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Making Marijuana Less Illegal: Challenges for Native American Tribes Entering the Marijuana Market

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MAKING MARIJUANA LESS ILLEGAL: CHALLENGES FOR NATIVE AMERICAN TRIBES ENTERING THE MARIJUANA MARKET

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Many Native American tribes are venturing into the marijuana industry. Tribes often have to rely on new business ventures to generate revenue for services, and marijuana shares some parallels with casino gaming. However, tribes face a bevy of issues entering the marijuana market. For example, tribes are largely prevented from interacting with state-licensed businesses. In addition, the Indian Gaming Regulatory Act may preclude tribal use of gaming revenue as an investment source. Simultaneously, tribes have advantages over other businesses. Tribes have important tax exemptions that give tribal businesses an important advantage in the marijuana space. This article provides an overview of the legal challenges and advantages tribes face in the marijuana industry.

I. INTRODUCTION

For many Native American tribes, the primary decision-maker is usually the tribal council.[1] The tribal council usually consists of a half-dozen to a dozen individuals that the tribe's membership base elects.[2] Council members often drive new business or political initiatives for the tribe. For example, some of the earliest tribal casino gaming operations were initiated or started by certain tribal council members.[3] The tribal council as a body usually makes the most crucial business and financial decisions for the tribe, depending on how much they are willing to delegate to their staff. The council can decide upon items as mundane as issuing a business license to a local marina or as complex as entering into a multi-million dollar loan.

Suppose a member of the tribal council invites an entrepreneur he or she met to a tribal council meeting. The council member has had an interest in the tribe entering the cannabis space as a new source of revenue and as an alternative to the

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1. *See, e.g.*, SAGINAW CHIPPEWA INDIAN TRIBE OF MICH. CONST. art. VI, § 1(e) (vesting the Tribal Council with power to manage all economic affairs and enterprises of the Tribe); CONST. AND BY-LAWS OF THE KEWEENAW BAY INDIAN CMTY. art. III, § 1 (denoting the Tribal Council as governing body of the Tribe).

2. SAGINAW CHIPPEWA INDIAN TRIBE OF MICH. CONST. art. IV, § 1; CONST. AND BY-LAWS OF THE KEWEENAW BAY INDIAN CMTY. art. III, § 2.

3. The Associated Press, *Fred Dakota, Native American Gambling Pioneer, Dies at 84*, NPR (Sept. 18, 2021, 9:51 PM), https://www.npr.org/2021/09/18/1038633631/fred-dakota-native-american-gambling-pioneer-dies-michigan.

opioid addiction that has plagued many people in the community. The entrepreneur has recently constructed and has been operating a 3,000 square-foot marijuana grow operation. The operation is about fifty miles outside the tribe's reservation boundaries, and the state licenses the operation. The entrepreneur is interested in selling the operation to the tribe for two million dollars, but the tribe must buy the operation within the next few months. So, the entrepreneur will need to know at this meeting whether the tribal council is interested in purchasing the facility.

Here, the tribal council faces an enormously complicated decision. It is tricky for anyone to acquire a marijuana operation, but Native American tribes are in a uniquely difficult situation. This hypothetical poses several questions. What funds are available to the tribe to purchase the facility, as most of the tribe's funds are from federal and state grants? Can the tribe own marijuana plants outside its reservation? Can the tribe license the facility itself? What licenses does the tribe need to operate the cannabis business? Will the tribe's bank accept the money generated from the operation? Can the tribe go through the process of adding the property to its reservation? Are there any competitive advantages to the tribe operating in the cannabis space?

This article will discuss the legal hurdles to tribes entering the cannabis space. Part I will summarize the current legality of marijuana under federal and state law. Part II discusses tribal sovereignty, tribal government structure, and the importance of economic development to tribes. Part III discusses some of the legal impediments to tribes entering the cannabis space. The article will conclude with a discussion of at least two advantages to tribes operating in the cannabis space in Part IV.

II. FEDERAL AND STATE MARIJUANA LAWS

A. FEDERAL LAW

Congress enacted the Controlled Substances Act of 1970 ("CSA") as Title II of the Comprehensive Drug Abuse Prevention and Control Act of 1970.[4] Congress passed the CSA in response to several factors. First, the Supreme Court had ruled that the federal government's primary means of criminalizing marijuana, the Marijuana Tax Act of 1937, was unconstitutional.[5] Second, the United States made commitments to prohibit marijuana under the Single Convention on Narcotic Drugs, an international treaty.[6] In addition, President Nixon and Congress desired to respond to counterculture and recreational drug use.[7] These

4. Controlled Substances Act of 1970, Publ. L. No. 91-513, 84 Stat. 1236 (codified as amended at 21 U.S.C. §§ 801-904 (2013 & Supp. 2022)).

5. Leary v. United States, 395 U.S. 6, 27, 37-39 (1969).

6. Single Convention on Narcotic Drugs, July 2, 1967, 18 U.S.T. 1407, 520 U.N.T.S. 204.

7. *See* David M. Crowell, *Gonzales v. Raich and the Development of Commerce Clause Jurisprudence: Is the Necessary and Proper Clause the Perfect Drug*, 38 RUTGERS L.J. 251, 287 (2006) (describing President Nixon's policy positions on drug use).

forces existed despite federal recommendations from the National Commission on Marijuana and Drug Abuse that Congress decriminalize marijuana.[8] In short, the federal government needed a new national criminal scheme to comply with treaty obligations and to satisfy the politics of the time.

The CSA classifies drugs into five schedules based on a given drug's potential for abuse.[9] Marijuana is a Schedule I substance,[10] which means it has a "high potential for abuse[,]" has "no currently accepted medical use in treatment in the United States[,]" and lacks "accepted safety for use . . . under medical supervision."[11] So, the CSA criminalizes the use or possession of marijuana under any circumstances.[12] Marijuana is broadly defined to include almost the entire plant.[13] The CSA also treats THC, the psychoactive agent in marijuana, as a Schedule I drug that individuals may not use under any circumstances.[14] Federal penalties for the possession or trafficking of marijuana range from fifteen days to life in prison, depending on various factors.[15]

B. STATE LEGALIZATION

The CSA contemplated that the federal government would focus its efforts on preventing large-scale drug trafficking, allowing states to focus on simple possession.[16] To this, the federal government encouraged many states to enact legislation that treated marijuana and other drugs the same as the CSA.[17] In the

8. Steven A. Vitale, *"Dope" Dilemmas in a Budding Future Industry: An Examination of the Current Status of Marijuana Legalization in the United States*, 23 U. MIAMI BUS. L. REV. 131, 137 (2014).

9. 21 U.S.C. § 812(c).

10. 21 U.S.C. § 812(c), Schedule I(c)(10); Drug Enforcement Administration Controlled Substance Schedules Rule, 21 C.F.R. § 1308.11(d)(23), (58) (2022).

11. 21 U.S.C. § 812(b)(1)(A)-(C).

12. 21 U.S.C. § 841(a)(1).

13. 21 U.S.C. § 802(16) ("all parts of the plant Cannabis sativa L., whether growing or not; the seeds thereof; the resin extracted from any part of such plant; and every compound, manufacture, salt, derivative, mixture, or preparation of such plant, its seeds or resin. . . . The term 'marihuana' does not include . . . the mature stalks of such plant, fiber produced from such stalks, oil or cake made from such seeds of such plant, any other compound, manufacture, salt, derivative, mixture, or preparation of such mature stalks (except the resin extracted therefrom), fiber, oil, or cake, or the sterilized seed of such plant which is incapable of germination."). This definition includes all types of the cannabis plant, including Cannabis indica, Cannabis ruderalis, Cannabis gigantean, and other cannabis plants not yet named. United States v. Walton, 514 F.2d 201, 203 (D.C. Cir. 1975); United States v. Gagnon, 635 F.2d 766, 770 (10th Cir. 1980).

14. 21 U.S.C. § 812(c), Schedule I(c)(17) ("any material, compound, mixture, or preparation, which contains any quantity of . . . Tetrahydrocannabinoils . . . ."); Hemp Indus. Ass'n v. DEA, 357 F.3d 1012, 1014 (9th Cir. 2004). *See also* 21 C.F.R. § 1308.11(d)(31) (identifying "tetrahydrocannabinols . . . naturally contained in the plant of the genus Cannabis (cannabis plant), as well as synthetic equivalents of the substances contained in the cannabis plant, or in the resinous extractives of such plant, and/or synthetic substances, derivatives, and their isomers with similar chemical structure and pharmacological activity to those substances contained in the plant . . . .").

15. *See* 21 U.S.C. § 844 (listing penalties for simple possession); 21 U.S.C. § 841 (listing the penalties for trafficking); *see also* 21 U.S.C. §§ 856-860 (providing for increases in the penalties for marijuana in certain locations and to certain individuals).

16. MARK K. OSBECK & HOWARD BROMBERG, MARIJUANA LAW IN A NUTSHELL 76-77 (2017).

17. *Id.* at 201.

1970s, many states passed legislation modeled after the CSA.[18] So, a super-majority of states treated marijuana and other drugs the same way as the federal government.[19]

However, states have diverged from the criminalization of marijuana over the past three decades.[20] States now treat marijuana on a spectrum, from legalization for adults to traditional criminalization.[21] However, it is important to note that a state can still treat marijuana as a criminal offense for failing to follow state law in legalization states.[22] As of the writing of this article, a majority of states have legalized the medical use of marijuana in some form,[23] and a growing number of states have legalized adult recreational use of marijuana.[24] So, state and federal policies are in an ever-increasing conflict.

III. TRIBAL ECONOMIC DEVELOPMENT

A. TRIBAL LAW BACKGROUND

There is no "all-purpose" definition of an Indian tribe,[25] but whether or not a tribe is federally recognized has become a bellwether due to the number of federal benefits this confers upon tribes.[26] Indian tribes have long been referred to under precedent as "domestic dependent nations,"[27] as tribes are "distinct, independent, political communities"[28] that retain authority to "make their own laws and to be

18. *Id.*

19. *Id.* at 201-02.

20. *Id.*

21. *Id.* at 202.

22. *See, e.g.*, MICH. COMP. LAWS Ann. § 333.27955 (West 2018) (providing immunities from state prosecution).

23. *See* NAT'L CONF. STATE LEGISLATORS, *State Medical Cannabis Laws* (Feb. 3, 2022), https://www.ncsl.org/research/health/state-medical-marijuana-laws.aspx (reflecting that "[a]s of February 3, 2022 37 states and four territories allow for medical use of cannabis products.").

24. *See* NAT'L CONF. STATE LEGISLATORS, *Cannabis Overview* (July 6, 2021), https://www.ncsl.org/research/civil-and-criminal-justice/marijuana-overview.aspx (stating that eighteen states, two territories, and the District of Columbia have legalized small amounts of marijuana for adult recreational use).

25. *See* Duke v. Absentee Shawnee Tribe of Okla. Hous. Auth., 199 F.3d 1123, 1125 (10th Cir. 1999) (noting that the definition of a tribe changes according to the purpose of the regulation or statute under consideration).

26. *See* John v. Baker, 982 P.2d 738, 753-54 (Alaska 1999) (noting that courts defer to federal determinations of tribal status to determine sovereign rights and governance); BIA Indian Tribe Federal Acknowledgment Procedures Rule, 25 C.F.R. pt. 83 (2022); 25 C.F.R. § 83.2 (2022) (describing the purpose of the Department of the Interior's ("DOI's") acknowledgement process, which largely equates to recognizing an Indian Tribe); 25 U.S.C. § 5131 (2013) (requiring the DOI to list tribes that are recognized for federal services). Inclusion on the list is proof of federal recognition. *See* Longo v. Seminole Indian Casino-Immokalee, 813 F.3d 1348, 1350 (11th Cir. 2016) (stating that tribes listed on the DOI's list published pursuant to the Federally Recognized Indian Tribe List Act of 1994 establishes that the tribe is federally recognized); McCrary v. Invanof Bay Vill., 265 P.3d 337, 340-42 (Alaska 2011) (holding that Ivanof Bay is a federally recognized tribe, as established by its inclusion on the DOI's list of tribes).

