**Should Tribes Legalize Marijuana?**

by

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Abstract: *Marijuana legalization has been gaining momentum in the United States in recent years, yet heated controversies continue to surround the issue. The central focus of this case is on the question of whether tribes should legalize marijuana. The case begins by briefly describing the history of marijuana, what is known about its impact, and the changing policies at the state and federal level. It then discusses the various ways tribes are exploring the “opportunity,” the ways they might become involved in the marijuana business, and the pros and cons of various forms of tribal involvement.*

Marijuana legalization has been gaining momentum in the United States yet heated controversies continue to surround the issue. Tribal legalization of marijuana has recently become a major issue and a potential opportunity in Indian Country. This case describes the early history of marijuana cultivation and its uses, how it became illegal, changes in federal and state policies about marijuana, and debates about legalization of marijuana within tribes. The case explores the various ways tribes might become involved in the marijuana business, the jurisdictional issues legalization raises, the pros and cons of legalization for tribes, and the factors that might influence this decision. This is a fast moving and evolving issue that some have compared to the introduction of gaming in Indian Country, which has had enormous impact on many tribal communities.

**History**

The marijuana, or hemp, plant (*Cannabis sativa*) was one of the first crops grown by humans and has been used for over 10,000 years, especially for its tough fibers that are used in fabrics, ropes, and paper (Inciardi, 1999). Early colonists in the Americas used hemp fiber for riggings, caulking, and sails (Morton, 2013). Presidents Thomas Jefferson and George Washington both grew it, along with many other Virginia planters. In the 17th and 18th centuries, it was a royally—then federally—mandated crop in what is now the United States (Inciardi, 1999). Between 1840 and 1900, there is considerable evidence supporting medical applications of marijuana, with a hundred or so published medical journal articles that recommended it for various ailments (Morton 2013). Cannabis was also used by ancient healers in other countries such as India, China and Greece. Seeds have been found in Siberian burial mounds that go back as far as 3000 B.C. (Sides, 2015). Chief horticulturist at Denver’s Mindful, one of the world’s largest cannabis companies, Phillip Hague stated, “It’s older than writing. Cannabis use is a part of us, and always has been. It spread from Central Asia after the last ice age and went out across the planet with man.” (Sides, 2015)

Marijuana was criminalized by various countries in the early 20th century. In the United States, the first restrictions for sale were in 1906. Later the director of the Federal Bureau of Narcotics, Harry Anslinger, saw taxing marijuana as a way to support his agency in the tight economy of the 1930’s. He convinced Congress to pass the federal Marihuana Tax of 1937. The Marihuana Tax Act of 1937 did not make marijuana illegal but it set an unaffordable high tax on the product and strictly regulated its possession and distribution (Morton, 2013). Anslinger spent many years vigorously campaigning against the drug with scare stories in the press. (Martin Lee, 2012)

In her overview of the history of marijuana, Catherine Morton claims that the criminalization of marijuana had little to do with sound medical science and a great deal to do with racism. Since marijuana was associated with criminal minorities and Mexican immigrants, it was assumed to be dangerous. Newspapers repeated sensationalized hearsay, such as “…how it turned people into murderers and would be used by the underworld to enslave youths…” (Inciardi, 1999, p. 76).

In 1970 lawmakers moved to classify marijuana as an illegal narcotic, despite the recommendations of medical professionals, with the passage of the Controlled Substances Act (CSA) during the Nixon Administration. This federal act named marijuana a Schedule 1 controlled substance like heroin and cocaine. The Act also stated that marijuana had no medical use whatsoever (Morton, 2013).

Shortly thereafter, in 1971, the newly appointed Shafer Commission began its work to study marijuana and eventually produced a 1,184-page report after commissioning more than 50 studies and projects. It “debunked nearly everything the federal government had been claiming about marijuana for 40 years” (Barcott, 40). The Commission recommended that marijuana be rescheduled and decriminalized. Prohibition had not worked and the new classification of marijuana was resulting in a significant increase in the population of federal prisons due to drug-related offences. The Shafer Commission did not recommend legalizing marijuana but said that it should be deemphasized as a major problem in America. The Nixon Administration, clearly disappointed in these conclusions, ignored the report.

In the Reagan administration the full weight of the federal government was put into the anti-drug effort (Barcott). “Over the next 30 years, incarceration rates continued to rise, driven almost exclusively by drug convictions….These weren’t spread equally among drug users….In 2010 the rate of incarceration among black men was 4,247 per 100,000. The rate among white men was 678” (Barcott, p. 208). This was partly a result of many communities adopting police reward systems for low-level pot arrests (Barcott, 55). For some, these disparities clearly indicated that the marijuana issue was a civil rights issue. Others eventually saw this as an important fiscal issue and asked whether this was a good use of resources. There were other important consequences. As a result of becoming illegal, medical research on marijuana became almost non-existent. It was not until very recently that worldwide opinion began to shift. A turning point came in 2013 when liberal Democrat Pat Leahy joined Libertarian Rand Paul in a bill ending mandatory minimum sentences in drug cases.

Making marijuana illegal did not put an end to people using it. “Even at a daily use level, marijuana was used by 9% to 10% of high school seniors from 1977 through 1980.” Marijuana use continued to grow during the 1990’s, with a 42% use rate reported in 1997 (Inciardi, 1999, p.13). In 2013 more than 20 million Americans used marijuana (Sides, 2015).

