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Exploring Indian Country Marijuana

Article By:

Brian L. Pierson

Introduction

On Oct. 28, 2014, ***Monty Wilkinson, Director of the U.S. Department of Justice Executive Office for United States Attorneys***, issued a "Policy Statement Regarding Marijuana Issues in Indian Country" (hereafter, policy statement.) The policy statement has triggered speculation regarding the opportunities for tribes wishing to *establish commercial marijuana enterprises as a means of raising revenue to fund governmental operations*. While the possibilities are undoubtedly worth exploring, the policy statement is highly conditional, requires careful interpretation and represents just one piece of a legal puzzle that also includes long-standing federal Indian law principles and state law.

The important policy issues relating to the operation of a psychoactive drug business in an Indian community are for tribal leaders to address.

What the policy statement means

The policy statement is based on ***Deputy U.S. Attorney General James M. Cole***'s Aug. 29, 2013 "Memorandum for all United States Attorneys" (Cole Memorandum) addressing enforcement of federal anti-drug laws in states that have adopted ballot initiatives that "legalize under state law the possession of small amounts of marijuana and provide for the regulation of marijuana production, processing, and sale." While acknowledging that the Controlled Substances Act (CSA) designates marijuana a "dangerous drug" whose illegal distribution is a "serious crime that provides a significant source of renewal to large-scale criminal enterprises, gangs and cartels," the Cole Memorandum directs U.S. Attorneys to enforce the CSA consistent with the eight enforcement priorities:

1. Preventing the distribution of marijuana to minors;

2. Preventing revenue from the sale of marijuana from going to criminal enterprises, gangs, and cartels;

3. Preventing the diversion of marijuana from states where it is legal under state law in some form to other states;

4. Preventing state-authorized marijuana activity from being used as a cover or pretext for

the trafficking of other illegal drugs or other illegal activity;

5. Preventing violence and the use of firearms in the cultivation and distribution of marijuana;

6. Preventing drugged driving and the exacerbation of other adverse public health consequences associated with marijuana use;

7. Preventing the growing of marijuana on public lands and the attendant public safety and environmental dangers posed by marijuana production on public lands; and

8. Preventing marijuana possession or use on federal property.

Noting that the Department of Justice (DOJ) "has not historically devoted resources to prosecuting individuals whose conduct is limited to possession of small amounts of marijuana for personal use on private property," the Cole Memorandum declares that federal prosecutors should focus their enforcement efforts "on persons or organizations whose conduct interferes with any one or more of these priorities, regardless of state law." The exercise of prosecutorial discretion consistent with the priorities is, however, expressly conditioned on a viable state regulatory framework:

The Department's guidance in this memorandum rests on its expectation that states and local governments that have enacted laws authorizing marijuana-related conduct will implement strong and effective regulatory and enforcement systems that will address the threat those state laws could pose to public safety, public health, and other law enforcement interests. A system adequate to that task must not only contain robust controls and procedures on paper; it must also be effective in practice. Jurisdictions that have implemented systems that provide for regulation of marijuana activity must provide the necessary resources and demonstrate the willingness to enforce their laws and regulations in a manner that ensures they do not undermine federal enforcement priorities.

With respect to medical marijuana, the Cole Memorandum instructs U.S. Attorneys that "prosecutors should not consider the size or commercial nature of a marijuana operation alone as a proxy for assessing whether marijuana trafficking implicates the Department's enforcement priorities listed above" but should "review marijuana cases on a case-by-case basis and weigh all available information and evidence, including, but not limited to, whether the operation is demonstrably in compliance with a strong and effective state regulatory system."

The policy statement explicitly adopts for Indian country the priorities established in the Cole Memorandum: "The eight priorities in the Cole Memorandum will guide United States Attorneys' marijuana enforcement efforts in Indian Country, including in the event that sovereign Indian Nations seek to legalize the cultivation or use of marijuana in Indian Country."

The significance of the Cole Memorandum and the policy statement lie in their implicit message: The distribution, sale or use of marijuana will not be a federal enforcement priority provided that such activities are supported by "strong and effective regulatory and enforcement systems" that are consistent with the federal priorities and that address "public safety, public health, and other law enforcement interests."

It is very important for tribes to understand the potentially limited shelf life of the policy statement. It

does not amend the Controlled Substances Act. Rather, it directs federal prosecutors to allocate their enforcement efforts in a manner that allows some leeway for states and tribes to permit the sale and distribution of marijuana in a well-regulated environment if none of the eight federal priorities is compromised. There will be a new president and a new attorney general in 2017. If they do not share the current administration's view, they may simply rescind the Cole Memorandum and/or the policy statement.

