

The Developing Law of Marijuana Legalization and Indian Housing

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WAGENLANDER & HEISTERKAMP LLC
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Summary of Presentation

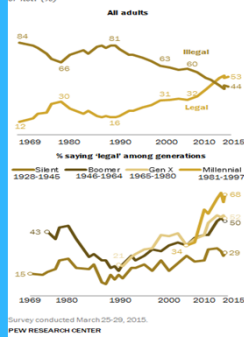
- Tribal Legalization Activity
- Not advocating for or against legalization
- Will review current examples of various types of legalization and implementation at the tribal level
- How legalization will likely impact TDHEs and Tribes
- Will discuss what Public Housing Authorities have faced in Colorado.

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Opinion on Legalizing Marijuana: 1969-2015

Do you think the use of marijuana should be made legal, or not? (%)



Public Opinion Shifting Toward Legalization

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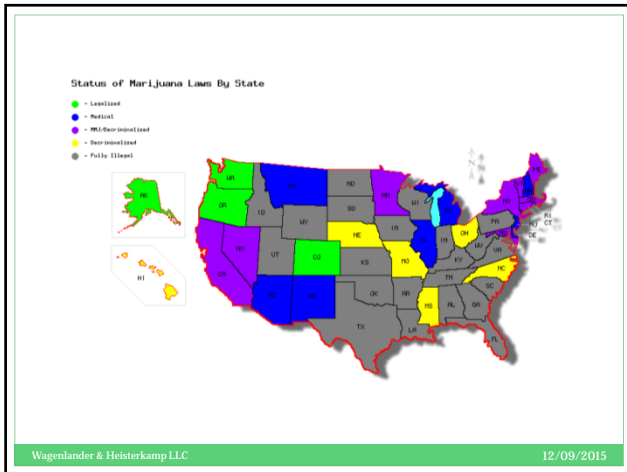
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Major Changes in Marijuana Laws Across States

- Medical Marijuana legal in 23 states and D.C.
- Recreational Marijuana now legal in 4 states
 - Colorado, Washington, Oregon and Alaska
 - Laws differ by State
- Decriminalized in 17 states to varying degrees and D.C. (includes AK, OR, CO & WA)

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Other Activities at the Federal Level

- Numerous bills working through Congress:
 - To decriminalize medical marijuana. (S.683, H.R. 1538, Compassionate Access, Research Expansion, and Respect States Act of 2015)
 - Would give physicians ability to recommend veteran access to medical marijuana (H.R. 667, The Veterans Equal Access Act)
 - Would remove marijuana from Controlled Substances Act Schedule and create federal regulatory structure (H.R. 1013, Regulate Marijuana Like Alcohol Act)
- Passed-2014 Federal Farm Bill. Allows states to implement pilot programs growing hemp for academic or agricultural research.
 - Section 7606 of the Agriculture Act of 2014, "Legitimacy of Industrial Hemp Research"

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Federal Bill that Could Impact Tribal Funding

- Sen. James Lankford (R-Oklahoma) introduced a bill could prevent tribes from growing marijuana.
- S.1984, the Keeping Out Illegal Drugs Act of 2015, would bar tribes that cultivate, manufacture or distribute marijuana from receiving federal funds.
- Lankford says he was taking action to protect young Native Americans from the influence of drugs.

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Marijuana Still Illegal Under Federal Law

- Cole Memorandum
 - August 29, 2013
 - Marijuana production, possession and distribution is illegal under the Federal Controlled Substances Act
 - Outlined examples of when the Federal Government would enforce law
 - <http://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf>

*****Cole Memorandum is strictly a policy statement and not new law. A new administration could completely revoke Cole.**

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Cole Memorandum

- August 29, 2013
 - Outlined examples of when the Federal Government would enforce law
 - ✦ Preventing distribution to minors
 - ✦ Preventing revenue from sales to criminal enterprises, gangs, etc.
 - ✦ Preventing diversion from states where it is legal to state where it is not
 - ✦ Preventing pretext or cover for sale of other illegal drugs
 - ✦ Preventing violence and the use of firearms in cultivation and distribution of MJ
 - ✦ Preventing drugged driving
 - ✦ Preventing growth of MJ on public lands
 - ✦ Preventing possession or use on federal property

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Conflicts of Law Between State Jurisdiction

- States of Nebraska and Oklahoma v. State of Colorado
 - Both parties have filed briefs in the U.S. Supreme Court
 - Nebraska and Oklahoma assert:
 - ✦ Legalization of marijuana language in Colorado Constitution (Sections 16(4) and (5) of Article XVIII) is preempted by federal law, and therefore unconstitutional and unenforceable under the Supremacy Clause, Article VI of the U.S. Constitution;
 - ✦ That Colorado should be enjoined from all application and implementation of legalization provisions of the Colorado Constitution and any accompanying statutes or regulations.
 - ✦ That legalization in Colorado has placed a heavy burden on neighboring states.