**Medicinal Uses of Marijuana**

Modern uses of marijuana and legislation to regulate it are typically categorized as either recreational or medical marijuana. Studies show that marijuana is used more for recreational purposes than medicinal purposes. Tetrahydrocannabinol, more commonly known as THC, produces a high that recreational users crave. This high makes sounds and colors more intense for the user (Sides, 2015).

The use of marijuana for its medicinal value is disputed. “The American Society of Addiction Medicine dismissed the concept of medical cannabis because of concerns about its potential for dependence and adverse health effects. The U.S. Food and Drug Administration (FDA) states that the herb cannabis is associated with numerous harmful health effects.” (Wikipedia) The FDA has only approved two synthetic marijuana medicines (Sides, 2015). The term “medical marijuana” refers to physician-recommended therapy with a prescription. This is now allowed in a growing number of countries and several dozen American states.

Some studies indicate that marijuana helps people suffering from serious ailments such as AIDS, cancer and other diseases by easing symptoms of nausea, anorexia, muscle spasms and vomiting. Marijuana has also been said to help less serious ailments such as sleeplessness, appetite loss, and can even cure the hiccups. It is also used as an anti-inflammatory, an antiemetic, and a bronchodilator. Some claim marijuana not only helps people physically, but emotionally and mentally too, as it helps relieve stress,. provides a barrier for everyday-life negative occurrences, and numbs traumatic memories. Cannabidiol (CBD), unlike THC, does not get you high and has no psychoactive effect. CBD and other compounds in marijuana, show promising results in treating disorders and diseases such as Amyotrophic Lateral Sclerosis (ALS or Lou Gehrig’s disease), osteoporosis, dementia, post-traumatic stress disorder (PTSD), epileptic seizures, multiple sclerosis and psoriasis. The US Surgeon General stated that “for certain medical conditions and symptoms” it can be “helpful” (Sides, 2015). In Spain, at a lab run by biochemist Manual Guzman, where they have been treating cancerous rats with cannabis compounds for 15 years, they have found that the tumors in a third of the rats were reduced and in another third of the rats, the tumors were completely gone (Sides, 2015).

Researchers in Israel have developed the most advanced medical marijuana programs (Sides, 2015). In Israel, more than 20,000 patients have a license to use cannabis to help with conditions such as Crohn’s disease, glaucoma, asthma and Tourette’s syndrome (Sides, 2015). Israeli scientist Raphael Mechoulam has devoted more than 45 years of his life to study marijuana and is credited with discovering the components of marijuana: tetrahydrocannabinol (THC) as well as cannabidiol (CBD), which has many potential medical uses but no psychoactive impact on humans (Sides, 2015). “Mechoulam is widely known as the patriarch of cannabis science…despite that, he’s not particularly in favor of legalizing cannabis for recreational use…(citing) studies showing that long-term use can change the way the brain develops” (Sides, 2015, p. 39-40). Mechoulam and his team were also able to isolate the chemical made by the human body that triggers the same receptor in the brain as THC does. They named it anandamide, which means “supreme joy.” (Sides, 2015)

The research on the medical benefits and risks of marijuana is incomplete and sometimes contradictory. The use of marijuana for treating PTSD is one example of a highly contested arena that needs more research (Brauser, 2014; Flatow, 2014; Wire, 2014). Some states specifically allow the use of medical pot for veterans with PTSD while others forbid it (Flatow, 2014).

In a historic recent vote, the federal government moved in a new direction with the United States Senate Appropriations Committee amending the federal marijuana law to allow Veterans Administration doctors to recommend the use of medical marijuana in states where it is legal. The Veterans Administration was the only federal agency which specifically prohibited physicians from discussing and recommending medical marijuana. In 2002 the Ninth Circuit Court of Appeals heard and upheld the *Conant v Walters* case on the right of physicians to recommend medical marijuana regardless of its legality in a state, but it was not until 2015 when a Senate amendment finally implemented that right. The amendment, called the “Veterans Equal Access Amendment, was inserted in a “must pass” military construction and veterans spending bill (Drug Policy Alliance, 2015).

The cover story titled “Weed-The New Science of Marijuana” in the June 2015 issue of *National Geographic* provides a good summary of many of the scientific issues involved from diverse perspectives. Hampton Side’s lengthy article describes the issues from the standpoint of a chemist (and the patriarch of cannabis research), a botanist, a biochemist, a geneticist, a caregiver, and medical migrants to states allowing its use (Sides, 2015). Clearly, more research is needed.

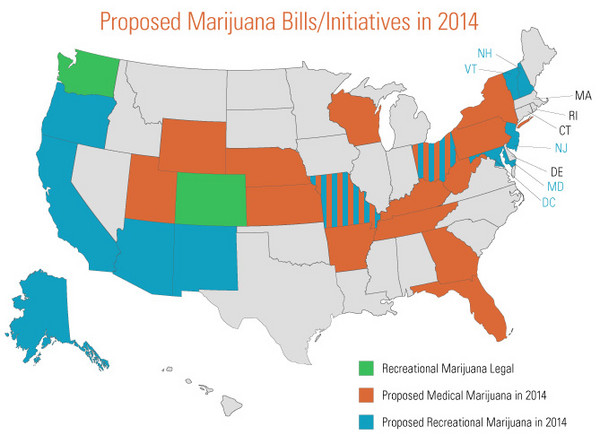
**Federal and State Policies on Marijuana**

Today in 2015, the politics of marijuana policy are changing rapidly at the state and federal level. Well-oiled websites and organizations, such as the National Organization for Reform of Marijuana Laws at [http://norml.org](http://norml.org/), report nearly daily changes in what is taking place.