27. Cherokee Nation v. Georgia, 30 U.S. 1, 10 (1831).

28. Worcester v. Georgia, 31 U.S. 515, 559 (1832).

ruled by them."[29] Initially, the general rule was that "[State law could] have no force [in Indian Country]."[30] However, this rule has relaxed to something akin to a preemption analysis.[31] Today, courts generally conclude that tribes can make their own laws and enforce them in Indian Country regardless of state and, arguably, federal law absent permission from Congress.[32]

As independent political communities, tribes must decide how to organize their government just like other states. Many tribes have been organized under constitutions,[33] with some important exceptions.[34] Tribal constitutions vary widely but generally grant broad power to the governing body of the tribe, usually a tribal council, to make decisions on behalf of the community.[35] Many, but not all, tribes decided to adopt a constitution under the Indian Reorganization Act ("IRA"),[36] which provided a formal process for tribes to adopt their Constitutions.[37] However, it is essential to note that a tribe's ability to govern does not arise from the IRA; a tribe could make decisions prior to the IRA and also could decide whether or not to adopt the IRA.[38]

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29. Williams v. Lee, 358 U.S. 217, 220 (1959). For example, the Village of Hobart could not require the Oneida Nation to receive a permit to host an outdoor festival on Oneida's reservation. Oneida Nation v. Vill. of Hobart, 968 F.3d 664, 689 (7th Cir. 2020).

30. *Worcester*, 31 U.S. at 561.

31. *See* White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 143-44 (1980) (providing an analysis of tribal sovereignty, the exercise of state authority, and pre-emption by federal law).

32. *Williams*, 358 U.S. at 220.

33. *See* MATTHEW L.M. FLETCHER, AMERICAN INDIAN TRIBAL LAW Ch. 3(A) (2011) (discussing several tribes that have tribal constitutions).

34. *See* COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 4.04[3][B] (2021) [hereinafter COHEN HANDBOOK] (noting that the absence of a written constitution does not affect a tribe's sovereignty); Daniel Kraker, *Navajo seeks Support for Tribal Constitution*, NPR (Dec. 20, 2007, 1:10 PM), https://www.npr.org/templates/story/story.php?storyId=17452654 (noting the lack of a constitution in the Navajo Nation).

35. *The Powers of Indian Tribes*, 1 U.S. DEPARTMENT OF THE INTERIOR, OPINIONS OF THE SOLICITOR OF THE DEPARTMENT OF THE INTERIOR RELATING TO INDIAN AFFAIRS, 1917-1974, 445, at 47-77 (Oct. 24, 1934) (1979) ("IRA tribal constitutions have those powers of local self-government which have never been terminated by law or waived by treaty.").

36. Felix S. Cohen, *Indians at Work* (Dep't of Interior 1939), *reprinted in* THE LEGAL CONSCIENCE; SELECTED PAPERS 222, 222-28 (Lucy Kramer Cohen ed., 1960) (stating that ninety-seven Tribes between 1935 and 1939 adopted constitutions under the Indian Reorganization Act).

37. 25 U.S.C. § 5123 (2013) ("Any Indian tribe shall have the right to organize for its common welfare, and may adopt an appropriate constitution and bylaws, and any amendments thereto[.]").

38. *See* Comment, *Tribal Self-Government and the Indian Reorganization Act of 1934*, 70 MICH. L. REV. 955, 960-68, 970-72 (1972), which states:

> It is, of course, not essential that a tribe or any group of people have a written constitution before they can govern themselves. The right to self-government exists as well in tribes whose organizational structure may have been based on ancient custom or tradition. Certainly, all the tribes were not politically developed to the same degree, and therefore some were less able than others to put into practice their inherent governmental powers. Nonetheless, these powers existed in all the tribes.

Id. at 970.

B. TRIBAL ECONOMIC DEVELOPMENT

Tribal economic development has emerged as one of the most important aspects of tribal communities.[39] Economic growth also has an essential link to tribal sovereignty, as financial resources are crucial for tribes to enforce their laws and provide services.[40] Further, tribes are unable to raise revenue through taxation for practical reasons.[41] A tribe may not have jurisdiction over many corporations and individuals on the reservation.[42] A tribal tax could result in double taxation, which would discourage economic growth.[43] A tribe's tax on its members is unlikely to generate much revenue given the financial condition of many Native Americans.[44] Without a tax base, a tribe can only depend on federal and state grant dollars to fund government services to its members.[45] As a substitute, tribal economic development through tribal businesses has emerged as an alternative means for tribes to raise revenue to provide government services.[46]

The most well-known example of tribal economic development has been casino gaming.[47] The Indian Gaming Regulatory Act ("IGRA") requires tribes to enter into compact agreements with states to conduct casino-style gaming.[48] Congress enacted the IGRA in response to a Supreme Court case and a growing

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39. Matthew L.M. Fletcher, *Keynote Address: In Pursuit of Tribal Economic Development as a Substitute for Reservation Tax Revenue*, 80 N.D. L. REV. 759, 777-80 (2005).

40. *Id.* at 771.

> Many reservations depend almost entirely on federal government funding to function. The Ogala Sioux Tribe, for example, is "90 percent dependent on the Federal Government . . . ." Federal funding is an extremely unreliable source of revenue for tribal government. And yet the unmet need for tribal government services approached 60 billion a year by the turn of the century.

Id. at 774-75 (quoting James Brooke, *Proposed Cuts in Indian Programs Hit Those Who Most Rely on Federal Aid*, N.Y. TIMES, Oct. 15, 1995, at 16).

41. *Id.* at 774-84.

42. *See* COHEN HANDBOOK, *supra* note 34, § 7.02[1], [2] (discussing tribal jurisdiction).

43. Michigan v. Bay Mills Indian Cmty., 572 U.S. 782, 811 (2014) (Sotomayor, J., concurring) (citations omitted) ("As commentators have observed, if Tribes were to impose their own taxes on [individuals and companies], the resulting double taxation would discourage economic growth.").

44. *Id.* at 812 ("Moreover, Tribes are largely unable to obtain substantial revenue by taxing tribal members who reside on non-fee land that was not allotted under the Dawes Act.").

45. Fletcher, *supra* note 39, at 771.

46. *Bay Mills Indian Cmty.*, 572 U.S. at 810 (Sotomayor, J., concurring).

> For tribal gaming operations cannot be understood as mere profit-making ventures that are wholly separate from the Tribes' core governmental functions. A key goal of the Federal Government is to render Tribes more self-sufficient, and better positioned to fund their own sovereign functions, rather than relying on federal funding. . . . And tribal business operations are critical to the goals of tribal self-sufficiency because such enterprises in some cases "may be the only means by which a tribe can raise revenues."

Id. (quoting Catherine T. Struve, *Tribal Immunity and Tribal Courts*, 36 ARIZ. St. L.J. 137, 169 (2004)) (citing 25 U.S.C. § 2702(1) (2013)).

47. COHEN HANDBOOK, *supra* note 34, § 12.01.

48. 25 U.S.C. § 2710(d)(1)I (2013); COHEN HANDBOOK, *supra* note 34, § 12.05.

trend among tribes entering the casino gaming market.[49] Congress passed IGRA with two goals in mind: (1) to promote "tribal economic development, self-sufficiency, and strong tribal governments" and (2) to "shield [tribes] from organized crime and other corrupting influences."[50] IGRA enacted a scheme where tribes can regulate casino gaming themselves, but needed to consider state public policy decisions regarding what gaming is and isn't illegal.[51] Casino gaming has emerged as a multi-billion-dollar-a-year industry, bringing newfound wealth to numerous tribes across the country.[52] Tribes can use casino gaming revenue for important government services that grants do not fund.[53] Still, tribes can use the funds as direct cash payments to tribal members as a form of universal basic, or not-so-basic, income.[54] However, Indian gaming is primarily a story of extremes, with a small number of tribal casinos bringing in most of the funds.[55] So, many tribes have to look to alternative sources of revenue outside of casino gaming.[56]

Marijuana is an attractive means for economic development for tribes for several different reasons. First, marijuana is a new and exciting industry as the market is projected to pull in forty-three billion dollars by 2025.[57] Tribes have been successful in turning perceived vices into fortunes, and marijuana fits neatly into this portfolio.[58] There are few examples of a new industry with such untapped potential emerging that exists in the way that marijuana does, and many tribal members want to see the tribe explore this opportunity to increase tribal economic

49. *See* COHEN HANDBOOK, *supra* note 34, § 12.01 (describing the IGRA as Congress's response to the decision in *California v. Cabazon Band of Mission Indians* and the growing trend of gaming among tribes); California v. Cabazon Band of Mission Indians, 480 U.S. 202, 208-09 (1987) (analyzing the effects of the growing trend of gaming among tribes).

50. 25 U.S.C. § 2702(1)-(2).

51. *See* 25 U.S.C. § 2710(b)(1)(A) (providing that "An Indian tribe may engage in, or license and regulate, class II gaming on Indian lands within such tribe's jurisdiction, if—such Indian gaming is located within a State that permits such gaming for any purpose by any person, organization or entity (and such gaming is not otherwise specifically prohibited on Indian lands by Federal law) . . . .").

52. *See* COHEN HANDBOOK, *supra* note 34, § 12.01 (describing the emergence of gaming among tribes).

53. 25 U.S.C. § 2710(b)(2)(B)(i)-(v).

54. *See* BIA Tribal Revenue Allocation Rules, 25 C.F.R. §§ 290.2, 290.4 (2022); Sarah Kershaw, *Family Behind Foxwoods Loses Hold in Tribe*, N.Y. TIMES (June 22, 2007), https://www.nytimes.com/2007/06/22/nyregion/22pequot.html (stating that Mashantucket Pequot members ages eighteen and above receive an average of about one hundred thousand dollars per year).

55. Alan Meister, *Casino City's Indian Gaming Industry Report – 2017 Edition*, NATHAN ASSOCS., INC. 1, 2 (2017), https://www.nathaninc.com/wp-content/uploads/2017/04/IGIRSummary2017-reducedsize.pdf (stating that "[i]n 2015, the top 7% of all Indian gaming facilities . . . accounted for 45% of total gaming revenue nationwide.").

56. *See* COHEN HANDBOOK, *supra* note 34, § 21.01 (discussing the importance of tribal economic development generally).

57. Iris Dorbian, *Legal Cannabis Market Projected to Rack Up 43 Billion*, FORBES (June 18, 2021, 8:20 AM), https://www.forbes.com/sites/irisdorbian/2021/06/18/legal-cannabis-market-projected-to-rack-up-43-billion-by-2025-says-new-study/?sh=10c868136b49.

58. *See* COHEN HANDBOOK, *supra* note 34, § 12.01 (discussing the emergence of gaming among tribes); Melinda Smith, *Native Americans and the Legalization of Marijuana: Can The Tribes Turn Another Addiction Into Affluence?*, 39 AM. INDIAN L. REV. 507, 519-34 (2014) (describing tribes' successful development of gaming and tobacco industries).

development.[59] If a number of tribes choose to enter the cannabis space, an avalanche of tribes entering the industry may follow for two reasons. First, tribal members often encourage tribal council members to enter new economic markets after seeing other tribes' success.[60] Second, it is easier for tribes to engage in new means of economic development once other tribes have created models to do so; once the model is created, it is easier to replicate it.

Additionally, parallels between marijuana and casino gaming exist in the realm of economic development, making for a compelling narrative in Indian Country. For example, Indian gaming started in small bingo halls and garages on reservations throughout the United States.[61] Many tribes took on significant risks of criminal prosecution to find ways to generate resources for their communities.[62] The result is that Indian gaming has blossomed into a multi-billion-dollar-a-year industry, which has provided many tribes untold means of providing for themselves.[63] Many tribes may look at marijuana as a similar venture that can offer new means of supporting themselves.[64]

C. TRIBAL BUSINESS ORGANIZATION

Tribal governments engage in economic development using tribal businesses, which tribes organize in several ways by uniquely integrating them into the tribal government.[65] As discussed above, tribes often organize themselves under a constitution, and this constitution creates a legal entity that can make many of the same decisions as other businesses.[66] The tribal constitution often delegates authority to either the tribal council[67] or a combination of a legislative and executive branch, similar to the United States Constitution.[68]

With this authority, the tribal government can organize its businesses in a number of different ways. First, the tribe could operate its business as a "DBA" (Doing Business As), similar to how an individual can run a business as a sole

59. *See, e.g.*, Laura Drotleff, *American Indian Tribes Turning to Partnerships to Cash in on Marijuana Business Opportunities*, MJBIZDAILY (Dec. 17, 2021), https://mjbizdaily.com/american-indian-tribes-building-marijuana-partnerships/?utm_medium=email&utm_source=newsletter&utm_campaign=MJD_20211103_NEWS_Daily (providing an example of tribes entering the marijuana market).

