WHERE THERE’S SMOKE, THERE’S FIRE: THE STATE-TRIBAL QUANDARY OF TRIBAL MARIJUANA

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[Indian communities] owe no allegiance to the states, and receive from them no protection. Because of the local ill feeling, the people of the states, where they are found are often their deadliest enemies.¹

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¹ United States v. Kagama, 118 U.S. 375, 384 (1886).
INTRODUCTION

The relationship between Indian tribes and the states has been one checkered by turmoil. State and local governments have long histories of using apparent legal authority and simple force to dispossess Indian people of land and property. On numerous occasions, the use of force turned deadly and resulted in the mass murder of Indian people in states like Massachusetts, Colorado, and California. Then, in the early half of the 20th century, states utilized their taxing and policing powers to exploit tribes.

Until recent years, tribal and state interests often clashed in a vigorous zero-sum game of civil regulation, taxation, and criminal jurisdiction; states tended to get the upper hand in most instances. But the judiciary has recognized enough exclusive tribal authority to create a common law presumption that state laws have no force in Indian Country. Still, some states continue to pursue legal and political warfare with tribes.

The next theater for this warfare will likely be marijuana. The recent publication of the Department of Justice Policy Statement Regarding Marijuana Issues in Indian Country (“Indian Policy Statement”) has given tribes a “yellow light” to pursue marijuana development on tribal lands without federal interference; and tribal interests in marijuana have skyrocketed.

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3 Id.
5 Fletcher, supra note 2, at 78.
Still, the biggest obstacle to tribal marijuana development may be state interference, especially in states that only allow medical marijuana or no marijuana use at all. Whenever tribes seek to develop their economy in a way that conflicts with the neighboring state’s interest, there is typically a controversy. For example, Justice Thomas summarized state concerns in his Bay Mills dissent:

[A]ny number of tribes across the country have emerged as substantial and successful competitors in interstate and international commerce, both within and beyond Indian lands. As long as tribal immunity remains out of sync with this reality, it will continue to invite problems, including de facto deregulation of highly regulated activities; unfairness to tort victims; and increasingly fractious relations with states and individuals alike.8

This model of mutual animosity forms the backbone of tribal-state relations to this day.

In general, state laws and regulations do not have an effect inside Indian Country absent Congressional authority.9 The powers vested in tribes are inherent powers of a limited sovereignty that have never been extinguished. After years of struggle to prevent further extinguishment of those powers, tribes should now move away from focusing on the “limits” of sovereignty and examine how they can activate the inherent powers that will expand and solidify tribal sovereignty.10

If a tribal sovereign makes a policy choice in any area of economic activity, the tribe has the sovereign right to do so, even if some state actors find the activity shocking or unsavory.11 It is likely that many states find the idea of tribal

10 Fletcher, supra note 2, at 86.
11 Jennifer H. Weddle, Suffer No Tyranny: How State-Tribal Relations Might
marijuana development within their borders very shocking and unsavory. Still, tribes have the “sovereign right to make their own laws and be ruled by them.”\textsuperscript{12} The issue with tribal marijuana development; however, is the permissible amount of state interference under the current jurisdictional framework. Each tribe will face different issues based upon their location and policies of the surrounding state.

Currently under federal law, the development, sale, and consumption of marijuana is illegal under the Controlled Substances Act (CSA).\textsuperscript{13} Colorado, Washington, Oregon, Alaska, and the District of Columbia have legalized adult-use marijuana. In addition, 23 States and the District of Columbia have legalized some form of medical marijuana.\textsuperscript{14}

This Article analyzes the jurisdictional issues surrounding the development of tribal marijuana in P.L. 280 and non-P.L. 280 states and considers arguments tribes can raise to respond to these issues. Part I analyzes the recent Department of Justice (DOJ) Policy Statement regarding tribal marijuana and raises three hypothetical scenarios of tribes seeking to develop various forms of marijuana in different locations. Part II covers state criminal jurisdiction issues in P.L. 280 and non-P.L. 280 states. Part III addresses whether tribal sovereign immunity can shield the tribe and its employees from state prosecution. Part IV discusses the results of the proposed hypothetical scenarios. Finally, Part V covers recommendations to reduce state interference in tribal marijuana development.

I. UNITED STATES DOJ POLICY STATEMENT REGARDING MARIJUANA ISSUES IN INDIAN COUNTRY

On October 28, 2014, the United States Department of Justice sent a memorandum to all United States Attorneys

\textit{Evolve in the Light of the Supreme Court's Michigan v. Bay Mills Indian Community Reluctance to Referee Intergovernmental Disputes, FED. LAW., April 2015, at 69.}


\textsuperscript{14} State Policy, MARIJUANA POLICY PROJECT, http://www.mpp.org/states/ (last visited May 12, 2016).
titled “Policy Statement Regarding Marijuana Issues in Indian Country.” The Indian Policy Statement specifically provides CSA enforcement guidelines on tribal lands. To address this issue, the Indian Policy Statement references the Cole Memorandum and its eight main priorities. The DOJ released the Cole Memorandum in 2013, and it was a groundbreaking acknowledgement of states’ efforts to legalize the cultivation and sale of recreational marijuana. The Cole Memorandum and Indian Policy Statement suggest the DOJ will not enforce the CSA on state/tribal lands if states/tribes do not violate the following eight priorities:

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

So long as tribes abide by these eight priorities, for the short term at least, it is unlikely that the DOJ will interrupt tribal marijuana cultivation and sale. Wyn Hornbuckle, a spokesman for the DOJ, stated tribes interested in legalizing

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15 Policy Statement, supra note 7.
16 Id.
17 Notably, the Indian Policy Statement recognizes tribal sovereignty and stresses the need to consult “with our tribal partners.” Id.
marijuana are not expected to consult with the department or federal officials. “American Indian tribes are sovereign governments, like states,” Hornbuckle declared. Hornbuckle also noted that tribal governments and local federal prosecutors “will consult on a government-to-government basis as issues arise.” Thus, the Indian Policy Statement recognizes the ability of tribes to cultivate marijuana in light of federal priorities.

As a result of the Indian Policy Statement, tribal interest in marijuana production intensified. Tribes all across the country from the Aroostook to the Senecas to the Seminoles to the Pinoleville Pomo Nation have expressed interest in cultivating marijuana. In February 2015, the Tulalip Tribe held the first Tribal Marijuana conference in Tulalip, Washington, which attracted about 400 people, including representatives from roughly 75 tribes. One month later, a second conference was held in San Diego. This increased interest shows that many tribes are considering the pros and cons of marijuana production on tribal lands.