California was the first state to legalize marijuana for medicinal use when it passed the Compassionate Use Act in 1996. This Act allowed patients to use marijuana for medical reasons when their primary care physician issues an approval. This led to the opening of medical cannabis dispensaries in California. Since then, Washington D.C. and twenty two states have legalized the use of marijuana for medicinal purposes. The number of states legalizing medical marijuana has continued to grow.

[](http://www.google.com/imgres?imgurl=http://www.ibj.com/ext/resources/IBJ-Print2/2015/02-February/marijuana-map.jpg&imgrefurl=http://www.ibj.com/articles/print/51583-medical-marijuana-bill-wont-fly-this-session-but-attitudes-shift&h=207&w=441&tbnid=zajmkbqLJW-13M:&zoom=1&docid=ynsi5bcdaC82rM&ei=PZxgVe7DBY3VoATggYKACw&tbm=isch&ved=0CDQQMygTMBM)

More recently, the American public has taken the push for the legalization of recreational marijuana further through the political process with changes in state laws. In 2012, voters from Washington and Colorado approved the legal possession of marijuana in small amounts for recreational use. Oregon, Alaska, and Washington D.C. quickly followed suit. As the map below indicates, a number of other states were exploring legalization of medical and/or recreational marijuana in 2014.

[](http://www.google.com/url?sa=i&rct=j&q=&esrc=s&source=images&cd=&cad=rja&uact=8&ved=0CAcQjRw&url=http://ishareimage.com/legal-weed-states.asp&ei=_p1gVamWFo3poATM5YDYDw&psig=AFQjCNEf5tonANtbKBthc8xg2qUQ3_nn8w&ust=1432481538338338)

Changes are also taking place at the federal level as state action has pushed the federal government to further clarify federal-state roles and policy in a number of different ways. In August 2013, the U.S. Justice Department issued a memorandum to federal prosecutors, titled “Guidance Regarding Marijuana Enforcement, but also known as the “Cole Memorandum.” (Cole, 2013) The purpose was to inform the prosecutors and the public that as long as the following eight conditions were met, the federal government would allow the states to go forth with marijuana legalization even though it was still illegal federally (McDougall, 2014).

* Preventing the distribution of marijuana to minors;
* Preventing revenue from the sale of marijuana from going to criminal enterprises, gangs, and cartels;
* Preventing the diversion of marijuana from states where it is legal under state law in some form to other states;
* Preventing state-authorized marijuana activity from being used as a cover or pretext for the trafficking of other illegal drugs or other illegal activity;
* Preventing violence and the use of firearms in the cultivation and distribution of marijuana;
* Preventing drugged driving and the exacerbation of other adverse public health consequences associated with marijuana use;
* Preventing the growing of marijuana on public lands and the attendant public safety and environmental dangers posed by marijuana production on public lands; and
* Preventing marijuana possession or use on federal property (Cole Memorandum, 2014).

These conditions required states to have a robust regulatory and enforcement scheme that was effective. If the conditions in states did not meet these criteria, federal challenges would take place. The capacity of states and local entities to enforce these regulations remains problematic with spot checks showing significant failure rates in terms of serving minors. Cities such as Seattle are now tightening municipal rules and practices.

The Cole memorandum failed to mention anything regarding Indian tribes and the legalization of marijuana on reservations (McDougall, 2014). It was not until October 2014 that the U.S. Department of Justice addressed Indian tribes when they issued another memorandum titled “Policy Statement Regarding Marijuana Issues in Indian Country.” This document gave Indian tribes the authority to govern their own jurisdictions regarding marijuana use, so long as they follow the eight federal guidelines established in the 2013 Cole Memorandum and restated in the 2014 memoranda. (Wilkinson, 2014).

This unexpected move by the federal government left many people thoroughly confused. Troy Eid, co-chair of the American Indian Law Practice Group, asked why there had been no tribal consultation prior to the issuance of the policy statement. “There are requirements in federal law and federal executive orders that the federal government must consult with tribes before making a declaration of policy,” he said. “Consultation is a key policy, it’s been in place since 1971 when President Nixon recognized tribal sovereignty” (Haglage, 2014, p 2). Nonetheless, this important opening was quickly noted by tribes across the United States and the dialogue about the challenges and opportunities began.

**Tribes Explore Emerging Opportunities**

In February 2015 an article in the *Huffington Post* reported that more than 100 tribes had reached out to FoxBarry Farms expressing interest in exploring the opportunity. Foxbarry is a management firm building the first marijuana facility on the Pinoleville Pomo Nation’s ranch in Northern California. They have also worked with tribes to build and operate casinos (Schwartz, 2015). Foxbarry CEO Barry Brautman is quoted as saying they work closely with local lawmakers and will only take on tribal projects in states that have already legalized medical and/or recreational marijuana (Schwartz, 2015). Foxbarry is apparently only one of a number of companies pursuing the opportunities in the emerging tribal cannabis market.

That same month in February 2015 in Washington State representatives of 75 tribes from around the country attended a conference at the Tulalip Tribes Resort Hotel about the regulatory, legal, and social issues related to legalization. The conference was organized by Robert Odawai Porter, a former president of the Seneca Nation in New York, and Seattle marijuana attorneys Hilary Bricken and Robert McVay. “Topics of discussion included the big business potential for pot, as well as concerns about substance abuse…and the potential creation of a tribal cannabis association” (Carr, 2015).