60. This is based on the author's experience working with tribes.

61. *See* The Associated Press, *supra* note 3 (describing the growth of Fred Dakota's casino, originally operated as a garage casino); Mike Hoeft, *The Bingo Queens of Oneida: How Two Moms Started Tribal Gaming in Wisconsin*, 97 WIS. MAG. OF HIST. 50, 50-53 (2014) (discussing Oneida Nation's first bingo hall in 1976).

62. *See* United States v. Dakota, 666 F. Supp. 989, 1001-02 (W.D. Mich. 1985) (finding that a tribal casino was in violation of the Assimilative Crimes Act), *aff'd*, 796 F.2d 186 (6th Cir. 1986).

63. *See* COHEN HANDBOOK, *supra* note 34, § 12.01 (describing the growth of tribal gaming).

64. *See, e.g.*, Drotleff, *supra* note 59 (providing an example of tribes entering the marijuana market).

65. *See* COHEN HANDBOOK, *supra* note 34, § 21.02[1][a]-[b].

66. *See id.* § 21.02[1] (describing and illustrating the integration of various businesses with tribal government).

67. *See id.* § 4.04[3][c][i]-[ii] (discussing the structure of tribal governments).

68. *See id.* (discussing the structure of tribal governments).

proprietorship.[69] Here, the business does not have a separate charter, but rather the tribal government makes all of the decisions based on its constitution.[70] For instance, if a tribe's constitution says that the tribal council shall "manage all economic affairs and enterprises . . . ." then the tribal council will have to approve every business decision, including contracts, unless the council delegates that authority to a position or individual.[71] This method may be more common in tribes with smaller economic development ventures, where there is less need to delegate decision-making.[72]

Tribes often create separate entities to delegate decision-making and separate a tribal business from the tribe's government operations.[73] One option is for the tribe to create a separate governmental entity that is still part of the government but has a different corporate charter and by-laws.[74] The tribe can organize sub-governmental entities in several ways, but the entity's board of directors may consist of tribal council members or the entire tribal council.[75] The tribal council often retains the authority to make more significant business decisions, like approving contracts over a certain amount.[76] Many tribes also incorporate state, federal, or tribally chartered corporations.[77]

IV. TRIBAL CHALLENGES

Tribes face many challenges entering the marijuana market. First, state policy creates barriers to tribes entering the market as many state laws do not consider tribes.[78] There are roadblocks to tribes utilizing their lands for a marijuana operation.[79] Financing is also an issue; the IGRA may inhibit financing as it is not clear whether a tribe's gaming revenue use is an illegal activity under federal law.[80] In addition, tribes will have to manage their relationships with their banks that they are likely skeptical of marijuana use.[81]

69. *See id.* § 21.02[1][a] (describing the conduct of business as a tribe).

70. *See id.* (describing the conduct of business as a tribe).

71. SAGINAW CHIPPEWA INDIAN TRIBE OF MICH. CONST. art. VI, § 1(e).

72. *See* COHEN HANDBOOK, *supra* note 34, § 21.02[1][a]-[b] (describing organizational forms of economic development among tribes).

73. *See id.* § 21.02[1][b] (describing the conduct of business as a corporate entity).

74. *Id.* §§ 4.04[3][a][ii], 21.02[1][b].

75. *Id.*

76. In practice, this means that many decisions are still made at tribal council meetings under their normal course of business. *Id.* §§ 4.04[3][a], 21.02[1].

77. *Id.*

78. *See infra* Section IV(A).

79. *See infra* Section IV(A)(2).

80. *See infra* Section IV(B).

81. *See infra* Section IV(B)(1).

A. STATE-LICENSING

1. Background

Many states regulate marijuana in the same way they handle other highly regulated industries like alcohol and casino gaming.[82] Although each state's laws are different, there are common threads. First, a state agency will issue licenses to grow, sell, or process marijuana.[83] To receive a license, applicants need to comply with the state's regulations regarding applicants.[84] In addition, states may require applicants to obtain a license from the local government in which the business will operate.[85] So, an applicant needs to comply with both state and local rules to get a license.[86] This article will use Michigan law as an example to show how state licensing laws can work to exclude tribes.

In Michigan, voters approved the Michigan Regulation and Taxation of Marihuana Act ("MRTMA"), a ballot initiative that legalized recreational marijuana for everyone ages twenty-one and older.[87] The initiative did not remove marijuana from Michigan's list of controlled substances, but rather it created a defense from prosecution if an individual possesses specific amounts of marijuana for personal use.[88] Similarly, the initiative granted licensees a defense from prosecution for engaging in licensed activity, such as operating a retail store.[89] Under the measure, the State of Michigan may still criminally prosecute individuals that do not comply with MRTMA or other state marijuana laws.[90]

Michigan, like other states, has different license types that authorize various activities.[91] For instance, a retailer licensee will need an additional license if it

82. OSBECK & BROMBERG, *supra* note 16, § 11-1.

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.*

87. MICH. COMP. LAWS ANN. §§ 333.27951, 333.27952 (West 2018).

88. MICH. COMP. LAWS ANN. § 333.27955.

89. MICH. COMP. LAWS ANN. § 333.27960 (West 2018).

90. MICH. COMP. LAWS ANN. § 333.7212(c) (West 1982 & Supp. 2013) (where marijuana is listed as a controlled substance). *See also* MICH. COMP. LAWS ANN. §§ 333.7106(4) (West 2014 & Supp. 2021), 333.27953 (West 2018 & Supp. 2021) (defining "Marihuana" as including all parts of the plant Cannabis sativa L., growing or not; the seeds of that plant; the resin extracted from any part of the plant; and every compound, manufacture, salt, derivative, mixture, or preparation of the plant or its seeds or resin. "Marihuana" does not include the mature stalks of the plant, fiber produced from the stalks, oil or cake made from the seeds of the plant, any other compound, manufacture, salt, derivative, mixture, or preparation of the mature stalks, except the resin extracted from those stalks, fiber, oil, or cake, or any sterilized seed of the plant that is incapable of germination. "Marihuana" does not include industrial hemp).

91. MICH. COMP. LAWS ANN. § 333.27959(2) (West 2018), enumerating:

> Marihuana retailer; marihuana safety compliance facility; marihuana secure transporter; marihuana processor; marihuana microbusiness; Class A marihuana grower authorizing cultivation of not more than 100 marihuana plants; class B marihuana grower authorizing cultivation of not more than 500 marihuana plants; and class C marihuana grower authorizing cultivation of not more than 2,000 marihuana plants.

Id.

wishes to grow its product. The Marijuana Regulatory Agency ("MRA") is the State of Michigan's primary regulatory agency that issues licenses to applicants and enforces state law.[92] The MRA approves licenses so long as they have submitted an application that complies with its rules and the applicant meets a growing list of other requirements.[93] The regulations define an "applicant" as several types of entities, including individuals and sole proprietorships, limited liability partnerships, limited liability companies, C corporations (private and public), multilevel ownership enterprises, nonprofit corporations, and trusts.[94] Tribes are not included in the applicant definition and do not neatly fit into any of these entity types.[95]

2. Tribal Issues Interacting with State Licensing Regimes.

A tribe can exercise its sovereignty to license and regulate marijuana activities within its jurisdiction.[96] First, a tribe can enact an ordinance legalizing recreational marijuana due to its status as a sovereign nation.[97] The tribe can also license entities, including a business owned and operated by the tribe, to grow and sell marijuana.[98] The tribe's marijuana business may avoid state prosecution in Indian Country because state law generally will not apply to a tribal activity on its reservation or trust land.[99] However, issues start to occur at the end of the tribe's reservation boundaries.

Michigan's statutory scheme's results are that tribes can only operate within Indian Country and cannot interact with other state-licensed entities. A hypothetical is helpful to illustrate how a tribe is likely confined to its jurisdiction. Suppose a tribe has incorporated a separate government entity that operates a marijuana grow operation, similar to how tribes create their other businesses. The tribe owns the entity, and the entity's Board of Directors is the Tribal Council. The tribe does not have access to a significant retail market, so it plans on selling its product to a retail dispensary off its reservation. The tribal enterprise will likely fail to sell its product to state-licensed businesses off of the reservation.

Tribes and their members are subject to state regulation outside of Indian Country, just like all other individuals and entities.[100] So, if a tribal business intends to interact with other state-licensed businesses or intends to operate

92. Mich. Exec. Order 2019-07.
93. MICH. COMP. LAWS ANN. § 333.27959(3).
94. MICH. ADMIN. CODE r. 420.1(c) (West 2020 & Supp. 2022).
95. *Id.*
96. COHEN HANDBOOK, *supra* note 34, § 4.01[2][c].
97. *Id.* § 4.01[1], [2][c].
98. *Id.*
99. *See* Williams v. Lee, 358 U.S. 217, 223 (1959) (affirming tribal sovereignty in Indian Country).
100. *See* Mescalero Apache Tribe v. Jones, 411 U.S. 145, 148-49 (1973) (internal citations omitted) (stating that "[a]bsent express federal law to the contrary, Indians going beyond reservation boundaries have generally been held subject to non-discriminatory state law otherwise applicable to all citizens of the State."); Kiowa Tribe of Okla. v. Mfg. Techs. Inc., 523 U.S. 751, 755 (1998) (noting "[w]e have recognized that a state may have authority to tax or regulate tribal activities occurring within the state, but outside Indian Country.").

outside of Indian Country, it will need to consider state law.[101] There are two roadblocks presented if a tribal grower were to attempt to sell to a state-licensed retailer. First, the state could criminally prosecute the tribal employees for transporting products off-reservation without a license.[102] Second, the state-licensed retailer likely would not purchase from the tribal grow in the first place because doing so could threaten the business's license.[103] These two issues prevent other types of tribal marijuana businesses (e.g., retailers, producers, etc.) from interacting with State licensed entities.

So, the tribal entity must ensure it complies with MRTMA to interact with state-licensed retailers,[104] and the tribe's compliance with MRTMA will require that the tribal grow receive a state license.[105] The entity will likely have difficulties getting licensed under state law as the definition of "applicant" does not include a government entity.[106] Even if the government entity could fit into the meaning of "applicant," such as a public corporation, the state rules require extensive background checks.[107] A state agency likely could interpret the background check requirement to apply to every member of the tribe, and a tribe is unlikely to have hundreds or even thousands of members that can pass a background check.[108] A team of clever lawyers and a sympathetic agency may very well find ways to allow a tribe to be licensed;[109] however, there are no straightforward means for a traditional tribal business to be licensed, which essentially prevents those businesses from interacting with state entities.

Many tribes will balk at the suggestion that it needs to consider state law. Tribes often operate their businesses on-reservation without concerning themselves with state law. For instance, a tribal convenience store on-reservation can purchase products from vendors without agreeing with the state. So why should marijuana be any different? The difference is that the highly regulated nature of marijuana will isolate a tribal marijuana business and force it to provide

101. *See Mescalero Apache Tribe*, 411 U.S. at 148-49 (internal citations omitted) (stating that "[a]bsent express federal law to the contrary, Indians going beyond reservation boundaries have generally been held subject to non-discriminatory state law otherwise applicable to all citizens of the State.").

102. *See* MICH. COMP. LAWS ANN. § 333.7212(c) (listing marijuana as a controlled substance); MICH. COMP. LAWS ANN. § 333.27955 (creating a defense to prosecution under certain conditions).

