



Cannabis on Tribal Lands

An Alternative to Michigan Regulation of Marijuana?

By Lance Boldrey

The Michigan Medical Marijuana Act, MCL 333.26421 *et seq.*, immunizes qualifying patients and caregivers from prosecution for possession and use of marijuana but restricts growing, sales, and even the forms of marijuana that can be used. Michigan law, of course, does not allow for the use of marijuana other than under the act's auspices. But state law applies only to a limited extent within the lands of Michigan's federally recognized Indian tribes, raising the question whether tribes can authorize or engage in marijuana-related activities beyond the scope of the act.

This is not an academic question. In 2014, the United States Department of Justice (USDOJ) issued a memorandum to U.S. attorneys directing that tribes be treated in the same manner as states when enforcing the federal Controlled Substances Act. Thus, so long as a tribe satisfies federal criteria, U.S. attorneys should exercise their discretion in allowing marijuana-related activity to occur.

Federal cannabis law and policy and tribes

Federal marijuana law is founded on the Controlled Substances Act, which today classifies marijuana as a Schedule I controlled substance—a status worse than cocaine or methamphetamine.¹ Manufacturing, distributing, or dispensing marijuana is a federal crime, as is its possession.² Yet federal policy toward marijuana has long been schizophrenic; although marijuana's classification means that, by definition, the federal government considers marijuana to have “no currently accepted medical use for treatment in the United States,”³ the federal government itself holds a patent for the medicinal use of marijuana.⁴

Despite federal prohibition, states—usually through voter initiatives—have in the past two decades made the medicinal use of marijuana legal under state law for a large percentage of the American public. In 1996, California became the

first state to do so through voter enactment of the Compassionate Use Act. As of July 2016, 25 states and the District of Columbia permit medicinal use, with additional developments happening so quickly that by the time this article is published, the number may have increased. This November, as many as four states are expected to vote on whether to allow medical marijuana and possibly six more on whether to permit adult use, joining the four states that already allow use outside of the medicinal framework.

For federal law enforcement, the proliferation of permissive state marijuana regulation coupled with decriminalization efforts make enforcement vastly more challenging, even though the United States Supreme Court upheld the primacy of the Controlled Substances Act, rejecting a challenge by patients who sought to confirm their right to use homegrown marijuana in conformity with California law.⁵ In 2009, after a number of states had joined California in permitting medicinal use, the USDOJ issued the Ogden Memo. Intended to provide guidance to U.S. attorneys struggling with marijuana enforcement, the memo advised deprioritizing the prosecution of individuals who were “in clear and unambiguous compliance with existing state laws providing for the medical use of marijuana.”⁶ Predictably, the memo led to the continued expansion of medical marijuana businesses, even though the document clearly stated that any use of marijuana continued to violate federal law and that compliance with state law is not a defense against federal charges.

In 2011, the pendulum appeared to swing in the other direction when the USDOJ issued the Cole I Memo, reminding U.S. attorneys that “[p]ersons who are in the business of cultivating, selling or distributing marijuana, and those who knowingly facilitate such activities, are in violation of the Controlled Substances Act, regardless of state law.”⁷ The memo concluded with the statement that “enforcement of the CSA has long been and remains a core priority.”⁸ State liberalization efforts continued unabated, however, and after Colorado and Washington voters passed adult (nonmedicinal) use measures in 2012, the USDOJ issued further guidance in the August 2013 Cole II Memo.⁹ The USDOJ acknowledged that the federal government generally relies on state and local

law enforcement to address marijuana activity. With the department having lost local assistance in a number of states, the Cole II Memo directed U.S. attorneys to focus efforts on activities that threatened any of eight enforcement priorities:

