



**Tribes and Marijuana
Affiliated Tribes of Northwest Indians**

February 4, 2015




**GARVEY
SCHUBERT
BARER**




COAST SALISH CONSULTING LLC
HONORING TRIBAL SOVEREIGNTY

Speakers



Lael Echo-Hawk, Attorney, Garvey Schubert
Chair, Indian Law Group
http://www.gsblaw.com/professionals/lael_echo-hawk/



Tracie Stevens,
President, Coast Salish Consulting
<https://www.linkedin.com/in/traciestevens>

2

Overview

- Introduction – DOJ Memo
- Cannabis overview
- Recent history of marijuana legalization
- What does this mean for my Tribe?
- What steps should my Tribe take?
- Wrap up and questions

3

Why Are We Here?

- December 11, 2014 the DOJ released its internal Policy Statement on Marijuana Issues in Indian Country.
- Memo dated October 28, 2014
- Internal policy developed without consultation with tribes.



4

DOJ Policy Statement Regarding Marijuana Issues in Indian Country

- Directs each U.S. District Attorney to:
 - Assess all threats within the District, including those in Indian Country.
 - Consult with the Tribes in their District on a government-to-government basis.
 - Focus enforcement efforts based on that district-specific assessment.

5

DOJ Policy Statement Regarding Marijuana Issues in Indian Country

- NOT a blanket authorization to begin operations or to legalize marijuana on tribal land.
- Guidance ONLY
- Not a coordinated policy position across federal family
 - “Checkerboard on checkerboard”

6

DOJ Policy Statement Regarding Marijuana Issues in Indian Country

- Unclear coordination with DOJ HQ & District Office.
- Restates illegality of marijuana federally.
- Includes a disclaimer that the DOJ can still choose to enforce federal law.

7



What is Cannabis?

8

Cannabinoids: CBD and THC



- Cannabis plants produce chemicals called cannabinoids
- There are 85 different cannabinoids
- Only THC is psychoactive

9

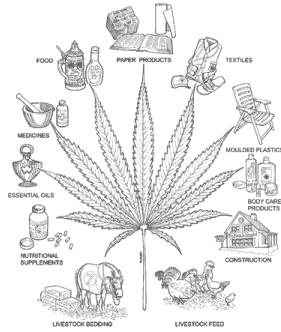
Industrial Hemp

- Industrial Hemp is a distinct variety of the cannabis sativa species
 - <.3%THC → NOT psychoactive
 - Tall, slender, fibrous
 - Uses: Paper, textiles, plastics, construction, health food, animal feed, fuel, etc.
- 2013 Farm Bill, Sec. 7606, Legitimacy of Industrial Hemp Research
 - Defines industrial hemp (<.3%THC) and authorizes institutions of higher education or State departments of agriculture, in states where hemp is legal, to grow hemp for research or agricultural pilot programs.

10

Marijuana Products

- Clones/Clippings/Seeds
- Dried Flower (includes pre-rolled joints)
- Concentrates
 - Bubble hash, shatter, wax, oil, tinctures, capsules
- Topicals
- Infused Edibles
- Infused Liquids



11

Federal Law

The possession, distribution, and manufacturing of marijuana, and aiding and abetting such offense, is a violation of the federal Controlled Substances Act.

21 U.S.C. § 841(a)

It is unlawful to knowingly lease any place for the purpose of distributing a controlled substance.

21 U.S.C. § 856

Property involved in the sale and distribution of marijuana may be subject to seizure by, and forfeiture to, the federal government.

21 U.S.C. § 881(a)

12

The Controlled Substances Act (1970s)
21 U.S.C.13 § 801 et seq.

- Marijuana is a “Schedule I” Controlled Substance
 - High potential for abuse.
 - No currently accepted medical use in treatment.
 - Lack of accepted safety for use of the drug under medical supervision.