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Wilkinson Memo: MJ in Indian Country

- October 28, 2014
 - “Nothing in the CM alters the authority or jurisdiction of the U.S. to enforce federal law in Indian Country.”
 - “The 8 priorities in the CM will guide US Attorneys’ MJ enforcement efforts in Indian Country, including in the event that sovereign Indian Nations seek to legalize the cultivation or use of MJ in Indian Country.”
 - <http://www.justice.gov/sites/default/files/tribal/pages/attachments/2014/12/11/policystatementregardingmarijuanaissuesinindiancountry2.pdf>

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State Enforcement in Indian Country?

- Unclear how States where MJ is still illegal in some way will enforce their own or differing laws if a tribe in their state legalizes MJ in some form.
- Complex jurisdictional issues
- Jurisdictional analysis different for Public Law 280 states
 - State Jurisdiction over P.L. 280 Tribes
- Conflicts of law between jurisdictions
- Tribal/State relationship

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Tribes in Washington State
 Recreational and Medical Marijuana legal

- Tribes with Retail Stores
- Compacts signed with Washington State Liquor and Cannabis Board
 - Squaxin Island Tribe
 - 1st Tribal Marijuana Retailer
 - Suquamish Tribe

Still must ensure compliance with Cole factors

- Must Establish and Enforce Strict Laws to protect minors, protect safety and prevent crime

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Menominee Tribe
 Wisconsin-
 Both medical and recreational marijuana prohibited in the state
 Possible future ballot issue for both in 2016

- Current enrollment around 9,000 members.
- Menominee Tribe Wisconsin's only non-Public Law 280 Tribe.
- Tribal members approved legalization of both recreational and medical marijuana on its 360-acre reservation near Shawano.

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Menominee Tribe
 Wisconsin-
 Both medical and recreational marijuana prohibited in the state
 Possible future ballot issue for both in 2016

- October 2015-Federal agents destroy 30,000 plants on the reservation
- Tribe asserts plants were intended for lawful research into growing industrial hemp (2014 Farm Bill)
- DEA asserted that the plants were marijuana

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Menominee
 Notable Points from Search and Seizure Warrant

- Workers hanging up plants were observed not using any protective equipment nor using any breathing apparatus-Health and Safety concern enumerated in Cole.
- Concerns that the weapons used for security may also have been in violation of the Cole Memorandum factors

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Menominee
Non-Native Involvement

- Agents determined that non-Natives from Colorado were the main cultivators of the hemp operation and were subject to federal jurisdiction.
- The warrant also identified a non-Native consultant from Colorado and concludes that another Cole factor was triggered regarding the diversion of marijuana from states where legal to states where prohibited.

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U.S. District Court Case
Menominee Indian Tribe of Wisconsin
v.
DEA and DOJ
Filed 11/18/15

- Action arises from Tribe's attempt to cultivate industrial hemp on the reservation pursuant to tribal law and Agricultural Act of 2014 (2014 Farm Bill).
- Tribe requesting:
 - Declaration that Tribe acting as a State as described in Farm Bill.
 - Declaration that cannabis laws of Wisconsin do not apply to industrial hemp cultivation by Tribe on reservation.
 - Declaration that the Menominee College is an institution of higher education as described in Farm Bill.

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Flandreau Santee Sioux
South Dakota-
Medical and Recreational marijuana prohibited
Non P.L. 280 Tribe

- Planned to create a resort for recreational marijuana
- Worked closely with state and federal officials to ensure all concerns addressed
- Early November 2015, tribe burns crop due to concerns about a raid
- Resort opening and cultivation put on hold until jurisdictional issues clarified

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Flandreau Santee Sioux
South Dakota-
Medical and Recreational marijuana prohibited
Non P.L. 280 Tribe

- Highlights problem when non-Natives travel to reservation for marijuana.
- South Dakota Attorney General Marty Jackley
 - For non-Native Americans, "it's against law everywhere in South Dakota on tribal land or otherwise" to smoke marijuana...
 - "any changes in tribal laws wouldn't affect any non-Indians or any non-tribal lands."
- City of Flandreau Police Chief Anthony Schrad
 - "...we could essentially arrest everyone who is non-Native"