This Article is not meant to weigh those pros and cons, but rather to consider the possible legal outcomes regarding the constant tension between states and tribes. It proposes three hypothetical scenarios and analyzes the jurisdictional quandaries and arguments in each area. This Article focuses on the difficulties that may arise where tribes sell marijuana on reservations surrounded by states that either allow only medical marijuana or have a total marijuana prohibition.

Here are the three hypothetical scenarios:

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19 Id.
20 Id.
1) Seneca Nation of Indians: The Seneca Nation, located primarily in Western New York, seeks to cultivate and sell adult-use marijuana on tribal lands. New York is a non-P.L. 280 state but has P.L. 280 jurisdiction provided specifically to the state in 25 U.S.C. § 232. New York has legalized medical marijuana, which is highly regulated.

2) Seminole Tribe of Florida: The Seminoles, located in Florida, seek to cultivate and sell adult-use marijuana on tribal lands. Florida is a P.L. 280 state, which prohibits all forms of marijuana use.

3) The Pinoleville Pomo Nation in California: The Pomo people in California seek to cultivate and sell medical marijuana only. California has legalized only medical marijuana but it is not currently regulated at the state level. California is also a P.L. 280 state.

II. STATE CRIMINAL JURISDICTION ISSUES IN P.L. 280 AND NON-P.L. 280 STATES

One of the first issues a tribe should consider before undertaking the sale and cultivation of marijuana is whether the tribe is within a P.L. 280 or non-P.L. 280 state.

A. Issues in P.L. 280 States

Generally, criminal jurisdiction over Indians in Indian Country lies with the tribal and federal governments. But there are exceptions. In 1953, Congress enacted Public Law 83-280, 18 U.S.C. § 1162, widely known as "Public Law 280," giving six states (Alaska, California, Minnesota, Nebraska, Oregon,

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23 On October 5, 2015, the California Governor signed into law the California Medical Marijuana Regulation and Safety Act, effective January 1, 2016; however, regulations are not expected to take effect until 2017. See, e.g., Canorml_admin, Cal Norml: A Summary of the Medical Marijuana Regulation and Safety Act (Mmrsa), CA NORML (Sept. 15, 2015), http://www.canorml.org/news/A_SUMMARY_OF_THE_MEDICAL_MARIJUANA_REGULATION_AND_SAFETY_Act (providing information on the three parts of the Act, Senate Bill No. 643, Assembly Bill No. 266, and Assembly Bill No. 243).
and Wisconsin) criminal jurisdiction over tribes within their boundaries. Between 1953 and 1968, a number of states other than the original six also exercised expanded criminal jurisdiction in Indian Country. These jurisdictions are often referred to as “optional P.L.-280” jurisdictions. Primarily, these include certain reservations in Florida, Idaho, and Washington. Congress has also specifically authorized certain other states (New York) to exercise jurisdiction over reservations.

The direct effects of P.L. 280 were twofold: First, it extended state criminal jurisdiction and civil jurisdiction over reservation Indians in the select states; and second, it eliminated special federal criminal jurisdiction over reservation areas in the select states. Thus, the law substituted state for federal legal authority on all designated reservations.

Historically, states resented the special rights and status of tribes under federal law, and the federal government often intervened to protect the tribes. P.L. 280 provided these states with the right to exercise authority within the reservations.

However, P.L. 280 “was not intended to effect total assimilation of Indian tribes into mainstream American society.” Nothing in its legislative history suggests that Congress intended P.L. 280’s extension of jurisdiction to the states to result in the undermining or destruction of tribal governments and turn tribes into “private, voluntary organizations.” Rather, P.L. 280 provides for the “full force and effect” of any tribal ordinances or customs “hitherto or hereafter adopted by an Indian tribe . . . if not inconsistent with any applicable civil law of the state.” Thus, state power is limited.

Nevertheless, in P.L. 280 States, regardless of actions that tribes may take to legalize and regulate marijuana, state officials

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25 Id.
26 Id.
27 Id.
29 Id. at 388 (citing United States v. Mazurie, 419 U.S. 544, 557 (1975)).
may retain the power to enforce state criminal laws prohibiting the sale, distribution, or use of marijuana against Indians and non-Indians where the state’s marijuana prohibition is deemed criminal and prohibitory in nature rather than a civil regulatory system pursuant to *California v. Cabazon Band of Mission Indians*. This Article will now analyze the *Cabazon* test within the context of marijuana and argue that, in certain circumstances, state marijuana laws may be regulatory in nature rather than prohibitory.

1. *California v. Cabazon Band of Mission Indians*: Where do State Marijuana Laws Fall along the Cabazon Spectrum?

Even in P.L. 280 states, states may lack jurisdiction to enforce their laws in Indian lands if marijuana prohibition is considered to be civil-regulatory in nature pursuant to the *California v. Cabazon* test. In *Cabazon*, California attempted to regulate Indian bingo operations on the Cabazon and

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32 Although the Michigan v. Bay Mills decision limited *California v. Cabazon*, this article contends that it did not completely overturn *Cabazon* and that the *Cabazon* test is still intact. Congress established IGRA to solve a very specific problem created by *Cabazon*, not to completely overrule *Cabazon* and its reasoning. For example, in footnote 6 of *Bay Mills*, the Court stated, “[i]ndeed, the statutory abrogation does not even cover all suits to enjoin gaming on Indian lands, thus refuting the very premise of Michigan's argument-from-anomaly. Section 2710(d)(7)(A)(ii), recall, allows a State to sue a tribe not for all ‘class III gaming activity located on Indian lands’ (as Michigan suggests), but only for such gaming as is ‘conducted in violation of any Tribal–State compact . . . that is in effect.’ Accordingly, if a tribe opens a casino on Indian lands before negotiating a compact, the surrounding State cannot sue; only the Federal Government can enforce the law. See 18 U.S.C. § 1166(d) (2016). To be precise, then, IGRA's authorization of suit mirrors not the full problem *Cabazon* created (a vacuum of state authority over gaming in Indian Country) but, more particularly, Congress's ‘carefully crafted’ compact-based solution to that difficulty. *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 73–74 (1996). So Michigan's binary challenge—if a State can sue to stop gaming in Indian Country, why not off?—fails out of the starting gate. In fact, a State cannot sue to enjoin all gaming in Indian Country; that gaming must, in addition, violate an agreement that the State and tribe have mutually entered.” *Michigan v. Bay Mills Indian Cmty.*, 134 S.Ct. 2024, 2053 n.6 (2014) Thus, the *Bay Mills* Court stated that IGRA was carefully crafted to deal with a specific problem, not to completely eliminate *Cabazon*. Accordingly, the *Cabazon* test is still good law and can be applied in the marijuana context.
Morongo reservations in Riverside County, California. The California sought to apply its penal code prohibiting gambling except under certain circumstances. The code permitted bingo when charitable organizations operated the games and prizes did not exceed $250 per game. The Court held that P.L. 280 did not justify California’s enforcement of its gambling laws on Indian lands. Looking to Bryan v. Itasca Cnty. and Duffy v. Barona Group of Capitan Band of Mission Indians, the Court created the civil-criminal dichotomy distinguishing “criminal/prohibitory” laws and “civil/regulatory” laws under P.L. 280:

