

## Doing Business with a Tribal Cannabis Operation

By Edward J. Kelleher and Robert L. Gips | Spring 2015

In December 2014, the U.S. Justice Department gave a conditional green light to Indian tribes looking to participate in the cannabis industry. This unleashed a torrent of interest in the prospects for tribal cannabis businesses. A number of tribes have already announced plans for tribal cannabis operations. Non-Indian companies are inking deals with tribes and many more are said to be exploring options.

Tribal entry into the cannabis industry will undoubtedly present opportunities for non-tribal businesses; tribes will need to create grow operations, will need testing facilities, will start commercial kitchens for edibles and so on. Some tribes will attempt to develop these capabilities themselves, while others will achieve this through agreements with non-tribal actors. Some tribes will be seeking capital, others expertise. There are a host of opportunities for consultants, producers and all sorts of ancillary businesses to benefit from tribal cannabis efforts.

However, if you're thinking about getting into a business deal with a tribe in the cannabis sector, it's important to understand how doing business with a tribe is different than typical non-Indian business arrangements. Failing to understand these issues, and to structure your legal arrangements in a way that accounts for the special status of tribes, could jeopardize your financial prospects.

Here are some key points you need to understand:

### **Tribal sovereignty.**

Under federal law, tribes are recognized as governmental entities, and as such, they are generally immune from being sued. Tribes may waive their sovereign immunity, but to do so there are a variety of strict legal requirements that must be satisfied for a waiver to be effective. The waiver must be in writing, must be clear and should contain certain key provisions, and must be approved by the tribe's governing body by proper procedures. If you enter into a contract with a tribe and it doesn't contain a waiver of immunity, or if the waiver isn't written the right way or wasn't properly approved, you could end up without an ability to enforce the contract. This could be a disaster, especially if you invested significant funds in the business venture.

### **Tribal regulatory systems.**

Tribes are governmental entities. That means that they create legislative and regulatory systems to govern tribal business affairs, including a tribal cannabis operation. So when you enter into a cannabis business relationship with a tribe, the tribe is both your business partner and your regulator. So you should understand the

tribal cannabis regulatory structure. Tribal regulations may impact or modify contractual or business terms, affecting issues like the ability to terminate or renew contracts, preferences for Indian hiring, applicability of tribal taxes, and so on. Many tribes have extensive regulatory structures, so you should understand how your contracts fit into the context of tribal law. Additionally, tribes getting into the cannabis sector will enact regulations that govern all the things cannabis businesses are used to seeing: number of licensees, license terms and fees, prescription availability, amount a consumer can purchase, handling of product, and many other issues. Businesses absolutely have to understand these regulations.

### **Who are you doing business with?**

Under federal law, tribes are allowed to form a variety of different entities to carry out their governmental and business operations. These are subdivisions of tribal government and corporations or other business entities, which may be formed under federal, tribal or state laws. We would expect tribes to use these kinds of entities in the cannabis sphere in order to protect other tribal operations from federal enforcement

actions in the event of a change in federal attitude toward tribal cannabis businesses. So, when you sign a contract with “a tribe” it’s critical that you know who the counterparty is, because it may not be the tribe itself. Tribally owned corporate entities will typically be significantly less well capitalized than the tribe as a whole. They may have governing bodies that are different than the tribal governing body. If the tribal entity you are dealing with is formed pursuant to tribal law, you need to understand how the tribal business laws affect its ability to act and its operations. You may think you’ve signed a deal with a large, well-financed tribe, only to find that you end up dealing with a much smaller and thinly capitalized tribal corporation, and that may change your thinking about deal structures.

### Where will you go to court?

Most business people expect that if they have to enforce a contract, they can go into a state or federal court and have a fairly predictable set of remedies available to them. You should understand what your contracts with tribal actors say about dispute resolution, because those provisions may require you to go to a tribal court, where the procedures, rules and remedies may be quite different from what you’d expect. This can be the case even when a contract specifies jurisdiction in federal or state court, so you must make sure your contracts are drafted to help ensure disputes are resolved in the forum you expect. Most tribes have created their own court systems, and generally prefer to litigate their disputes in that system. That may be a requirement you have to accept, but then at a minimum you need to understand how tribal courts operate, and be prepared to have counsel who are comfortable representing you in a tribal court, should the need arise.

### How do state laws apply?

Many state laws are preempted on Indian lands. However, there are a lot of variations on that general theme, depending on where the tribal land is located and also on some very technical provisions of federal Indian law. Understanding these issues is critically important in the cannabis arena. The scope of state law applicability to tribal operations will impact the

critical question of how a tribe designs the contours of its cannabis operations. For instance, tribes may have a significant advantage over non-Indian businesses if state laws taxing cannabis sales are preempted on their lands. Tribes may of course, enact their own tax systems. Additionally, states will be paying attention to how a tribal cannabis regime interacts with state law: is the tribal regime more or less permissive? How a tribe has answered this question has a direct relationship on the economic and legal risks of your business relationship with the tribe.

### What do the local federal prosecutors think?

The December 2014 Justice Department guidance on tribal cannabis operations made it clear that the Justice Department expects tribes to consult with local U.S. Attorneys before starting tribal cannabis operations. Before you go into business with a tribe, you should be sure that these consultations have occurred and need to do some due diligence on the substance of those discussions. The federal position on tribal cannabis, just like the federal position on recreational cannabis in Colorado and the other states that have legalized, is discretionary, and leaves significant latitude for local prosecutors to act to shut cannabis businesses if they deem it appropriate. This absolutely applies to tribal cannabis businesses as well. Thus, understanding the attitude of the local federal prosecutors about the operations of the tribe with which you are dealing is a critical piece of information as you decide how to structure your tribal relationship.

In many ways, the cannabis business resembles the gaming industry two or three decades ago: a business that is emerging from an illicit past and maturing into a more legitimate and regulated industry. Many non-Indian businesses have prospered doing business with tribes in the gaming sector; but many have had negative outcomes by not paying close attention to the details of tribal legal status. If you are serious about doing business with a tribal cannabis operation, you should consult with attorneys who understand these issues, and you need to make sure you’ve structured your arrangements in a way that adequately protects your rights and gives you adequate remedies.

*This advisory does not constitute legal advice. It is critical to consult with an attorney about the specifics of any proposed course of action relating to cannabis-related business activities. Importantly, marijuana possession, use, cultivation and sale are crimes under federal law, regardless of what any state law allows. Nothing in this memo can or should be construed to constitute a recommendation or advice that any person take actions that may violate federal law.*

If you have any questions about any of the topics discussed in this advisory, please contact your Drummond Woodsum attorney.



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