Seth Pearman, an attorney for the Flandreau Santee Sioux Tribe in South Dakota said, “We have to take a look at it….The economic opportunity is just astronomical—it would be almost negligent to miss out on this” (Johnson, 2015). Others agreed, saying that this was another opportunity for promoting self-sufficiency. Some attendees, quoted in newspaper accounts of the conference, noted that tribes were proceeding cautiously, trying not to outpace states where they were located. Conference organizer Porter noted that legal issues were still an obstacle since 17 states have some legal jurisdiction over tribes, and this could lead to conflicts if tribes legalize it but the state does not (Johnson, 2015).

Boulder Colorado city attorney Thomas Carr noted the importance of thorough planning, screening, and enforcement to keep out the bad operators. Others pointed to serious security issues because of the all-cash nature of the business. Capitalizing the business was also noted as an obstacle since many banks have refused to participate in the marijuana business. Bricken, turning this obstacle into an opportunity, said this was an opportunity for tribes to enter the marijuana banking business (Keeler, 2015). Follow-up meetings were planned to carry the discussion further. The issue was also being widely discussed at other Native American conferences(Keeler, 2015). Meanwhile, many states are also exploring legalizing marijuana in one form or another.

**Washington State establishes new marijuana laws and processes**

In Washington State 2015 was a legislative year for clarifying and aligning state regulatory processes about marijuana through the passage of two critical new laws. Many years after the state approved medical marijuana the enterprise was largely unregulated. This would change in 2015 through the passage of Senate Bill 5052, the *Cannabis Patient Protection Bill*. In addition, House Bill 2000 was introduced to establish a process for state agreements with Indian tribes about marijuana.

Oregon, meanwhile, was also tightening up its medical marijuana program with an overwhelming vote in the state Senate for new reporting requirements, caps on the number of plants, and a provision allowing cities and counties to prohibit medical marijuana dispensaries and processing sites (Mapes, 2015). Opponents strongly criticized the Oregon bill as unresponsive to public support for legalization (Green, 2015). Much of the debate in both Oregon and Washington centered on the issue of how much state power should be delegated to cities and counties to set the rules.

In Washington Senate Bill 5052, the *Cannabis Patient Protection* bill, was introduced early in the 2015 legislative session in the Committee on Health Care and Wellness. Of the two marijuana proposals in the legislature, the medical bill faced the toughest opposition. Washington had been one of the first states to legalize medical marijuana in 1998 but the original legislation did not allow commercial sales. Meanwhile, the medical marijuana business grew and flourished with virtually no regulation. Senate Bill 5052 changed that, establishing a regulatory framework for the medical marijuana business aligned with the new recreational market regulations. It creates a voluntary registry of patients and a licensing process that will give preference to medical marijuana businesses that have been “good guys”—operating since 2013, paid their taxes, and plan to apply for a recreational license as well (Peninsula Daily News, 2015).

Rick Graza, State Liquor Control Board director, said he expects “many of Washington’s more than 1,000—maybe more than 2,000—unlicensed medical marijuana shops won’t qualify…because they are too new (Peninsula Daily News, 2015). This screening should help address a concern that the rapid growth of medical dispensaries had become a front for black-market sales (New York Times, April 25, 2015). The Department of Health will implement many aspects of the new law.

The debate over the *Cannabis Patient Protection Bill* was heated, and the bill passed by the House by a vote of 60 yeas to 36 nays. Much of the debate centered on the need for any regulation. Senator John McCoy recalled a meeting in his office with half of the people opposed to any regulation and the other half —mostly the early and well established dispensaries—accepting regulation as a foregone conclusion. McCoy said “here’s the problem folks—this is a choice of federal regulation or state regulation. There are no other choices. We can’t regulate recreational marijuana but not medical.” Washington State Senators, Ann Rivers and Jeanne Kohl-Wells heard a similar debate across the State as they held listening sessions to hear public opinion on the issue (Personal interview John McCoy, May 29, 2015).



Haiden Day, 6, right, who has Dravet Syndrome, a form of epilepsy that his parents treat with medical marijuana, looks on as Washington Gov. Jay Inslee, left, signs a bill at the Capitol in Olympia, Wash., that overhauls Washington's medical marijuana market

Meanwhile, in response to the U.S. Department of Justice memorandums, a second bill, House Bill 2000, was introduced in the Washington State Legislature House Committee on Commerce and Gaming to establish a framework for Washington State and federally recognized tribes to jointly regulate marijuana, should they chose to do so. Several tribes—the Suquamish and the Confederated Tribes of the Colville Reservation—spoke in favor of the bill at the hearings. The bill authorized the Governor to enter into compacts with tribes on marijuana-related issues. Compacting was a well-established framework for intergovernmental relations in Washington State which has a longstanding government to government process. This authority could be, and was subsequently, delegated to the Washington State Liquor Control Board, renamed the “Liquor and Cannabis Board.” The legislation addressed both state and tribal interests including:

* Criminal and civil law enforcement;
* Regulatory issues concerning the possession, production, processing, and sale of marijuana;
* Medical research of marijuana;
* Taxation; and
* Any immunities and preemptions in regard to the production, processing and sale (Wolf, 2015).

Both tribal and non-tribal businesses would be subject to a similar rate of taxation with exemptions for medical marijuana. The bill also included a provision for tribes to institute a tax exemption for tribal members and tribal enterprises (Westney, 2015). The bill passed both the Senate and the House with overwhelming majorities. The Senate vote was unanimous and the House vote was 79 yeas and 17 nays with most of the nays coming from the same legislators—mostly Republicans and some members of the Tea Party—who had opposed the medical marijuana bill. The bill was signed into law by Governor Jay Inslee on May 8, 2015. (See picture below.)