[I]f the intent of a state law is generally to prohibit certain conduct, it falls within P.L. 280’s grant of criminal jurisdiction, but if the state law generally permits the conduct at issue, subject to regulation, it must be classified as civil/regulatory and P.L. 280 does not authorize its enforcement on an Indian reservation...The shorthand test is whether the conduct at issue violates the state's public policy.

The Court determined that California did not prohibit all forms of gambling. The Court noted that California itself operated a state lottery and encouraged its citizens to participate in state-run gambling. California also permitted horse-race betting and although certain enumerated gambling games were prohibited under California law, the games played on the Cabazon and Morongo reservations were permissible. The Court found it significant that California permitted a substantial amount of gambling activity, including bingo, and actually promoted gambling through its state lottery. Thus, the Court

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33 Cabazon, 480 U.S. at 205.
34 Id.
35 Id.
36 Id. at 209–10.
39 Cabazon, 480 U.S. at 208–09.
40 Id. at 210–11.
concluded that California regulated rather than prohibited “gambling in general and bingo in particular.” Accordingly, California’s gambling laws were regulatory in nature and thus fell outside the scope of P.L. 280; California could not regulate the Cabazon gaming.

In footnote 10, the Cabazon Court noted that “nothing in this opinion suggests that cock-fighting, tattoo parlors, nude dancing, and prostitution are permissible on Indian reservations within California. The applicable state laws governing an activity must be examined in detail before they can be characterized as regulatory or prohibitory.”

In the marijuana context, tribes may argue that the state marijuana law at issue is a regulatory scheme rather than a pure prohibitory law. For example, like Cabazon, where California permitted some forms of gambling, certain states, such as California, permit some forms of marijuana use. Medical marijuana is lawful under California law; however, it is largely unregulated at the state level. Still, the fact that California permits a wide range of medical marijuana weighs strongly in favor of a civil-regulatory label.

Similarly, in states such as New York, where medical marijuana is heavily regulated, tribes may have a stronger argument that marijuana development falls along the civil-regulatory spectrum. For example, the New York medical marijuana code is over 100 pages long, regulating everything from possession limits to physician registration to proper disposal of marijuana products and everywhere in between. Like the Cabazon bingo gambling, where California allowed

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41 Id.
42 Id.
43 Id. at 211 n.10.
44 See Canorml_admin, California NORML Patient's Guide to Medical Marijuana, CA NORML (Nov. 2013), http://www.canorml.org/medical-marijuana/patients-guide-to-california-law. But, California’s regulations of medical marijuana under the California Medical Marijuana Regulation and Safety Act, when effective, will strengthen the tribal argument that California’s marijuana law is a civil-regulatory scheme.
specific games such as horserace betting and bingo while prohibiting other forms of gambling, many medical marijuana states allow specific uses of marijuana—namely marijuana to treat “debilitating medical conditions”—while prohibiting other forms of adult-use marijuana.46

Although medical marijuana states may not actively encourage marijuana use, like California’s encouragement that its citizens participate in its state lottery, this does not detract from the extensive system that states such as New York have in place to regulate marijuana consumption. Even though all regulation involves some aspect of prohibition, the test under Cabazon and Bryant looks to the most important aspect of the statute. Here, the tribal argument will be that the regulation of medical marijuana is the critical aspect of the state marijuana law. Under Cabazon, the focus must be on the regulatory scheme rather than the potential penal sanction. Thus, if a state permits but regulates marijuana use then this regulation trumps the corresponding criminal punishments.

For example, during the Cabazon oral arguments, the Justices were concerned with the difference between roulette wheels, prohibited under California law, and bingo cards, permitted by California law, in relation to the narrow difference between prohibition and regulation. The answer to this distinction was simply that California permitted but regulated bingo. Thus, the question becomes: does the inclusion of a penal sanction in a regulatory scheme permit state jurisdiction? Under Bryant and Cabazon, the answer is no. If this were the law, Bryant would be gutted. States are not authorized to exercise general jurisdiction. Similarly, where a state prohibits adult-use marijuana but permits and regulates medical marijuana, then the P.L. 280 state has established a civil-regulatory scheme and cannot apply its marijuana criminal sanctions within the reservation.

Thus, Cabazon and Bryant serve as a counterweight to limit state power. In states that regulate some form of marijuana,

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46 See, e.g., N.Y. COMP. CODES R. & REGS. Tit. 10, § 1004.1–.23 (2015); Md. CODE REGS. § 13-3304 (2014); MASS. GEN. LAWS ch. 94C, §§ 1–49 (2016); N.M. CODE R. § 7.34.2–.4 (LexisNexis 2014).
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tribes can likely argue that the state marijuana scheme should be considered regulatory, thereby preventing state interference. The more regulation the state has in place to govern marijuana, the stronger the tribal argument will be.

B. Issues in Non-P.L. 280 States

State jurisdiction in non-P.L. 280 states is limited to crimes committed by non-Indian perpetrators to non-Indian victims. The United States Supreme Court ruled in United States v. McBratney,47 and Draper v. United States,48 that state courts have jurisdiction to punish wholly non-Indian crimes in Indian Country. For example, in Draper, the Court stated that “in reserving to the United States jurisdiction and control over Indian lands, it was not intended to deprive [the] state[s] of power to punish for crimes committed on a reservation or Indian lands by other than Indians or against Indians.”49 Thus, non-P.L. 280 states lack criminal jurisdiction to enforce state laws outside purely non-Indian offenses.

Therefore, non-P.L. 280 states lack jurisdiction to enforce marijuana prohibitions where tribal members are involved in the sale, cultivation, or distribution of marijuana. But, the sale of marijuana is not a typical crime because it is usually “victimless”; the sale of marijuana does not harm a specific person under the traditional view of Indian criminal law jurisdiction. This begs the question whether the limitations from Draper and McBratney apply to the victimless crimes such as the sale of marijuana. If not, then states could argue that they would have jurisdiction to enforce penal laws against non-Indians who sell and buy marijuana on tribal lands. This article explores the validity of these potential issues below.

