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Native American Tribes Eye Marijuana Business---With Their Tax-Free Gaming Advantage

Native American tribes are poised to move into the lucrative legal marijuana businesses. With spreading legalization and with taxes being levied right and left, tribal tax advantages could be huge. In [California v. Cabazon Band of Mission Indians](#), the Supreme Court ruled that in states permitting gaming, tribes can conduct gaming on Native American lands unhindered by state regulation. A year later, Congress enacted the Indian Gaming Regulatory Act of 1988, creating a regulatory framework for gaming on Indian lands.

Today, Native American tribes are looking to expand beyond casinos into marijuana, now legal in 4 states, and legal for medical use in 23. As governments try to exact on taxes to cash in, the idea of a tax-free ticket to the industry is not lost on Native Americans. Some tribes are considering changes to tribal laws as well as looking at commercial opportunities. California's Pinoleville Pomo Nation is poised to be the [first tribe to grow medical marijuana](#).



Federal law still outlaws marijuana, and this too could give Native American Tribes big advantages. The Department of Justice has taken notice, issuing [a memorandum](#) last October that reviewed their policy on marijuana issues as they relate to Native American Tribes. Yet some tribes could move in big just as they did with casinos. Native American tribes are looking at new sources of income.

According to the National Indian Gaming Commission, [gaming revenues barely grew](#) from \$27.9 billion in 2012 to \$28 billion in 2013. Gaming on Native American lands earned \$26.5 billion in 2011. 236 Native American tribes operate 422 facilities across 28 states. Yet Native American tribes and their wholly owned tribal corporations are not subject to federal income taxes on their earnings.

Some types of tax-exempt organizations are taxed on some types of income. Tribes are exempt from federal income taxes even when conducting commercial activities. They can form corporations to conduct business and their income remains exempt. Native Americans are U.S. citizens, and unlike their tribes, individuals *are* subject to federal income taxes.

Even exempt tribal income can be taxed when distributed to individual members of the tribe. One of the more complicated provisions of IGRA permits Native American tribes to make per capita distributions of revenue from gaming activities to tribe members. These per capita distributions are taxed. Some “general welfare” payments to individuals under social benefit programs are *not* taxed.

In general, to be tax-free, payments must be made under a governmental program; be for the promotion of general welfare (*i.e.*, based generally on individual, family or other needs); and not be compensation for services. This General Welfare Exception from income has become increasingly controversial as applied to tribal members and the IRS is being asked to weigh in.

Absent an express authorization from Congress, states do not have the power to tax Native Americans living on a reservation whose income is derived from reservation sources. However, a state *may* tax Native Americans on income (including wages from tribal employment) if they reside in the state but outside the reservation. As with many other tax rules, these rules are becoming more controversial. Expect renewed discussion of these rules and their limits in the future.

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