13

Possession			
Any amount (first offense)	misdemeanor	1 year	\$ 1,000
Any amount (second offense)	misdemeanor	15 days*	\$ 2,500
Any amount (subsequent offense)	misdemeanor or felony	90 days* - 3 years	\$ 5,000
* Mandatory minimum sentence			
Sale			
Less than 50 kg	felony	5 years	\$ 250,000
50 - 99 kg	felony	20 years	\$ 1,000,000
100 - 999 kg	felony	5 - 40 years	\$ 500,000
1000 kg or more	felony	10 years - life	\$ 1,000,000
To a minor or within 1000 ft of a school, or other specified areas carries a double penalty. Gift of small amount -- see Possession			
Cultivation			
Less than 50 plants	felony	5 years	\$ 250,000
50 - 99 plants	felony	20 years	\$ 1,000,000
100 - 999 plants	felony	5 - 40 years	\$ 500,000
1000 plants or more	felony	10 years - life	\$ 1,000,000
Paraphernalia			
Sale of paraphernalia	felony	3 years	\$ 0

14

NORML, available at <http://norml.org/laws/item/federal-penalties-2#mandatory> (Sept. 2, 2014)



Federal Enforcement and Policy Developments

2009 Ogden Memo; 2012 and 2013 Cole Memos; FinCEN; Dept. of Reclamation

15

Across the Country...

• 23 states, plus WA D.C., recognize and permit the **medical use** of cannabis

- 1996: California
- 1998: Alaska, Oregon, Washington
- 1999: Maine
- 2000: Colorado, Hawaii, Nevada
- 2004: Montana
- 2006: Rhode Island
- 2007: New Mexico, Vermont
- 2008: Michigan
- 2010: Arizona, New Jersey
- 2011: Delaware, Washington, D.C.
- 2012: Connecticut, Massachusetts
- 2013: New Hampshire, Illinois
- 2014: Maryland, Minnesota, New York

16

Across the Country...

• 4 states legalized the **recreational, adult use** of marijuana

- 2012:
 - Washington
 - Colorado
- 2014:
 - Oregon
 - Alaska
 - Washington D.C.*

17

Across the Country...

Hemp

- 16 states have passed pro-hemp legislation.
- 8 states have removed barriers to hemp production or research.



18

Ogden Memo (10/19/2009)

Memo from Deputy Attorney General, David Ogden to US Attorneys

- US Attorneys “should not focus federal resources . . . on individuals whose actions are in clear and unambiguous compliance with existing state laws providing for the medical use of marijuana.” (Emphasis added)
- In contrast, “prosecution of commercial enterprises that unlawfully market and sell marijuana for profit continues to be an enforcement priority.”

19

Ogden Memo (10/19/2009)

- The following conduct is NOT in clear and unambiguous compliance:
 - Unlawful possession or use of firearms;
 - Violence;
 - Sales to minors;
 - Financial and marketing activities inconsistent with state law, including evidence of money laundering activity and/or financial gains or excessive amounts of cash;
 - Amounts of marijuana inconsistent with state law;
 - Illegal possession or sale of other controlled substances; and
 - Ties to other criminal enterprises.
- **Memo is Guidance only**, does not “legalize” medical marijuana or “provide a legal defense to a violation of federal law.”

20

Cole Memo (6/29/2011)

- Memo from Deputy Attorney General James Cole to US Attorneys
- Provide “guidance regarding Ogden Memo” in light of “Green Rush.”

“[W]ithin the past 12 months, several jurisdictions have considered or enacted legislation to authorize multiple large-scale, privately-operated industrial marijuana cultivation centers... [with] revenue projections of millions of dollars. . . .”

“The Ogden [Memo] was never intended to shield such activities from federal enforcement action and prosecution, even where those activities purport to comply with state law.” pg. 2. (Emphasis added)

21

Cole Memo (8/29/2013)

- In light of WA's and CO's new laws, DOJ identified 8 federal enforcement priorities to preventing:
 - Distribution to minors;
 - Revenue from going to criminal enterprises, gangs, and cartels;
 - Diversion to other states;
 - State-authorized activity from being used as a cover for the trafficking of other drugs or illegal activity;
 - Violence and the use of firearms;
 - Drugged driving and the exacerbation of other adverse public health consequences;
 - Growing of marijuana on public lands; and
 - Possession or use on federal property.

