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National Indian Health Board

Legal Landscape of Cannabis in Indian Country

NIHB

September 23, 2015

- October 24, 2014 “Cole Memorandum”
- Misconceptions about the Memorandum
- General Confusion About the Current Status of the Legal Landscape
- Purpose of this Presentation is to Lay out the Background and Provide Updates Associated with Cannabis Issues in Indian Country

- Overview of State Medical and Recreational Marijuana Laws
- Example of 1996 California Medical Marijuana Law
- Example of 2012 Colorado Recreational Marijuana Law

- California Proposition 215 was the first, and since then 23 more states and DC have enacted similar laws
- With the exception of a very specific Texas law associated with the writing of prescriptions in certain circumstances, these laws generally are based on a physician certification, not prescription

- Important to understand the *Conant v. Walters* case to understand the basis of state legal schemes
- Doctor's recommendation protected by First Amendment free speech protections
- Medical marijuana laws function based upon defined and covered medical conditions

- Overview of the 2012 Colorado law, differences and similarities to Washington (2012), Oregon (2014), Alaska (2015) laws
- Colorado lacked specifics, later laws more detailed regulatory schemes
- All have a tax structure in place
- Local governments retain zoning authority

- Overview of the Controlled Substances Act, 21 U.S.C. Section 801, et seq.
- Places various plants, drugs and chemicals into one of five schedules
- Schedule I are deemed to have no currently acceptable medical use and have a high potential for abuse
- The CSA currently classifies marijuana as a Schedule I substance
- Efforts have been made to change the classification, but up to Congress

- Under the CSA, only doctors licensed by the DEA are allowed to prescribe Schedules II-V drugs, and only through pharmacies licensed by the DEA
- Because of its classification, the CSA makes growing, selling, using, or possessing marijuana a federal crime
- CSA has forfeiture provisions as well

- Regardless of state actions to legalize marijuana under state law, the CSA still outlaws marijuana, except for research
- Because of this confusing overlay of state and federal law, Obama Administration has, through the USDOJ, issued 5 guidance Memoranda since 2009, to clarify the doctrine of “prosecutorial discretion”

- 2009 Ogden Memorandum focused on guidance to federal prosecutors in states where use of medical marijuana permitted under state law
- Maintain focus on prosecution of major traffickers, but no “focus” of federal resources on prosecuting individuals in clear compliance with existing state law

- 2011 Cole Memorandum clarified the 2009 Ogden Memorandum, as the growth of major dispensaries and industrial growing operations were beginning to happen
- Direction to prosecutors to still focus on commercial actors in states where legalized, wanted to clarify that 2009 Memorandum was not a “green light”

- 2013 Cole Memorandum issued following the initiatives in Colorado and Washington
- Maintains that marijuana is a dangerous drug that is still illegal, but that USDOJ will not seek prosecutions against jurisdictions where legalized under its prosecutorial discretion, so long as pervasive regulations in place

- The key aspect of the 2013 Memorandum are the 8 activities suggested for priority in federal prosecutions—
- 1) Distribution to children; 2) $ to gangs and cartels; 3) Movement to non-legal states; 4) Selling other drugs; 5) Violent behavior; 6) Health issues, DUIs; 7) Grows on “public lands”; 8) Federal properties

- 2013 Memorandum sought focus on 8 factors rather than size of grow operation or distribution

- 2014 Cole Memorandum focused on financing and money laundering laws, and recites the same 8 factors in assessing whether to pursue financial transactions associated with marijuana business

- October 28, 2014 Wilkinson Memorandum focused on DOJ's policy on marijuana issues in Indian Country
- Suggests that the 8 factor 2013 Memorandum applies to Indian Country considerations
- References the DOJ's 2010 Indian Country Initiative, suggesting that each US Attorney's office should consult on a government-to-government basis

- Lessons learned from those that have met with USAOs
- USAO will “consult” with the Tribe, but will not approve or sign off on any specific approach, ordinance, or transaction
- USAO will not likely agree to a non-prosecution agreement with a Tribe
- USAO will emphasis that marijuana is still illegal

- USAOs will point the Tribe to the 2013 Cole Memorandum, suggesting that the Tribe apply those standards to any activities that it considers
- USAO will likely suggest that any tribal regulatory scheme be robust and that it limit those 8 factors, including reducing interstate transport to non-legal states

- Recent developments: federal seizure of 12,000 plants in CA, Alturas and Pit River Tribes; size of operation, investor involved and small tribal communities
- Flandreau Santee Sioux legalized cannabis in South Dakota, where it remains illegal under state law

- Suquamish Tribe signed a Compact with the State of Washington
- Tribe will cultivate, process, and sell marijuana on the Reservation
- Washington State Liquor and Cannabis Board negotiated with the Tribe
- A tribally chartered business will carry it out, with one retail outlet to start

- Tribe may expand business later with notification to the Board
- Notification to surrounding jurisdictions, but unclear what Board will do if they protest
- Tribe allowed to make sales and purchases with other licensed businesses in the State
- Tribe agrees to apply full level of State tax (37% excise at retail)

- The FAQ for Section 200.512 does not allow for “tribal entities” to opt out of report publication even though Section 4 of the ISDEAA allows a broad category of “tribal organizations” to limit their reporting requirements
- This was brought to OMB and COFAR’s attention last week and they are taking it under advisement

- Tribal taxes collected must be used to fund “essential governmental services”
- Compact is for 10 years
- Medical marijuana sold on tribal lands is not subject to the 37% tax
- Likely that the State will pursue these Compact terms with other tribes
- Unclear if the Compact will impact USDOJ’s approach

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