

Federal Narcotics Laws Can Still Trump Tribal Sovereignty

Law360, New York (July 20, 2015, 1:37 PM ET) -- A high-profile criminal investigation of two marijuana cultivation facilities on Native American trust lands in California is a reminder that despite recent U.S. Department of Justice assurances of possible prosecutorial forbearance, tribes considering violating the federal drug laws — even for the sake of much-needed economic development — may do so at their peril.

At first blush, the latest joint federal-state task force operation in Northern California looks like many others that have unfolded there and elsewhere for decades. On July 8, special agents from the Drug Enforcement Administration and the Bureau of Indian Affairs' Office of Justice Services, along with state and county officers, searched two separate but linked marijuana grow operations on the Alturas Indian Rancheria and the Pit River XL Ranch Reservation in Northeastern California. They seized at least 12,000 marijuana plants and 100 pounds of processed marijuana.



Troy Eid

That said, this particular enforcement action — the first against commercial-scale tribal marijuana production since the Justice Department's Oct. 28, 2014, policy statement giving guidance to United States Attorneys on how to prioritize marijuana enforcement involving Indian tribes in states that have legalized marijuana for medicinal, agricultural or recreational use[1] — has special implications. How the investigation plays out remains to be seen. But the raids attest to the continuing power of United States attorney's offices — there are 93 U.S. attorneys across the United States, each appointed by the president and confirmed by the Senate — to make enforcement decisions within their own districts. Because this prosecutorial discretion often includes vindicating the supremacy of federal law even when tribes' sovereign decision-making may be at stake, the California raids will certainly influence other Native nations' decisions considering marijuana projects of their own.

Publicizing the Investigation

Notwithstanding states such as California that have moved to legalize marijuana for certain purposes under their own laws, the federal Controlled Substances Act criminalizes the possession, use, cultivation and distribution of marijuana for all purposes, including medicinal purposes.[2] With that conflict in mind, the local United States Attorney in the Alturas-Pit River marijuana probe, Benjamin B. Wagner, took the unusual step of publicizing the three search warrants and unsealing the supporting affidavits.

U.S. attorney's offices rarely comment on ongoing criminal investigations. In a public statement, however, Wagner said an exception was warranted at this stage — even though no federal criminal charges have been filed — in part because of the “substantial attention” generated by the Justice Department’s October 2014 Policy Statement Regarding Marijuana Issues in Indian Country.[3] The policy statement, which has been widely perceived by tribes and the cannabis industry as opening the door for tribal marijuana businesses, and its actual interpretation in the field by individual United States Attorneys, should be a matter of intense interest and concern as many tribes debate potential marijuana projects. The Alturas-Pit River raid shows that extreme caution is warranted when tribes seek to defy federal criminal laws — even when “Main Justice” in Washington, D.C., might appear to be encouraging U.S. attorney's offices not to prosecute certain cases otherwise within their statutory authority.

Reaching Out to Federal Prosecutors Prior to the Raid

Significantly, the Alturas-Pit River raid happened despite the tribes’ repeated and proactive outreach to state and local law enforcement as well as the Justice Department, including several meetings in which legal counsel actively participated. Officials from both tribes and their lawyers from Fredericks Peebles & Morgan LLP — represented by veteran attorney John M. Peebles of Sacramento — met with the U.S. Attorney Wagner’s office regarding their planned marijuana venture well in advance of the July raid. According to the BIA’s unsealed affidavit supporting the search warrants in the investigation, Peebles assured federal and state law enforcement that the tribes’ marijuana business would comply with California law when he first began meeting with them in March.[4] For his part, Wagner has since confirmed that such meetings occurred on “multiple occasions,” but explained that “the U.S. Attorney’s Office reminded the tribes that the cultivation of marijuana is illegal under federal law and that anyone engaging in such activity did so at the risk of enforcement action.”[5]

Wagner’s decision not to take the tribes’ assurances at face value is noteworthy. The Justice Department’s policy statement expressly reaffirms the earlier “Cole Memo,” the department’s August 2013 guidance from Deputy Attorney General James M. Cole sometimes credited with encouraging marijuana’s commercialization in states that have purported to legalize it. While reminding U.S. attorneys of marijuana’s continuing criminalization under the federal Controlled Substances Act, Cole opined that “both the existence of a strong and effective state regulatory system, and [a marijuana] operation’s compliance with such a system, may allay the threat that an operation’s size poses to federal enforcement interests.”[6] It is significant that the tribes’ promises that they would adhere to California law were insufficient, in and of themselves, to dissuade federal authorities from raiding their large-scale grow operation.

Focusing on the Possible Marijuana Diversion

The sheer scale of the tribes’ marijuana project seemed to make a deep impression on federal officials, notwithstanding the Cole Memo’s insistence that compliance with state law might reduce the threat of federal enforcement even for large-scale cultivation. This is in keeping with the policy statement’s insistence that each United States Attorney ultimately “must assess all of the threats present in his or her district, including those in Indian Country, and focus enforcement efforts based on that district-specific assessment.”[7] U.S. attorneys, of course, are supervised by the attorney general of the United States and expected to comply with the Justice Department’s guidance. It is worth remembering, however, that presidents appoint U.S. attorneys to serve as the chief federal prosecutors in their districts — and therefore to be accountable not just to Washington, but at the state and local level.

