarding cannabis policies and enforcement actions.

107 Id.
108 Id.
109 Id.
112 “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.” Id.
113 Id.
Read in its entirety, the Wilkinson Memo does not strike a deferential tone. While recognizing the complexity of tribal governance, including in the cannabis space, the Memo is short on guarantees or assurances, and repeatedly reserves the DOJ’s right to take enforcement actions in accordance with its interpretation of any given circumstance. Nonetheless, by clarifying that the Cole Memo’s eight enforcement priorities vis-à-vis the states would also represent the DOJ’s enforcement priorities vis-à-vis the tribes, the Wilkinson Memo appeared to place tribes on similar footing. At the very least, the memo helped clarify that Priority 8 (preventing marijuana possession or use on federal property) would not be interpreted to include all marijuana possession or use on tribal lands.


About eight months after the Wilkinson Memo was published, the Drug Enforcement Administration (“DEA”), the Bureau of Indian Affairs (“BIA”), and the state of California raided two relatively large-scale tribal cannabis cultivation operations. In total, the raid confiscated 12,000 plants between northern California’s Pit River Tribe and Alturas Tribe. Both tribes were growing cannabis in dozens of greenhouse facilities located on reservation lands. Given the brief amount of time that had elapsed since the Wilkinson Memo’s release, the raids might have initially signaled that the federal government was not planning on giving tribes any deference when it came to cannabis policy.

According to the federal government’s search warrant affidavit, however, there is reason to believe that neither tribe had fully complied with the Cole and Wilkinson Memos’ enforcement parameters. The affidavit alleged that neither tribe had meaningfully consulted with the U.S. Attorney’s Office with jurisdiction over the reservations, and in fact had been informed by the office that cannabis activities “on the scale contemplated by the two tribes is a violation of federal law.” The affidavit further alleged that the entities responsible for conducting the growing operations had not obtained consensus from their tribe as a whole. Finally, the cannabis being grown was not being adequately tracked and traced in order to ensure compliance with California law (which still had not legalized recreational marijuana use).

Taken together, the affidavit paints a picture of two fairly extensive growing operations that were testing the limits of the federal government’s willingness to defer to tribal cannabis operations. As neither tribe appeared to have followed a transparent or collaborative approach, the raids could not be interpreted as an

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114 Julian Brave NoiseCat, These American Indian Tribes Legalized Weed. But that Didn’t Stop Them from Getting Raided by the Feds, HUFFINGTON POST (Sept. 9, 2015), https://www.huffpost.com/entry/pit-river-marijuana-raid_n_55a938ce8ce4b064b8b8e52a [https://perma.cc/Q3F7-TUFN].
116 Id.
117 Id.
indication that no cannabis cultivation would ever be permitted in Indian country. However, the raids did disabuse stakeholders of the notion that tribes would be given free rein to cultivate cannabis on tribal lands.\footnote{NoiseCat, \textit{supra} note 114.}

A month after the raids, a bill proposed in the U.S. Senate called for an outright cannabis prohibition on tribal lands. The Keeping Out Illegal Drugs Act, if passed, would have prohibited tribes from cultivating or distributing cannabis on tribal land.\footnote{Keeping Out Illegal Drugs Act of 2015, 114 S.1984 § 4 (2015), https://www.govinfo.gov/content/pkg/BILLS-114s1984is/pdf/BILLS-114s1984is.pdf [https://perma.cc/FPB7-RLY3].} The proposed penalty for doing so: a complete withholding of federal funds.\footnote{\textit{Id.} at § 5.} The bill did not become law.\footnote{S. 1984, 114th Cong. § 1 (2015), https://www.govinfo.gov/app/details/BILLS-114s1984is/related [https://perma.cc/5E9V-NCZN].} Nonetheless, the California raids and the proposed prohibition bill signaled that tribal cannabis activities were receiving increased scrutiny.

4. \textit{Sessions Memorandum}

Whatever guidance or assurances the Cole and Wilkinson Memos may have provided evaporated in 2018, when U.S. Attorney General Jeff Sessions issued a one-page memo of his own on the subject of cannabis prohibition enforcement.\footnote{Memorandum from Jefferson B. Sessions on Marijuana Enforcement to All U.S. Att’ s, (Jan. 4, 2018) https://www.justice.gov/opa/press-release/file/1022196/download [https://perma.cc/L3S6-TT47].} Noting that the CSA remains in force, the Sessions Memo expressly rescinded the Cole and Wilkinson Memos, dismissed them as unnecessary, and directed U.S. Attorneys to weigh “all relevant considerations” when deciding whether or not to pursue cannabis-related prosecutions.\footnote{\textit{Id.}}

Though the Cole and Wilkinson Memos were rescinded, they were not replaced. No subsequent guidance regarding federal enforcement of cannabis prohibition was issued by the Sessions DOJ. That said, the strong anti-cannabis stance may have been a largely political posture. A study of federal cannabis-related prosecutions in the two years after the Sessions Memo was published found that the DOJ’s enforcement priorities mostly reflected the enforcement priorities laid out in the Cole Memo.\footnote{Tom Firestone, \textit{The Sessions Memorandum: Two Years}, \textit{GLOBAL CANNABIS COMPLIANCE BLOG} (Jan. 6, 2020), https://globalcannabiscompliance.bakermckenzie.com/2020/01/06/the-sessions-memorandum-two-years-later/ [https://perma.cc/445M-JKHD].} From 2018–2020 the DOJ prosecuted around 50 cannabis-related cases, and almost all of them reflected a Cole Memo priority (such as organized crime or associated use of firearms). In cases where a Cole Memo enforcement priority was not implicated, defendants were either operating in states where cannabis had not yet been legalized, or defendants were accused of public

