U.S. Department of Justice

United States Attorney
District of Arizona

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March 23, 2011

Dear Tribal Leader:

In keeping with my belief that frequent communication between us is key to improving public safety in Indian Country, I write to provide you with the latest updates on USAO matters and programs that bear on your community. In December, I wrote to you to discuss the transfer of juveniles to adult status in federal criminal matters, and to advise you that the law provides your tribal government with opportunity for input to the process when the juvenile suspects from your community are under the age of 15. Today I write with additional news I think will be of interest to all of you, including an update on the progress of our Tribal SAUSA program, which I introduced in an earlier letter.

Tribal SAUSA Program

In November, I sent you a model letter of agreement detailing the Tribal SAUSA Program, so you could evaluate it and consider whether your government might participate by nominating a tribal prosecutor or other tribal attorney. Several of you have responded in the affirmative and have requested or entered into a final letter of agreement. This office is setting up initial meetings with the tribal prosecutors thus far designated by their leaders and we anticipate this first group (of approximately six tribal prosecutors) will submit papers for the federal background check in April, with SAUSA training for the first class to take place in June. We will repeat the process three months later for up to six additional tribal attorneys. For those tribal leaders still considering whether to participate in the Tribal SAUSA program, I sincerely hope you will take advantage of it and then monitor the benefits to your community. If this is at all a possibility, I encourage you to contact Tribal Liaison John Tuchi at (602) 514-7543 or Deputy Tribal Liaison Marnie Hodahkwen at (602) 514-7568 to discuss it. And if you have decided to participate, please contact John or Marnie to get a final letter agreement addressed to the appropriate official.

USAO Approach to Medical Marijuana in Tribal Lands

Since the voters of the State of Arizona passed, by referendum, a medical marijuana regime in November, several of you have contacted us to discuss the position the United States Department of Justice will take regarding criminal prosecution of marijuana offenses in Indian Country. In October 2009, then-Deputy Attorney General David Ogden issued Department-wide policy guidance on this issue for all districts in which states had enacted laws authorizing medical marijuana cultivation, distribution, possession and use. I enclose with this letter a copy of that policy, which provides in brief that where a target is in "clear and unambiguous compliance" with the state law, federal prosecutors ought not devote scarce resources to the prosecution of program participants. I also attach guidance our

office has recently developed to address the particular circumstance of medical marijuana on tribal lands. That guidance, while honoring the Department-wide policy, also recognizes the unique circumstance of Indian Country, where state law does not apply and tribal criminal law does not reach non-Indians; the guidance therefore provides that we will evaluate every case submitted from Indian Country involving marijuana on a case-by-case basis, and where sufficient evidence is developed taking the matter out of "clear and unambiguous compliance" with the state scheme, we will consider prosecution. A copy of that guidance also is attached. Should you have any questions about either of these policies or medical marijuana in general, please contact John or Marnie at the above numbers.

Special Law Enforcement Commission Program Issues

Another major thrust of our Public Safety Operational Plan is to promote the Special Law Enforcement Commission (or SLEC) Initiative to every tribe with a 638-contract police force. SLEC is a program administered by BIA that allows tribal police officers, upon completing required training in substantive federal law and federal criminal procedure, to act as federal agents for purposes of investigating and prosecuting federal felonies (including the so-called "Major Crimes") in Indian Country. This Office aggressively promotes SLEC status because we recognize that it multiplies the number of trained officers available to properly investigate and bring federal charges against the most serious and dangerous offenders in Indian Country. SLEC also improves the training and ability of those most likely to be the first responders to serious violent crimes in Indian Country - your tribal police.

As we have assumed an increasing role in delivering SLEC training to tribes, we also have observed practices in administering the program that needlessly inconvenience and even discourage otherwise qualified tribal officers and their departments from participating in SLEC. Our concern for the treatment of tribal police officers in Arizona led us to draft substantial portions of a letter from the U.S. Attorney community to Mr. Darren Cruzan, BIA's Assistant Director for Justice Services, pointing out some of the obstacles the current system has placed before those seeking SLEC certification, and suggesting ways to make the program more officer-friendly. I have attached a copy of that letter for your review as well. We are hopeful that BIA will act on our suggestions to make obtaining SLEC a less frustrating and more respectful process for tribal law enforcement.