1. United States v. Langford: Can States Exercise Criminal Jurisdiction over Victimless Crimes committed by non-Indians?

The first issue is whether states can exercise criminal jurisdiction over non-Indians who sell marijuana as part of the

49 Id. at 247.
tribal enterprise. A relevant case regarding state jurisdiction of victimless crimes committed by non-Indians is United States v. Langford. In Langford, a non-Indian was charged with being a spectator at a cockfight under 18 U.S.C. §§ 13, 1151, and 1152.\textsuperscript{50} The cockfight took place at a cockfighting facility located on property held in trust by the United States for a Kiowa allotment, and was therefore located in Indian Country.\textsuperscript{51} The 10th Circuit addressed the issue of whether state criminal jurisdiction existed for a victimless crime, perpetrated by a non-Indian in Indian Country.\textsuperscript{52} The court found that states possess exclusive criminal jurisdiction over crimes occurring in Indian Country if there is neither an Indian victim, nor an Indian perpetrator.\textsuperscript{53}

In reaching this conclusion, the court first looked to McBratney and cited the “equal footing” rationale from that case.\textsuperscript{54} There, the McBratney Court reasoned that Colorado entered into the United States “upon an equal footing with the original states in all respects whatsoever . . . [and consequently] acquired criminal jurisdiction over its own citizens and other white persons throughout the territory within its limits.”\textsuperscript{55} The 10th Circuit also cited United States v. Ramsey, holding that the grant of statehood ended the authority of the U.S. under § 2145 to punish crimes not committed by or against Indians.\textsuperscript{56} Also, the 10th Circuit noted that under People v. Martin, the Supreme Court observed that with respect to “Indian country crimes involving only non-Indians, longstanding precedents of this Court hold that state courts have exclusive jurisdiction despite the terms of § 1152.”\textsuperscript{57}

Finally, the 10th Circuit noted that the Supreme Court suggested in dicta that the McBratney rule applies to victimless

\textsuperscript{50} United States v. Langford, 641 F.3d 1195 (10th Cir. 2011).
\textsuperscript{51} \textit{Id.}
\textsuperscript{52} \textit{Id.} at 1197.
\textsuperscript{53} \textit{Id.}
\textsuperscript{54} \textit{Id.} at 1197–98.
\textsuperscript{55} \textit{Id.} at 1198 (citing United States v. McBratney, 104 U.S. 624 (1881)).
\textsuperscript{56} Langford, 641 F.3d at 1198.
In *Solem v. Bartlett*, the Court stated, “[w]ithin Indian country, state jurisdiction is limited to crimes by non-Indians against non-Indians, and victimless crimes by non-Indians.”

The 10th Circuit found that the “absence of federal jurisdiction over victimless crimes perpetrated by a non-Indian in Indian country is explicit in the dicta of *Solem* and implicit in the holding of *McBratney*.”

Thus, pursuant to the *Solem* dicta and the reasoning of the 10th Circuit in *Langford*, non-P.L. 280 states could contend that they may exercise criminal jurisdiction to enforce marijuana prohibitions on Indian reservations where non-Indians are involved. The state could severely hamper the tribal business by prosecuting any non-Indian employee. This is an issue that tribes who cultivate and sell marijuana should consider. To avoid this potential issue, tribes could simply limit employment in their marijuana industry to only tribal members or non-member Indians.

2. State Jurisdiction over Non-Indians Purchasing Marijuana on the Reservation

With a colorable argument that states have jurisdiction over non-Indian victimless crimes, the next concern then becomes whether a state can exercise its criminal jurisdiction over non-Indians purchasing marijuana lawfully on tribal lands. Citing cases such as *Duro*, *Solem*, *Antelope*, *Martin*, *Williams*, *McBratney*, and *Draper*, courts from numerous jurisdictions have held that state courts have jurisdiction over cases involving non-Indian defendants who committed “victimless” offenses on Indian lands.

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58 *Langford*, 641 F.3d at 1199.
59 *Id.* (citing *Solem v. Bartlett*, 465 U.S. at 465 n.2 (citing New York *ex rel. Ray v. Martin*, 326 U.S. 496 (1946))); *see also* *Ross v. Neff*, 905 F.2d 1349, 1353 (10th Cir.1990) (noting the “Supreme Court has expressly stated that state criminal jurisdiction in Indian country is limited to crimes committed ‘by non-Indians against non-Indians . . . and victimless crimes by non-Indians’”).
60 *Langford*, 641 F.3d at 1199.
61 *See, e.g.*, *Langford*, 641 F.3d at 1197–99 (10th Cir. 2011) (stating that there is clearly no federal jurisdiction for a victimless crime committed in Indian Country by a non-Indian because the states possess exclusive
For example, in *Michigan v. Collins*, two non-Indian defendants were charged with controlled substance offenses that occurred inside an Indian casino located on tribal lands.\(^{62}\) The Michigan Appellate court found that state courts have criminal jurisdiction in cases where a non-Indian defendant committed a “victimless” offense in Indian Country.\(^{63}\) Relying upon *Solem v. Bartlett* and several other state cases, the Michigan Appellate court determined that it had jurisdiction to prosecute the two non-Indian defendants for the sale of controlled substances on tribal lands in violation of Michigan law.\(^{64}\)

As a counter-argument to *Michigan v. Collins*, tribes could legitimately contend that where the tribe has legalized marijuana and the surrounding state still criminalizes marijuana use, tribal sovereignty trumps state intrusion. In other words, tribes have the right to “make their own laws and be ruled by them” as part of their inherent sovereignty.\(^{65}\) Thus, if the tribe decriminalizes marijuana consumption on tribal lands, then there technically would be no “crime” for the state to punish.

A tribe could contend that state criminal laws operate on tribal lands only so far as a crime concurrently exists under state and tribal law. So, if the tribe removes the criminal sanctions for marijuana it removes the criminality of marijuana consumption on tribal lands and precludes state intrusion. Tribes could thus argue that states cannot exercise jurisdiction where a “crime” is absent.

Borrowing from the civil context, “state courts may not exercise jurisdiction over disputes arising out of on-reservation conduct—even over matters involving non-Indians—if doing so

\(^{63}\) *Id.* at 176–77.
\(^{64}\) *Id.* at 177.
would ‘infringe[e] on the right of reservation Indians to make their own laws and be ruled by them.’\textsuperscript{66} This rationale should apply to the criminal context as well. Tribes have the power to make their own laws pursuant to their status as sovereign nations. Part of this sovereignty is the sanctity of tribal codes to be free from state interference. Thus, a state should be unable to exercise its criminal jurisdiction over purely on-reservation marijuana consumption where the tribe has legalized such consumption on tribal lands.