\footnote{NoiseCat, \textit{supra} note 114.}


\footnote{\textit{Id.} at § 5.}


\footnote{\textit{Id.}}

\footnote{Tom Firestone, \textit{The Sessions Memorandum: Two Years}, \textit{GLOBAL CANNABIS COMPLIANCE BLOG} (Jan. 6, 2020), https://globalcannabiscompliance.bakermckenzie.com/2020/01/06/the-sessions-memorandum-two-years-later/ [https://perma.cc/445M-JKHD].}
According to the study, no cannabis businesses that were compliant with state cannabis laws and did not conflict with a Cole Memo enforcement priority were ever prosecuted.  

That’s not to say that tribes were given a free pass during the time period. According to one report, members of the Paiute Tribe of Nevada were told by federal officials to put their plans to cultivate or sell cannabis on ice. At the time, Nevada had already legalized recreational cannabis use, and the state had negotiated a state-tribal compact that would organize and authorize cannabis economic activity between tribes and the state. Nonetheless, the Paiute Tribe received word that the BIA and DOJ were prepared to prosecute if the tribe moved forward with their plans to operate dispensaries on the reservation.

5. Farm Bill of 2018

In late 2018, the Agricultural Improvement Act of 2018 (also known as the Farm Bill of 2018) advanced federal cannabis legalization by removing “hemp” strains of cannabis from the Controlled Substances Act. Under the bill, hemp is defined as cannabis with a THC content less than 0.3%. Unlike the Cole Memo, the Farm Bill explicitly includes tribes in its language authorizing hemp production. In fact, in the Farm Bill’s section on hemp production (Subtitle G), the phrase “State or Indian Tribe” is mentioned 12 times; the phrase “state or tribal” is mentioned 21 times; and the phrase “State or territory of the Indian tribe” is mentioned 3 times. There is no doubt that Congress intended for tribes to be on the same or similar footing as the states when it came to legalizing and regulating hemp production.

In 2021, the U.S. Department of Agriculture published its final rule outlining the steps states and tribes must take to receive federal authorization to produce hemp. The primary requirement for both states and tribes is the submission and approval of a hemp production plan, which should include information about the land being used for production, measures taken to issue and monitor cultivation permits, and methods used to ensure compliance with the 0.3% THC limit. The USDA rule

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125 Id.
126 Id.
129 MJFeed, supra note 127.
131 Id.
132 See id. (calculations made by the author).
133 Establishment of a Domestic Hemp Production Program, 7 C.F.R 990 (2021)
also granted broad jurisdicitional authority to tribal regulators, stating that as long as an approved hemp production plan is in place, “an Indian Tribe may exercise jurisdiction and therefore primary regulatory authority over all production of hemp in its Territory regardless of the extent of its inherent regulatory authority.”

Thus, tribes should be able to regulate hemp production by non-Indians operating on lands that qualify as territory of an Indian tribe.

As of January 3, 2023, fifty-three tribes have a hemp production plan approved by the USDA. An additional seven tribes have a “hemp producer license,” and one tribe has a plan that is currently under review. It is clear that many tribes are moving rapidly to take advantage of this new opportunity. Hemp production can be used to supply many different products, and hemp agriculture is often soil regenerative. Granting broad discretion to tribes to cultivate and sell hemp presents a significant opportunity for tribal agriculturalists.

Of course, critics of hemp legalization argue that since non-psychoactive cannabis plants (defined on paper as hemp) look the same as psychoactive cannabis plants (defined on paper as marijuana), it can be difficult to distinguish hemp cultivation from marijuana cultivation. As a result, hemp production can be used as a guise for illicit marijuana activity. Indeed, one of the largest tribal cannabis raids to date occurred on Navajo Nation lands in 2020, when the FBI confiscated a whopping 250,000 psychoactive cannabis plants that growers had been claiming as non-psychoactive hemp.
It is too soon to tell which direction the tribal hemp industry will take. But the 2018 Farm Bill and 2021 USDA Hemp Production Rule provide reason for optimism. Tribes have broad authority to develop hemp agriculture industries of their own. Doing so may provide a bridge to a future in which growing psychoactive strains is less fraught. For the moment, psychoactive cannabis agriculture still presents risk and uncertainty. But tribes may benefit from incremental progress in the cannabis space by launching and developing hemp production plans.

6. Federal Cannabis Enforcement on Tribal Lands: 2023 and Beyond

So, where are we now? The current U.S. Attorney General has signaled an informal return to the enforcement priorities of the Cole and Wilkinson Memos. As recently as April 2022, Attorney General Merrick Garland reiterated his position that prosecuting marijuana use and possession is not an efficient use of federal resources. The statement echoed Garland’s previous remarks during his confirmation hearings that he would not ask U.S. Attorneys to prioritize state-compliant marijuana activity. However, Garland has not addressed cannabis cultivation or sale in Indian country, nor has he formally reinstated the Cole or Wilkinson memos.