- (1) Distribution to minors
- (2) Revenue flowing to criminal enterprises, gangs, and cartels
- (3) Diversion to states that continue to criminalize possession
- (4) Use of state law as a cover for trafficking other illegal drugs or other illegal activity
- (5) Violence and the use of firearms
- (6) Drugged driving and exacerbation of adverse public health consequences
- (7) Growing marijuana on federal lands and attendant safety and environmental dangers
- (8) Possession or use on federal property

In late 2014, with little to no forewarning, the USDOJ issued a policy statement extending the premise of the Cole II Memo to tribes.¹⁰ Although the document was couched as a response to tribal concerns about the negative impact state legalization might have on their communities, it was widely interpreted as a green light to tribes to consider their own legalization models. No doubt this was a direct reaction to the document’s statement that the eight Cole II Memo priorities would guide federal enforcement “in the event that sovereign Indian Nations seek to legalize the cultivation or use of marijuana in Indian Country.” Within weeks, tribal marijuana business proposals were being floated and conferences being convened to inform tribal leaders of new opportunities in the world of cannabis.¹¹

Michigan cannabis law and tribes

But what of Michigan law and tribes in the marijuana context? When it comes to criminal law within Indian Country, Michigan does not have jurisdiction over crimes committed by members of federally acknowledged tribes or over tribes themselves. Instead, tribal members are subject to prosecution only by the federal government or their tribe.¹² Except in limited instances in which Congress has explicitly provided otherwise, state and local governments also lack civil regulatory jurisdiction over a tribe or its members in Indian Country, leaving members subject only to the tribe’s regulatory jurisdiction.¹³ Consequently, when a tribal member engages in marijuana-related activity within Indian Country, Michigan and local law enforcement are without authority to act unless they have been legally delegated the ability to enforce federal or tribal law.

FAST FACTS

Michigan’s 12 federally recognized tribes and their members are not subject to state law on Indian Country lands.

The federal government does not generally prosecute marijuana offenses as long as federal enforcement priorities aren’t implicated.

The United States Department of Justice extended this treatment of marijuana offenses to tribes and tribal lands in a 2014 policy statement.

For the non-Indian, however, Michigan maintains criminal jurisdiction over drug crimes, and its criminal law still applies on tribal lands.¹⁴ With respect to Michigan's civil regulatory jurisdiction, state civil jurisdiction over non-Indians can be preempted by federal law when a court-applied balancing test determines that the state, federal, and tribal interests at stake demonstrate that state regulation would violate federal law, generally by interfering in a transaction involving a tribe or tribal member and a non-Indian.¹⁵ In this context, given that marijuana-related activities violate federal law, it is difficult to conceive of the balancing test ousting state regulatory jurisdiction over nonmembers. Nevertheless, while Michigan would likely retain full authority over actions by non-Indians, as a practical matter, if the activity occurred on lands or within a facility owned or controlled by the tribe or a tribal member, state and local authorities may be without the ability to enter the property to investigate and enforce those laws.

Possibilities for Michigan tribes

Tribal marijuana initiatives nationally have yielded mixed results. In 2015, the Flandreau Santee Sioux Tribe sought to create "America's first cannabis resort" in South Dakota, only to set fire to what the state attorney general described as a \$1 million crop of marijuana when the tribe anticipated a federal raid. That same year, federal officials destroyed the Menominee Indian Tribe of Wisconsin's hemp crop and California law enforcement seized cannabis plants growing on two tribes' lands. Tribes in Washington state, however, have opened and continue to operate marijuana growing and retail establishments under compacts authorized by state law, and at least one Oregon tribe is moving forward with plans to do the same. The lesson, to date, is that more conservative tribal operations, hewing to state law, have succeeded, whereas more aggressive efforts have failed.

Michigan provides what may be unique opportunities for tribes. The Michigan Medical Marihuana Act authorizes Michigan citizens to possess cannabis. A cultivation operation or dispensary operated by a tribe or tribal member on tribal lands would not be subject to state law, and an individual qualifying to possess marijuana under the act would be immune from prosecution upon leaving such a facility. Thus, a tribe could permit cultivation and supply both caregivers and patients. Potentially, a tribe could also permit consumption so long as measures were taken to prevent drugged driving, one of the federal enforcement concerns.