With this in mind, there is an additional concern that tribal marijuana could collide with significant state policy interests prohibiting marijuana, triggering the principles of \textit{Washington v. Confederated Tribes of Colville Indian Reservation}. This article now addresses this concern and potential solutions.


\textit{Washington v. Confederated Tribes}, allows states to regulate the activities of tribal members on tribal land when state interests outside the reservation are implicated.\textsuperscript{67} In \textit{Colville}, the Colville, Lummi, and Makah Tribes were selling cigarettes on their reservations to nonmembers from off the reservation, without collecting the state cigarette tax.\textsuperscript{68} In response, the state of Washington seized shipments of unstamped cigarettes en route to the reservations from wholesalers outside the state.\textsuperscript{69} The Court held that Washington could require the tribes to collect the tax from nonmembers, and could “impose at least ‘minimal’ burdens on the Indian retailer to aid in enforcing and collecting the tax.”\textsuperscript{70} The Court also found that Washington’s interest in enforcing its taxes was sufficient to justify the seizure of cigarettes heading for the reservations.\textsuperscript{71} The Court

\textsuperscript{66} Id.
\textsuperscript{67} Id. at 142.
\textsuperscript{68} Id.
\textsuperscript{69} Id.
\textsuperscript{70} Id. at 151.
\textsuperscript{71} Id. at 161–62.
noted that the mailed cigarettes were not immune from seizure where the tribes refused to fulfill obligations to collect the state tax.\textsuperscript{72} Thus, Washington validly seized these cigarettes under its ability to police “against wholesale evasion of its own valid taxes without unnecessarily intruding on core tribal interests.”\textsuperscript{73}

\textit{Washington v. Colville} is problematic for tribes because the sale of cigarettes and the sale of marijuana are eerily similar. Like the sale of cigarettes, which targets non-Indian state residents, the sale of marijuana will also target and attract state residents. Like \textit{Colville}, where the tribes were marketing an exemption from state tax law, tribes will be marketing an exemption from state marijuana laws. Also, like cigarettes, which involve importing raw goods and materials to be packaged and sold, marijuana distribution will also require importing the necessary raw materials onto reservations. Thus, like \textit{Colville}, tribes will have to run marijuana resources through the surrounding state. This directly intersects with state power outside the reservation.

This is concerning because in \textit{Colville}, the Court stated, “[i]t is significant that these seizures take place outside the reservation, in locations where state power over Indian affairs is considerably more expansive than it is within reservation boundaries.”\textsuperscript{74} “Tribal activities conducted outside the reservation present different considerations” than purely on-reservation activity.\textsuperscript{75} “State authority over Indians is yet more extensive over activities . . . not on any reservation.”\textsuperscript{76} Absent express federal law to the contrary, Indians going beyond reservation boundaries are subject to non-discriminatory state law applicable to all citizens.\textsuperscript{77} Courts broadly apply this principle from state tax to

\textsuperscript{72} \textit{Id.}
\textsuperscript{73} \textit{Id.} at 162.
\textsuperscript{74} \textit{Id.} at 161–62; \textit{see also} Mescalero Apache Tribe v. Jones, 411 U.S. 145 (1973).
\textsuperscript{75} \textit{Mescalero Apache Tribe}, 411 U.S. at 148.
\textsuperscript{76} \textit{Id.} (citing Organized Village of Kake v. Egan, 369 U.S. 60, 75 (1962)).
criminal laws, and would apply this rule to marijuana activities outside the reservation.

*Colville* combined with language from *Nevada v. Hicks* could potentially create a formidable state power with respect to tribal marijuana. In *Hicks*, state game wardens executed a search warrant of a tribal member’s house on tribal land for evidence of an off-reservation crime.\(^{78}\) The Court stated, “[i]t is also well established in our precedent that states have criminal jurisdiction over reservation Indians for crimes committed off the reservation.” “[T]he principle that Indians have the right to make their own laws and be governed by them requires ‘an accommodation between the interests of the tribes and the federal government, on the one hand, and those of the state, on the other.’”\(^{79}\)

In *Hicks*, the Court hinted to the possibility that states may have the “right to enter a reservation (including Indian-fee lands) for enforcement purposes.”\(^{80}\) The Court reasoned that “the state's interest in execution of process is considerable, and even when it relates to Indian-fee lands it no more impairs the tribe's self-government than federal enforcement of federal law impairs state government.”\(^{81}\)

Thus, absent an agreement with the surrounding state, tribes will have to minimize the amount of resources imported through state boundaries in order to avoid state interference like in *Colville* and the possibility of state intrusion hinted at in *Hicks*. Tribes should also seek to conduct as much of the marijuana activity within the reservation as possible. This will avoid collisions and complications with state marijuana prohibitions outside the reservation. To do so, tribes should seek to cultivate, distribute, and consume marijuana *only* on tribal lands.

The main concern from *Colville* is the proposition that states can regulate tribal member activity on tribal lands where significant state interests are implicated. Marijuana

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\(^{79}\) *Id.* at 362 (quoting *Colville*, 447 U.S. at 156).

\(^{80}\) *Hicks*, 533 U.S. at 363.

\(^{81}\) *Id.* at 364.
advertisement and distribution to state citizens could trigger significant state interests, opening up the door for state interference. However, if tribes carefully structure their marijuana systems, they may have a legitimate argument to avoid Coleville interference and thus prevent state enforcement.

For example, if tribes use marijuana to generate value on the reservation, this may distinguish the sale of marijuana from the sale of cigarettes in Coleville. In Coleville, the Court stressed the balance between state and tribal interests:

While the tribes do have an interest in raising revenues for essential governmental programs, that interest is strongest when the revenues are derived from value generated on the reservation by activities involving the tribes and when the taxpayer is the recipient of tribal services. The state also has a legitimate governmental interest in raising revenues, and that interest is likewise strongest when the tax is directed at off-reservation value and when the taxpayer is the recipient of state services.82

The key here is that the Coleville Court recognized a balance between tribal sovereignty and the ability of tribes to raise revenue to run their governments on the one hand, and state sovereignty and the state’s interest in raising revenue and providing services on the other hand. So, the best argument for tribes is twofold: 1) tribes have the sovereign right to make their own laws and be ruled by them; and 2) tribal marijuana businesses generate value for the reservation, which is a significant interest that outweighs the state’s interests in enforcing its marijuana prohibitions on the reservation.