103. MICH. COMP. LAWS ANN. § 333.27965 (West 2018).

104. MICH. COMP. LAWS ANN. § 333.27960.

105. *Id.*

106. MICH. ADMIN. CODE r. 420.1(c).

107. MICH. ADMIN. CODE r. 420.6(2) (West 2020 & Supp. 2022).

108. *See, e.g.*, *Saginaw Chippewa Indian Tribe*, CENTRAL MICH. UNIV., https://www.cmich.edu/about/our-community/saginaw-chippewa-indian-tribe/ (last visited Feb. 15, 2022) (stating there are over three thousand members of the Saginaw Chippewa Indian Tribe); Simon Romero, *Navajo Nation Becomes Largest Tribe in U.S. After Pandemic Enrollment Surge*, N.Y. TIMES (May 21, 2021), https://www.nytimes.com/2021/05/21/us/navajo-cherokee-population.html (noting that enrollment in the Navajo Nation grew to nearly four hundred thousand in a rush to secure federal hardship benefits, exceeding enrollment in the Cherokee Nation).

109. Joe Boomgaard, *Leveraging Tribal Sovereignty Gives Cannabis Firm Entry to Off-Limits Michigan Markets*, MIBIZ (Aug. 2, 2020, 7:31 PM), https://mibiz.com/sections/economic-development/leveraging-tribal-sovereignty-gives-cannabis-firm-entry-to-off-limits-michigan-markets.

everything itself.[110] In order to sustain a marijuana business, a tribe will have to have a great retail location, the ability and facilities necessary to grow marijuana, and the knowledge to create the numerous product types available on its own.[111]

Marijuana is more than just a smokable product; there are various marijuana products available to consumers. Marijuana products now include baked goods,[112] candies,[113] tinctures,[114] patches,[115] and more eccentric products like infused lubricants.[116] Moreover, concentrates are a specialized form of marijuana that require large-scale facilities to process and create.[117] In addition, marijuana comes in dozens and dozens of strains,[118] and consumers are becoming more sophisticated in requesting certain strains.[119] In the aggregate, the state market makes all of these products, and those businesses cannot interact with a tribal marijuana company for fear of losing its license.[120] A tribe will have to create all of these products itself to compete with state-licensed retail stores.[121] In essence, a tribe may as well be asked to develop an iPhone on its own.

110. As discussed *supra* notes 102-103 and accompanying text, tribes will be precluded from interacting with the state market due to the ability of the state to bring criminal prosecution against tribes. *See, e.g.*, MICH. COMP. LAWS ANN. § 333.7212(c) (where marijuana is listed as a controlled substance); MICH. COMP. LAWS ANN. § 333.27955 (creating a defense to prosecution under certain conditions).

111. *See supra* note 110 and accompanying text (describing the difficulty of a tribal marijuana business interacting with the state, thus requiring the tribe be self-sufficient in their operation).

112. *See* Tony Davis, *Not your Grandmother's Recipe? Cannabis Cookies Hit P.E.I. Shelves*, CBC (Nov. 7, 2021, 3:31 PM), https://www.cbc.ca/news/canada/prince-edward-island/pei-cannabis-cookies-nov-2021-1.6240524 (reporting the sale of baked goods at P.E.I. Cannabis retailers).

113. *See* Valeriya Safronova, *Big Candy is Angry*, N.Y. TIMES (May 22, 2021), https://www.nytimes.com/2021/05/22/style/edibles-marijuana.html (describing lawsuits by major candy producers against producers of marijuana-infused candy look-alikes).

114. *See* Phlip Bjorge, *Cannabis Tinctures 1010: How to Make, Consume, and Dose Them*, LEAFLY.COM (Mar. 4, 2020), https://www.leafly.com/news/cannabis-101/cannabis-tinctures-101-what-are-they-how-to-make-them-and-how-to (describing the production of cannabis tinctures).

115. *See* Rae Lland, *What are THC, CBD, and Other Cannabis-Derived Transdermal Patches?*, LEAFLY.COM (Jan. 24, 2017), https://www.leafly.com/news/strains-products/what-are-marijuana-transdermal-patches (describing cannabis transdermal patches).

116. FORIA, http://www.foriawellness.com (last visited Feb. 15, 2022).

117. Sarah Maslin Nir, *Chasing Bigger High, Marijuana Users Turn to 'Dabbing'*, N.Y. TIMES (May 12, 2016), https://www.nytimes.com/2016/05/13/nyregion/chasing-bigger-high-marijuana-users-turn-to-dabbing.html.

118. *Leafly's 110 Best Cannabis Strains of All Time*, LEAFLY.COM (Aug. 23, 2021), https://www.leafly.com/news/strains-products/top-100-marijuana-strains.

119. *See* Douglas Brown, *High-Demand Strains, March 15, 2017*, CANNABIS BUS. TIMES (Mar. 25, 2017), https://www.cannabisbusinesstimes.com/article/high-demand-strains/ (describing demand trends in cannabis strains).

120. As discussed *supra* notes 102-103 and accompanying text, tribes will be precluded from interacting with the state market due to the ability of the state to bring criminal prosecution against tribes. *See* MICH. COMP. LAWS ANN. §§ 333.7212(c), 333.27955.

121. As discussed *supra* notes 102-103 and accompanying text, tribes will be precluded from interacting with the state market due to the ability of the state to bring criminal prosecution against tribes. *See* MICH. COMP. LAWS ANN. §§ 333.7212(c), 333.27955.

3. Potential Solutions

a. Compacting

Tribal compacts are agreements between a state and a tribe, or tribes, where the tribe and the state agree on how to handle a complicated legal issue.[122] Compacts are commonly associated with Indian Gaming, as the IGRA requires a tribal compact with a state to conduct "casino-style" gaming.[123] However, states and tribes have used compacts for other areas where the case law is complicated, such as taxation and criminal law, and such compacts have become models for resolving complex jurisdiction issues.[124] Compacts also have benefits over state legislation as tribal-state compacts allow each tribe to resolve its unique circumstances and because state law generally has no effect within Indian Country.[125]

Some states and tribes have entered into marijuana compacts. Nevada and the Las Vegas Paiute Tribe have entered into a compact,[126] and Washington State has a template compact that it can use for tribes.[127] Congress has granted Washington broader criminal jurisdiction in Indian Country than in Nevada, which may explain some of the differences between the compacts.[128] Each state's compact generally applies to tribal purchases from, and sales to, state licensees.[129] Each compact conditions that a tribal businesses' sale of marijuana must comply with tribal law, and the tribe and the state agree on the tribe's law as part of the compact.[130] In addition, the tribe must collect a tax equal to the state's tax, but it does not have to share the tax with the state.[131]

Compacting marijuana has several benefits. One advantage of compacting is that many states and tribes have compacted before.[132] Many tribes have gaming compacts, in addition to other agreements with states.[133] Compacting's familiarity means that most of the parties involved will have a sense of the processes.[134] Moreover, tribes and states can quickly look to other states'

122. COHEN HANDBOOK, *supra* note 34, §§ 6.05, 12.05.

123. *Id.* § 12.05.

124. *Id.* § 6.05.

125. *Id.*

126. Marijuana Compact between Las Vegas Tribe of Paiute Indians and the State of Nev., § I, STATE OF NEV. CANNABIS COMPLIANCE BD. [hereinafter Nevada Compact], https://ccb.nv.gov/wp-content/uploads/2020/06/LV-Tribe-of-Paiute-Indians-Fully-Executed.pdf.

127. Marijuana Compact Between Tribe and the State of Washington, WASH. STATE LIQUOR & CANNABIS BD. [hereinafter Washington Compact], https://lcb.wa.gov/sites/default/files/publications/Tribal_Resources/Tribal%20Compact%20Template%20March%202021.docx.

128. COHEN HANDBOOK, *supra* note 34, § 6.04[3].

129. Nevada Compact, *supra* note 126, § V.A.; Washington Compact, *supra* note 127, § V.G.

130. Nevada Compact, *supra* note 126, § V.B.(2); Washington Compact, *supra* note 127, § V.I.D.(1).

131. Nevada Compact, *supra* note 126, § V.E.; Washington Compact, *supra* note 127, § IX.

132. COHEN HANDBOOK, *supra* note 34, § 6.05.

133. *Id.* §§ 6.05, 12.05.

134. *Id.*

compacts as starting points. In addition, compacting around marijuana will allow the state and tribal businesses reciprocity; tribes can sell to state businesses and vice-versa.[135] For the state, a compact could be an opportunity to ensure that tribal marijuana operations are collecting the same taxes as state-regulated facilities and are adhering to minimum safety standards.[136]

The downside of compacting is that it is often time-consuming as it can involve multiple parties given the complex interests involved. Tribes and states can take months or even years to agree, depending on the process. Time is of the essence in a growing industry like cannabis, so compacting comes with significant disadvantages.

b. State Licensing Laws

As an alternative to a compact, there may be means for a tribe to receive a state license. A tribe could incorporate a state-chartered corporation and apply for a license under state law. Tribes have decided to incorporate under state law in certain situations; essentially, such an entity is a corporation with the sole shareholder or owner being the tribe or some other tribally created entity.[137] The benefit of this approach is that it may be faster than compacting as new laws or agreements are not needed. This approach also gives a tribe the ability to operate a business off its reservation.[138] A compact may only clarify that tribal companies can interact with state businesses but won't clarify that the tribe can open a retail store off its reservation.[139]

This approach, however, has several downsides. First, a tribe will lose out on its ability to exercise its sovereignty.[140] Tribal sovereignty allows tribal businesses to enjoy regulatory and tax benefits that other companies do not.[141] In addition, a state-chartered corporation will likely have no claims to sovereign immunity, which is a crucial tool for tribal businesses.[142] In short, a state-charted

135. *Id.* § 6.05.

136. Nevada Compact, *supra* note 126, § V.B.(2); Washington Compact, *supra* note 127, § V.I.D.(1).

137. COHEN HANDBOOK, *supra* note 34, §§ 4.04[3][a], 21.02[1].

138. Without a license, a tribe is likely unable to operate off its reservation without the risk of criminal penalties. *See* MICH. COMP. LAWS ANN. § 333.7212(c) (identifying marijuana as a controlled substance); MICH. COMP. LAWS ANN. § 333.27955 (describing permissive acts by individuals under the MRTMA).

139. *See generally* Nevada Compact, *supra* note 126 (focusing mainly on marijuana operations centered within the reservation); Washington Compact, *supra* note 127 (focusing mainly on marijuana operations centered within the reservation).

140. *See* Mescalero Apache Tribe v. Jones, 411 U.S. 145, 148-49 (1973) (internal citations omitted) (stating that "[a]bsent express federal law to the contrary, Indians going beyond reservation boundaries have generally been held subject to non-discriminatory state law otherwise applicable to all citizens of the State.").

141. COHEN HANDBOOK, *supra* note 34, §§ 4.04[3][a], 21.02[1].

142. *See* Michigan v. Bay Mills Indian Cmty., 572 U.S. 782, 810 (2014).

> For tribal gaming operations cannot be understood as mere profit-making ventures that are wholly separate from the Tribes' core governmental functions. A key goal of the Federal Government is to render Tribes more self-sufficient, and better positioned to fund their own sovereign functions, rather than relying on federal funding. . . . And

tribal business operating off its reservation loses many of a tribe's competitive advantages. Moreover, this approach may require a state agency to interpret the law in favor of a tribe. As discussed, it is ambiguous as to whether a tribe can receive a license, so a state agency has discretion in deciding whether and how a tribe can receive a state license.[143] A state agency can think of a tribal business as more akin to a public benefits corporation or a trust, as all of the funds must be used to benefit a government.[144] A tribe convincing a state agency to give it a license could be time-consuming, which essentially defeats the benefit of this approach.

c. Land

It works to a tribe's benefit to ensure that its marijuana business is on land that falls within the definition of Indian Country because the tribe will more than likely desire to regulate the industry without interference from the state.[145] Indian Country includes fee land on a tribe's reservation and land that is in trust,[146] however, fee land that the tribe owns on its reservation may not be the best location for the type of marijuana business the tribe is interested in starting. Here, the tribe may need to consider how it can navigate the federal trust process to put land into trust, which treats its business as illegal.

i. *Fee-to-Trust*

The fee-to-trust process refers to the ability of the Secretary of Interior to acquire land for tribes and tribal members.[147] The United States will hold the title to lands acquired under this statute in trust for the Indian tribe or individual Indian.[148] There are several benefits to tribes taking land into trust, such as exemption from state and local taxation and potentially broader civil and criminal jurisdiction.[149] In addition, tribes can use the fee-to-trust process for land on or off of a tribe's reservation.[150] Tribes could ensure that a marijuana operation located off of its reservation can take advantage of these benefits if it puts the tribal

> tribal business operations are critical to the goals of tribal self-sufficiency because such enterprises in some cases "may be the only means by which a tribe can raise revenues."