To engage in marijuana activities, however, a tribe should demonstrate that federal enforcement priorities are satisfied. This would almost certainly require a robust regulatory system, likely one that ensured that only qualifying individuals under the Michigan Medical Marihuana Act acquired marijuana within the act's quantity limits. Ultimately, any undertaking would need to be done with the understanding that lack of federal enforcement cannot be guaranteed, but at most would consist of an exercise of prosecutorial discretion that

could be reversed at any time. For tribes themselves, ramifications could include negatively affecting banking relationships, suitability for gaming purposes, and reputational harm. For all of these reasons, it remains unclear when and how we will see a Michigan tribe act on marijuana. But if the rapid evolution of the cannabis industry continues, the day when that occurs may be soon. ■



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ENDNOTES

- 21 USC 812. Although cannabis is currently classified on Schedule I under the Controlled Substances Act, on April 4, 2016, the Drug Enforcement Administration informed U.S. senators that it "hopes" to release a determination on rescheduling "in the first half of 2016"; see https://www.washingtonpost.com/blogs/wonkblog/files/2016/04/Response.pdf?tid=a_inl.
- 21 USC 841, 846.
- 21 USC 812(b)(1)(B).
- Compare 21 USC 812(b)(1)(B) with Hampson, et al., *Cannabinoids as antioxidants and neuroprotectants*, US Patent 6630507 B1 (filed 1999, issued October 7, 2003).
- Gonzales v Raich*, 545 US 1; 125 S Ct 2195; 162 L Ed 2d 1 (2005).
- US Dept of Justice, Memorandum for Selected US Attorneys (October 19, 2009) <<https://www.justice.gov/opa/blog/memorandum-selected-untied-state-attorneys-investigations-and-prosecutions-states>>. All websites cited in this article were accessed July 6, 2016.
- US Dept of Justice, Memorandum for US Attorneys (June 29, 2011) <<https://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/dag-guidance-2011-for-medical-marijuana-use.pdf>>.
- Id.*
- US Dept of Justice, Memorandum for All US Attorneys (August 29, 2013) <<https://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf>>.
- US Dept of Justice, Memorandum (October 28, 2014) <<https://www.justice.gov/sites/default/files/tribal/pages/attachments/2014/12/11/policystatementregardingmarijuanaissuesinindiancountry2.pdf>>.
- The USDOJ's Indian Country memorandum and tribal marijuana proposals have also led to congressional activity, with lawmakers on the one hand introducing legislation to strip tribes of federal funding if they pursue marijuana activities (2015 S 1984), and on the other, seeking to block federal enforcement against tribes that choose to allow marijuana use (2015 HR 5014).
- See generally Conference of Western Attorneys General, *American Indian Law Deskbook* (2014), § 4.7; US Dept of Justice, U.S. Attorney's Criminal Resource Manual, p 689. By definition, "Indian Country" includes all land within a tribe's federal reservation. 18 USC 1151. While there is some legal dispute as to whether land acquired in trust by the federal government for a tribe is Indian Country, as a practical matter, such land is typically proclaimed "reservation" land through 25 USC 467, meaning most if not all land held in trust for Michigan tribes is Indian Country, and state criminal jurisdiction over tribal members is lacking.
- Bryan v Itasca Co*, 426 US 373; 96 S Ct 2102; 48 L Ed 2d 710 (1976).
- See, e.g., *People v Collins*, 298 Mich App 166; 826 NW 2d 175 (2012) (upholding state criminal jurisdiction to pursue charges including possession with intent to deliver marijuana for an offense occurring within a tribal casino).
- See *White Mountain Apache Tribe v Bracker*, 448 US 136; 100 S Ct 2578; 65 L Ed 2d 665 (1980).