Thus, the main argument to distinguish Coleville is that tribal marijuana ventures create significant on-reservation value. In Coleville, other than profits, the tribes gained no value from selling cigarettes and allowing people to take them off the reservation to avoid the state cigarette tax. In other words, the tribe was not generating value on the reservation. There, the

82 Coleville, 447 U.S. at 156–57 (emphasis added).
tribe did not grow the tobacco, manufacture the cigarettes, nor produce the secondary products for tobacco consumption. Rather, the tribes imported cigarettes from elsewhere and sold them without tax to non-Indians who would take them off the reservation.83

In the marijuana context, tribes can avoid this situation by growing on the reservation, selling on the reservation, and providing places for people to consume marijuana on the reservation. Such activity would directly generate a value for the tribe. Tribes could also provide recreational services for people to enjoy marijuana on the reservation. This would supplement the “value generated on the reservation by activities involving the tribe” and further distance tribal marijuana from the Colville tribal cigarettes.

Marijuana should be a purely tribal affair. The tribe should try to touch every aspect of marijuana cultivation and sale as possible. The tribe should try to limit the growth to tribal lands. The tribe should seek to manufacture the ancillary marijuana products on the reservation as much as possible. The tribe should provide places for customers to enjoy the marijuana on tribal lands: build a resort, create on-site consumption areas or establish environments to enjoy marijuana. The tribe should do anything and everything to generate as much “value” through marijuana. By doing so, the tribe will have a strong argument to distinguish Colville and avoid any excuse for state involvement.

In the event that states disrupt tribal marijuana activity, this paper will now turn to whether tribal sovereign immunity can protect the tribe from a state lawsuit.

III. TRIBAL SOVEREIGN IMMUNITY

A. Tribal Immunity

Another issue linked to tribal marijuana development is tribal sovereign immunity and whether this immunity would shield both tribes and tribal officers from state suit. Under the doctrine of tribal sovereign immunity, tribes possess “common-

83 Id.
law immunity from suit traditionally enjoyed by sovereign powers.”

This immunity is “a necessary corollary to Indian sovereignty and self-governance.” 

“[T]he qualified nature of Indian sovereignty modifies [this] principle only by placing a tribe's immunity, like its other governmental powers and attributes, in Congress’s hands.” Thus, the “doctrine of tribal immunity [is] settled law” and bars any suit against a tribe absent Congressional authorization or waiver.

Tribal immunity applies to suits brought by both states and individuals alike. Rather than litigate, a state must resort to other remedies, even if they would be less “efficient” because tribal immunity “is a matter of federal law and is not subject to diminution by the states.” Tribal sovereign immunity can be waived only if a tribe unequivocally waives its tribal immunity or Congress unequivocally abrogates tribal sovereign immunity.

The recent decision of Michigan v. Bay Mills Indian Community is a good sign for tribal sovereign immunity within the context of marijuana regulation. In Bay Mills, the Court upheld the Bay Mills Indian community’s immunity from suit by Michigan. There, Michigan brought suit to enjoin Bay Mills’ operation of a casino on land located outside its reservation purchased with earnings from a congressionally established land trust. The Court reasoned that Bay Mills’

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85 Bay Mills, 134 S.Ct. at 2030 (citing Three Affiliated Tribes of Fort Berthold Reservation v. Wold Engineering, P.C., 476 U.S. 877, 890 (1986)).
86 Bay Mills, 134 S.Ct. at 2030.
88 See Bay Mills, 134 S.Ct. at 2031.
89 Id.; see also Kiowa, 523 U.S. at 755 (“There is a difference between the right to demand compliance with state laws and the means available to enforce them.”).
90 E.F.W. v. St. Stephen's Indian High School, 264 F.3d 1297, 1304 (10th Cir. 2001) (quoting Fletcher v. United States, 116 F.3d 1315, 1324 (10th Cir.1997)).
91 Bay Mills, 134 S.Ct. at 2039.
92 Id. at 2029.
sovereignty implied immunity from the lawsuit. The Court noted that Congress did not abrogate Bay Mills’ immunity because the “abrogation of immunity in IGRA applies to gaming on, but not off, Indian lands.” The Court also refused to “create a freestanding exception to tribal immunity for all off-reservation commercial conduct.” The Court reasoned that to do so now “would entail both overturning precedent and usurping Congress’s current policy judgment.” Thus, the Court dismissed the suit absent Congressional authorization (or waiver). Michigan could not enjoin the casino operations.

“The rule flowing from Bay Mills is clear, tribal sovereignty is not inferior to that of states.” “Despite the fact that tribes and states will rarely be able to resolve their differences by litigation, no sovereign need suffer the tyranny of another.” There is no evidence that Congress has clearly abrogated tribal sovereign immunity regarding tribal marijuana development. Such a Congressional abrogation “must be clear.”

To abrogate tribal sovereign immunity, Congress must “unequivocally express its purpose to subject a tribe to litigation.” This rule represents an enduring principle of Indian law—although Congress has plenary authority over

93 Id. at 2039.
94 Id.
95 Id.
96 Id.
97 Id. at 2030–31.
98 Id. at 2039.
99 Weddle, supra note 11, at 69.
100 Id.
101 § 862(f) of The Controlled Substances Act does have an Indian provision but does not abrogate tribal sovereign immunity: “Nothing in this section shall be construed to affect the obligation of the United States to any Indian or Indian tribe arising out of any treaty, statute, Executive order, or the trust responsibility of the United States owing to such Indian or Indian tribe. Nothing in this subsection shall exempt any individual Indian from the sanctions provided for in this section, provided that no individual Indian shall be denied any benefit under Federal Indian programs comparable to those described in subsection (d)(1)(B) or (d)(2) of this section.” See 21 U.S.C. § 862(f) (2015).
102 Bay Mills, 134 S.Ct. at 2031–32.
tribes, courts will not lightly assume that Congress in fact intends to undermine Indian self-government.\footnote{Bay Mills, 134 S.Ct. at 2032; Iowa Mutual v. LaPlante, 480 U.S. 9, 18 (1987); United States v. Dion, 476 U.S. 734, 738–39 (1986).} Without Congressional abrogation or tribal waiver in a state compact,\footnote{For a waiver of sovereign immunity to be effective it must comply with tribal law. Colombe v. Rosebud Sioux Tribe, No. CIV 11–3002–RAL, 2011 WL 3654412, at *8 (D.S.D. Sept. 23, 2011); see also Memphis Biofuels, LLC v. Chickasaw Nation Indus., 585 F.3d 917, 922 (6th Cir. 2009) (finding tribal corporation’s contract containing express waiver of sovereign immunity was ineffective without approval of the board by resolution, as required by tribal law); Sanderlin v. Seminole Tribe of Fla., 243 F.3d 1282, 1288 (11th Cir. 2001) (rejecting argument that tribal official had authority to waive immunity because “[s]uch a finding would be directly contrary to the explicit provisions of the Tribal Constitution”); Winnebago Tribe of Neb. v. Kline, 297 F. Supp. 2d 1291, 1303 (D. Kan. 2004) (“[F]or a waiver of sovereign immunity to be effective, the waiver must be in compliance with tribal law.”); World Touch Gaming v. Massena Mgmt. Corp., 117 F. Supp. 2d 271, 275 (N.D.N.Y. 2000) (holding that a contractual waiver of sovereign immunity was invalid where tribal constitution and civil judicial code established that the only way the tribe could waive its sovereign immunity was through a tribal council resolution).} states will have to save their litigation budgets and engage in government-to-government discussions when it comes to tribal marijuana operations.\footnote{Santa Clara Pueblo v. Martinez, 436 U.S. 49, 58 (1978) (finding that courts should be hesitant to infer a federal cause of action (and therefore a waiver of tribal sovereign immunity) where it would disserve the stated congressional purpose of promoting tribal economic development, self-sufficiency, and strong tribal governments); Davids v. Coyhis, 869 F. Supp. 1401, 1411 (E.D. Wis. 1994).}