I hope you find the information in this letter useful. As always, please call me or any member of our Indian Country Team whenever we can be of help.

Sincerely,

Dennis Burke

DENNIS K. BURKE
United States Attorney
District of Arizona

enclosures

U.S. Department of Justice

Office of the Deputy Attorney General

The Deputy Attorney General

Washington, D.C. 20530

October 19, 2009

MEMORANDUM FOR SELECTED UNITED STATES ATTORNEYS

FROM: David W. Ogden
Deputy Attorney General

SUBJECT: Investigations and Prosecutions in States
Authorizing the Medical Use of Marijuana

This memorandum provides clarification and guidance to federal prosecutors in States that have enacted laws authorizing the medical use of marijuana. These laws vary in their substantive provisions and in the extent of state regulatory oversight, both among the enacting States and among local jurisdictions within those States. Rather than developing different guidelines for every possible variant of state and local law, this memorandum provides uniform guidance to focus federal investigations and prosecutions in these States on core federal enforcement priorities.

The Department of Justice is committed to the enforcement of the Controlled Substances Act in all States. Congress has determined that marijuana is a dangerous drug, and the illegal distribution and sale of marijuana is a serious crime and provides a significant source of revenue to large-scale criminal enterprises, gangs, and cartels. One timely example underscores the importance of our efforts to prosecute significant marijuana traffickers: marijuana distribution in the United States remains the single largest source of revenue for the Mexican cartels.

The Department is also committed to making efficient and rational use of its limited investigative and prosecutorial resources. In general, United States Attorneys are vested with "plenary authority with regard to federal criminal matters" within their districts. USAM 9-2.001. In exercising this authority, United States Attorneys are "invested by statute and delegation from the Attorney General with the broadest discretion in the exercise of such authority." *Id.* This authority should, of course, be exercised consistent with Department priorities and guidance.

The prosecution of significant traffickers of illegal drugs, including marijuana, and the disruption of illegal drug manufacturing and trafficking networks continues to be a core priority in the Department's efforts against narcotics and dangerous drugs, and the Department's investigative and prosecutorial resources should be directed towards these objectives. As a general matter, pursuit of these priorities should not focus federal resources in your States on

individuals whose actions are in clear and unambiguous compliance with existing state laws providing for the medical use of marijuana. For example, prosecution of individuals with cancer or other serious illnesses who use marijuana as part of a recommended treatment regimen consistent with applicable state law, or those caregivers in clear and unambiguous compliance with existing state law who provide such individuals with marijuana, is unlikely to be an efficient use of limited federal resources. On the other hand, prosecution of commercial enterprises that unlawfully market and sell marijuana for profit continues to be an enforcement priority of the Department. To be sure, claims of compliance with state or local law may mask operations inconsistent with the terms, conditions, or purposes of those laws, and federal law enforcement should not be deterred by such assertions when otherwise pursuing the Department's core enforcement priorities.

Typically, when any of the following characteristics is present, the conduct will not be in clear and unambiguous compliance with applicable state law and may indicate illegal drug trafficking activity of potential federal interest:

- unlawful possession or unlawful use of firearms;
- violence;
- sales to minors;
- financial and marketing activities inconsistent with the terms, conditions, or purposes of state law, including evidence of money laundering activity and/or financial gains or excessive amounts of cash inconsistent with purported compliance with state or local law;
- amounts of marijuana inconsistent with purported compliance with state or local law;
- illegal possession or sale of other controlled substances; or
- ties to other criminal enterprises.

Of course, no State can authorize violations of federal law, and the list of factors above is not intended to describe exhaustively when a federal prosecution may be warranted. Accordingly, in prosecutions under the Controlled Substances Act, federal prosecutors are not expected to charge, prove, or otherwise establish any state law violations. Indeed, this memorandum does not alter in any way the Department's authority to enforce federal law, including laws prohibiting the manufacture, production, distribution, possession, or use of marijuana on federal property. This guidance regarding resource allocation does not "legalize" marijuana or provide a legal defense to a violation of federal law, nor is it intended to create any privileges, benefits, or rights, substantive or procedural, enforceable by any individual, party or witness in any administrative, civil, or criminal matter. Nor does clear and unambiguous compliance with state law or the absence of one or all of the above factors create a legal defense to a violation of the Controlled Substances Act. Rather, this memorandum is intended solely as a guide to the exercise of investigative and prosecutorial discretion.