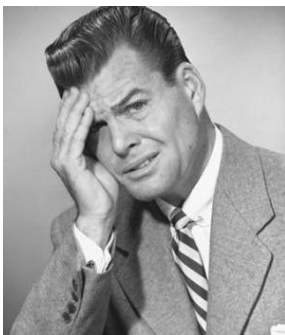
22

Cole Memo (8/29/2013)

- DOJ's guidance relies upon expectation that state governments "implement strong and effective regulatory and enforcement systems," with "robust controls and procedures on paper," and "effective in practice." "If state enforcement efforts are not sufficiently robust to protect against [8 enforcement priorities] the federal government may seek to challenge the regulatory structure."
- Reversal of earlier Cole Memo: The size of an operation is no longer a "proxy" for determining whether the operation implicates DOJ's enforcement priorities.

NOTE - Guidance only, individual prosecutors have discretion to deviate from federal enforcement priorities

23



24

FinCEN Memo (2/14/2014)

- The Financial Crimes Enforcement Network (FinCEN) published guidelines for banks providing financial services for marijuana-related businesses.
- The current Banking Security Act (BSA), requires financial institutions to file Suspicious Activity Reports (SARs) on businesses they suspect to be engaged in potentially illegal activity.

25

FinCEN Memo (2/14/2014)

- Under the new guidelines, Banks must continue to file SARs:
 - (1) “Marijuana Limited” SAR – businesses that appear to be operating legally, and not engaging in activities that will interest federal prosecutors (as detailed in the [Cole Memo](#) of August 29, 2013),
 - (2) “Marijuana Priority” SAR – businesses that appear to be in violation of state law or interfering with federal enforcement priorities (Emphasis added)
 - (3) “Marijuana Termination” SAR – where a financial relationship with a marijuana-related business is terminated due to suspected violations.

26

Casinos – Financial Institution

- **FinCEN's guidance applies to all financial institutions covered under FinCEN regulations, including casinos.**
- How can Tribes with a casino participate in the Cannabis industry?

27

2014 Federal Spending Bill

- In the very same federal spending bill that Congress is using to block DC's recreational marijuana ballot initiative, Congress is treating medical marijuana very differently.
- New spending law will **prohibit** the Department of Justice — including DOJ's Drug Enforcement Administration — **from using federal funds to interfere with states' implementation of their own medical marijuana laws.**

Sec. 538. None of the funds made available in this Act to the Department of Justice may be used, with respect to the States of ..., to prevent such States from implementing their own State laws that authorize the use, distribution, possession, or cultivation of medical marijuana.

28

Changes?

- New President, 2016
- Republican controlled Congress, 2015
- New U.S. Attorney General (Eric Holder resigning)
- New U.S. Deputy Attorney General (James Cole resigning)
- New U.S. Attorney for Western Dist. of WA (Jenny Durkan resigning)
- Nebraska and Oklahoma's suit against Colorado alleging federal preemption

29



What does this mean for my tribe?

30

What should my Tribe consider when deciding whether to legalize or prohibit marijuana in Indian Country?

- Historical substance abuse on reservations.
- Consider community concerns for or against
 - Possible directive from general membership
- Other affected Federal Programs: HUD, IHS, 638, USDA, ICW
- Employment, including federal program employees
- Revenue source
 - Sales
 - Taxation

31

What should my Tribe consider when deciding whether to legalize or prohibit marijuana in Indian Country?

- What additional resources are required if the Tribe decided to:
 - Legalize marijuana in some manner?
 - Prohibit marijuana?
- Reservation border or Fee-to-Trust within reservations boundaries activity if disapproved
- PL 280 state civil & criminal jurisdiction over tribal members
- Other statutes giving state jurisdiction over tribal lands



32

Legal Options

Doing nothing should NOT be an option.