\textbf{B. Immunity for Tribal Officers}

It seems fairly clear that tribes should be immune from state lawsuits, but what about the tribal officials or employees working in the marijuana industry? Tribal sovereign immunity protects tribal officials acting within the scope of their authority as well as tribal employees.\footnote{Weddle, supra note 11, at 66; see also Hardin v. White Mountain Apache Tribe, 779 F.2d 476, 479 (9th Cir. 1985).}

However, in \textit{Santa Clara Pueblo v. Martinez}, the Supreme Court suggested that the doctrine of \textit{Ex parte Young} extends to the tribal context, allowing suits against tribal officials in their
official capacities for declaratory or injunctive relief. Some scholars suggest that the Ex parte Young doctrine has been extended to tribal officials sued in their official capacity such that tribal sovereign immunity does not bar a suit for prospective relief against tribal officers allegedly acting in violation of federal law. The rationale is that when tribal officials act in violation of federal law, they are acting beyond their authority and not on behalf of the tribe and are amenable to suit without the protections of tribal sovereign immunity. Thus, tribal employees may be subject to suit when they “act beyond the authority that the tribe is capable of bestowing upon them under federal laws defining the sovereign powers of Indian tribes.”

However, the fact that tribal immunity does not bar the suit

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108 Weddle, supra note 11, at 66.
109 Circuits, including the District of Columbia, Eighth, Ninth, Tenth Circuits and Eleventh Circuits, have extended the Ex Parte Young doctrine to tribal sovereign immunity. See, e.g., Crowe & Dunlevy, P.C. v. Stidham, 640 F.3d 1140, 1154 (10th Cir. 2011) (“Today we join our sister circuits in expressly recognizing Ex Parte Young as an exception not just to state sovereign immunity but also to tribal sovereign immunity.”); Vann v. Kempthorne, 534 F.3d 741, 749 (D.C. Cir. 2008); N. States Power Co. v. Prairie Island Mdewakanton Sioux Indian Cmty., 991 F.2d 458, 460 (8th Cir. 1993); Burlington N. & Santa Fe Ry. Co. v. Vaughn, 509 F.3d 1085, 1092 (9th Cir. 2007) (stating that the Ex Parte Young doctrine “has been extended to tribal officials sued in their official capacity such that tribal sovereign immunity does not bar a suit for prospective relief against tribal officers allegedly acting in violation of federal law.” (citation and internal quotations omitted)); Davids v. Coyhis, 869 F. Supp. 1401, 1410 (E.D. Wis. 1994) (For purposes of Ex Parte Young, if individual tribal officials’ “actions are in violation of the IGRA, then the defendants have acted outside the scope of their authority, because tribes are not authorized to conduct Class II and III gaming in violation of the IGRA’s provisions.”); Tamiami Partners v. Miccosukee Tribe, 63 F.3d 1030 (11th Cir. 1995).
110 Weddle, supra note 11, at 66; Burlington N. & Santa Fe Ry. Co. v. Vaughn, 509 F.3d 1085, 1092 (9th Cir. 2007) (holding that tribal official charged with collecting tax could be sued to enjoin tax collection, although tribal chairman with no responsibility for collecting tax could not be sued).
112 See Tamiami Partners by & Through Tamiami Dev. Corp. v. Miccosukee Tribe of Indians of Fla., 63 F.3d 1030, 1045 (11th Cir. 1995); Ex Parte Young, 209 U.S. 123, 28 (1908) (holding that a suit against an individual in his official governmental capacity—claiming that the individual is acting beyond his authority—is not a suit against the sovereign).
does not mean that a cause of action may be implied against the official where such action would infringe tribal sovereignty.\textsuperscript{113} Other limitations include: 1) where the relief sought is damages, \textit{Ex parte Young} suits may not be maintained against tribal officials;\textsuperscript{114} and 2) suits for damages against employees or officers in their individual capacities are barred by immunity unless the alleged actions were not within the authority delegated by the tribe.\textsuperscript{115} In other words, “tribal officials are protected by sovereign immunity when they act in their official capacity and within the scope of their authority.”\textsuperscript{116}

Tribal employees of tribal marijuana businesses could argue that they are acting within the tribal authority to cultivate and sell marijuana under the Indian Policy Statement. Although the DOJ did not explicitly authorize tribes to produce marijuana, the Indian Policy Statement does imply that the federal government will not take corrective action so long as tribes abide by the eight main enforcement priorities. Also, tribes could refer to the states of Colorado, Washington, Alaska, Oregon, and the District of Columbia, all of which have legalized recreational marijuana, for the proposition that if states have the authority to legalize marijuana, then tribes—as sovereign entities—also have the authority to legalize and sell