Why state law still matters

State law is important not only because of the criminal jurisdiction that some states may exercise over tribal marijuana sales but also because of the DOJ's third enforcement priority, "[p]reventing the diversion of marijuana from states where it is legal under state law in some form to other states." The DOJ's interpretation of this priority may the key issue. A tribal enterprise that serves as a ready source for state residents wishing to purchase sufficient quantities of marijuana for off-reservation use or even for sale to others would arguably undermine state laws prohibiting the sale, possession and use of marijuana, possibly triggering federal intervention.

Generally, of course, criminal jurisdiction over Indians in Indian country lies with the tribal and federal governments. But there are exceptions. In 1953, Congress enacted Public Law 83-280, 18 U.S.C. § 1162, widely known as "Public Law 280," giving six states (Alaska, California, Minnesota, Nebraska, Oregon and Wisconsin) criminal jurisdiction over tribes within their boundaries. Congress has also authorized certain other states to exercise jurisdiction over reservations by specific congressional act. In these states, regardless of actions that tribes may take to legalize and regulate marijuana, state officials will retain the power to enforce state criminal laws prohibiting the sale, distribution or use of marijuana against Indians and non-Indians.

Even states not authorized to exercise criminal jurisdiction over Indians in Indian country nonetheless have jurisdiction over crimes committed by non-Indians against non-Indians. *U.S. v. McBratney, 104 U.S.* 621 (1882); *Draper v. United States, 164 U.S.* 240 (1896). A non-Indian state resident who makes a purchase of marijuana at a tribal enterprise on-reservation could, therefore, be prosecuted for the purchase, possession and/or use of the drug. This raises interesting questions relating to the state's enforcement priorities and options. Will state law enforcement officers have probable cause to make stops of non-members who make short reservation visits consistent with a drug buy, or perhaps make pre-textual stops in order to conduct searches? If a Tribe permits the consumption of marijuana on the reservation, will this create a risk of "drugged driving," triggering not only state enforcement efforts but also the DOJ's sixth enforcement priority? Might the state response be different where the tribe adopts regulations to assure that sales are limited to "small amounts of marijuana for personal use on private property," as referenced in the Cole Memorandum?

Under the Supreme Court's decisions in *Moe v. Salish Kootenai and Confederated Tribes of Colville* cases, tribes would likely be required to collect any state sales taxes on sales to non-Indian. States may be tempted to impose additional taxes specifically on marijuana sales. While the Court acknowledged in *Colville* that states might lack taxing authority where the tribal sales are based on value added on the reservation rather than on tax avoidance, tribal efforts to deny states any revenue from marijuana sales would likely guaranty opposition.

For tribes unable to grow marijuana, obtaining supplies will be difficult in states that prohibit the importation of marijuana and other controlled substances. States will likely impound trucks and confiscate cargos en route, as they have sometimes done in connection with tobacco and fuel destined for Indian country. The risk of criminal prosecution for transporters would be very high.

A marijuana business based on sales that are made through the internet or telephone, with deliveries made to customers off reservation by mail or courier is fraught with even greater risk than a brick and mortar enterprise on reservation. Courts have rejected arguments that states lack jurisdiction over transactions involving off-reservation deliveries to non-Indians, usually holding either that such transactions actually takes place off reservation and tribes are subject to state regulation under the rule of *Mescalero Apache v. Jones* ("Absent express federal law to the contrary, Indians going beyond reservation boundaries have generally been held subject to non-discriminatory state law otherwise applicable to all citizens of the State"). Alternatively, courts have held that, even if the transaction is deemed to occur in Indian country, the state's interest in enforcing state law against non-Indians residing off reservation supports state jurisdiction under the balancing test of *White Mountain Apache Tribe v. Bracker*. Tribes have sometimes been able to avoid enforcement by state authorities based on sovereign immunity but this might not work for a mail order marijuana business because such a business would likely would run afoul of the DOJ's enforcement priorities.

Conclusion

The policy statement, while certainly a welcome demonstration of federal respect for tribal sovereignty, does not provide a complete legal foundation for tribal commercial marijuana enterprises. Rather, it provides a road map that, if carefully followed, will enable tribes to operate tribal marijuana businesses without triggering federal enforcement action. States hostile to sales of marijuana to state residents will still have tools to undermine tribal enterprises, including arrest of employees and customers in Public Law 280 states, investigation and prosecution of non-Indian customers, taxation of sales, prosecution of suppliers and, perhaps most importantly, enlistment of federal prosecutors pursuant to the DOJ's third enforcement priority. Tribes' best chance of success may involve an accommodation with state authorities where the tribal enterprise does not unduly conflict with existing state enforcement priorities, e.g., where sales are limited to small amounts that state residents subsequently consume in the privacy of their homes.

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