The Bureau of Indian Affairs, an agency within the Department of the Interior, has done its part to create confusion for the tribal cannabis industry. In September 2021, the BIA raided and confiscated nine plants from a home garden grown on the Picuris Pueblo tribe’s land in New Mexico. The grower appeared to be in compliance with both state and tribal cannabis regulations, having received a medical marijuana license from the state that permitted cultivation for personal use, while tribal law decriminalized marijuana possession. Still, the BIA interpreted the garden to be in violation of federal law and informed the tribe that it would not stand down in the face of violations of the federal cannabis prohibition.

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144 Id.
The raid is confusing on many fronts, not least because it appeared to target a very small at-home garden that would, theoretically, not conflict with the Cole or Wilkinson Memo’s enforcement priorities. The BIA is not obligated to follow the DOJ’s enforcement priorities—much less priorities that have since been formally rescinded. But this type of sporadic enforcement of federal cannabis prohibition is at best confusing and possibly discriminatory.

In March of 2022, nine U.S. Senators sent a formal request to Attorney General Merrick Garland, asking him to respect tribal sovereignty by not enforcing the CSA as it relates to tribes growing or selling cannabis.\textsuperscript{145} The letter subtly asks the DOJ to reinstate the Cole and Wilkinson Memos in order to formally authorize U.S. Attorneys to deprioritize cannabis activity that is compliant with tribal rules and regulations.\textsuperscript{146} The DOJ has not taken the action requested in a formal way, and of course the letter of request does not have any legal effect. But it serves as an indication that in some corners of the federal government, there are forces working to give tribes more autonomy and control over their own cannabis industries.

Where federal policy with respect to tribal cannabis will go from here is uncertain. The trend is toward more freedom and a hands-off approach from the federal government, though movement in that direction has been uneven. The BIA and DOJ may not always be moving in lockstep with each other, which creates further confusion. Nonetheless, tribes are moving forward and developing cannabis economies. In the next Part, these multitude of approaches are identified and explored.

III. TRIBAL CANNABIS POLICIES: TRENDS AND CHALLENGES

It should go without saying that each tribe has its own unique history, culture, and experience when it comes to cannabis. This Article does not attempt to inventory every tribe’s approach to cannabis agriculture in the United States. Rather, this Part identifies the most prevalent approaches while assessing the trends and challenges associated with those approaches. Many tribes are continuing a long-standing policy of prohibition. Others are treading lightly, decriminalizing or legalizing possession and use but staying away from getting involved in the industry or licensing cannabis businesses. Many tribes have jumped into the fray, however, and are cultivating cannabis themselves (meaning the tribe itself is leading cultivation efforts) or are authorizing and licensing cannabis cultivation on tribal lands. In some cases, tribes have managed to partner with non-tribal entities, and are entering into compacts with states in order to participate in state cannabis markets.


\textsuperscript{146} Id.
A. Prohibition Continuity

Many tribes’ approach to cannabis has reflected a desire to maintain the status quo of prohibition. Perhaps the most prominent prohibitionist tribe is the Navajo Nation. The Navajo Nation is the largest Native American tribe by land area in the United States, the second most populous in total members, and the most populous reservation. It shares a border with Arizona, New Mexico, and Utah, states that have legalized recreational cannabis use (Arizona and New Mexico) or medicinal cannabis use (Utah). Nonetheless, the Navajo Nation maintains a strict policy of prohibition on Navajo lands. While there might have been some ambiguity regarding the tribe’s enforcement priorities in the past, the high-profile raid of illegally grown cannabis on Navajo Nation described in Part III above prompted the tribal government to clarify that even low-THC hemp strains would be prohibited. And in general, the tribe’s criminal code states a “zero tolerance policy” for marijuana possession, distribution, or use, regardless of quantity or reason for use.

The second most populous reservation in the United States, the Osage Reservation of Oklahoma, maintains a similar policy of prohibition. After Oklahoma voters legalized medicinal cannabis use in 2018, the Osage Nation Police Department published a statement clarifying that the state’s measure would have no effect on the tribe’s long-standing enforcement of the federal government’s prohibition policy. The statement notes that as long as marijuana is federally classified as a Schedule I drug, marijuana would remain illegal to possess “for any reason in Indian Country jurisdiction.”

The Yakama Tribe of Washington issued a similar statement in the wake of Washington voters’ successful recreational cannabis legalization initiative in 2012. The fourth most populous reservation comprising 1.2 million acres, the Yakama

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148 HARTMAN, supra note 2.


150 See NAVAJO NATION CODE tit. 17, § 391(A).


Tribe made clear that marijuana businesses seeking to grow, sell, or distribute are “not welcome on Yakama Nation lands.”153 The tribe has, however, rolled out a regulatory framework for the production of hemp.154

There are several reasons why tribes may not want to deviate from the longstanding prohibitionist policies of the federal government. For some, the risk of prosecution may not be worth the rewards. While many observers assume that cannabis cultivation is a lucrative endeavor, recent developments in legal markets suggest otherwise. The surge in cultivation spurred by legalization, and a lack of acreage limits or output caps from regulators, has led to a fall in cannabis prices that threatens the viability of the industry.

In California, wholesale cannabis prices have fallen 95 percent since recreational legalization in 2016.155 In Humboldt County, formerly the heart and soul of the American cannabis agriculture industry, 60 percent of farms have gone out of business.156 Drops in prices have also hurt farmers in Oregon,157 Michigan,158 and Colorado.159 Even the largest multi-state operator retail companies like Curaleaf and MedMen are facing difficulties as Curaleaf has scaled back operations and MedMen has struggled to stay viable in the face of unfavorable market conditions.160

153 See Yakama Nation Keeps Marijuana Illegal on Reservation, 500 NATIONS (Oct. 27, 2013), https://www.500nations.com/Washington-Cannabis.asp [https://perma.cc/54BV-HCKU] (“[T]he citizens of Washington lack the authority to legalize recreational pot use on tribal lands. We want to put out public information for those that want to grow, sell and distribute that they are not welcome on Yakama Nation lands.”).