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California
 Recreational Illegal,
 Medical Legal
 P.L. 280 state

- Alturas Indian Rancheria/Pit River Reservation
- Enrolled Population small
- DOJ received information about large scale marijuana cultivation
- Raid conducted by BIA/DEA/State and County officials.
- Seized over 12,000 plants and over 100 pounds of processed marijuana

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California
 Medical Legal
 Recreational Illegal
 P.L. 280 State

- Pinoleville Pomo Nation – grow and manufacture MMJ on tribal lands, operation will sell to authorized users and dispensaries in accordance with CA state law
- Small tribal population
- Mendocino County Sheriff's Office Conducted Raid in September, 2015
- 382 MJ plants destroyed
- "Sheer size of the operation"
- Sheriff asserted aim was financial gain not allowed under state law

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More Tribal Activity

- Torres Martinez Desert Cahuilla Tribe and Santa Rosa Band of Cahuilla Indians-developing MMJ production and processing facility on tribal lands.
- Omaha Tribe of Nebraska-voted to study implementation of recreational and medical MJ. Vote was guidance but not legalization.
- The Fort McDermitt Paiute and Shoshone Tribe of Nevada and Oregon-to open an indoor cultivation facility in northern Nevada in spring 2016.
- Hoopa Valley Tribe-recent tribal vote to continue ban on cultivation on tribal lands.
- Yakama Nation-implemented ban on MJ grows and sales on tribal and ancestral lands.

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More Tribal Activity

- Passamaquoddy Tribe-moving forward with industrial hemp facility on reservation
- Ft. Peck Assiniboine and Sioux Tribes – legalized for medical purposes
- Confederated Tribes of the Colville Reservation – Tribal Council voted to decriminalize less than one ounce on reservation
- The Warm Springs Tribe-to vote December 17 on commercial production facility

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Tribal Legalization

- We recommend that all TDHEs get involved when their Tribe considers marijuana legalization.
- Tribe must consult with Department of Justice
- Recreational use and sales, medical use and sales, commercial or private cultivation.
- Impact will be great on TDHEs.

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TDHE Management Issues

- Determine what will be allowed in units (use, sale, cultivation)
- Establish a uniform standard to enforce
- Smoking violations
- Odors and other nuisances
- Behavior
- Impact on Unit
 - Private Cultivation (increased water and electricity usage, weight, wiring issues)
- Impact on communities
- Commercial Activity in Units
- HUD's Position?

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HUD's Position So Far

- **September 24, 1999 Memo**
 - Medical Use of Marijuana in Public Housing
- **January 20, 2011 Memo**
 - Medical Use of Marijuana and Reasonable Accommodation in Federal Public and Assisted Housing
- **February 10, 2011 Memo**
 - Medical Marijuana Use in Public Housing and Housing Choice Voucher Program
- **December 29, 2014**
 - Use of Marijuana in Multifamily Assisted Properties

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HUD's Position So Far...

- Manufacture, distribution or possession of marijuana is a federal criminal offense.
- None of the opinions specifically cover NAHASDA.
- HUD relies on Quality Housing and Work Responsibility Act of 1998 (QHWRA) as authority.

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QHWRA and Admission

- Public Housing Authorities (PHAs) required to deny admission to any household with a member who the owner determines is illegally using a controlled substance, including marijuana.
- No discretion for PHAs.
- MMJ costs cannot be used as part of medical deduction when calculating rent.
- No similar language in NAHASDA.

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QHWRA and Continued Occupancy

- PHA must establish policies which allow for the termination of tenancy for illegal use of marijuana.
- Enforcement is discretionary.
- Cannot have lease provisions or policies that affirmatively permit occupancy by any member who uses marijuana.
- NAHASDA allows for discretionary termination for drug-related criminal activity.

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Colorado PHAs

- We represent a diverse group of PHAs who have differing approaches to marijuana in their units.
- Client in a small and conservative community prohibits all marijuana in their units, including medical.
- Client in metro area will evict only when it interferes with the health, safety and right to peaceful enjoyment of other residents.
- Client with no smoking policy where smoking marijuana would be a violation that could lead to eviction.

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Employment Issues

- NAHASDA requires TDHEs to be Drug Free Workplaces.
- Potential conflicts
 - Between Tribal Law and TDHE Employment Policy
 - Differing standards for employees and tenants
- Harder to enforce because of testing issues.
- Colorado Supreme Court case
 - Coats v. Dish Network
 - Supreme Court held that employer zero-tolerance policy can trump Colorado medical marijuana laws

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Thank You



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