



# Michigan Marijuana Laws

## Michigan Tribes Can Participate, But How?

By Jeff J. Davis

On November 6, 2018, Michigan became the first state in the Midwest to legalize the recreational use of marijuana.<sup>1</sup> The Michigan Regulation and Taxation of Marihuana Act decriminalizes the personal possession and cultivation of marijuana by adults 21 years of age or older.<sup>2</sup> It includes commercial grow operations, distribution and retail sales, provisioning centers, and more.<sup>3</sup> The law is silent regarding Michigan's federally recognized tribes, although they have also been wrestling with this issue for some time.<sup>4</sup>

Two days after the act passed, the U.S. attorneys for Michigan released a joint statement in response, warning they "will not unilaterally immunize anyone from prosecution for violating federal laws simply because of the passage of Proposal One."<sup>5</sup> They then provided the following caveat: "Our offices have never focused on the prosecution of marijuana users or low-level offenders, unless aggravating factors are present. That will not change."<sup>6</sup> They will work closely with federal, state, local, and tribal law enforcement partners to assess the federal interest on a case-specific basis.<sup>7</sup>

In 2017, marijuana sales in the United States reached \$9.2 billion and are on track to reach \$24.5 billion by 2021.<sup>8</sup> American Indian tribes in other states have made significant inroads into this market, notwithstanding it is still illegal under federal law.<sup>9</sup>

What are Michigan tribes to do? Generally, and as covered further in the next section, state law does not apply in Indian Country, and then only in limited situations. Moreover, tribal lands fall under the jurisdiction of the federal government.<sup>10</sup> Yet those lands are located within the geographic boundaries of Michigan, surrounded by non-Indian users of recreational marijuana.<sup>11</sup>

The tribes must seek fair and impartial treatment by the state and the Department of Justice (DOJ) as they move through the difficult process of determining whether personal or commercial marijuana use on their lands is a viable option. At a minimum, they should expect the state's assistance and demand that the DOJ apply the law and policy fairly and without prejudice.

## Tribes lack criminal jurisdiction over non-Indians

Marijuana is still considered a Schedule I controlled substance under the Controlled Substances Act.<sup>12</sup> Manufacturing, distributing, or dispensing marijuana is a federal crime, as is its possession.<sup>13</sup> Tribal lands are generally held in trust with considerable federal oversight.<sup>14</sup> Equally clear is the fact that state law has only limited application.<sup>15</sup>

Tribes generally retain jurisdiction over all Indians<sup>16</sup> who commit crimes within Indian Country.<sup>17</sup> Since the 1978 Supreme Court decision in *Olipbant v Suquamish Indian Tribe*, however, tribes lack criminal authority over non-Indians.<sup>18</sup> States retain exclusive jurisdiction over criminal matters involving only non-Indians.<sup>19</sup> States also have jurisdiction over victimless crimes,<sup>20</sup> which Michigan recently determined include possession and use of marijuana in Indian Country.<sup>21</sup> The federal government has exclusive jurisdiction over all other crimes committed by non-Indians against Indians on Indian property.<sup>22</sup> Finally, federal laws of general applicability like drug and firearms statutes apply to everyone regardless of where the crime occurs.<sup>23</sup>

With passage of the Michigan Regulation and Taxation of Marihuana Act, non-Indians who possess or use marijuana in Indian Country raise serious issues for the tribes.<sup>24</sup> The state can no longer prosecute these as victimless crimes. The tribe has no criminal jurisdiction over these cases and, although the federal government has authority, it has publicly announced that unless its law enforcement priorities are implicated it will not prosecute, as covered later in this article.