156 Id.


These signs suggest that the “green rush” may be over, and cannabis cultivation will not produce the lucrative margins it did during the prohibition era. For tribes in or near these markets, shrinking profit margins may not be worth the risk of prosecution and conflict with the federal government. The 2020 Navajo Nation raid is an illustration of the risk. If profits aren’t likely, some tribes might ask, why provoke conflict with the federal government?

For other tribes, prohibitionist policies are inextricably motivated by a long and painful history of drug and alcohol abuse. Native Americans have the highest rates of marijuana, alcohol, and cocaine use disorders compared to other ethnic groups. Nonetheless, very few Native Americans have access to treatment options. According to the Substance Abuse and Mental Health Services Administration, 13 percent of Native Americans need substance abuse treatment, but only 3.5 percent receive it.

A full treatment of this complex topic is beyond the scope of this Article, but it is clear that there is a gap in services available to tribes and their members that may make many tribes hesitant to legalize drugs of any kind. Although there is strong evidence that cannabis is not a drug of abuse in the same vein as alcohol, opiates, or amphetamines, some tribes may not be willing to experiment with drug liberalization given this history.

A third reason to maintain prohibition may simply reflect a wait-and-see approach. As this Article demonstrates, the federal government’s stance toward tribal cannabis agriculture is ambiguous, and likely still developing. Some tribes may benefit from being first movers in the cannabis space, but others are likely to fail. There may be a benefit for some tribes to observe and learn, and then jump in.

### B. Legalization and Decriminalization

For many tribes, as well as states and cities, the first steps toward cannabis legalization were often to decriminalize or legalize personal use and possession of cannabis in small quantities. As mentioned above, Oregon became the first state to decriminalize possession of marijuana in 1973. Even California’s medical
marijuana legalization initiative in 1996, as significant as it was, did not create a regulatory framework for business licensing. Many states today are jumping into the legalization era head on by authorizing legal markets and business activity. But the smaller step of decriminalizing or legalizing individual possession or use remains appealing to more cautious jurisdictions.

The Picuris Pueblo Tribe of New Mexico, whose raid by BIA agents was described in Part III above, decriminalized medicinal marijuana use for its tribal members in 2015. In 2021, the Choctaw Nation Tribal Council passed a resolution temporarily decriminalizing medicinal marijuana use on the Choctaw reservation. That same year, the Northern Arapaho Tribe also decriminalized medical marijuana, while the Eastern Band of Cherokee Indians decriminalized and then legalized “small amounts of marijuana for medicinal and health reasons.”

A major downside for any jurisdiction that chooses to decriminalize or legalize small amounts of possession or use is that the approach turns a blind eye to all other aspects of the supply chain that allowed individual use to happen. Cultivation and distribution are inevitably occurring even though they are prohibited, and maintaining prohibitionist policies with respect to those processes means they will remain on the illicit market, where the jurisdiction has little to no oversight or control. For tribes, this means not having control over or information about, where the cannabis consumed on tribal lands comes from, how it was grown, or what characteristics it contains for consumers. Individual transactions may present more risk since they are unregulated.

More importantly, perhaps, tribes that have stopped at this step may be losing out on economic opportunities for themselves and their members. In the next

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See Hartman, supra note 2; Cal. Health & Safety Code § 11362.5.


Melinda Smith, Comment, Native Americans and the Legalization of Marijuana:
Sections, this Article explores tribal cannabis policies that reflect an embrace, in one way or another, of the economic opportunities that the cannabis industry presents.

C. Cannabis Agriculture on Tribal Lands

A fair number of tribes have embraced cannabis agriculture in one of two ways. In the first approach, some tribes are cultivating cannabis themselves, participating in the cannabis market directly by developing cultivation infrastructure and expertise on behalf of the tribe or an associated tribal entity. This first approach has the advantage of channeling the economic benefits of cannabis cultivation directly to the tribe, while ensuring that the tribal government’s regulatory oversight demands stay low. While this approach has not been embraced by the states, many tribes have experience with an analogous version of this model in the form of tribal-run casinos. This experience with the gambling industry may be catalyzing direct tribal involvement in cannabis economic activity.

The Puyallup Tribe in the state of Washington is the third most populous reservation in the United States and was the first tribe in the state of Washington to grow, test, and sell cannabis following the state’s recreational legalization initiative in 2012. The tribe cultivates cannabis on reservation lands, with full control over agricultural operations. The tribe’s cannabis ordinance creates a tribal cannabis committee responsible for creating rules and regulations for cannabis cultivation, hiring employees, and ensuring compliance with tribal laws. The ordinance includes agricultural regulations the tribe must follow regarding pesticides, nutrients, and testing requirements. Finally, the ordinance prohibits any entity other than the Puyallup Tribe from engaging in cannabis economic activity on the tribe’s reservation lands.

