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Much Ado About Doing Nothing: DOJ's Latest Memorandum Cracks Open Door to Marijuana Development on Tribal Lands

By Blaine I. Green and Emily M. Burkett

In December 2014, the Department of Justice (DOJ) released a policy statement regarding enforcement of marijuana laws in Indian Country. While some media have reported the Department's statement as carte blanche for tribes to legalize marijuana, the policy statement raises more questions than it answers, posing uncertainty and challenges—as well as opportunities—for tribes.

The Pinoleville Pomo Nation plans to break ground on a $10 million, 100,000-square-foot marijuana greenhouse just outside of Ukiah, Calif.[1] The project will be the first of its kind on tribal lands in California and comes on the heels of the DOJ's widely reported memorandum regarding the cultivation, sale, possession, and use of marijuana on tribal lands.[2] The 2014 memorandum is the latest development in the DOJ's evolving policy regarding marijuana prosecutions and has drawn the interest of tribes and investors looking to capitalize in a rapidly growing, but risky industry.

From Doing Something to Doing Nothing: The Federal Legal Background

Marijuana use, cultivation and possession remain illegal under federal law.[3] However, in response to several states' legalization of medical and recreational marijuana, the DOJ has relaxed its policy on federal prosecution of marijuana crimes.

In October 2009, the DOJ issued the Ogden Memorandum, advising U.S. attorneys to de-prioritize prosecuting individuals whose actions were "in clear and unambiguous compliance with existing state laws

[1] Pinoleville Pomo Nation and its investors are facing opposition from local law enforcement officials, who claim the operation is illegal under federal, state and local law. Robin Abcarian, *Los Angeles Times*, "Pot Farm a template for strapped Indian tribes—or a cautionary tale?" (Mar. 19, 2015).

[2] Memorandum from Monty Wilkinson, Director, Policy Statement Regarding Marijuana Issues in Indian County (Oct. 28, 2014), available here.

[3] Controlled Substances Act, 21 U.S.C. §§ 812, 841, 844, 846.

providing for medical use of marijuana."[4] The DOJ extended this policy in 2011 and again in 2013 with the Cole Memorandum.[5] In the final Cole Memorandum, the DOJ said it would focus its prosecution efforts on those marijuana-related activities which threatened the following enumerated federal priorities:

1. Preventing the distribution of marijuana to minors
2. Preventing revenue from the sale of marijuana from going to criminal enterprises
3. Preventing the diversion of marijuana from states which have legalized its use to those which have not
4. Preventing marijuana transactions from being used as cover or pretext for other illegal activities
5. Preventing violence and the use of firearms in cultivation and distribution
6. Preventing drugged driving and other adverse public health consequences
7. Preventing cultivation on public lands and the attendant public safety and environmental concerns
8. Preventing marijuana possession or use on federal property

The DOJ found as a matter of policy that state-authorized marijuana activities were less likely to threaten the enumerated federal priorities than unauthorized activities. Individuals and businesses that complied with rigorous state marijuana laws were therefore less likely to be prosecuted than those who were not operating under the auspices of state law.

While the DOJ has elected—pursuant to the Cole Memorandum—to de-prioritize federal prosecutions, states are still free to enforce their own laws. Most states have not legalized marijuana at all. Some have legalized the drug only for medical purposes. Only four states have legalized recreational use and, even then, the cultivation and sale is highly regulated.

The 2014 Indian Country Memorandum

In December 2014, the DOJ issued a memorandum from Monty Wilkinson, Director of the Executive Office for U.S. Attorneys, extending the Cole Memorandum policy to marijuana activities on tribal lands. The 2014 Indian Country Memorandum directs U.S. Attorneys to use the Cole Memorandum priorities as a guide when enforcing federal law in Indian Country. In doing so, the 2014 Indian Country Memorandum recognizes tribal sovereignty by treating tribal legalization decisions with the same deference afforded to state decisions.

While marijuana activities remain illegal under federal law, the DOJ is less likely to prosecute on tribal lands when those activities are authorized by a strong and effective tribal regulatory system. As with states, the likelihood of prosecution increases if the marijuana activities threaten the Cole Memorandum priorities. However, the Cole Memorandum priorities remain unchanged in the 2014 Indian Country Memorandum. As explained below, this poses unique challenges for tribes.

