

# Cannabis Guide for the USA & Canada

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Federally Recognized

## American Indian & Alaska Native Tribes

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## Overview

There are currently 574 federally recognized American Indian and Alaskan Native tribes and villages recognized by the Bureau of Indian Affairs of the United States. These entities enjoy a special relationship within the United States federal system of government. A tribe's decisions regarding cannabis—its use, growth, distribution, and taxation—may be different than the state jurisdiction in which the tribe is located. Tribes within a state jurisdiction may vary considerably in their decisions regarding cannabis, and states have taken different positions regarding how to address tribes within their jurisdictions regarding cannabis. This summary is meant only to provide a general framework for understanding the regulation of cannabis in Indian Country.<sup>1</sup>

## Current Regime

Federally recognized tribes are described as “domestic, dependent nations.” The United States acts as trustee, and much of the land base of tribes is held by the United States for the benefit of the tribes. States have limited authority to regulate on Indian reservations. Tribes have the authority to regulate over their members and their reservation subject to the power of Congress to legislate and regulate.

Nowhere is this more significant than in the criminal law arena. Criminal enforcement of cannabis laws in Indian Country will depend on whose law is being applied: federal law (e.g., the Controlled Substances Act), state or local law, or the law of the tribe. Jurisdiction will also depend on whether the offender is Indian or non-Indian; whether there are victims; if so, whether the victims are Indian or non-Indian; and whether the state has been granted jurisdiction to enforce crimes in Indian Country.

<sup>1</sup> The term “Indian Country” is defined by 18 U.S.C. § 1151 as “(a) all land within the limits of an Indian reservation, notwithstanding the issuance of any patent, and including rights-of-way running through the reservation, (b) all dependent Indian communities whether within the original or subsequently acquired territory, and (c) all Indian allotments, and including rights-of-way running through the allotment.”

Marijuana is a Schedule 1 Controlled Substance, and federal laws related to marijuana are considered laws of general applicability, thus applicable in Indian Country. A tribe's engagement in the cannabis industry by decriminalizing or legalizing cannabis often began with the issuance of the Wilkinson Memorandum, a policy statement issued on December 14, 2014, by the U.S. Department of Justice, regarding enforcement of federal drug laws as they apply to marijuana in Indian Country.

The Wilkinson Memorandum reiterates the authority and jurisdiction of the United States to enforce federal law in Indian Country. It provides that, with respect to Indian Country, the federal government's limited investigative and prosecutorial resources should be focused on the eight priorities of marijuana enforcement described in a previous policy statement referred to as the Cole Memorandum.<sup>2</sup>

The priorities for enforcement of federal marijuana laws are directed at preventing:

1. distribution of marijuana to minors,
2. the influence of criminal enterprises in the marijuana business,
3. transportation from states that allow marijuana to states that do not allow marijuana,
4. the use of marijuana as a cover for other illegal activity,
5. violence and the use of firearms,
6. driving under the influence and other public health consequences,
7. growth of marijuana on public lands, and
8. possession and use on federal property.

Priorities 3 and 8 create significant ambiguity in their application to Indian Country.

**Priority 3.** The reservations of certain tribes include portions of more than one state. By example, the Navajo Nation includes portions of Arizona, New Mexico, and Utah and borders Colorado. Arizona, New Mexico, and Utah each permit some use of marijuana for medicinal purposes. Arizona and New Mexico allow cultivation of marijuana, while Utah allows importation of cannabis extract but does not allow cultivation within the state. Colorado

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<sup>2</sup> In a memo dated January 4, 2018, the DOJ, through then Attorney General Jeff Sessions, issued the "Sessions Memorandum" which "rescinded" the Cole and Wilkinson Memorandum, and all previous guidance on marijuana enforcement. While the Sessions Memorandum at the time was interpreted by some as a sign that the federal government would start prosecuting marijuana crimes more vigorously, the DOJ's actions after the Sessions Memorandum has not borne this out. Furthermore, the Sessions memorandum still requires prosecutors to "weigh all relevant considerations" before bringing charges and these considerations are the "federal law enforcement priorities set by the Attorney General, the seriousness of the crime, the deterrent effect of criminal prosecution, and the cumulative impact of particular crimes on the community."

permits adult recreational use of marijuana, and effective January 2021, Arizona will also permit adult recreational use of marijuana. Reservation boundaries may complicate the application of this priority.

**Priority 8.** The term “federal property” includes tribal or allotment trust land.<sup>3</sup> If U.S. Attorneys were to prioritize enforcement of marijuana violation of federal law based on this priority, there would be no limitations on enforcement, as most of Indian Country would come under this priority.

The Wilkinson Memorandum specifically provides that, with respect to federal law enforcement of marijuana within an Indian tribe, the relevant U.S. Attorney should consult with the tribe and should provide notice to certain Washington D.C. officials. The Wilkinson Memorandum does not change federal law, does not provide a defense to prosecution, does not provide safe harbor, and can be revoked at any time.

In January 2018, the Department of Justice did just that. Then Attorney General Jeff Sessions issued the “Sessions Memorandum,” which “rescinded” the Wilkinson Memorandum and all previous guidance on marijuana enforcement. The Sessions Memorandum stated that “prosecutors should follow the well-established principles that govern all federal prosecutions,” and these principles require that federal prosecutors “weigh all relevant considerations, including federal law enforcement priorities set by the Attorney General, the seriousness of the crime, the deterrent effect of criminal prosecution, and the cumulative impact of particular crimes on the community.”