The Oneida Indian Nation in New York is pursuing a similar model, investing in a 50,000 square foot tribally operated cultivation facility, with plans to sell and collect taxes. And the Flandreau Santee Sioux Tribe of South Dakota, already operating a 10,000 square-foot facility, is expanding with the construction of two new tribe-run growing facilities.
In the second approach, tribes are issuing cultivation licenses to growers seeking to grow on tribal lands. This model is similar to the approach taken by most states, in that the government acts as licensor and regulator, while attempting to foster the growth of a new legal market within the jurisdiction. This approach is appealing for several reasons. First, the tribe itself is not directly involved in cannabis cultivation, distribution, or sale, and therefore is not at significant risk of prosecution. Second, the tribe may still be able to generate revenue through licensing fees and taxes.

The St. Regis Mohawk Tribe of New York, for example, legalized recreational cannabis use in 2021, and adopted a cannabis ordinance that creates regulatory agencies responsible for overseeing cannabis economic activity on the reservation. In particular, the ordinance allows tribal members (or businesses owned by tribal members) to apply for and receive cannabis cultivation licenses, and thereafter be subject to the tribe’s cannabis cultivation license requirements. The cultivation regulations include a requirement to provide up to 30 percent of cannabis grown to the tribe’s “tribal cannabis exchange,” an entity responsible for setting prices and distributing cannabis to retail stores, and significant fees are collected from licensees at all stages of the supply chain.

Similarly, the Oglala Sioux Tribe of South Dakota passed a cannabis ordinance that allows tribal members to grow and sell cannabis on the Pine Ridge Reservation. The reservation only has a few licensed operators, and a mixture of cultivation approaches, but the tribe and its cannabis businesses are optimistic that cannabis licensing will remain sustainable and profitable for all stakeholders. The Pine Ridge reservation is located in the poorest county in the United States, so cannabis licensing and cultivation may represent a promising source of economic relief.

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177 _Id. at § 4.01 to 4.03._

178 _Id. at § 4.02._

179 _Id. at § 6.01._


182 _MARIJUANA BUS. DAILY, supra note 180._
There is a possible third approach to cannabis agriculture for tribes: bypass the cultivation process altogether by purchasing cannabis in bulk from licensed growers unaffiliated with the tribe and sell the cannabis under the tribe’s name or brand. The Suquamish Tribe of Washington follows this approach, purchasing cannabis from growers licensed by the state, then packaging and selling the cannabis under the tribe’s house brand. The tribe cedes control over agricultural operations under this approach, and of course must pay a price to skip the first step in the supply chain. But given low prices for bulk cannabis in many state markets, this approach may provide economic benefits while minimizing upfront costs and risks.

Figure 3. Tribal-owned cannabis retail businesses are still rare relative to the extent of state legalization efforts depicted in Figure 1 above.

As mentioned in Part III above, many tribes are also embracing cannabis cultivation in a non-psychoactive form by producing hemp. For some tribes, the hemp production path is being taken concurrently with the cultivation of psychoactive marijuana. Of the tribes mentioned above that have psychoactive marijuana cultivation operations, the Flandreau Santee Sioux Tribe, the St. Regis
Mohawk Tribe, and the Oglala Sioux Tribe have hemp production plans approved by the USDA.\textsuperscript{185}

In other cases, tribes are only authorizing hemp production. This might stem from a desire to reap the benefits of cannabis legalization without taking on the risk or potential downsides of embracing psychoactive strains of cannabis. The Yakama Tribe’s prohibitionist stance on psychoactive marijuana stands in contrast to the tribe’s embrace of hemp cultivation and its USDA-approved hemp production plan.\textsuperscript{186} Alternatively, tribes could be experimenting with hemp first in order to lay the groundwork for a marijuana agriculture regulatory framework in the future. The White Earth Indian Reservation in northern Minnesota, for example, embraced hemp production several years before the tribe adopted a medicinal cannabis code.\textsuperscript{187}

\subsection*{D. Non-Tribal Partnerships and State Market Participation}

Part III made clear that tribal rights and privileges when it comes to legalizing and developing cannabis markets on tribal lands are ambiguously defined at present. But it’s fair to say that whatever rights tribes do enjoy when it comes to embracing cannabis legalization, those rights are likely strongest with respect to activities conducted by tribal members and taking place on tribal lands. More complex is the notion that tribes may seek to create partnerships with non-tribal entities and participate in state markets. Many tribes are attempting to do both.

While partnerships with non-tribal entities and participation in state markets both present uncertainties and some legal risk, it is quite clear that there are benefits for the tribes. With respect to business partnerships with non-tribal entities, tribes may recognize that there are many cannabis businesses with significant experience and expertise in the cannabis industry that can be brought to the table. Whether cannabis is grown indoors or outdoors, creating vigorous growing environments requires technical expertise, and bringing cannabis to the market from seed to sale also requires know-how and experience. For tribes that are new to cannabis

\begin{thebibliography}{9}
\bibitem{187} See Bill Weinberg, Growing a Cannabis Economy on White Earth, PROJECT CBD (Nov. 20, 2020), https://www.projectcbd.org/culture/growing-cannabis-economy-white-earth [https://perma.cc/65F4-YVLW] (discussing the White Earth Indian Reservation’s adoption of hemp cultivation); see also WHITE EARTH BAND OF OJIBWE, MEDICINAL CANNABIS CODE.
\end{thebibliography}
agriculture, partnering with proven cannabis businesses can jump-start tribal cannabis markets. And for these businesses, tribes represent an attractive partner, one with self-governance and autonomy from the states, and a long-standing respect for medicinal horticulture.