Finally, nothing herein precludes investigation or prosecution where there is a reasonable basis to believe that compliance with state law is being invoked as a pretext for the production or distribution of marijuana for purposes not authorized by state law. Nor does this guidance preclude investigation or prosecution, even when there is clear and unambiguous compliance with existing state law, in particular circumstances where investigation or prosecution otherwise serves important federal interests.

Your offices should continue to review marijuana cases for prosecution on a case-by-case basis, consistent with the guidance on resource allocation and federal priorities set forth herein, the consideration of requests for federal assistance from state and local law enforcement authorities, and the Principles of Federal Prosecution.

cc: All United States Attorneys

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Assistant Attorney General
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United States Attorney's Office - District of Arizona
Policy Guidance on Medical Marijuana in Indian Country

The United States Attorney's Office for the District of Arizona remains committed to the enforcement of the Controlled Substances Act. Our District policy remains one of "zero tolerance" for illegal distribution or other trafficking of any controlled substance–including marijuana–in Indian Country, no matter what the quantity. Now that the voters of Arizona have enacted by referendum a medical marijuana regime, this District will be subject to, and expected to follow , the attached policy directive from the office of the Deputy Attorney General of the United States, dated October 2009. It provides that USAOs should refrain from devoting scarce resources to the prosecution of individuals who possess or handle marijuana in clear and unambiguous compliance with a state's duly enacted medical marijuana laws. We will therefore handle prosecutions in Indian Country—as with the rest of our potential medical marijuana prosecutions on other federal land and elsewhere–in accordance with the DAG memo. This will not interfere with our commitment to prosecuting illegal drug trafficking on tribal land. We will evaluate every marijuana prosecution referred to us on a case-by-case basis to determine whether there are indicators that an individual is not in clear and unambiguous compliance with state law, which can be indicated in many ways–possessing a quantity of the drug greater than allowed by the state scheme; possession of other controlled substances in concert with marijuana; evidence of distribution for profit; or carriage of a firearm in connection with marijuana. This list is not exhaustive, and in cases where these other factors exist, we will evaluate for federal prosecution.

Recognizing that in many cases, individuals may be subject to stiffer penalties for certain crimes under tribal law than in the federal court system, each tribe may also wish to work to formulate its own policies and regulations for medical marijuana cases. We are also open to further discussions on medical marijuana policy if any tribes have concerns or questions.

U. S. Department of Justice

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March 7, 2011

Mr. Darren A. Cruzan
Deputy Bureau Director, Office of Justice Services
Bureau of Indian Affairs
MS-4551-MIB
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Dear Deputy Bureau Director Cruzan:

We appreciate the interest you have expressed in the concerns of the United States Attorney community relating to the improvement of public safety in Indian Country. We value, and indeed share, your desire for a true partnership aimed at addressing those issues and improving the delivery of federal law enforcement services to Tribal communities, and we look forward to continuing to work with you on these important issues. To that end several of our number who make up the Native American Issues Subcommittee - Cross Deputization Working Group of the Attorney General's Advisory Committee have identified two related issues that, if addressed by the Bureau of Indian Affairs ("BIA"), would in our view both substantially improve the provision of law enforcement services in Indian Country and demonstrate clear responsiveness by the Federal government to the stated concerns of the Tribal law enforcement communities.

I. Background.

The Cross Deputization Working Group supports efforts, where approved by the affected Tribal Councils, to cross-deputize State, Local, and Tribal law enforcement officers to enforce Tribal and Federal law in Indian Country. Cross-deputization serves several positive purposes. It provides additional law enforcement resources to the Tribal community; it makes less complicated the patchwork nature of criminal jurisdiction on some Tribal lands; and it promotes enhanced cooperation and familiarity between State, Local Tribal, BIA, and Federal law enforcement, with all its attendant public-safety benefits.