Id. (quoting Struve, *supra* note 46, at 169) (citing 25 U.S.C. § 2702(1)).

143. *See, e.g.*, MICH. ADMIN. CODE r. 420.1(c) (defining an applicant for the purposes of the MRTMA).

144. *Bay Mills Indian Cmty.*, 572 U.S. at 810.

145. *See* Williams v. Lee, 358 U.S. 217, 220 (1959) (stating that "Congress has . . . acted consistently upon the assumption that the States have no power to regulate the affairs of Indians on a reservation.").

146. 18 U.S.C. § 1151 (2013).

147. 25 U.S.C. § 5108 (2013).

148. *Id.*

149. *Id.*; COHEN HANDBOOK, *supra* note 34, § 3.04[1].

150. 25 U.S.C. § 5108. *See also* BIA Off-Reservation Land Acquisitions Rule, 25 C.F.R. § 151.11 (2022) (describing considerations in evaluating tribal requests to acquire lands outside of and noncontiguous with the reservation as trust lands).

land into trust;[151] however, it appears extremely unlikely that a tribe can get the Secretary of the Interior to take land into trust for an existing marijuana operation. The tribe is required to include in its application to the Secretary the tribe's intended use for the property.[152] The fee-to-trust process contemplates that a tribe can acquire land for economic development, but this process requires the tribe to provide an operational and business plan.[153] So, the Department of the Interior ("DOI") will need to know many details about the tribe's business operations, and the DOI has a lot of discretion in deciding whether to take land into trust.[154] It is unlikely that the DOI will approve taking land into trust for a marijuana operation as marijuana is illegal under federal law.[155] Alternatively, a tribe may have better luck getting land into trust for a different purpose and then using the land for a marijuana operation after the fact.[156]

ii. *Leasing*

An alternative means for tribes to enter the cannabis space is to lease land to marijuana businesses.[157] A tribe may wish to collect rental payments as additional revenue and provide tribal members with new employment opportunities.[158] Due to its location, jurisdiction, or other reasons, a tribe may wish to lease trust land rather than fee land.[159] A tribe generally must receive the Secretary of the Interior's approval before it may lease trust land to tribal and non-tribal businesses,[160] which may be challenging.

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151. *See* COHEN HANDBOOK, *supra* note 34, § 3.04[1].

152. DEP'T INTERIOR BUREAU INDIAN AFFS., ACQUISITION OF TITLE TO LAND HELD IN FEE OR RESTRICTED FEE STATUS 11 (June 28, 2016) [HEREINAFTER FEE-TO-TRUST HANDBOOK], https://www.bia.gov/sites/bia.gov/files/assets/public/raca/handbook/pdf/Acquisition_of_Title_to_Land_Held_in_Fee_or_Restricted_Fee_Status_50_OIMT.pdf.

153. *Id.* at 16.

154. 25 U.S.C. § 5108.

155. *See id.* (stating the Secretary of Interior has authority, but is generally not required to, take land into trust); Comprehensive Drug Abuse Prevention and Control Act of 1970, Publ. L. No. 91-513, 84 Stat. 1236 (codified as amended at 21 U.S.C §§ 801-904).

156. *See* FEE-TO-TRUST HANDBOOK, *supra* note 152, at 11 (stating that tribes can acquire land for economic development, tribal self-determination, and Indian Housing).

157. *Store Opening Follows Historic Partnership with the Sault Ste. Mari Tribe of Chippewa Indians*, SAULT STE. MARIE TRIBE OF CHIPPEWA INDIANS (Jan. 15, 2021), https://www.saulttribe.com/newsroom/7132-lume-cannabis-co-to-launch-adult-use-marijuana-sales-in-sault-ste-marie.

158. *Id.*

159. *Id.*

160. 25 U.S.C. § 415(a) (2022).

> Any restricted Indian lands, whether tribally, or individually owned, may be leased by Indian owners, with the approval of the Secretary of the Interior, for public, religious, educational, recreational, residential, or business purposes, including the development or utilization of natural resources in connection with operations under such leases, for grazing purposes, and for those farming purposes which require the making of a substantial investment in the improvement of the land for the production of specialized crops as determined by said Secretary . . . Prior to approval of any lease or extension of an existing lease pursuant to this section, the Secretary of the Interior shall first satisfy himself that adequate consideration has been given to the relationship between the use of the leased lands and the use of neighboring lands; the

It seems unlikely that a tribe can receive the Secretary's approval of a lease. The DOI's regulations require the tribe to identify the reason for the lease.[161] The rules also require the tribe to provide information on the development plan[162] and partnership entity and the partner's ability to manage the project.[163] So, without some creative thinking, the DOI will know the tribe intends to allow an illegal operation on federal lands at the outset. These disclosures alone will likely prevent the DOI from approving the lease as it will probably know the lease is for cannabis, and the DOI can deny a lease for any "compelling reason."[164]

In addition, even if the tribe successfully avoids informing the DOI that the lease is for a marijuana operation, there are other practical reasons why a lease arrangement will not work. The lease must contain a clause that states the lessee must not engage in any unlawful conduct.[165] The DOI can inspect the premises at any time[166] and can enforce the lease without the tribe's consent or permission.[167] So, a marijuana business is taking on a lot of risk in its lease agreement, given the tremendous authority the DOI has to enforce the lease.[168] A lease may be practically challenging as well. The DOI must approve

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> height, quality, and safety of any structures or other facilities to be constructed on such lands; the availability of police and fire protection and other services; the availability of judicial forums for all criminal and civil causes arising on the leased lands; and the effect on the environment of the uses to which the leased lands will be subject.

Id.

161. BIA Business Lease Mandatory Provisions Rule, 25 C.F.R. § 162.413(a)(2) (2022) ("All business leases must identify . . . the purpose of the lease and authorized uses of the leased premises.").

162. 25 C.F.R. § 162.438(j) (2022) ("A preliminary plan of development that describes the type and location of any permanent improvements the lessee plans to construct and a schedule showing the tentative commencement and completion dates for those improvements.").

163. 25 C.F.R. § 162.438(i).

> A lessee or the Indian landowners must submit the following documents to the BIA to obtain approval of a business lease: "Where the lessee is not an entity owned and operated by the tribe, documents that demonstrate the technical capability of the lessee or lessee's agent to construct, operate, maintain, and terminate the proposed project and the lessee's ability to successfully design, construct, or obtain the funding for a project similar to the proposed project."

Id.

164. 25 C.F.R. § 162.441 (2022) ("Will approve a business lease unless (1) The required consents have not been obtained from the parties to the lease; (2) The requirements of this subpart have not been met; or (3) We find a compelling reason to withhold our approval in order to protect the best interests of the Indian landowners.").

165. 25 C.F.R. § 162.413(c)(2) ("All business leases must include the following provisions – there must not be any unlawful conduct, creation of a nuisance, illegal activity, or negligent use or waste of the leased premises . . . .").

166. 25 C.F.R. § 162.413(c)(5) ("BIA has the right, at any reasonable time during the term of the lease and upon reasonable notice, in accordance with § 162.464 to enter the leased premises for inspection and to ensure compliance."); 25 C.F.R. § 162.464 (2022) (stating that the BIA "may enter the leased premises at any reasonable time, upon reasonable notice, and consistent with any notice requirements under applicable tribal law and applicable lease documents, to protect the interests of the Indian landowners and to determine if the lessee is in compliance with the requirements of the lease.").

167. 25 C.F.R. § 162.413(e) ("[the BIA] may treat any provision of a lease document that violates Federal law as a violation of the lease."); 25 C.F.R. § 162.467(c) (2022) (allowing the BIA to cancel the lease).

168. 25 C.F.R. §§ 162.413(e), 162.467(c).

amendments[169] and assignments,[170] so it will likely learn the lease is for cannabis, as amendments and assignments may disclose important business information. With this backdrop, the Secretary of the Interior's process creates issues with tribes leasing to a marijuana business.

Tribes do have a few options to work around these issues. First, the Hearth Act allows tribes to create regulations and approve leases themselves.[171] The DOI will need to approve the rules,[172] but the Tribe approving the lease over the DOI gives the tribe flexibility in deciding whether to approve leases.[173] This option still has its shortfalls; the tribe's regulations must be consistent with federal law, so presumably, a lease must not violate federal law.[174] In addition, the DOI can still enforce a lease a tribe approves under the Hearth Act in certain circumstances.[175] Another alternative is that a tribe could sublease a lease to a marijuana operation, as the DOI does not need to approve subleases.[176] However, a subleasing approach still has risks, as the DOI must approve amendments and assignments.[177]

B. FINANCING A TRIBAL MARIJUANA OPERATION.

Tribes also face the issue of how to invest in a new cannabis operation. Marijuana is no longer grown in your friend's basement; the marijuana industry is quickly becoming a large-scale, sophisticated business.[178] Similarly, the industry's economics are driving it towards vertical integration, where each

169. 25 C.F.R. § 162.445 (2022) ("The parties may amend a business lease by obtaining: (a) the lessee's signature; (b) the Indian landowners' consent under [these regulations]; and (c) BIA approval of the amendment under §§ 162.447 and 162.448.").

170. 25 C.F.R. § 162.449 (2022).

171. 25 U.S.C. § 415(h)(1).

172. 25 U.S.C. § 415(h)(3)(A).

173. 25 U.S.C. § 415(h)(1).

174. 25 U.S.C. § 415(h)(6).

> If an Indian tribe executes a lease pursuant to tribal regulations under paragraph (1), the Indian tribe shall provide the Secretary (A) a copy of the lease, including any amendments or renewals to the lease; and (B) in the case of tribal regulations or a lease that allows for lease payments to be made directly to the Indian tribe, documentation of the lease payments that are sufficient to enable the Secretary to discharge the trust responsibility of the United States under paragraph (7).

Id.

175. 25 U.S.C. § 415(h)(7)(B).

> Pursuant to the authority of the Secretary to fulfill the trust obligation of the United States to the applicable Indian tribe under Federal law (including regulations), the Secretary may, upon reasonable notice from the applicable Indian tribe and at the discretion of the Secretary, enforce the provisions of, or cancel, any lease executed by the Indian tribe under paragraph (1).

Id.

176. BIA Business Lease Compatible Uses Rule, 25 C.F.R. § 162.419 (2022).

177. 25 C.F.R. §§ 162.445, .449.

178. *See, e.g.*, Thomas Fuller, *Marijuana Goes Industrial in California*, N.Y. TIMES (Apr. 15, 2017), https://www.nytimes.com/2017/04/15/us/california-marijuana-industry-agriculture.html (describing the growth and industrialization of the marijuana industry in California).

operation will have its own grow, processor, and retail operation.[179] So, tribes that are seriously interested in entering the cannabis space will need to make a substantial investment to operate. In practice, the most likely source of funds for a cannabis operation will come from gaming revenue. There are great examples of tribal economic development outside of Indian gaming.[180] However, the most uniform type of economic development revenue that a tribe is free to use is gaming revenue.[181]

IGRA created the National Indian Gaming Commission ("NIGC"), which can bring enforcement actions against tribes for violations of IGRA.[182] The NIGC can issue fines of up to $52,596 per violation[183] and require a tribal casino to shut down in extreme cases.[184] IGRA states that tribes may use net gaming revenue for five purposes: "(i) to fund tribal government operations or programs; (ii) to provide for the general welfare of the Indian tribe and its members; (iii) to promote tribal economic development; (iv) to donate to charitable organizations; and (v) to help fund operations of local government agencies."[185] Of these purposes, tribal economic development is the most relevant to a cannabis operation.[186]

"Tribal economic development" is not defined in the statute,[187] regulations,[188] senate reports,[189] or legislative history,[190] and no court has interpreted its meaning.[191] The ordinary meaning of "economic development" provides insight into how to define economic development.[192] Dictionary

179. *See, e.g.*, Lindsey Bartlett, *How to Build a Vertically-Integrated Cannabis Empire*, FORBES (Oct. 29, 2020, 7:20 AM), https://www.forbes.com/sites/lindseybartlett/2020/10/29/how-to-build-a-vertically-integrated-cannabis-empire/?sh=63c6720467df (describing the goal of cannabis entrepreneurs to achieve vertical integration).