The Shinnecock Nation, for example, runs its own vertically integrated cannabis cultivation, processing, and retail sale facilities, but does so in partnership with a private cannabis management firm. In exchange for providing some upfront capital, as well as cannabis management services, the firm will receive 11.25 percent of the tribe’s gross revenue, among other benefits.188 Not all such deals are successful; like all industries, some cannabis deals fall through. The Las Vegas Paiute Tribe’s cultivation and retail sale partnership with a private company specializing in cannabis healthcare products fell through shortly after being made public.189 There is a risk that tribes may be taken advantage of by more experienced cannabis firms. But many tribal-private partnerships may provide benefits to tribes as they navigate the evolving cannabis industry landscape.

Other tribes are finding success partnering with each other. The Native American Cannabis Alliance was formed in 2020 to build partnerships between tribal cannabis businesses, and signed preliminary agreements with Mohawk, Cheyenne, and Arapaho tribal members to promote cannabis cultivation on tribal lands.190 It may be too soon to judge the alliance’s success but given the regulatory complexity tribes face in getting their cannabis businesses off the ground, collaboration may be a shrewd approach to overcome these hurdles.

With respect to tribal-state compacts, it is fairly evident that tribal cannabis businesses may not succeed if they are required to conduct all their business on tribal lands. Growing cannabis on tribal lands is certainly feasible, but ideally the crop produced could be distributed and sold to markets outside the reservation. If tribal cannabis businesses cannot participate in state markets, they are likely to suffer from the geographic isolation many tribes face, and the consequent economic

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shortcomings that come from that isolation. Reservations often lack paved roads as well; over 90 percent of roads maintained by tribes are unpaved and may not be suitable to attracting consumers to the reservation.

For these reasons, negotiating compacts with the states is a critical path towards the sustainability of tribal cannabis markets. These compacts allow tribes or their licensed businesses to participate in state cannabis markets, including distribution across state-tribal lines. And generating tax revenue from cannabis sales on reservation lands may become a significant source of tribal tax revenue.

The Suquamish Tribe is believed to have been the first tribe to sign a tribal-state cannabis compact when it did so with Washington in 2015. As part of the agreement, the tribe successfully negotiated for benefits that state-licensed cannabis businesses are not entitled to, demonstrating the potential state-tribal cannabis compacts can have in the marketplace. Washington has negotiated compacts with other tribes as well, creating a more welcoming marketplace for tribal businesses. Nevada has taken a similar approach, signing compacts with multiple tribes in order to facilitate growth in its cannabis market and create opportunities for tribal businesses.

Many tribes, however, have not been able to secure an agreement with the states they share a border with. The Flandreau Santee Sioux, for example, operate their cannabis cultivation and retail facilities without a compact with the state of South Dakota. In some cases, the time and effort required may deter compact negotiations. And perhaps most problematically, California’s 110 federally recognized tribes are unable to participate in the state’s legal market unless they waive their right to sovereign immunity, a core power enjoyed by tribal governments. A legislative solution was proposed in 2017 that would have created

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191 See generally, Adam Crepelle, Decolonizing Reservation Economies: Returning to Private Enterprise and Trade, 12 J. BUS. ENTREPRENEURSHIP & L. 413, 455 (2019) (“Reembracing trade is essential to the tribal economic development.”).


195 NATIVE BUS., supra note 183.


199 Jocelyn Kane, Cannabis in the CV: California’s American Indian Tribes Are
a regulatory pathway for tribes to sign compacts with the state, but the bill was never passed. Consequently, tribes in California largely remain locked out of the country’s largest cannabis market and the future for tribal cannabis in California remains uncertain.

IV. THE HOOPA TRIBE OF CALIFORNIA: A BRIEF CANNABIS CASE STUDY

Though Part IV attempted to identify trends among tribal approaches to cannabis agriculture, it might go without saying that each tribe’s approach has been and will be unique. For that reason, this Article closes by providing a portrait case study of one tribe’s experience with cannabis legalization, and the complex dilemmas it presents. In my 2018 book, CRAFT WEED: FAMILY FARMING AND THE FUTURE OF THE MARIJUANA INDUSTRY, I wrote about the late Sonny Jackson (to whom this Article is dedicated), and his efforts to use cannabis to revitalize his community within the Hoopa Tribe of northern California.

Sonny passed away during the harvest season of 2021, but his legacy lives on. What follows is a brief portrait of the Hoopa Tribe and Sonny’s efforts to capitalize on the potential of cannabis agriculture.

A thousand years ago, tribal migrants settled into a fertile valley along the Trinity River in northern California. The valley is located near the Trinity’s confluence with the Klamath River, providing human settlers with plentiful fish stocks and an abundance of edible plants and game animals. In 1864, the Hoopa Tribe reluctantly signed a treaty with the U.S. government, setting aside lands in the valley for the Hoopa Valley Indian Reservation. The treaty allowed the Hoopa Tribe to stay on their ancestral lands, one of a small handful of tribes that weren’t forcibly removed from their homes. But the tribe’s relationship with the federal government quickly soured.


201 This Article benefited from research conducted by Brandon Nicolas in a student paper produced for Professor Mike Vitiello’s Marijuana Law Seminar at the University of the Pacific McGeorge School of Law. The paper provided a detailed analysis of Assembly Bill 924, its failure, and the implications for tribes in California. A copy of the paper is on file with the author of this Article. See also Amanda Chicago Lewis, How California Is Blocking Native Americans from the Weed Business, ROLLINGSTONE (Feb. 14, 2018), https://www.rollingstone.com/culture/culture-features/how-california-is-blocking-native-americans-from-the-weed-business-253651/ [https://perma.cc/WDJ3-PRQN].