[4] Memorandum from David W. Ogden, Deputy Attorney General, Investigations and Prosecutions in States Authorizing Medical Use of Marijuana (Oct. 19, 2009), Available here.

[5] Memorandum from James M. Cole, Deputy Attorney General, Guidance Regarding Marijuana Enforcement (Aug. 29, 2013), Available here.

The 2014 Indian Country Memorandum differs from the Cole Memorandum in two ways. First, the DOJ requires U.S. Attorneys to consult with affected tribes on a government-to-government basis when evaluating enforcement activities in Indian Country. Second, before determining whether to commence prosecution, the U.S. Attorney must inform the Executive Office for U.S. Attorneys, the Office of Tribal Justice and the Office of the Deputy Attorney General. These conditions precedent to federal law enforcement are unique to Indian Country.

Like the Cole Memorandum, the 2014 Indian Country Memorandum does not alter federal law or eliminate the federal government's ability to prosecute federal marijuana crimes. It does, however, telegraph where federal efforts will be focused.

Impact of 2014 Indian Country Memorandum in the States: Three Scenarios

The 2014 Indian Country Memorandum must be considered and understood in the context of the complexities of Indian law—and, in particular, the unique interplay between state, federal and tribal law on reservation lands.

Tribes are domestic dependent nations with sovereign powers; like each state, each tribe may choose the extent to which marijuana is criminalized, permitted or regulated, as a matter of tribal law, on tribal lands.[6] While subject to federal law, state and local laws generally do not apply on tribal lands, meaning state and local marijuana prohibitions do not reach Indian Country. This general rule comes with an important caveat. In 1953, Congress passed P.L. 280 which grants certain state governments jurisdiction over tribal lands, including criminal jurisdiction over offenses committed by or against Indians within Indian Country.[7] In P.L. 280 states, state marijuana laws may have force and effect in Indian Country. Depending on the legality of marijuana under state law, this interplay creates at least three different scenarios for tribes to consider.

Marijuana is totally illegal under state law. In the first scenario, the state has not legalized marijuana for any purpose. This scenario presents the greatest market advantage for tribes, but also the greatest risk. Because there is no legal state market, tribes choosing to engage in marijuana development would have the least amount of competition. However, the legality of a tribal marijuana enterprise under state law would depend on whether P.L. 280 applies. In P.L. 280 states, the state may enforce its criminal laws on tribal lands. Even if the state in question is not a P.L. 280 state, marijuana activity in states where all marijuana is illegal would potentially threaten the Cole Memorandum's federal priorities, and thus risk federal prosecution. Whether or not P.L. 280 applies, this scenario carries the greatest risk of prosecution.

Medical marijuana is legal under state law. This scenario is the middle ground. Tribes choosing to legalize marijuana for all purposes may have a market advantage. Risk, while still present, is somewhat reduced, even in P.L. 280 states. In those states, the critical and unanswered question is whether legalizing medical marijuana transforms what is typically a criminal statutory scheme to a regulatory one. Under *Cabazon v. Cabazon Band of Mission Indians*,[8] state P.L. 280 jurisdiction does not extend to regulatory matters, which may include marijuana statutes. If a court finds that state marijuana laws are

[6] Marijuana legalization presents important health and policy issues for tribes, as for other governments. Just as states are taking different approaches to criminalization, legalization and regulation, so are tribes. While some tribes are pursuing marijuana development, others have sought to ban marijuana on the reservation. Jonathan Kaminsky, *Reuters*, "Indian tribe seeks pot business ban in part of Washington state" (Mar. 24, 2014).

[7] Pub. L. 83-280 (1953).

[8] 480 U.S. 202 (1987).

regulatory in nature, those laws would not extend onto tribal lands.[9] That said, marijuana, even medical marijuana, remains illegal under federal law. Even if the state may not prosecute, the federal government may choose to do so if Cole Memorandum priorities are threatened.