1. **Prohibition**
2. **Authorize limited adult, individual possession**
3. **Authorize medical cultivation and use only**
4. **Authorize recreational, medical cultivation, and distribution**
5. **Participate in state licensed recreational industry**
 - Licensing window closed in Dec. 2013, unknown when it will open again.
 - Although tribes may acquire majority interest in currently licensed entity, state laws would not allow all tribal members to receive share in profits (anyone who shares in profits must qualify and be approved by LCB).
 - Participation requires **robust** regulatory framework

33



What steps should my tribe take?

34

1. Consult with your U.S. District Attorney

- Authorization of marijuana will require consultation with DOJ.
- Prohibition of marijuana will require consultation with DOJ.
- DC Headquarters will need to ensure consistency in District-Tribal consultation process.
- Diverse Tribal interests in each District.

35

2. Make a Decision & Adopt As Tribal Law

- Gather information before making a decision
 - Transparency - Share information with community
 - Consider social impacts
 - General membership involvement
 - Consider your State's authorization or lack thereof
 - Jurisdiction & resources to implement
 - Political discourse & effects
- Memorialize the decision (prohibitive or permissive) in Tribal law
 - Some tribes may have to obtain federal approval of their ordinance by BIA.

36

If Tribe Decides to Allow – Development of Robust Regulatory Framework Required

What to Consider:

• Rules which protect against the 8 federal enforcement priorities (Cole Memo):

- Distribution to minors;
- Funding criminal enterprises, gangs, and cartels;
- Interstate distribution;
- Trafficking other illegal drugs or illegal activity;
- Violence and use of firearms;
- Drugged driving and other public health consequences;
- Growing on public lands; and
- Possession or use on federal property.

37

If Tribe Decides to Allow – Development of Robust Regulatory Framework Required

• What those rules will likely need to include

- Some method for tracing product from seedling through sale, to prevent product from diverting into black market
- Security requirements
- Distance buffer from facilities with children
- Criminal background checks on managers and investors
- Advertising and packaging restrictions to protect minors
- Quantity limits on consumer sales
- Public safety regulations on acceptable extraction methods
- Required testing of product for potency and mold, etc.
- Independent, policing, enforcement division

38

3. Coordinate Law Enforcement

- MOU and/or Non-Prosecution Agreements with law enforcement agencies
 - Department of Justice
 - BLM/Park Rangers
 - State, County, City
 - BIA
- Consider PL-280 state challenges
- Consider federal challenge for BIA

39

4. If Applicable, Carefully Vet Potential Partners

Given the vagueness of the policy & lack of federal unanimity:

- Caution when approached by “gold rushers”
- Look to the past & present-
 - Gaming management
 - Natural resources today (oil boom)
 - On-line lending
- Do homework first –
 - Community involvement
 - Legal implications relative to your State & US district
 - PLAN
- Then, if appropriate, choose partners who are thoroughly vetted

40

Lessons Learned

- Whether a prohibitive or permissive decision, action is required!
- Do your homework
- Don't reinvent the wheel – look to States experience. States are forging through & resolving issues from which Tribes may benefit
- If only legalize medical - develop robust medical regulations and carefully consider (1) who can authorize the medical use of marijuana; and (2) what medical conditions must be diagnosed.

41

Lessons Learned

- Either medical or recreational legalization will require a robust regulatory scheme that encompasses similar controls as state regulations
- Be prepared for mixed responses from the different federal government agencies
- Appreciate challenges in banking and lending
- Take a conservative approach, slow down and consider the risk management
- Be wary and prepare for “gold rush” mentality

42

Whether a prohibitive or permissive decision, action is necessary!



43

Questions

Lael Echo-Hawk
Attorney, Garvey Schubert Barer
206-816-1355
lechohawk@gsblaw.com

Tracie Stevens
President, Coast Salish Consulting
(425) 422-0680
Tracie_Stevens@CSCLLC.net

Stephanie Boehl
Attorney, Garvey Schubert Barer
206-816-1506
sboehl@gsblaw.com



44