[](http://mediad.publicbroadcasting.net/p/northwestnews/files/styles/x_large/public/201505/050815TB_TribesPot.jpeg)

Puyallup Tribal Chairman Sterud stands third from left behind Gov. Jay Inslee at a bill signing ceremony.

Source: Tom Banse, *Northwest News Network*

**Jurisdictional Issues**

The U.S. Department of Justice memorandum about tribal involvement in the marijuana business left many important issues and questions unresolved. Whether or not tribes across the United States decide to legalize marijuana, there will be considerable confusion regarding competing laws among the various states and tribes. This means not only 50 states with different marijuana laws, but also 326 reservations as well (McDougall, 2014). How this plays out is really an issue of tribal-state relations and tribes with experience and positive relations with their state will probably do better,

Complications may arise from Public Law 280 (PL280), enacted by Congress in 1953. Public Law 280 was a transfer of authority (jurisdiction) from the federal level to some of the states. This Act gives states under PL-280 jurisdiction over most crimes that occur on tribal land. PL-280 was mandatory in six states--Alaska, California, Minnesota, Nebraska, Oregon, and Wisconsin (except the Menominee Indian Reservation). A number of other states were designated as *optional* PL-280 states where the states could assume expanded criminal jurisdiction but it was dependent on tribal approval. Optional PL-280 states were originally Florida, Idaho, Iowa, Montana, Nevada, South Dakota, Washington, and Utah. (U.S. Attorney General’s office, District of Minnesota, 2015)

In the 1970s and 1980s many tribes in the optional PL-280 status used the retrocession process and cooperative law enforcement agreements to eliminate state criminal jurisdiction and set up other law enforcement systems. Amendments to PL 280 allowed for retrocession to return to tribal jurisdiction and required tribal agreement to state criminal jurisdiction. Many of the Public Law 280 states and non PL280 states have now developed agreements that allow shared information and enforcement of mutually agreed-upon codes for tribal, state, and local law enforcement and working relationships with court tribal and state systems. In Washington, for example, quite a few tribes have established their own law enforcement system, and others have cooperative law enforcement agreements with the state and local law enforcement offices to make the system clear. While working relationships have improved in many areas, there is still much progress needing to be made.

Whatever the law enforcement situation, states also vary in terms of marijuana legalization. As a result, individuals could find themselves possessing marijuana legally according to tribal law but under certain conditions, like PL 280 still being in effect, might still be subject to law enforcement action in states where it remains illegal. On July 8, 2015 agents from the Bureau of Indian Affairs, the Drug Enforcement Administration, and state and local law enforcement descended on the Pit River Tribe’s XL Ranch and the Alturas Indian Racheria in Northern California. The tribes maintained that they had informed authorities that they were legalizing medical marijuana and setting up a farm. Medical marijuana is legal in California, but the number of plants being cultivated was reportedly well above legal limits (Armitage, 2015). Authorities had apparently been called in by disgruntled tribal members. (Noisecat, 2015) Tribal leaders declared the raid an invasion on tribal sovereignty. News reports said it was also a story of conflicting internal politics and a failure to work out agreements with local officials.

Is this simply an aspect of working out a new policy and establishing new relationships? The policy process that accompanies the expansion of tribal businesses into new areas frequently involves diverse interests that come into conflict. As in the case of marijuana sales, areas of tribal entrepreneurship involve activities and substances that are regulated outside tribal boundaries that can produce conflict with state governments. This was true in the process of establishing tribal tobacco sales and casinos that are now successful areas of economic development for tribes. Conflict with competing interests and accusations of potential corruption, expansion of addictive behavior, and damage to youth marked the early stages of tribal casino development, and similar accusations mark the development of tribal marijuana sales today.

Tribal-state relations evolved from a period of intense conflict to an era of problem solving that has benefited many tribal economic ventures and state economic growth. In the late 60s and 70s, decisions in the Supreme Court and implications from federal administrative decisions that made tribes eligible to compete for federal agency funds, employ senior water rights and other issues led to intense conflict in state and tribal relations. Legal and political challenges to expansions in tribal responsibility and authority often failed in court. (Hanna, et. al., p. 580) The Boldt Decision in Washington, the Indian Gaming and Regulatory Act, and the emergence of many tribes as economic and political players changed the landscape. As opportunities for problem solving, mutual benefit and cooperation emerged from new opportunities in the changing landscape, the nature of state-tribal relations broadened in scope and effectiveness in making mutually beneficial policy.

Federal laws and guidelines provided a background of Supreme Court and federal administrative decisions that opened doors to tribal economic development, but at the end of the day relationships between tribes and states must be created through negotiations, agreements, and new legislation at state level. In the last forty years, fundamental principles of state-tribal relationships emerged: 1) coordination without transferring jurisdiction 2) cross-deputation of law enforcement officers through cooperative law enforcement agreements and 3) tax collection agreements. (Hanna, Deloria and Trimble, 2012) These principles forged a problem-solving attitude that led to agreements, compacts, and compatible regulatory structures that made development possible, and together, managed to avoid many negative impacts.

In Washington State, the long experience of state-tribal relations that emerged from the Boldt decision provided the foundation for numerous opportunities for successful tribal-state relationships, including recent state legislation outlining the relationship of state and tribes in marijuana sales. In other states, the latest controversy surrounding tribal marijuana sales may follow a process similar to that of developing tribal casinos. As in casino development where states that had some form of legalized gambling that preceded tribal casinos, tribal marijuana sales may emerge in states that have some form of legalized marijuana, medical or otherwise.