180. *See* Fletcher, *supra* at note 39, at 775-81.

181. *See* Mavis Harris, *2019 Indian Gross Gaming Revenues of 34.6B Set Industry Record and Shows a 2.5% Increase*, NAT'L INDIAN GAMING COMM'N (Dec. 8, 2020), https://www.nigc.gov/news/detail/2019-indian-gross-gaming-revenues-of-34.6b-set-industry-record-and-show-a-2.5-increase (stating that 245 federally recognized tribes have casinos).

182. 25 U.S.C. § 2713 (2013); NIGC Notice of Violation Rule, 25 C.F.R. § 573.3 (2022).

183. 25 U.S.C. § 2713(a)(1); NIGC Civil Fines Rule, 25 C.F.R. § 575.4 (2022).

184. 25 U.S.C. §§ 2705(a)(1) (2013), 2713(b)(1).

185. 25 U.S.C. § 2710(b)(2)(B)(i)-(v).

186. *Id.*

187. 25 U.S.C. § 2703 (2013).

188. Tribal Revenue Allocation Plans, 65 Fed. Reg. 14461-01 (Mar. 17, 2000) (to be codified at 25 C.F.R. pt. 290).

189. *See* S. REP. NO. 100-446 (1988) (discussing legislation on the joint regulation by tribes and the Federal Government of gaming on Indian lands).

190. *See Gaming Activities on Indian Reservations and Lands: Hearing on S. 555 and S. 1303 Before the Select Comm. on Indian Affairs*, 100th Cong. (1987) (hearing "to establish federal standards and regulations for the conduct of gaming activities on Indian reservations and lands, and for other purposes").

191. W.S. Miller & Chad LeBlanc, *Bingo: An Overview of the Potential Legal Issues Arising from the use of Indian Gaming Revenues to fund Professional Sports Facilities*, 19 J. LEGAL ASPECTS SPORT 121, 136 (2009). *Contra* United States v. Hunter, No. C 06-565 SI., 2008 WL 191981, at *3 (N.D. Cal. Jan. 22, 2008) (holding that political contributions are an acceptable use of tribal funds).

192. Artis v. District of Columbia, 138 S. Ct. 594, 603 (2018) (quoting Moskal v. United States, 498 U.S. 103, 108, (1990)) ("In determining the meaning of a statutory provision, 'we look first to its language, giving the words used their ordinary meaning.'"); CBS Inc. v. Prince Time 24 Joint Venture, 245 F.3d 1217, 1222 (11th Cir. 2001) (quoting Harris v. Garner, 216 F.3d 970, 976 (11th Cir. 2000)) ("We have also said just as frequently that 'when the import of words Congress has used is clear . . . we need not

definitions of economic development generally focus on the progress of the overall economy, wealth building, and general increases in living standards.[193] The Economic Development Administration states that economic development "creates the conditions for economic growth and improved quality of life by expanding the capacity of individuals . . . to maximize the use of their talents and skills."[194] These definitions are helpful, but do not neatly resolve whether activity deemed illegal under federal law can be legal for the purposes of improving economic development under the IGRA.

The NIGC is in a position where it will have to decide how to balance IGRA's policy goals of promoting tribal economic development and preventing criminal activity.[195] The NIGC's enforcement action against the St. Croix Chippewa Indians of Wisconsin may suggest its approach to the issue. St. Croix appears to have hired a consultant, who may have provided the Tribe advice on entering the cannabis space.[196] The NIGC's recent enforcement action against the Tribe noted that "there is no record of any benefit provided or expected to be provided" by the consultant in exchange for the fees provided to him.[197] A reasonable person could read this as simply bringing an enforcement action against the Tribe for failing to have proper documentation for such a hefty fee.[198] However, tribes should not ignore the NIGC's attention to cannabis consulting fees in its enforcement action.

Despite these tea leaves, tribes can make several arguments that the use of net gaming revenue for a marijuana operation is an acceptable use of gaming revenues. First, tribes can argue that the ambiguity in this statute should be resolved in favor of the tribe.[199] Federal legislation addressing Indian affairs must be construed liberally in favor of Indian tribes, and individuals must interpret ambiguous provisions to benefit Indian tribes.[200] However, this canon of

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resort to legislative history, and we certainly should not do so to undermine the plain meaning of the statutory language.'").

193. *See* ICSE QUESTION BANK CLASS 9 ECONOMICS 33 (Oswaal Ed. Bd. ed., 2022) ("[P]rogress in an economy, or the qualitative measure of this. [Economic development] usually refers to the adoption of new technologies, transition from agriculture-based to industry-based economy, and general improvements in living standards."); *see also Economic Development*, YOUR DICTIONARY, http://www.yourdictionary.com/economic-development#oqXFuhttjRId5ehG.99 (last visited Feb. 16, 2022) ("Economic development is defined as an increase in a country's wealth and standard of living. It is usually measured by an increase in the gross domestic product (GDP) or other measure of aggregate income.").

194. *Key Definitions*, ECON. DEV. AGENCY, https://www.eda.gov/performance/key-definitions/ (last visited Feb. 17, 2022).

195. 25 U.S.C. § 2702(1)-(2).

196. Ed Silverstein, *St. Croix Chippewa Tribe Allegedly Paid Marijuana Consultant who had Spent Decade in Prison*, CASINO.ORG (Apr. 25, 2019, 6:45 AM), https://www.casino.org/news/st-croix-chippewa-tribe-allegedly-paid-marijuana-consultant-after-he-spent-decade-in-prison/.

197. Notice of Violation NOV-19-02 from National Indian Gaming Commission to St. Croix Chippewa Indians of Wisconsin at 11 (Nov. 19, 2002) (on file with author), https://www.nigc.gov/images/uploads/enforcement-actions/NOV1902StCroix.pdf.

198. 25 U.S.C. § 2710(b)(2)(D); NIGC Gaming Ordinance Approval Requirements Rule, 25 C.F.R. § 522.4(b)(4) (2022).

199. White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 143-44 (1980) ("Ambiguities in federal law have been construed generously in order to comport with these traditional notions of sovereignty and with the federal policy of encouraging tribal independence.").

200. *See* Choate v. Trapp, 224 U.S. 665, 675 (1912).

construction will not apply when the statute is not ambiguous, which means it is not "'fairly capable' of two interpretations . . . or fairly 'possible.'"[201] Courts have used this canon of construction to interpret IGRA on multiple occasions.[202] However, one court declined to apply this cannon because the statute's interpretation was clear under IGRA and its legislative history provided guidance as to how the court needed to resolve the issue.[203] Tribes can argue that IGRA is ambiguous, as there are two plausible interpretations of whether tribal economic development includes investing in a marijuana operation by drawing on IGRA's competing policy goals.[204]

Some tribes could also argue that its use of gaming revenue for marijuana is consistent with IGRA because the tribe is in a state that has legalized marijuana. IGRA contemplates that tribes consider state policy when the tribe regulates gaming.[205] For example, tribes may only conduct gaming if the tribe operates such gaming within a state that permits it.[206] Tribes also must compact with the state to conduct casino-style gaming, so the tribe needs the state's permission to conduct certain gaming activities.[207] Understanding this, it is reasonable to interpret an ambiguous provision of the statute by referencing state law to mean that IGRA requires tribes to consider state public policy.[208] The tribe's use of tribal gaming revenue to invest in legal activity under state law could not lead to the "corrupting influences" and "organized crime" issues that Congress wanted to prevent.[209]

> The construction, instead of being strict, is liberal; doubtful expressions, instead of being resolved in favor of the United States, are to be resolved in favor of a weak and defenseless people, who are wards of the nation, and dependent wholly upon its protection and good faith. This rule of construction has been recognized, without exception, for more than a hundred years, and has been applied in tax cases.

Id. See also Bracker, 448 U.S. at 143-44 (providing "[a]mbiguities in federal law have been construed generously in order to comport with these traditional notions of sovereignty and with the federal policy of encouraging tribal independence."); HRI, Inc. v. EPA, 198 F.3d 1224, 1245 (10th Cir. 2000) (noting "[t]he trust relationship and its application to all federal agencies that may deal with Indians necessarily requires the application of a similar canon of construction to the interpretation of federal regulations.").

201. Chickasaw Nation v. United States, 534 U.S. 84, 94 (2001) (internal citations and quotations omitted).

202. Rincon Band of Luiseno Mission Indians of Rincon Rsrv. v. Schwarzenegger, 602 F.3d 1019, 1028-29 (9th Cir. 2010); Exposing Truth About Casinos v. Kempthorne, 492 F.3d 460, 467 (D.C. Cir. 2007); Sault Ste. Marie Tribe of Chippewa Indians v. United States, 576 F. Supp. 2d 838, 851 (W.D. Mich. 2008) (citing Ramah Navajo Chapter v. Lujan, 112 F.3d 1455, 1462 (10th Cir. 1997)) ("Whereas *Chevron* promotes a general rule of deference to agency determinations, the Indian canon provides specific guidance regarding the interpretation of statutes relating to Indian tribes.").

203. Colo. River Indian Tribes v. Nat'l Indian Gaming Comm'n, 383 F. Supp. 2d 123, 145 (D.D.C. 2005) (citing Montana v. Blackfeet Tribe of Indians, 471 U.S. 759, 766 (1985)) ("[T]he canon only has a role in the interpretation of an ambiguous statute.").

204. 25 U.S.C. § 2702(1), (2); *Bracker*, 448 U.S. at 143-44.

205. 25 U.S.C. § 2710(b)(1)(A).

206. *Id. See also* N. Arapaho Tribe v. Wyoming, 389 F.3d 1308, 1311 (10th Cir. 2004) (describing the different approaches courts have taken in deciding whether "such gaming" is allowed under state law).

207. 25 U.S.C. § 2710(d)(1)(C).

208. 25 U.S.C. § 2710(b)(1)(A).

209. 25 U.S.C. § 2702(1)-(2).

1. Banking

"I don't care about banking! I'll just build a vault and store all my money in there!" can be heard across the lips of every tribal leader when it comes to cannabis banking. Storing profits from a new economic enterprise seems like a nice problem to have; however, it can create several issues for Indian tribes. First, they will have trouble convincing their current bank to either accept cannabis dollars or that no cannabis dollars will be intermingled with other forms of revenue. Second, they could have issues with their existing financing agreements.

a. Cannabis Banking, Generally

Banking is one of the most challenging problems for the entire marijuana industry.[210] State and federally chartered banks face many challenges if they wish to provide services to a marijuana business. First, the inescapable problem is that banks will be subject to criminal liability for aiding and abetting the illegal distribution of a controlled substance, including marijuana.[211] Banks have generally displayed a cautious outlook and are less inclined to enter the space due to the federal criminalization alone.[212]

There are also several regulatory hurdles to banks serving the marijuana space. Almost all banks and credit unions desire FDIC insurance, which involves interacting with federal agencies skeptical of illegal activity under federal law.[213] Similarly, state-chartered banks must subject themselves to federal oversight if they want to be part of the Federal Reserve System; this requires that they monitor their depositors' compliance with "applicable laws and regulations."[214] Depository institutions must report illegal and suspicious activities of their customers to the Department of the Treasury's Financial Crimes Enforcement Network ("FinCEN").[215] They also must file Suspicious Activity Reports ("SARs") if they have reason to believe that a transaction involves funds derived

210. *See, e.g.*, Nathaniel Popper, *Banking for Pot Industry Hits a Roadblock*, N.Y. TIMES (July 30, 2015), https://www.nytimes.com/2015/07/31/business/dealbook/federal-reserve-denies-credit-union-for-cannabis.html (discussing the Federal Reserve's denial of Colorado's Fourth Corner Credit Union application for a master account for financial institutions to finance marijuana business endeavors).

211. 18 U.S.C. § 2 (2013). *See also* Money Laundering Control Act, 18 U.S.C. §§ 1956-1957 (2013 & Supp. 2022) (applying to any entity that "knowingly engages or attempts to engage in a monetary transaction in criminally derived property value greater than $10,000 . . . .").