Both recreational and medical marijuana are legal under state law. In this final scenario, tribal and state marijuana enterprises are on roughly equal footing. The federal government may still prosecute, but the risk for marijuana enterprises is at its lowest in this scenario. Conversely, tribal market advantage is also at its lowest; state-authorized marijuana would compete with tribal marijuana for all uses. However, marijuana business on tribal land may offer some advantages even in states where marijuana is fully legal. For example, while the federal government can prosecute even state-authorized marijuana enterprises with little or no warning, the federal government has created deferential consultation procedures before taking enforcement action on tribal lands. In addition, tribes have the ability to apply their own system of regulation and taxation on their lands, which may be more favorable to marijuana business than the state regulatory and taxation system.

Challenges and Uncertainties for Tribes

To minimize the risk of federal prosecution, tribes interested in allowing or engaging in marijuana development on tribal lands may adopt regulations consistent with advancing the enumerated federal priorities. Tribes can model many of their regulations on those of states which have legalized marijuana. However, several of the Cole Memorandum priorities present unique challenges for tribes. The 2014 Indian Country Memorandum extended the Cole Memorandum priorities without modification to Indian Country, creating something of a square peg for a round hole.

For example, the eighth priority, preventing marijuana possession on "federal property," raises question for tribes. Several statutes include Indian Country in definition of federal property, and many cases interpret tribal land in the same way. How then should tribes understand the Cole Memorandum priority of preventing marijuana possession on federal property? The answer is unclear.

Two other priorities that could raise unique challenges for tribes are diversion to states which have not legalized marijuana and drugged driving. Offering marijuana for sale in states with more restrictive laws may provide a competitive advantage in the market. But, at the same time, drawing non-tribal customers onto tribal lands in such states could implicate the DOJ's goal of preventing diversion of marijuana to states where it is currently illegal. Similarly, the sale of marijuana can attract non-tribal customers to the reservation for purchases, but could also increase the occurrence of drugged driving. This issue is particularly acute for tribes with lands located in remote areas.[10]

Another issue tribes must consider is what role to play in marijuana development on tribal lands. States which have moved forward with legalization have done so as regulators. States generate revenue by taxing marijuana transactions; they place limits on the sale of marijuana and regulate the industry as a whole. Tribes can choose to follow a similar tax-generating, regulatory model, permitting non-government actors to participate in a market on tribal lands. Doing so may insulate a tribe from direct liability under federal law in the event the DOJ pursues prosecution because the tribe is not itself violating the law.

[9] *Ibid.*

[10] A possible solution to these challenges is to create a destination model in which all marijuana sales, use and possession occur solely on tribal lands. This kind of destination model may mitigate the diversion and drugged driving problems identified in the Cole Memorandum. Whether such a model can be effective in application remains uncertain and is complicated by complex jurisdictional rules. For instance, marijuana crimes may be considered victimless crimes and, under existing law, there is the potential that non-Indians coming on to the reservation to commit a state law crime would be subject to state prosecution. Even in a destination model, marijuana activities carry substantial risk and uncertainty.

However, tribes have another option—to act as a market participant themselves. Many on-reservation enterprises, including casinos (as required by federal law), are owned and operated by tribal governments. Tribal ownership could reduce the likelihood of a state tax attaching to marijuana transactions and increase the share of revenue generated for the tribe. But, in contrast to the taxer/regulator model, tribes could be directly liable under federal law should the federal government prosecute.

Conclusion

With many states legalizing marijuana, and the federal government de-prioritizing marijuana law enforcement in Indian Country, it makes sense that tribes are considering—both as governments and commercial actors—how to address marijuana on tribal lands. While the Indian Country Memorandum acknowledges the prospect of legalization on tribal lands, it does not change or clarify the law, or address any of the difficult questions in this area.

Opportunities and risks abound. Tribes, as well as their partners and investors in marijuana projects, should proceed with caution.

If you have any questions about the content of this alert, please contact the Pillsbury attorney with whom you regularly work, or the authors below.

Blaine I. Green (bio)
San Francisco
+1.415.983.1476
blaine.green@pillsburylaw.com

Emily M. Burkett (bio)
San Francisco
+1.415.983.1010
emily.burkett@pillsburylaw.com

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