## Cole/Wilkinson memos and the DOJ's policy position

In 2012, Washington and Colorado became the first states to legalize adult recreational use of marijuana.<sup>25</sup> Shortly after these laws passed, the states sought guidance on how to reconcile their laws with federal law.<sup>26</sup> In response, the DOJ issued a memorandum to all U.S. attorneys regarding marijuana enforcement (Cole memo).<sup>27</sup> The Cole memo explained that the DOJ is “committed to using its limited investigative and prosecutorial resources to address the most significant threats in the most effective, consistent, and rational way,” and it listed several law enforcement priorities that would trigger action.<sup>28</sup>

More than a year later, the DOJ released a policy statement from Monty Wilkinson, director of the Executive Office for U.S. Attorneys for Indian Country (Wilkinson memo).<sup>29</sup> The Wilkinson memo advised that the enforcement priorities set forth in the Cole memo should also guide enforcement activities in Indian Country, “including in the event that sovereign Indian nations seek to legalize the cultivation or use of marijuana in Indian country.”<sup>30</sup>

The Wilkinson memo was clearly an attempt to treat tribes and tribal land like states. This was immediately seen by some,

however, as a green light for legalization.<sup>31</sup> That was not the DOJ's understanding, and they immediately began damage control through national presentations, U.S. attorney meetings with tribes in their districts, and letters to tribes and their consultants.<sup>32</sup> In the Western District of Michigan, the United States Attorney's Office met with the tribes to discuss the matter and tamp down any misunderstandings or unrealistic expectations.<sup>33</sup> This proactive reaction was noteworthy, especially as tribes continue to seek the DOJ's guidance.

The Wilkinson memo did indicate that federal enforcement resources can be used by tribes to address these issues.<sup>34</sup> Moreover, the chairperson of the Attorney General's Native American Issues Subcommittee stated that the federal government will continue to support marijuana bans passed by tribal councils—even when the state allows recreational use.<sup>35</sup>

Whether the DOJ would take actions against Michigan for allowing marijuana to be diverted onto tribal lands is an open question. Fairness would suggest they should, as the DOJ clearly had no problem taking quick and forceful action against tribes in the past when perceived enforcement policies were violated, as explained in the next section.

## Tribal participation to date

### Early tribal attempts thwarted

In South Dakota, the Flandreau Santee Sioux Tribe planned to open the nation's first marijuana resort that would include a lounge where customers could use the tribally grown product.<sup>36</sup> The tribe built a grow facility, planted crops, and began converting an existing building into a lounge. However, marijuana was still illegal under state law, and South Dakota's attorney general threatened prosecution of nonmembers. Even though the tribe attempted to resolve jurisdictional issues with nontribal authorities, the DOJ warned of a raid if the tribe

## AT A GLANCE

Recreational use of marijuana was legalized by Michigan in 2018. Marijuana is still illegal on the lands of Michigan tribes; however, the tribes have no jurisdiction over non-Indian users. Moreover, non-Indian users who comply with the Michigan Regulation and Taxation of Marihuana Act are no longer subject to prosecution by the state, and as long as they comply with state law, the Department of Justice will not prosecute. The act has resulted in a quagmire of issues for Michigan tribes, both in addressing non-Indian users and balancing equities for their own members.

persisted. The tribe eventually suspended the project and burned the crops.<sup>37</sup>

California tribes faced similar problems. Marijuana operations on tribal lands were raided by federal and state authorities.<sup>38</sup> The DOJ determined that the facilities did not comply with California's more limited medical marijuana laws.<sup>39</sup>

It became clear from these actions that state concerns drove federal involvement. South Dakota was directly involved in circumventing the Flandreau Santee Sioux Tribe's marijuana resort.<sup>40</sup> In California, although medical marijuana was legal, apparently the for-profit purpose of the tribal operations may have been in tension with state law, raising concerns from state, federal, and local officials.<sup>41</sup>

### Recent tribal successes

#### Washington

Tribes in the state of Washington were among the first to confront the dilemma of state-legalized marijuana.<sup>42</sup> They were immediately faced with how to enforce their laws against non-Indians.<sup>43</sup>

Initially, the tribes asked authorities how the state would deal with non-Indian marijuana users on its lands, and they discussed resource issues and the fact that their lands were now surrounded by non-Indian users. After these issues were raised, the state's inability to assure the tribes that their concerns would be adequately addressed led to discussions regarding legalization.<sup>44</sup> The two parties eventually entered into comprehensive compacts.<sup>45</sup>