**Legalization of Marijuana: How Tribes Might Become Involved**

Whether tribes in Washington and elsewhere should legalize marijuana is not, of course, a simple “yes-no” question. Nor is it a single option. Legalization of marijuana presents a myriad of choices ranging from only eliminating drug testing for marijuana for tribal employment to producing marijuana, to selling recreational and/or medical marijuana, to producing a product mostly for export vs reservation use. Many different possible scenarios have been put forward: getting involved in banking around this emerging industry, a cannabis casino, a tribe working with pharmaceutical companies to grow and do research on medical uses of marijuana. Numerous opportunities can be imagined but not all are feasible. Tribes differ in their readiness and capacities to enter the marijuana business. Infrastructure capacities are also an issue: does a tribe have the buildings, power, water, and security systems to do this well? Is location a consideration? Do they have skilled personnel for the endeavor? Do they have the means to finance such an enterprise?

**Arguments for Legalizing Marijuana on Reservations**

One reason tribes might consider legalizing marijuana is to bring economic opportunities to their people, where so many live in poverty. The profit from marijuana sales could create substantial revenue to fund education, housing, and health care programs. It could help tribes and their members become more economically independent. In two months of legal marijuana, the state of Colorado collected over $6 million in tax money from its sale (McDougall, 2014). Some tribes have greater confidence levels that they can participate in the new marijuana business and control the impacts on their communities, just as they have in the casino and tobacco businesses.

The Oglala Lakota of the Pine Ridge Indian Reservation is one tribe interested in the legalization of marijuana for revenue is. The Oglala Lakota Tribe has more than 30,000 tribal members and almost half of the population lives in extreme poverty. The Suquamish Tribe in Washington State has also made it clear that they are very interested in the legalization and sale of marijuana for profit (Reuters, 2015).

Perhaps the most compelling argument can be made to legalize medical marijuana. Medical marijuana is already acceptable in nearly half of the states and pharmaceutical companies are interested in partnership opportunities to expand this market. The Pinoleville Pomo Nation of northern California has already begun construction on their 10,000 square foot state-of- the-art greenhouse, which will soon be home to a medical marijuana growing operation. Their crops will be used for pills and also sublinguals, which are applied under the tongue to treat problems from chronic pain to insomnia. Their operation will reportedly produce about 100 jobs for their people (Reuters, 2015). The Narragansett Indian Tribe has decided to allow only medicinal use (Phelps, 2014).

Bringing the sale of marijuana out of the black market and out of criminal hands is another argument for legalization since it would also reduce criminal activity and court and jail costs. Colorado has already seen arrest rates plummet as a result of legalization.

Some argue that marijuana brings significantly fewer risks to tribal communities than alcohol. You cannot generally overdose on it, whereas alcohol poisoning is common (Sides, 2015). Also, fatal car accidents are far more likely to result from the use of alcohol than from marijuana (McDougall, 2014). Some people use marijuana as a treatment option for alcoholism, as it helps to cut back the alcohol craving. The same may be an option for people coming off of opiates or other hard-core drugs.

There are also potential marijuana products unrelated to its use as a drug that could provide employment and new business opportunities. Hemp produces natural soft fibers that are stronger, longer, more absorbent and provide better insulation than cotton. It is also known to grow well without pesticides, herbicides or fungicides that are harmful to the environment. This means hemp would be less polluting when making paper or other fibrous materials. It is also more recyclable (Inciardi, 1999).

**Arguments Against Legalizing Marijuana on Reservations**

One of the biggest fears tribes have about legalizing recreational marijuana is the impact it might have on their youth. Native Americans have the highest addiction rate of any racial or ethnic group in the U.S., and tribes do not want to give their youth the wrong idea about drug use. Studies have shown that continued use of marijuana containing high levels of THC by youth could change the way their still-developing brain grow. Another study showed mice born from mothers who were injected with high doses of THC during pregnancy were very anxious, not social, and also very uncoordinated (Sides, 2015).

There is also concern that marijuana may be a gateway drug that will lead to more dangerous drug use. The gateway drug hypothesis is controversial and studies are inconclusive (Barcott), Marijuana smoke is also an irritant of the respiratory system and actually produces more tar to the lungs than cigarettes (Inciardi, 1999). This would be true if it is smoked but many alternative means of injesting it are now available.

Tribes also are concerned about the consequences that could occur from the move to legalize and profit from marijuana. One consequence might be attracting criminal or other destructive elements to reservation communities. Another fear is being made a bad example by the federal government if something goes wrong (McDougall, 2014). Fears about potential conflicts between tribes and states with Public Law 280 are another concern, especially in states which are opposed to legalization.

Even within states approving legalization, there are often cultural conflicts about this issue. Before the Washington Legislature set up the compacting process for tribal involvement with marijuana, the Yakama Tribe in eastern Washington made it clear in 2014 that they will remain strongly opposed to any type of use in their jurisdictions. George Colby, attorney for the 10,000 member Yakama Nation, said “marijuana is the biggest problem for our people under age 40. It’s a bigger problem than alcohol” (Kaminsky, 2015). In what was reported as “a bold move to test the limits of tribal sovereignty,” the Tribe is seeking to bar pot sales and cultivation on not only their 1.2 million acre reservation, but also their “10.8 million acre stretch of the state it ceded under an 1855 treaty with the U.S. government, but where it still holds hunting, food-gathering and fishing rights” (Kaminsky, 2015). To further complicate matters, about a quarter of that land is U.S. National Forest where marijuana is illegal. A member of the state Liquor and Cannabis Board said it would consider the tribe’s concern when granting licenses but denying applications on the ceded land “seemed like quite a heavy lift.” Two cities in the vicinity have also banned marijuana. News reports suggested that the parties at odds try to settle the matter rather than take it to court. Newspaper accounts of the dispute described the issue as a culture clash between the largely rural east side of the state and the urban, high tech Seattle area (Kaminsky, 2014).

