

Cannabis Business Blog

Cannabis in Indian Country – A Year Later...

Foster Garvey on 1.28.16 | Posted in Indian Country, Marijuana business owners, Marijuana retailers, Marijuana-related Business, Washington State

A little over a year ago, the Department of Justice released the infamous “Wilkinson Memo” containing DOJ policy guidance to U.S. District Attorneys on Marijuana in Indian Country.

Chaos ensued.

Media and industry began shouting “Marijuana is legal in Indian Country!” from the rooftops. Tribal leaders were swarmed by tribal members demanding that marijuana be immediately legalized. State and local jurisdictions were worried about the impact of legalization on their jurisdictions. Some tribes immediately announced their intent to open large marijuana operations; other tribes issued strong statements against legalization, and lawyers all started scratching our heads.

As the debris settles, we look back at a year with several tribes attempting to enter into the industry. The federal government either closed down their operations or the tribes shut down their operations themselves. Two tribes successfully opened two retail shops.

The truth is that there is just too much uncertainty in the law for most tribes to confidently enter into the industry. But there does seem to be economic opportunity available and some tribes will be able to take advantage of that.

Here are some highlights from 2015:

- Development of the [National Indian Cannabis Coalition](#). In February 2015, Jeff Doctor (Seneca) announced the establishment of NICC. NICC’s mission is to educate tribal leaders and elected officials on the emerging regulated cannabis industry while advocating for parity on behalf of Indian Country. NICC has been on the forefront of cannabis policy development in Indian Country, speaking at conferences around the country and weighing in on policy development at the Congressional and Administrative level.

- Development of a draft tribal marijuana bill. Congress has been paying attention to the concern in Indian Country that dabbling in the cannabis industry could lead to the termination of federal grants or other funding. House representatives drafted a bill that would clarify that tribes would not lose federal funding if they were engaged in economic development in the cannabis industry.
- HHS Secretary Burwell promised that tribes engaged in the cannabis industry will not lose their federal funding so long as they do not use HHS funds in those endeavors. (Now we need more such statement from other Agencies).
- Suquamish and Squaxin Island open and operate (successfully) two retail marijuana stores on their reservations. While other tribes were being raided, these tribes in Washington were quietly negotiating with the State and preparing to open their retail stores. Now I hear that several other tribes are in negotiations with Washington State to do the same.

What should we look for in 2016?

- Ruling in *Menominee v. DEA and DOJ* determining whether a tribal college is an “institute of higher learning” for the purposes of growing hemp under the Farm Bill.
- Congressional legislation protecting federal funding for tribes engaged in the cannabis industry.
- Development of a single federal policy regarding legalization of cannabis in Indian Country.
- Development of tribal cannabis businesses in states with some form of legalization.

There have been a couple tribes who have tried unsuccessfully to open marijuana operations within states that have no form of legalized marijuana. The logistics of ‘legalization on an island’ are at this point, in my opinion, too difficult to overcome. Instead, the focus should be on developments within states with some form of marijuana legalization. I understand that this means that tribes in restrictive states without other forms of economic development will lag behind others – but cannabis remains a schedule 1 Controlled Substance carrying severe penalties for those convicted of possession, intent to manufacture or distribute. It is just not

worth the risk unless you KNOW your intergovernmental agreements are strong and protect tribal people and tribal investments.

We are still in the infancy of this industry, both in Indian Country and the “outside” world. Growing pains are inevitable. What is both encouraging and frightening is that for the first time since gaming, non-Native businesses are coming to Indian Country. A word of caution - be careful who you work with – the sharks are circling and while they can leave and change their name, we are tribal people and members of our tribal nations from the beginning of time to the end of time and these businesses will remain part of our tribal history forever. Make sure that history tells a good story of developing cutting edge industries in a good way.

Warning Regarding Federal Law: The possession, distribution, and manufacturing of marijuana is illegal under federal law, regardless of state law which may, in some jurisdictions, decriminalize such activity under certain circumstances. Penalties for violating federal drug laws are very serious. For example, a conviction on a charge of conspiracy to sell drugs carries a mandatory minimum prison term of five years for a first offense and, depending on the quantity of marijuana involved, the fine for such a conviction could be as high as \$10 million. In addition, the federal government may seize, and seek the civil forfeiture of, the real or personal property used to facilitate the sale of marijuana as well as the money or other proceeds from the sale. Although the U.S. Department of Justice (DOJ) recently rescinded its guidance regarding prioritization of criminal prosecutions of individuals and entities operating in compliance with effective state regulatory systems, DOJ left in place long standing guidance to federal prosecutors regarding how to exercise this discretion. Individuals and companies are cautioned to consult with experienced attorneys regarding their exposure to potential criminal prosecution before establishing business operations in reliance upon the passage of state laws which may decriminalize such activity. Federal authority to prosecute violations of federal law as crimes or through seizures and forfeiture actions is not diminished by state law. Indeed, due to the federal government’s jurisdiction over interstate commerce, when businesses provide services to marijuana producers, processors or distributors located in multiple states, they potentially face a higher level of scrutiny from federal authorities than do their customers with local operations.

Tags: cannabis policy development, Department of Justice, DOJ policy guidance, Farm Bill, Indian Country, marijuana legalization, Menominee v. DEA and DOJ, National Indian Cannabis Coalition, NICC, Squaxin Island, Suquamish Island, tribal cannabis business, tribal marijuana bill, Wilkinson Memo