Tribes and the state of Washington approached the issue of marijuana with a clear understanding of state-tribal jurisdiction. By doing so, they avoided state diversion issues while protecting the entire Washington system from the federal government's possible intervention.<sup>46</sup>

To accomplish these goals, the state and tribes jointly shepherded a measure through the state legislature authorizing the governor to compact with the tribes.<sup>47</sup> It had overwhelming support in both the House and the Senate.<sup>48</sup>

The parties negotiated a range of issues covering commercial production, processing, sale and possession, criminal and civil enforcement, and taxation, to name just a few.<sup>49</sup> The parties also made sure that DOJ concerns set forth in the Cole and Wilkinson memoranda were specifically referenced and addressed.<sup>50</sup>

#### Nevada

In 2017, following Washington's lead, Nevada was able to pass legislation providing for state-tribal compacts<sup>51</sup> and many tribes in Nevada have since entered into these compacts.<sup>52</sup> The Las Vegas Paiute compact recognizes the sovereign powers of the tribe as well as their ability to sell marijuana products on their lands and tax the product and to regulate and police the industry.<sup>53</sup> The compact allowed the tribe to open what has

been hailed as the "largest recreational marijuana store on the planet."<sup>54</sup> Other Nevada tribes have found similar success.

### Tribal takeaways

As shown, tribes that have attempted to establish commercial marijuana ventures beyond what state law allows have been quickly and decisively shut down. On the other hand, tribes that have established successful marijuana developments have done so in states where it is legal for medical and recreational purposes. Those tribes have developed comprehensive tax and regulatory schemes equivalent to that of the state, ensuring that no unfair business advantage is created and providing for limited waivers of immunity as an adequate review mechanism, if needed.

Although Michigan does not currently have laws that allow the state to compact with the tribes, it is not unattainable, especially when the alternative is considered—unilateral development by the tribes. The state has limited legal avenues to prevent such development, and the DOJ has little incentive to intervene, especially in a state where this activity is legal.

### Conclusion

The passage of the Michigan Regulation and Taxation of Marihuana Act has forced Michigan's tribes into a difficult position regarding their community and members. As the president of Bay Mills recently noted, "[T]he tribal council was faced with the disparate treatment of their members versus non-Indians in their own community."<sup>55</sup> Their members faced potential criminal prosecution whereas non-Indian users did not.<sup>56</sup> Sault Ste. Marie's chairman also noted that his tribe legalized marijuana with trepidation, as it is still illegal for federal purposes.<sup>57</sup>

Michigan's other tribes face the same conundrum. They should meet with state officials and the DOJ to discuss the effect the act is having on their communities. What are the state and DOJ prepared to do to ensure that tribal lands are not overrun by non-Indian users? Will the state provide resources to address this issue?<sup>58</sup> Will the DOJ protect tribal lands from state diversions?

Michigan tribes should explore alternatives with the state. Gov. Whitmer has certainly set the tone, appointing Wenona Singel as deputy legal counsel to, among other things, "strengthen the government-to-government relationship between Michigan's twelve federally-recognized tribes and the State of Michigan."<sup>59</sup> State representatives should be equally amenable to addressing these issues.

In the end, if tribes enter into this arena, they should be prepared to defend their actions,<sup>60</sup> recognizing that doing so without a compact raises potential criminal exposure.<sup>61</sup> Of course, any conflict would be resolved by Michigan's citizens—voters who have already weighed in on this issue once before by passing the Michigan Regulation and Taxation of Marihuana Act. ■



Jeff J. Davis currently is of counsel in the Grand Rapids office of Barnes & Thornburg, LLP, where he co-chairs the Native American Law and Policy Group. Davis spent more than 23 years as an assistant U.S. attorney in the Western District of Michigan, serving as tribal liaison to the district's 11 federally recognized tribes. He also briefed and argued numerous Indian Country cases before the U.S. Sixth Circuit Court of Appeals.

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