202 STOA, supra note 43 at 183–94. The first Section of this Part adapts material published in Chapter 10 of the book.

A decade after signing the treaty, federal officials contemplated relocating the Hoopa Tribe further south, to a reservation set aside to house half of a dozen disparate tribes being driven from their homelands. Eventually the Hoopa Tribe negotiated the right to stay in the Hoopa Valley. Over the next several decades, the Hoopa developed a talent for agriculture. Historically reliant on aquaculture and traditional hunting and gathering techniques, the Hoopa Valley’s favorable climate, plentiful water, and rich soils encouraged the Hoopa to turn to farming instead. Hoopa farmers traded with neighboring tribes and White settlements and adopted European agricultural methods. Much to the frustration of federal officials, however, the Hoopa’s adoption of White practices was selective. The Hoopa Tribe embraced modern farming without losing their tribal identity, religious practices, or cultural traditions.

Unfortunately, there weren’t enough arable lands to go around. A federal agent observed that by the 1890s farming had possibly become too popular on the Hoopa Valley Reservation. At the time, federal officials were trying to determine how to divide the Hoopa Valley Reservation into plots they could allocate to individual Hoopa tribal members. The effort was part of a broader strategy designed to assimilate tribes into mainstream American culture. By transferring tribal lands to individual Indians, federal officials hoped that Indians would adopt European-American lifestyles, or eventually sell their lands to White settlers. On the surface the allotments seemed generous. In reality, they embodied a cynical deprivation of tribal resources.

The Hoopa, by every measure, didn’t fall for the trappings of the federal government’s allotment strategy. They accepted the land transfers, but did not allow private ownership of tribal lands to erode their cultural identities or economic customs. Many of the allotments reflected pre-existing arrangements between neighbors, and the scarcity of arable land forced Hoopa farmers to cultivate their crops on small-scale plots that encouraged subsistence farming.

Nonetheless, farming in the valley was dense and intense, and eventually soil quality and crop production diminished. The federal government allotted timber and grazing acreage to Hoopa members in 1918. Tribal leaders did their best to make

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204 Id.
205 Id. at 175.
206 The fact that white federal officials favored agriculture to subsistence hunting and gathering no doubt played a role as well.
207 CAHILL, supra note 203.
209 Id. at 99.
210 Id.
211 Id.
212 Id.
213 Id.
214 Id. at 102.
215 Id. at 103.
sure these allotments didn’t break up the Hoopa Tribe. Over time the allotment strategy succeeded in anglicizing some aspects of Hoopa culture, but for the most part, the tribe stuck together, refusing to be assimilated into mainstream American culture. Federal officials had a hard time making sense of it all.

The Hoopa Tribe couldn’t insulate themselves from the unrelenting might of the federal government forever. But a steely resolve and commitment to one another kept the community alive and the tribe’s values intact. As a tribal historian put it, “the people’s quiet, persistent refusal to abandon ancient beliefs had itself become a way of life in Hoopa Valley.”

Fast forward to 2023, and the Hoopa face a daunting challenge. Northern California remains a hotbed for cannabis agriculture and the lucrative returns it can provide. Within that environment, the Hoopa Valley represents a potential gold mine for cannabis farming. It enjoys the hot, dry summers cannabis plants crave during the growing season, as well as the wet winters that replenish water resources. And the Hoopa Valley is a rare haven of flat ground in an otherwise mountainous region.

But cannabis agriculture presents dilemmas for tribal leaders as well. Like many reservations, the Hoopa Reservation has a troubling history with substance abuse and a lack of healthcare services to address the problem. In a 2012 exposé on drug abuse in the Hoopa Valley, tribal leaders described the influence of illegal drugs and substance addiction as crippling for the community. The tribe’s lead physician described the problem as “absolutely overwhelming,” while the police chief was quick to associate substance abuse with cannabis cultivation in the area. Nearly ten years later, a protest was held on the reservation by friends and family of substance abuse victims to raise awareness of the ongoing substance abuse problem. It is not clear that cannabis cultivation has a causal connection with the substance abuse patterns observed in rural communities, but certainly it is understandable that some would be reluctant to embrace open cultivation of what was formerly an illicit drug.

Compounding this painful history is the state of California’s current inability to sign state-tribal compacts without requiring that tribes relinquish their sovereign immunity. Any tribe, such as the Hoopa, is more or less free to legalize and regulate cannabis activity on the reservation, but participation in California’s legal market is frustratingly limited without a compact in place. For a tribe like the Hoopa, who are

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216 Id. at 105.
217 Id.
219 Id.
located in a remote region of northern California more than six hours of driving away from San Francisco, it is difficult to imagine the tribe realizing its full potential in the cannabis industry without having the ability to move freely into the state market.

Nonetheless, the potential agrarian renaissance that cannabis cultivation represents is appealing for communities with few economic opportunities. For that reason, Sonny Jackson and other proponents championed the cause of legalizing cannabis cultivation. They saw the potential to bring jobs and skills development to the tribe, and since cannabis cultivation was happening all around the reservation, Jackson and others questioned why the tribe wasn’t also taking advantage of the economic opportunities California’s new legal market was presenting. The Hoopa Tribe’s consideration of the issue, however, demonstrates how challenging it can be for a tribe to embrace cannabis cultivation on the reservation.