To become cross-deputized and receive authority to enforce Federal criminal laws, a State, Local, or Tribal law enforcement officer must receive BIA-approved Special Law Enforcement Commission ("SLEC") training on Federal criminal jurisdiction in Indian Country and on substantive Federal criminal law and procedure and then pass a written examination on those subjects. While this training and testing can be done locally and is often provided by the local U.S. Attorney's Office, under current BIA process it is certified by the Indian Police Academy ("IPA"). Once an officer has passed the exam, BIA issues him (or her) an SLEC card, which authorizes him to enforce federal criminal law on the reservation.

The Cross Deputization Working Group has identified some persistent problems with the current IPA-driven process that delay and unnecessarily complicate the recruitment, training, and certification of Tribal and other officers under the SLEC program. We set forth our observations below:

II. Notice of SLEC Training.

Officers seeking SLEC certification often experience significant delays and bureaucratic hurdles in simply trying to enroll in the SLEC training courses. In many districts the SLEC training is provided by the U.S. Attorney's Office. In these districts AUSAs involved in teaching the course report regularly seeing that IPA personnel -- who are responsible for sending test booklets and recording which officers pass the exam -- impose a requirement that all officers have their applications to IPA fully 60 days before the planned course.

Frequently, officers who have missed that deadline, but still have applied weeks or more before the class, are turned away on the day of the course or not allowed to take the exam on the instruction of IPA personnel. Anecdotally, AUSAs have prepared and traveled to teach a course for a contemplated 70 students, only to arrive to a room of 25, largely because "late enrollees" were told not to come. This 60-day requirement cannot be justified by any need on IPA's part to prepare for the course in those situations where U.S. Attorney's offices have assumed responsibility for all of the teaching and course presentations.

We suggest there is little reason that IPA's limited administrative duties in connection with these courses -- copying and mailing of exam booklets and recording electronic scoring results -- should justify an application deadline of more than a few days.

Reducing the deadline will reduce officer frustration, something we often hear voiced by law enforcement, and so will serve to directly show respect for the State, Local, and Tribal officers who are willing to undertake this process. It also will make SLEC certification as painless as possible.

III. Delays in the physical issuance of SLEC cards.

Once an officer has received the SLEC training and passed the exam, he or she does not gain authorization to enforce federal law on the reservation until he physically receives an SLEC card from BIA. In some regions there are consistent unacceptable delays in the SLEC card-issuance process. Receipt of notice that an officer has passed the SLEC test and issuance of the card should not reasonably take more that a few days, but delays of several months have been commonly experienced, and in some cases delays of over a year have been reported by Tribal police departments. In the meantime, a properly trained law enforcement officer is unable to provided much-needed Federal law enforcement assistance on the reservation.

Some of our offices have attempted to resolve the lengthier delays in card issuance, and have been told by BIA personnel that the affected officers had failed to submit all necessary application information. The officers in issue, or their departments, have denied omitting material from applications and the attempted resolution process has often become a stalemate. We are unsure in these circumstances who is in the right; we submit that it doesn't matter, when the end result is that qualified individuals are sitting on the sidelines. We urge resolution of this issue by BIA (1) by streamlining its SLEC card issuance procedures to squeeze out all unnecessary delay; and (2) by investigating instances of non-issuance due to incomplete applications and improving the communication process between applicants and reviewing BIA officials so that both sides know at all times the status and missing elements of an application. We believe strongly that improvement in this area will again reduce officer frustration with what they now see as a non-responsive and disrespectful bureaucratic process, and will eliminate one of the most potent arguments among officers for declining SLEC certification.

IV. Conclusion.

In a recent telephone conversation with USASD Brendan Johnson and I you indicated that these two issues were within your area of responsibility. We look forward to working with you to address these concerns, and we offer our own efforts and personnel

to help design solutions, however you might find them useful. Should you wish to schedule a telephone conference or meeting to discuss these issues, or if you or your staff need additional background information, please contact me at 701-530-2420.

Thank you for your attention to these issues, and for your stated willingness to work with us on our shared goal of improving our service to Tribal communities.

Sincerely,

TIMOTHY Q. PURDON
United States Attorney

TQP:ceb

cc: Honorable Brendan V. Johnson