212. *See* MJBizDaily Staff, *Chart: Ranks of US Banks Serving Cannabis Firms Growing, but Data may Overstate True Number*, MJBIZDAILY (Dec. 17, 2021), https://mjbizdaily.com/chart-us-banks-serving-cannabis-firms-growing-data-may-overstate-true-number/ (discussing trends in financial institutions serving marijuana businesses); Elana Schmidt, *Banking Options for US-Based Cannabis & Hemp Companies*, ACS LAB'YS (Aug. 28, 2020), https://acslabcannabis.com/blog/regulation/banking-options-for-us-based-cannabis-hemp-companies/ (describing Colorado's new legislation providing guidance to state-run banks for working with hemp and cannabis companies, and noting that many banks are reluctant to work with such companies due to the lack of regulatory clarity and risks involved).

213. FDIC Deposit Insurance Coverage Rule, 12 C.F.R. § 330 (2022).

214. Membership of State Banking Institutions in the Federal Reserve System, 12 C.F.R. § pt. 208, App. D-1, II.A.5 (2022).

215. Department of the Treasury Financial Crime Reporting Rule, 31 C.F.R. § 1020.320(a)(2) (2022).

from illegal activities, such as the unlawful sale of drugs.[216] Federal law will require a financial institution to report on an enormous amount of a marijuana business's operation.[217]

FinCEN issued a guidance document outlining the federal government's expectations for financial institutions seeking to provide services to marijuana-related businesses.[218] The FinCEN guidance clarifies how financial institutions can provide services to marijuana-related businesses, consistent with their obligations under federal law, including the Bank Secrecy Act.[219] The FinCEN memo still relies on the Cole Memorandum despite the Attorney General rescinding it in 2018, so banks know the federal government's enforcement priorities.[220] Despite this guidance, only a small, but growing, percentage of banks provide services to the cannabis industry.[221]

C. TRIBAL ISSUES

As discussed above, tribes uniquely integrate their businesses into the tribal government.[222] If a tribe organizes a cannabis business like its other businesses, the tribal government will, in practice, intertwine its cannabis business with the government.[223] The tribal council may approve the most crucial business decisions at its regular weekly meeting. The tribal attorney will represent the marijuana business and advise the tribal council on a number of its business ventures. The other governmental agencies of the tribe could provide services to the cannabis company. For example, the tribe's public works department may repair the tribe's marijuana business since the building is probably owned by the tribe or on land owned by the tribe.

The tribe and the cannabis business's connection will likely create banking issues as the tribe will have to navigate working with two banks. It is unlikely that the tribe's current bank will be one of the few banks that provides cannabis banking services,[224] so the tribe will need to find a separate bank for its cannabis business. The tribe could keep its current bank for the government/casino operations as it may be practically challenging to switch banks.

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216. 31 C.F.R. § 1020.320(a)(2), (b).

217. 31 C.F.R. § 1020.320(a)(2), (b)(1).

218. DEP'T OF THE TREASURY, FIN. CRIMES ENF'T NETWORK, BSA EXPECTATIONS REGARDING MARIJUANA-RELATED BUSINESSES, FIN-2014-G001 (2014), https://www.fincen.gov/sites/default/files/guidance/FIN-2014-G001.pdf.

219. *Id.*; 31 U.S.C. §§ 5311-5336 (2013 & Supp. 2022).

220. Joseph Silvia, *Embracing Uncertainty: Banking Cannabis*, ABA (Apr. 24, 2020), https://www.americanbar.org/groups/business_law/publications/blt/2020/05/banking-cannabis/. *See also* Laura Jarrett, *Sessions nixes Obama-era rules leaving states alone that legalize pot*, CNN (Jan. 4, 2018, 5:44 PM), https://www.cnn.com/2018/01/04/politics/jeff-sessions-cole-memo/index.html ("Attorney General Jeff Sessions on Thursday rescinded a trio of memos from the Obama administration that had adopted a policy of non-interference with marijuana-friendly state laws.").

221. MJBizDaily Staff, *supra* note 212.

222. *See supra* Section III(C).

223. *See supra* Section III(C).

224. MJBizDaily Staff, *supra* note 212.

Having two different banks and the connection between the tribe and the marijuana business creates two separate issues. Many tribes have taken out financing agreements to fund various initiatives, including expanding casino operations.[225] These loan agreements often contain language preventing the tribe from engaging in unlawful activities, whether under state or federal law.[226] This prohibition usually applies to the tribe and its sub-governmental entities, so the tribe has the potential to violate its financing and loan agreements even if the tribal business is separate from the tribe if the agreement requires the tribe to follow federal law.[227] The tribe's current bank may also install extra compliance measures to ensure that the bank is not receiving funds from the cannabis business.[228] The bank may even place limits on the tribe's interaction with its cannabis business, otherwise, the bank could be in violation of federal law for either aiding the tribe with its illegal operation or failing to monitor the tribe for violating federal law.[229]

There are few options to resolve the issues discussed above, but the best resolution is likely to leverage the tribe's relationship with its current bank. The tribe could attempt to work with its lender to renegotiate its existing financing agreements to clarify that its cannabis businesses are exempt from the requirements in its loan documents. Getting the bank to amend these agreements may be impractical, but the bank may agree to such an amendment in exchange for certain safeguards to ensure proceeds from banking are not used to pay back the loan. In addition, the tribe should work closely with its current bank to keep it apprised of its new venture and develop compliance procedures that work for the bank and the tribe.

V. TRIBAL ADVANTAGES

Despite all of the potential challenges a tribe faces entering the cannabis space, there are two unique advantages that tribes have that could enable them to compete in this specific market. The first is that a tribe's ability to make decisions about its businesses free of state regulation may allow it more flexibility to create different types of marijuana businesses than state law.[230] In addition, the federal government heavily taxes cannabis businesses; this is due to the interesting

225. These assertions are based on the author's experience.

226. This is based on the author's experience.

227. *See supra* note 226 and accompanying text (noting that loan agreements often prohibit engaging in activities illegal under federal law); 21 U.S.C. § 802(16) (defining "marihuana"); 21 U.S.C. § 812 Schedule I(c)(10), (b)(1)(A)-(C) (classifying "marihuana" as a controlled substance); 21 U.S.C. § 841(a)(1) (outlawing the manufacture and distribution of controlled substances); Drug Enforcement Administration Controlled Substance Schedules Rule, 21 C.F.R. § 1308.11(d)(23), (58) (determining the quantity of hallucinogenic substance required to be classified as "Marihuana" or "Marihuana Extract").

228. *See* Department of the Treasury Financial Crime Reporting Rule, 31 C.F.R. § 1020.320(a)(2), (b)(1) (requiring banks to report suspicious activity, so banks may require extra safeguards if they know their customers are engaging in marijuana to fulfill this requirement).

229. 31 C.F.R. § 1020.320(a)(2).

230. *See* Williams v. Lee, 358 U.S. 217, 220 (1959) (stating that state law may not interfere with the right of reservation Indians to make their own laws and to be governed by them).

treatment of companies deemed illegal under federal law.[231] Tribal taxation can compete in this area and should be allowed to do so with few infringements.

A. SOVEREIGNTY

A Native American tribe's unique status as a domestic dependent nation allows the tribe broad authority to govern itself within Indian Country.[232] In its purest form, a tribe is free to decide the laws regarding its tribal members and tribal businesses on the tribe's reservation or trust property; the tribe would not need to consider what state law or federal law requires.[233] To crystalize the potential ramifications of this notion, tribes have the ability to create their own rules for their marijuana businesses.[234] There are numerous examples of courts finding that states cannot regulate tribes and tribal members within Indian Country.[235]

There are, however, important limitations on tribal sovereignty. First, courts generally confine tribal sovereignty to the regulation of the tribe's government, businesses, and members rather than the conduct of non-members.[236] The tribe will generally need non-members' consent to regulate them.[237] State and federal laws can apply to tribes depending on the circumstances. Many federal laws apply

231. 26 U.S.C. § 280E (2013).

232. *Williams*, 358 U.S. at 220; Bryan v. Itasca Cnty., 426 U.S. 373, 388 (1976) ("[The destruction of tribal governments is likely to result] if tribal governments and reservation Indians were subordinated to the full panoply of civil regulatory powers, including taxation, of state and local governments.").

233. New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 333-34 (1983) ("State jurisdiction is pre-empted by the operation of federal law if it interferes or is incompatible with federal and tribal interests reflected in federal law, unless the state interests at stake are sufficient to justify the assertion of state authority."); White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 144 (1980) ("[W]hen on-reservation conduct involving only Indians is at issue, state law is generally inapplicable, for the State's regulatory interest is likely to be minimal and the federal interest in encouraging tribal self-government is at its strongest."). This test is often a fact-specific weighing and balancing, rather than a black line rule. *Bracker*, 448 U.S. at 145.

234. *See Williams*, 358 U.S. at 220 (stating that state law may not interfere with the right of reservation Indians to make their own laws and to be governed by them).

235. *See* Chemehuevi Indian Tribe v. McMahon, 934 F.3d 1076, 1082-83 (9th Cir. 2019) (holding that state traffic safety laws and motor vehicle safety responsibility laws are inapplicable to Indian country, even though the Indian may be using state highways there); Prairie Band of Potawatomi Indians v. Wagnon, 476 F.3d 818, 827 (10th Cir. 2007) (finding state vehicle registration and title laws to be discriminatory infringements of a tribe's sovereign right to regulate licensing and title of vehicles of the tribe and its resident members, precluding application of the state laws even when those vehicles left the reservation and traveled elsewhere in the state); California v. Cabazon Band of Mission Indians, 480 U.S. 202, 221-22 (1987) (finding that the state lacked the ability to regulate on-reservation Indian gaming); Oneida Nation v. Vill. of Hobart, 968 F.3d 664, 689 (7th Cir. 2020) (holding that the Village of Hobart could not require the Oneida Nation to receive a permit to host an outdoor festival on Oneida's reservation).

236. *See* Washington v. Confederated Tribes of Colville Indian Rsrv., 447 U.S. 134, 161 (1980) ("For most practical purposes those [nonmember] Indians stand on the same footing as non-Indian resident on the reservation.").

237. *See* Montana v. United States, 450 U.S. 544, 564 (1981) (internal citations omitted) (finding that "the Indian tribes retain their inherent power to determine tribal membership, to regulate domestic relations among members, and to prescribe rules of inheritance for members . . . [b]ut exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation.").

to tribes in Indian Country, although there is a disagreement about which rules apply.[238] State law applies to tribes and tribal members outside of Indian Country in the same manner as it applies to everyone else.[239]

States may regulate Indians in two limited circumstances. States may regulate on-reservation conduct of tribes and tribal members if a court determines it is an "exceptional circumstance" worthy of regulation.[240] However, the Supreme Court has only found this in cases implicating off-reservation interests,[241] and the tribe's cooperation was necessary to collect a state tax.[242] In addition, Congress can grant a state jurisdiction over tribes in Indian Country, but it must do so expressly.[243] For example, the Supreme Court has found that Congress has given states the authority to regulate liquor sales in Indian Country.[244] States do not have jurisdiction over a tribal marijuana retailer as the CSA has not granted states express authority to regulate tribes.[245] In addition, there are no facts to suggest the state regulating a marijuana business is an exceptional circumstance; the company itself is on a reservation, and such a regulation is not necessary to enforce state law or tax provision.[246]

Tribes may exercise their sovereignty to create a marijuana regulatory regime that allows their businesses flexibility to innovate.[247] As discussed above, states that have legalized marijuana treat it as a heavily regulated industry.[248] A state often requires its new marijuana industry to comply with hundreds of pages of regulations.[249] So, these state-licensing systems could create an inflexible industry that may have challenges innovating due to state constraints.[250] In contrast, tribes can create a more relaxed regulatory scheme that allows marijuana businesses to innovate.[251] For example, a tribe could provide one license to its

238. *See Tribal Power, Worker Power: Organizing Unions in the Context of Native Sovereignty*, 134 HARV. L. REV. 1162, 1163-74 (2021) (discussing the Indian Cannons of Construction and the Tuscarora-Couer d'Alene Rule).

239. *See* Mescalero Apache Tribe v. Jones, 411 U.S. 145, 148-49 (1973) (internal citations omitted) (stating that "[a]bsent express federal law to the contrary, Indians going beyond reservation boundaries have generally been held subject to non-discriminatory state law otherwise applicable to all citizens of the State.").