When California voters passed Proposition 215, or the Compassionate Use Act, legalizing medicinal marijuana in 1996, the legislature infamously declined to pass legislation to regulate the new legal medical market. As a result, the California cannabis industry operated in gray, murky waters. Three years later, the Hoopa Tribe adopted the Marijuana Cultivation Suppression Ordinance, which, unsurprisingly, prohibits cannabis cultivation on the reservation and authorizes the tribe to exclude any members in violation from future membership in the Tribe.

But twenty years later, and two years after California voters legalized recreational cannabis and opened the floodgates to the legal cannabis industry, Sonny Jackson and other legalization advocates in the Hoopa community succeeded in overturning the suppression ordinance. The 2018 General Election of the Hoopa Valley Tribe included a ballot measure to repeal the suppression ordinance, which would pave the way for legal cultivation of cannabis by members on the reservation. The legalization measure passed by 20 votes.

Unfortunately for legalization advocates, the Hoopa Tribal Council took issue with the results, claiming that the wording of the legalization measure was confusing and therefore invalid. The council put the issue back on the tribe’s election ballot.

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221 Statement is based on personal conversations between the author and Sonny Jackson.

222 Id.


225 Id.

for 2019, where the legalization measure lost by 14 votes.\textsuperscript{227} Since then concerns have been raised about cannabis farms on Hoopa traditional lands, and the tribal police have carried out raids on Hoopa-owned land.\textsuperscript{228}

Anecdotally, however, cannabis cultivation is still taking place on reservation land, while legalization and regulation of cannabis economic activity remains a controversial topic for the tribe and its members. Tellingly, perhaps, while the Marijuana Suppression Ordinance is still listed as Title 34 on the tribe’s official website, the link to the ordinance redirects to the 2018 election results overturning the ordinance.\textsuperscript{229} Whether an oversight, a tongue-in-cheek joke, or a subtle jab at the Tribal Council’s refusal to accept the 2018 results, cannabis cultivation remains a legally ambiguous business in the Hoopa Valley. In that regard, the Hoopa Tribe reflects the broader state of cannabis agriculture for tribes in the United States.

Conclusion

The cannabis industry is a truly inter-disciplinary subject of inquiry. Among other matters, cannabis implicates agriculture and the environment, law enforcement, incarceration and restorative justice, regulation and taxation, intellectual property, labor, transportation, manufacturing, marketing, consumption, and public health. Stakeholders face many obstacles they must overcome on the road to a prosperous and equitable legal cannabis marketplace. The era of prohibition is coming to a close, but that does not mean that the new era of legal markets will be an easy one for stakeholders.

At the forefront of these challenges are equity and participation in legal markets. As states create new regulatory frameworks, many small businesses struggle to keep up with or navigate new requirements. And while the war on drugs hit low-income and minority communities the hardest, those communities are not proportionately represented in the legal cannabis business community. While states and cities are beginning to appreciate the need to ensure that these communities are able to participate in the new legal cannabis industry, tribes are often being ignored.

It is clear that Indian law, with its fraught history, overlapping authority structures, and tensions between tribes, states, and the federal government, is a complex and often poorly understood field. Cannabis law, meanwhile, is not straightforward either. The industry is evolving at a rapid pace, with many ostensibly

\textsuperscript{227} Ryan Burns, The Hoopa Valley Tribe Can’t Decide Whether to Allow Weed Cultivation, Nor Whether They Already Answered that Question, LOST COAST OUTPOST (May 1, 2019, 5:14 PM), https://lostcoastoutpost.com/2019/jun/27/hoopa-tribal-election-results/ [https://perma.cc/58UK-3P5V].
\textsuperscript{229} HOOPA VALLEY TRIBE, supra note 224.
legal markets being poorly regulated, and the lines between legal and illegal economic activities are often blurred. For these reasons, the interplay between Indian law and cannabis law is rife with confusion, conflicting interpretations, and changing circumstances.

Within this dynamic, this Article has addressed tribal cannabis agriculture laws and policies. First, the Article outlined the federal government’s ambiguous stance toward cannabis cultivation on tribal lands, noting that there is a lack of clear guidance and a history of inconsistent treatment of tribal cannabis activity. Second, the Article analyzed existing practices with respect to tribal cannabis agriculture, identified trends, and considered the advantages and disadvantages of existing approaches. Examples of each approach were provided throughout, offering a snapshot of tribal experiences in the United States. Finally, the Article concluded with a brief case study of the Hoopa Valley Tribe. Their place at the center of the cannabis agriculture industry of northern California provides a unique perspective from which to evaluate the role that cannabis cultivation should or should not play on their reservation lands.

The future may provide more clarity for tribes and the cannabis industry. A lifting of the federal prohibition of cannabis would certainly pave the way for tribal participation in state and national cannabis markets. Until then, clearer statements from federal agencies would help tribes navigate uncertainties. And if that is not forthcoming either, the continued emergence of state-tribal compacts may provide the requisite assurances to tribes hesitant to jump into the cannabis industry feet first.

At the moment, however, tribes face a daunting amount of risk and uncertainty. Cannabis agriculture offers many benefits to tribes, their members, and their economies. But those benefits are not guaranteed, and the risk of prosecution or conflict with the federal or state governments remains significant. This Article has demonstrated that tribal approaches to this risk/reward dynamic are diverse and evolving. The cannabis industry would likely benefit from tribal participation in legal markets. Whether or not stakeholders are able to help make that happen in meaningful ways remains to be seen.