\begin{footnotes}
\item[113] Weddle, \textit{supra} note 11, at 66.
\item[114] See Cook v. ACI Casino Enterprises, Inc., 548 F.3d 718, 725 (9th. Cir. 2008) (holding that tribal employees were immune from claims they performed in their tribal duties because tribal corporations act as an arm of the tribe and enjoy the same sovereign immunity granted to the tribe itself); Chayoon v. Chno, 355 F.3d 141, 143 (2d Cir. 2004) (dismissing damages claim against tribal officers).
\item[115] \textit{Id.} at 66.
\item[116] \textit{Id.}; Burrell v. Armijo, 603 F.3d 825, 832–34 (10th Cir. 2010) (dismissing individual capacity action where evidence showed defendant was acting within his authority as governor of the Pueblo); Native Am. Distrib. v. Seneca-Cayuga Tobacco Co., 491 F. Supp. 2d 1056, 1072 (D. Okla. 2007) (dismissing individual capacity actions were defendants acting with “colorable” claim of authority from the tribe); Frazier v. Turning Stone Casino, 254 F. Supp. 2d 295, 307 (N.D.N.Y. 2003) (tribal officials have qualified immunity unless their challenged actions “were not related to the performance of their official duties); Bassett v. Mashantucket Pequot Museum & Research Ctr. Inc., 221 F. Supp. 2d 271, 280–81 (D. Conn. 2002) (holding that alleging that defendants’ actions were illegal was insufficient to surmount qualified immunity; instead actions must be “manifestly or palpably beyond his authority”).
\end{footnotes}
marijuana.

With this framework in mind, this Article will now consider the potential results of the hypothetical scenarios posed above.

IV. HYPOTHETICAL RESULTS

A. Seneca Nation of Indians

Within a modified P.L. 280 state, the Seneca Nation will have to argue that New York’s regulation of medical marijuana has created a regulatory regime such that under Cabazon, New York cannot exercise its criminal jurisdiction to penalize marijuana sales and consumption on tribal lands. As stated above, New York has established a highly regulated system to manage medical marijuana, which will support the Seneca argument that New York has a regulatory system rather than a prohibitory framework in place. If the Senecas can successfully argue that New York has a civil-regulatory system in place to govern marijuana, then New York’s marijuana penal sanctions should have no force and effect within the Cattaraugus reservation.

B. Seminole Nation of Florida

Within a pure P.L. 280 state that prohibits all forms of marijuana, the Seminoles face an uphill battle at the moment. The Seminoles will be unable to argue that Florida’s marijuana framework is regulatory because Florida in no way regulates the consumption of marijuana. Rather, Florida purely prohibits all forms of marijuana. However, polls show that Florida may be moving in the direction of legalizing at least medical marijuana and possibly recreational marijuana. So, the Seminoles would be wise to wait for Florida voters to accept a medical marijuana initiative before beginning marijuana operations on tribal lands.

C. Pinoville Pomo Nation

The Pomo Nation can begin its operations to cultivate and distribute medical marijuana within California. Although medical marijuana is currently unregulated at the state level, California has had medical marijuana for nearly 20 years. The recent passage of the California Medical Marijuana Regulation and Safety Act further illustrates a civil-regulatory regime. This supports the argument that California regulates rather than prohibits marijuana. Also, Pomo marijuana would be very similar to Cabazon gaming; both activities are allowed under California law. When California’s medical marijuana regulatory system goes into effect, this will only support the Pomo’s efforts. The Pomos have a strong case for cultivating medical marijuana without state interference.

V. Recommendations

With the above concerns in mind, tribes should take specific measures to avoid triggering state jurisdiction over tribal marijuana activity. The first measure is to hire Indian workers only. By only hiring tribal members or nonmember Indians, tribes can avoid states stepping in to prosecute non-Indian tribal marijuana employees. Employing only Indians would remove employees’ conduct from the scope of state criminal jurisdiction in non-P.L. 280 states where such states can only exercise authority over non-Indian conduct. This also provides an added benefit by creating jobs for tribal members on the reservation. Tribes can also permissibly prefer tribal members/nonmember Indians without violating Title VII due to the Indian Preference Exemption and recent case law out of the Ninth Circuit.

Second, tribes should establish on-site smoking facilities to ensure that customers consume marijuana on tribal lands. By restricting consumption to tribal lands, tribes will avoid

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violating priority number three to prevent the diversion of marijuana.\textsuperscript{121} Allowing off-site consumption of marijuana also maximizes the potential for diversion to unauthorized users.\textsuperscript{122} On-site consumption will also curb state interference because when customers take marijuana off of reservation land and into the state, they become immediately subject to state jurisdiction and punishment. Providing facilities and amenities to consume marijuana on tribal lands will also create “generated-value” for the tribe thereby avoiding the threat of a \textit{Colville} intervention.

Third, tribes should seek to make as much of the industry tribally owned, operated, and located on tribal lands as possible. Tribes should make the marijuana business a purely tribal affair. This will ensure that the tribe’s sovereign immunity protects the tribe and its employees from suit. It will also provide an extra layer of protection from state interference. By making the marijuana industry tribally owned and operated on tribal land, this should also insulate the tribe from state civil and criminal jurisdiction.

Fourth, although this Article has discussed ways to insulate the tribes from state intervention, tribes, as a practical matter, should seek to be transparent with the states about their plans to develop tribal marijuana. By doing so, tribes can potentially avoid deliberate state efforts to interfere with tribal marijuana development due to insecurity, confusion, or displeasure. Tribes can also enter into compacts to ensure that customers do not divert marijuana into the state, alleviating state and federal concerns of diversion and cartel activity. Transparency and cooperation to achieve common goals could help tribes minimize the desire of states to hamper tribal marijuana efforts.

Finally, tribes should be cognizant of the potential security concerns linked to the sale of marijuana. The inability to bank marijuana money due to federal prohibitions leads to businesses being inundated with cash. Such large amounts of cash on hand make marijuana businesses easy targets for armed robberies.

\textsuperscript{121} Policy Statement, supra note 7.

Thus, tribes should take efforts to protect its cash reserves from the sale of marijuana. This will help curb criminal conduct on the reservations.

CONCLUSION

Overall, tribes should exercise caution when they establish their marijuana systems. For tribes affected by P.L. 280, if the state flatly bans all marijuana possession and use, that ban will apply to the tribal communities. But if states allow any form of legal marijuana, tribes have the legal framework for legalization. Certain tribes, such as the Seminoles, will likely have to wait for state marijuana policies to change before making any substantial commitments to tribal marijuana. But, for others such as the Senecas or the Poms, tribal marijuana development may be a realistic venture at this time.

Still, tribes that undertake marijuana businesses should seek to make it a purely tribal affair. The tribe should also seek to be as insular as possible with the cultivation, sale, and consumption of marijuana because activities that go beyond reservation boundaries may be subject to any generally applicable state law. However, if tribes utilize their sovereign rights responsibly, the potential for economic growth in the field of tribal marijuana is boundless.

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