Another tribe that does not even condone the use of medical marijuana on their reservation is the Confederated Salish and Kootenai Tribes in Montana. In 2010, the Tribal Council made the decision to ban the use of medical marijuana on their reservation, although it was made legal in their state in 2004. The Tribal Council reasoned that they already had questionable people coming onto their lands looking to buy marijuana for illegal purposes. They went on to say that the legal use of medical marijuana just made it too hard to control. The Tribe was very aware that their members could easily leave the reservation to use their medical marijuana, but they stand behind their decision not to allow it on the Tribe’s lands (Mayrer, 2010).

**Tribes Exploring the Options**

At this time, many tribes are at a stage of cautious exploration of the options. George Thurman, Principal Chief of the Sak and Fox Nation, attended the Tulalip marijuana conference and was quoted as saying “I learned a lot...and will take it back to share with the tribal members….We are still up in the air about whether we are going to do it or not. Oklahoma just passed a medical marijuana bill and they are looking at a seed to sale business model” (Keeler, 2015) Conference participants from Hawaii and Canada said they wanted to be included. Canadian representatives said the market was much bigger than the U.S. and the situation was moving rapidly. The Fort Peck Assiniboine and Sioux Tribes of Montana and the Red Lake Band of Chippewa in Minnesota have also started to look into legalization.

In Washington state many tribes are also in the “exploring the options” stage. The Yakama have clearly said no, and after a series of public meetings within the community, the Tulalip Tribe said “no.” The Colville Tribe has asked for a vote of the people to give advice to the tribal council.

Only the Suquamish Tribe has made a formal “yes” decision. They became the first tribe in Washington to sign a compact with the State in September 2015 (Walker). This compact is the first in the United States, and is expected to become the model for future compacts. (Walker) The ten year compact includes a provision that the Tribe will charge a tax equivalent to the State excise tax on sales to non-tribal members with the revenue used for tribal government services. The compact also allows expansion of retail outlets and processing and producing marijuana although this vertical integration of businesses is usually not allowed in these state licenses (Bricken). This will give the Tribe some competitive advantage (Bricken).

Tribal Chair Leonard Forsman said the issue was brought to their door by State legalization of recreational marijuana. After careful consideration they decided a complete ban on marijuana was unrealistic, and it was in the best interest of their community to decriminalize the sale and possession of marijuana in certain circumstances and pursue the opportunity to enter the retail market. He stressed that they would work within the federal regulatory processes. (Walker, Bricken) The nearby Port Gamble S’Klallam Tribe said they will not do this just because they can because of tribal members’ concern about the conflict with cultural teachings about drug and alcohol free living. (Walker)

Asked about which tribes he expected to step forward and decide in favor of legalization, State Senator John McCoy (Tulalip) said he thought it would likely be tribes that have casinos that are doing okay but aren’t huge revenue generators comparable to the big three casinos operated by the Tulalip, Puyallup, and Muckleshoot Tribes. These other tribes are likely looking for an additional revenue stream (Personal Interview, McCoy). Professor Linda Moon Stumpff, an expert on tribal management, added that the capacity of the tribes to manage this new enterprise and have the appropriate structures would be critical. Echoing the words of Colorado attorney Thomas Carr, McCoy said “this has to be done carefully. If there isn’t a tight rein, it will lead to corruption” (McCoy, Personal Interview, 2015).

**Conclusion**

The issue of marijuana legalization presents tribes with some very important decisions. Each tribe will have to carefully consider the pros and cons of legalizing marijuana in their communities based on their traditions and values and the needs of their tribal community. Important complicated questions arise: how much do we really know about the impact of marijuana on our bodies and our brains? What will be the economic and social impact on our communities? Do we have the necessary infrastructure and the will to properly manage bringing marijuana into our tribal communities? What infrastructure is needed? What will be the real benefits and potential hazards? What particular decision process and community involvement should be pursued to make this decision? If a tribe decides to legalize marijuana, what form of involvement makes the most sense? What is the most risky? What is the most lucrative? What is the real value of a decision one way or the other?

**References**

Armitage, Lynn. *Raided Marijuana Facilities on Pit River Land Cultivating Well Above the Limit*. Indian Country Today Media Network. 7/9/15.

Associated Press (May 27, 2015). *Medical Marijuana business will get shakeup by newly named Liquor and Cannabis Board.* Peninsula Daily News.

Barcott, Bruce (2015) *Weed and the People: The Future of Legal Marijuana in America*. Time Life Books.

Barnard, Jeff (Dec 12, 2014) *Tribes wary of selling pot, even if feds allow it*. Providence Journal.

Brauser, Deborah (December 15, 2014) *Medical Marijuana May Worsen PTSD Symptoms, Increase Violence*. Downloaded June 8, 2015 from http://medscape.com/viewarticle/836588

Bricken, Hillary (Sept 21, 2015) *Smoke Signals: Washington State and Suquamish Tribe Ink First Ever Marijuana Compact*. Downloaded Oct 31, 2015 from http://abovethelaw.com/2015/09/smoke-sognals-washington-state-and-suquamish-tribein...

Carr, Thomas (February 27, 2015) *Marijuana legalization debate draws 75 tribes to Washington state conference.* Oregon Live.