240. New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 331-32 (1983) ("[I]n exceptional circumstances a State may assert jurisdiction over the on-reservation activities of tribal members."); Nevada v. Hicks, 533 U.S. 353, 362 (2001) ("When . . . state interests outside the reservation are implicated, States may regulate the activities even of tribe members on tribal land . . . .").

241. *Hicks*, 533 U.S. at 362.

242. *See* California v. Cabazon Band of Mission Indians, 480 U.S. 202, 215-16 (1987) (discussing the limited circumstances where the Supreme Court has found exceptional circumstances).

243. Rice v. Rehner, 463 U.S. 713, 719-20 (1983).

244. *Id.*

245. 21 U.S.C §§ 801-904.

246. *Hicks*, 533 U.S. at 362; *Cabazon Band of Mission Indians*, 480 U.S. at 215.

247. *See* Williams v. Lee, 358 U.S. 217, 220 (1959) (stating that state law may not interfere with the right of reservation Indians to make their own laws and to be governed by them).

248. *See supra* Section IV(A)(1).

249. MICH. ADMIN. CODE r. 420.1.

250. *Id.*

251. *Williams*, 358 U.S. at 220.

marijuana business that enables it to do anything in the marijuana space, rather than giving multiple license types.

B. TAXATION

Federal taxation of marijuana businesses is made surprisingly complex due to the tax code's treatment of companies deemed illegal under federal law but legal under state law.[252] Marijuana businesses are not allowed to take business deductions, which significantly increases their tax burden.[253] Many scholars have noted the harsh income tax consequences that marijuana businesses face.[254] Tribes can compete in this space as they are exempt from federal income tax.[255] This exemption gives tribes an enormous advantage while cannabis remains illegal under federal law.[256]

1. Corporate Structure

Federally-recognized Indian tribes are not subject to federal income tax.[257] The federal government could change this policy by expressly stating that tribes must pay income tax.[258] However, such tax treatment is consistent with how the federal government treats other units of government.[259] This exemption also furthers the goal of supporting tribal economic development.[260] This exemption

252. *See* Benjamin Moses Leff, *Tax Planning for Marijuana Dealers*, 99 IOWA L. REV. 523, 532-33 (2013).

> In other words, while a marijuana seller cannot deduct the ordinary and necessary expenses incurred in running her business, at least she can subtract the wholesale cost of the marijuana itself from her gross revenue before calculating how much tax she owes. Thus, § 280E disallows business deductions for marijuana sellers, but does not prevent them from subtracting COGS in arriving at taxable income.

Id. (internal citations omitted).

253. 26 U.S.C. § 280E.

> No deduction or credit shall be allowed for any amount paid or incurred during the taxable year in carrying on any trade or business if such trade or business (or the activities which comprise such trade or business) consists of trafficking in controlled substances (within the meaning of schedule I and II of the Controlled Substances Act) which is prohibited by Federal law or the law of any State in which such trade or business is conducted.

Id.

254. *See* Moses, *supra* note 252, at 532 ("Thus a marijuana seller cannot deduct her expenses prior to calculating her taxable income.").

255. *See* Uniband, Inc. v. C.I.R., 140 T.C. 230, 245-46, 246 n.10 (Tax Ct. 2013) (quoting Rev. Rul. 94-16, 1994-1 C.B. 19, *1 (1994)) ("Because an Indian Tribe is not a taxable entity, any income earned by an unincorporated tribe . . . is not subject to federal income tax.").

256. *See* Mark J. Cowan, *Taxing Cannabis on the Reservation*, 57 AM. BUS. L.J. 867, 899 (2020) (illustrating the effects of exemption on after-tax income).

257. *Uniband, Inc.*, 140 T.C. at 245-46, 246 n.10; Rev. Rul. 94-16, 1994-1 C.B. at *1; COHEN HANDBOOK, *supra* note 34, § 8.02[1], [2][a].

258. COHEN HANDBOOK, *supra* note 34, § 8.02[1], [2][a].

259. *Id.* § 8.02[2][a].

260. Michigan v. Bay Mills Indian Cmty., 572 U.S. 782, 810 (2014) (Sotomayor, J., concurring) (citing 25 U.S.C. § 2702(1)) ("A key goal of the federal Government is to render Tribes more self-

also applies to tribal businesses.[261] So, tribal revenue received from casino gaming and other tribal companies is exempt from federal income tax.[262]

A tribe will need to be mindful of how it organizes its business to ensure that its enterprises are exempt from federal taxation.[263] For example, a Tax Court found that a state-chartered corporation owned entirely by a federally recognized tribe must pay federal income tax.[264] So, if a tribe incorporated a marijuana business under state law, it likely would be subject to federal income tax.[265] Tribes will probably face this dilemma in the context of state licensing laws.[266] If a state requires a tribe to incorporate as a state-chartered entity to receive a license, the tribe may lose an essential competitive advantage.[267]

Instead, the tribe should incorporate a separate governmental entity under the tribe's constitution for its marijuana business.[268] This organization allows the tribe to retain its tax advantage and help separate the marijuana businesses' activities from the rest of the tribe.[269] Many tribal constitutions grant the tribe's governing body the authority to charter subordinate government entities, as discussed above.[270] These entities are still considered part of, or an arm of, the tribal government, but are nonetheless separate.[271]

This organizational structure has two benefits. First, it allows the tribe to ensure its revenue is exempt from federal income taxation.[272] A tribe that incorporates as a state-chartered corporation will lose out on its ability to avoid federal taxation.[273] However, courts generally treat sub-entities of the tribe in the same manner as the tribe because it is part of the government.[274] Next, this organizational structure helps create some distance from the tribe's other tribal businesses and the government.[275] The marijuana business's legal issues, if any, will not have as much of an impact on the rest of the Tribe because the Tribe and the business are separate entities.[276]

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sufficient, and better positioned to find their own sovereign functions, rather than relying on federal funding.").

261. COHEN HANDBOOK, *supra* note 34, § 8.02[2][a].
262. *Id.*
263. *Id.*
264. Uniband, Inc. v. C.I.R., 140 T.C. 230, 273 (Tax Ct. 2013).
265. *Id.* at 244-65; COHEN HANDBOOK, *supra* note 34, § 8.02[2][a].
266. *See supra* Section IV(A).
267. COHEN HANDBOOK, *supra* note 34, § 8.02[2][a].
268. *Id.*; *supra* Section III.
269. COHEN HANDBOOK, *supra* note 34, §§ 8.02[2][a], 21.02[1][b].
270. *See supra* Section III.
271. COHEN HANDBOOK, *supra* note 34, §§ 8.02[2][a], 21.02[1][b].
272. *See id.* § 8.02[1], [2][a].
273. Uniband, Inc. v. C.I.R., 140 T.C. 230, 244-65 (Tax Ct. 2013); COHEN HANDBOOK, *supra* note 34, § 8.02[2][a].
274. COHEN HANDBOOK, *supra* note 34, § 21.02[1][a].
275. *Id.* §§ 8.02[2][a], 21.02[1][a].
276. *Id.*

2. Proposed Legislation

Professor Mark J. Cowan recently summarized the tax status of tribal cannabis businesses and suggested policy changes in an article titled *Taxing Cannabis on the Reservation*.[277] Cowan highlights the advantages that tribal marijuana businesses have in the unique context of marijuana.[278] Cowan is deeply concerned about the inequity this causes; marijuana businesses are on an unfair playing field with tribal marijuana businesses due to the tax burden and the administrative burden non-tribal cannabis businesses face.[279]

Cowan makes many recommendations to remedy a tribe's advantage in this space.[280] An "Indian Cannabis Regulatory Act" could require tribes to pay federal income tax on income expended for non-governmental purposes.[281] However, the tribe's exemption will remain for spending cannabis proceeds on government purposes.[282] This Act also could require tribal members to pay taxes on any distributions from the tribe, and the tribe must create plans for how it plans to distribute cannabis profits to its members.[283] Tribes could also be required to compact with states regarding tax issues.[284] This proposed Act largely mirrors the IGRA.[285]

Cowan is correct in many respects. First, Tribes have an enormous advantage in competing against other retail dispensaries due to the federal government's harsh treatment of marijuana businesses.[286] Tribes will not have to go through the inconvenience that many marijuana businesses go through of creating separate corporations to deduct their expenses.[287] In addition, it seems reasonable to require tribal members to pay taxes on distributions. However, it is also clear that tribal members will have to pay federal income tax on these distributions without changing the law[288] with important exceptions.[289] In addition, voluntary compacting is a good approach for tribes and states to avoid lengthy, costly

277. Cowan, *supra* note 256, at 867.
278. *Id.* at 899.
279. *Id.* at 910-11.
280. *Id.*
281. *Id.* at 902-03.
282. *Id.*
283. *Id.*
284. *Id.* at 907-10.
285. *Id.* at 901-11.
286. *Id.* at 899.
287. *Id.* at 900.
288. COHEN HANDBOOK, *supra* note 34, § 8.02[2][b].
289. *See* Tribal General Welfare Exclusion Act of 2014, Pub. L. No. 113-168, 128 Stat. 1883 (2014) (codified at I.R.C. § 139E) (clarifying the treatment of general welfare benefits provided by tribes). The General Welfare Exclusion Act of 2014 allows tribes to distribute funds to tribal members under certain conditions, but the distributions must not be lavish or extravagant. *Id.* So, tribes will not be able to distribute enormous amounts of money to tribal members as they will be subject to federal income tax. *Id.*

litigation. Compacting can help ensure state tax equity as states have required tribes to collect excise taxes equivalent to state taxes.[290]

However, the new legislation does not appear necessary at this time for several reasons. First, Congress will likely resolve many of these issues in other ways; the tribes' enormous advantage is gone if Congress de-schedules marijuana and THC from the CSA.[291] In addition, many of the most successful tribes that have entered the cannabis space have compacted with the state as it is mainly in their best interest to do so.[292] As discussed above, tribes will be required to make a substantial investment without access to the state market because the tribe will have to do everything itself.[293] So, there is already incentive enough for tribes to compact with states without being forced to do so.[294]

There are other reasons why the current status quo is acceptable. First, the tribe's tax advantage is not unique, as most tribal business income is exempt from federal income tax.[295] Congress will likely remove the exceptional nature of this disadvantage by amending the CSA before Congress considers an Indian Cannabis Regulatory Act.[296] Second, state licensing laws essentially limit the tribe's tax advantage as tribes will be confined to operating on their respective reservations.[297] Tribes will have challenges receiving state licenses unless they incorporate under state law, which eliminates this advantage.[298] In short, there do not appear to be exceptional reasons why Congress needs to change the current tax treatment of tribes through legislation.

VI. CONCLUSION

Tribes face many issues entering the cannabis space. Tribes will have to work with state and local governments to gain access to broader markets.[299] The NIGC should clarify the ability of tribes to use gaming resources to invest in new economic ventures.[300] Banking and land issues are also problems challenging for tribes.[301] However, the federal government's policy of tribal self-determination

290. *See, e.g.*, Nevada Compact, *supra* note 126, § V.E. (describing taxation and record keeping required of marijuana sales); Washington Compact, *supra* note 127, § IX (describing taxation and record keeping required of marijuana sales).

291. 26 U.S.C. § 280E.

292. *See, e.g.*, Nevada Compact, *supra* note 126, § V.B. (describing the terms of retail sales of marijuana); *supra* Section IV(A)(3)(a) (discussing compacting as a potential solution to state licensing schemes).

293. *See supra* Section IV(A)(1).

294. *See supra* Section IV(A)(1).

295. COHEN HANDBOOK, *supra* note 34, § 8.02[2][a].

296. *See, e.g.*, Nicholas Fandos, *Schumer Proposes Federal Decriminalization of Marijuana*, N.Y. TIMES (July 14, 2021), https://www.nytimes.com/2021/07/14/us/politics/marijuana-legalization-schumer.html (describing the draft Cannabis Administration and Opportunity Act, which would remove marijuana from the Controlled Substance Act in order to begin regulating and taxing it).

297. *See supra* Section III(a)(i).

298. *Id.*

299. *Id.*

300. *See supra* Section IV(B).

301. *See supra* Section IV(B)-(C).

and tribal sovereignty does allow tribes unique opportunities to compete in this space.[302]

302. *See supra* Section V.