## Tribes’ Experiences with Cannabis

### Federal Raids

Even with the Wilkinson Memorandum still in effect, in 2015, federal agents raided two marijuana operations on federally recognized tribal lands at the Alturas Indian Rancheria and the XL Ranch in Modoc County, California. The agents seized 12,000 marijuana plants and over 100 pounds of processed marijuana. In its press release on why the raid occurred, the U.S. Attorney’s office stated that the grow operations “were well in excess of the locally enacted marijuana cultivation limits applicable to county land,” and “all of the marijuana cultivated at both facilities was intended to be distributed off tribal lands at various unidentified locations.”

### Successful Tribal Business Operations

Tribes that have successfully operated marijuana businesses have done so almost exclusively in states that have legalized marijuana in some form.

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<sup>3</sup> See, e.g. 20 U.S.C. § 7713(5)(A)(ii)(I) (“the term ‘federal property’ means real property that is not subject to taxation by any State or any political subdivision of a State due to Federal agreement, law, or policy, and that is . . . held in trust by the United States for individual Indians or Indian tribes”).

Tribes in Washington and Nevada have entered into “state-tribal compacts” to implement the tribes’ regulatory programs and business enterprises. Under these compacts, tribes regulate tribal cannabis activities in partnership with, but not under, the state’s licensing authority. Washington legalized recreational use of marijuana in 2012 and four tribes in Washington—Muckleshoot, Port Gamble S’Klallam, Puyallup, and Squaxin Island—have executed state-tribal compacts and opened successful cannabis businesses in the state. The state’s compact with the Suquamish Tribe explains “the State and the Tribe have recognized the need for cooperation and collaboration with regard to marijuana in Indian country.”

In Nevada, five tribes—Las Vegas Paiute, Pyramid Lake, Lovelock Paiute, Ely Shoshone, Yerington Paiute—have executed state-tribal compacts.

Because of the compact, the Las Vegas Paiute Tribe has constructed the NuWu Cannabis Marketplace, designed to be the largest cannabis dispensary in the world, and includes “drive-thru service (the first of its kind in the United States), online order and pick-up service, and cannabinoid-infused products for dogs.”

California tribes are not so fortunate as the tribes are in Washington and Nevada. California, which legalized recreational marijuana in 2016, has failed to adopt compacting legislation and has issued regulations that require “tribes to waive sovereign immunity to participate in the state licensing system.”

In March 2020, members of the Oglala Sioux Tribe voted to legalize medical and recreational marijuana, while voting down the legalization of alcohol. On October 27, 2020, the Oglala Sioux Tribal Council enacted the Marijuana Control Ordinance, creating a Marijuana Commission and adopting regulations for both medical and recreational use of marijuana. The Pine Ridge Reservation is located in South Dakota, which had yet to legalize any use of marijuana. Legalization of both medical and recreational use was passed by the South Dakota electorate on the state ballot on November 3, 2020.

## Hemp Production in Indian Country

In 2015, federal agents seized 30,000 hemp plants from the Menominee Tribe in Wisconsin. The tribe brought suit against the government arguing that its hemp crop was grown legally in accordance with the 2014 Farm Bill, which allowed hemp cultivation. Despite Wisconsin not allowing hemp cultivation, the Tribe argued that they had the right to cultivate under its own laws. The Court rejected this argument by noting that as long as a state prohibits the activity, then a tribe will not be able to independently legalize the activity under its own laws.

Any lasting effect of the Menominee tribal decision is likely limited because the 2018 Farm Bill expressly allows tribes to create their own hemp programs regardless of the state laws as long as the tribes enter into a tribal regulatory plan with the U.S. Department of Agriculture (USDA). The USDA<sup>4</sup> has approved hemp production plans for a number of tribes including the Colorado River Indian Tribe, Confederated Tribes of Warm Springs, Flandreau Santee Sioux, Fort Belknap Indian community, Iowa Tribe of Kansas and Nebraska, La Jolla Band of Luiseno Indians, Oglala Sioux Tribe, Otoe-Missouria Tribe, Prairie Band of Potawatomi Nation, Pueblo of Picuris Tribe, Santa Rosa Band of Cahuilla Indians, Santee Sioux Nation, Seneca Nation, Sisseton-Wahpeton Oyate, Standing Rock Sioux Tribe, Turtle Mountain Band of Chippewa Indians, and the Yurok Tribe.

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**DISCLAIMER:** The possession, distribution, and manufacturing of marijuana are illegal under federal law. State law, which may in some jurisdictions decriminalize such activity under certain circumstances, is superseded by federal law. Violation of federal drug laws carries serious penalties, with the federal government reserving the right to seize and seek civil forfeiture of real or personal property facilitating the sale of marijuana and money or proceeds accruing from such transactions. Section 280E of the Internal Revenue Code also disallows deductions for amounts paid or incurred in the carrying on of a trade or business that consists of the “trafficking” of cannabis. Law or policy covering this industry may change at any time. Nothing herein may be construed as legal advice or tax advice, and is merely for informational purposes only.

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<sup>4</sup> Farm Bill, P.L. 115-334, Section 10113.