Cole, James M. (August 29, 2013). *Memorandum Subject: Guidance Regarding Marijuana Enforcement*. U.S. Department of Justice. Office of the Deputy Attorney General

Drug Policy Alliance (May 21, 2015). Press Release *In Historic Vote, Senate Appropriations Committee Approves Veterans Medical Marijuana Amendment.*

Ecoffey, Brandon. (March 7, 2014) *It’s time to legalize pot in Pine Ridge.* Native Sun News. Retrieved 5/22/15 from [www.indianz.com/News/2014/012782.asp](http://www.indianz.com/News/2014/012782.asp)

Flatow, Nicole (April 29, 2014). *Colorado Declines Medical Pot Access for Veterans with PTSD.* Retrieved June 10, 2015 from http://thinkprogress,org/justice/2014/04/29/3431993/colorado-declines-medical-pot

Green, Johnny. (2015) *Oregon Senate Passes Harmful Medical Marijuana Bill*. The Weed Blog

Hanna, Tassie, Sam Deloria, and Charles E. Trimble (2012) *The Commission on State-Tribal Relations: Enduring Lessons in the Modern State-Tribal Relationship.* Tulsa Law Review. Vol. 47:3 p.580

Inciardi, J.A. (1999). The Drug Legalization Debate. New York: Sage Publications.

Johnson, Gene (Feb 27, 2015) *Indian tribes converge in Washington state to discuss marijuana legalization*. Retrieved 5/22/15 from www.the cannabist.co

Kaminsky, Jonathan (March 24, 2014). *Indian tribe seeks pot business ban in part of Washington State*. Retrieved 5/22/15 from [www.reuters.com/article/2014/03/24/us-usa-marijuana-tribe-idUSBREA2N12J2014](http://www.reuters.com/article/2014/03/24/us-usa-marijuana-tribe-idUSBREA2N12J2014)..

Keeler, J. (March 2, 2015) *Tribal Marijuana Conference: A 10-Year Window for Tribes to Capitalize.* Indian Country Today Media Network

KTLA (July 12, 2014) *Research on Medical Marijuana’s Effects on Veterans with PTSD Stalls After Arizona Professor is Let Go*. Retrieved June 9, 2015 from <http://ktla.com/2014/07/12/research>-on-medical-marijuana-effects0on-veterans-with-ptsd..

McCoy, John (May 29, 2015). Personal interview

Morton, Catherine. (2013). *Reconciling American Marijuana Policy in a Federal System,* Global Tides: Vol.7, Article 11

McDougall, I. (2014, May 23). Smoke signals. Newsweek Global, 162 (20).

Haglage, A. (2014, December 13) *Tribes to U.S. Government: Take Your Weed and Shove It.* The Daily Beast. Retrieved From:<http://www.thedailybeast.com/articles/2014/12/13/tribes-to-u-s-government-take-your-weed-and-shove-it.html>

Mapes, Jeff. (May 28, 2015) *Bill to limit medical marijuana growers gets strong support 29-1 vote in Oregon Senate*. Oregonlive.

New York Times (April 25, 2015). *Washington State Revisits Rules on Use of Marijuana as Medicine.* Retrieved 5.18.15 from <http://www.nytimes.com/2015/04/26/us/washington-state-tightens-its-law-on-medical-marijuana>...

Noisecat, Julian Brave. *These Native American Tribes Legalized Weed, But That Didn’t Stop Them from Getting Raided by the Feds.* Huffington Post. July 18, 2015

Phelps, T. (2014, December 11). *U.S. won’t stop Native Americans from growing, selling pot on their lands.* Providence Journal. Retrieved from: <http://www.providencejournal.com/article/20141211/News/312119881>

Reuters, M. (2015, February 8). *Native American pot venture sparks controversy.* Retrieved from: <http://www.reviewjournal.com/business/native-american-pot-venture-sparks-controversy>

Mayrer, J. (2010, May 27). *Tribes just say no.* Missoula Independent. Retrieved From: <http://missoulanews.bigskypress.com/missoula/marijuana/Content?oid=125751>

Schroyer, John and Tony C. Dreibus (May 15, 2015) *Week in Review: Wa Reaching Out to Tribes, Banks Explain MJ Stance + Ohio Campaign Boost. Marijuana* Business Daily

Schwartz, Carly. *More than 100 Native American Tribes Consider Growing Marijuana*. Huffington Post. February 3, 2015.

Sides, Hampton (June 2015) *High Science*. National Geographic

United States Attorney’s Office. *Frequently Asked Questions about Public Law 83-280*. Retrieved July 20, 2015 from <http://www.justice.gov/usao-mn/Public-Law%2083-280>

Walker, Richard. (Sept 21, 2015) *Suquamish will enter retail marijuana market this fall*. North Kitsap Herald.

Westney, Andrew (April 28, 2015) *Washington Tribal Marijuana Pact Bill Heads to Governor.* Downloaded May 27, 2015 from http://www.law360.com/articles/649117/

Wilkinson, Monty (Oct 28, 2014) Policy Statement Regarding Marijuana Issues in Indian Country. Memorandum to All U.S. Attorneys and others. U.S. Dept of Justice.

Wikipedia, Cannabis (drug) http://e.wikipedia.org/wiki/Cannabis\_drug

Wolf, Heather (May 13, 2015) *Washington State Enacts Tribal Marijuana Bill.* Downloaded 5/22/15 from http://www.brownlieevans.com/marijuana-business-law/washington-state-enacts-tribal-mar...

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