In this regard, U.S. Attorney Wagner could not fail to have been impressed by the massive operation contemplated by the two tribes. The facility at the XL Ranch, immediately adjacent

to U.S. Highway 395 on the banks of the Pit River, consisted of 40 newly constructed greenhouses and other facilities capable of producing an estimated 40,000 to 60,000 plants. This was in addition to the production from the companion marijuana grow operation at the Alturas Indian Rancheria. According to the U.S. attorney's office, the combined production "far exceeds any prior known commercial marijuana grow operation anywhere within the 34-county Eastern District of California." [8] Given the size of the tribes' attempted cultivation, U.S. Attorney Wagner cited concerns about marijuana being diverted "to places where it is not authorized and potential threats to public safety, both of which are listed priorities in Department of Justice guidelines."

Besides size, Wagner added another concern — that "the activity occurring off tribal lands is not subject to effective state or local regulation" — not mentioned in any Justice Department guidance, including the policy statement. Here the tiny membership of the tribes involved — the Alturas Rancheria has just three to seven members, depending on who is counting, and has reportedly granted tribal citizenship to non-Indians in exchange for perceived business advantages — and their lack of corresponding governmental services and capabilities, was almost certainly a factor. So was alleged political intrigue. According to the BIA affidavit, Wendy Del Rosa — sister of Alturas Tribal Chairman Phillip Del Rosa — sent a letter to the U.S. attorney's office in June demanding that the marijuana business be shut down. She claimed that rather than a project authorized by tribal law, the venture was actually a private business deal by Phillip Del Rosa and others "designed by attorney Peebles, and financed internationally through Jerry Montour of Canada." [9]

Montour, a multimillionaire cigarette-manufacturing mogul who is the target of several lawsuits by state governments in the United States for tax evasion, is reportedly a convicted felon in Canada. The alleged international nexus is also potentially important to the investigation given the possibility that marijuana produced by the two tribes could be diverted north. Again according to the BIA agent's affidavit, Montour — who has been described as a key player in previous drug-smuggling operations where marijuana was diverted to Canada from Mexico — visited the grow operations at the Alturas Rancheria and XL Ranch sites, among other things to encourage the workers building the facilities. [10] While Alturas Chairman Phillip Del Rosa has not commented publicly, the chairman of the Pit River Tribe, Mickey Gemmill Jr., has characterized the raid as a surprise crackdown on marijuana intended solely for medical use in California as provided by state law.

BIA: Front and Center in a Tribal Marijuana Raid

Finally, the significance of Bureau of Indian Affairs' leading the investigation against the two tribes, with DEA in a key but less visible role (at least at this stage), was not lost on Pit River Chairman Gemmill and some other elected tribal leaders. They insist that BIA, in furtherance of the federal government's trust responsibility to tribes, should be helping rather than hindering commercial marijuana enterprises as a means of encouraging tribal economic development in states where cannabis has already been legalized under state law. [11] The waters are muddied, of course, because other members of these very small tribes reportedly oppose getting into the marijuana business. Yet when faced with two tribes seeking to push the envelope on large-scale marijuana cultivation, BIA did not hesitate to enforce the federal narcotics laws. Other tribal leaders in California and elsewhere should carefully monitor the Alturas-Pit River raid and its aftermath when considering what role, if any, marijuana ventures can and should play in charting their economic futures.

—By Troy A. Eid, Greenberg Traurig LLP

Troy Eid, the former U.S. attorney for the District of Colorado, is a shareholder in Greenberg Traurig's Denver office and co-chairman of the firm's American Indian law practice group. He previously chaired the Indian Law and Order Commission and currently serves on the Tribal Issues Advisory Committee of the United States Sentencing Commission. He is a regular contributor to Native American Law360.

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[1] The Justice Department's Policy Statement Regarding Marijuana Issues in Indian Country can be downloaded at www.justice.gov/tribal.

[2] 21 U.S.C. Section 844(a). See also *Gonzales v. Raich*, 545 U.S. 1, 14 (2005), and *Coats v. Dish Network*, No. 13SC394 (Colo. June 15, 2015).

[3] Andrew Westney, "California Tribal Leader Blasts BIA for Marijuana Facility Raid," *Native American Law360* (July 14, 2015), accessible at www.law360.com/nativeamerican/articles/678412?nl_pk=27453edd-cf24-4c0e-a52c-cf43f8f8e4da&utm_source=newsletter&utm_medium=email&utm_campaign=nativeamerican.

[4] Charles Turner, Special Agent, BIA-Office of Justice Services, "Affidavit in Support of Search Warrant" (July 7, 2015), p. 7 (hereafter "Turner Affidavit"), accessible at <https://turtletalk.wordpress.com/2015/07/09/unsealed-search-warrant-affidavit-in-alturas-marijuana-raid/>.

[5] *Id.*

[6] James M. Cole, Memorandum for All United States Attorneys, "Guidance Regarding Marijuana Enforcement," (Aug. 29, 2013), p. 3.

[7] *Id.* n. ii, p. 2.

[8] See "Federal and Local Law Enforcement Execute Search Warrants at Large Scale Commercial Marijuana Cultivation Facilities on Tribal Lands," U.S. Attorney's Office for the Eastern District of California (July 8, 2015), accessible at www.justice.gov/usao-edca/pr/federal-and-local-law-enforcement-execute-search-warrants-large-scale-commercial.

[9] *Id.* n. v, pp. 7-8.

[10] *Id.* at p. 9, 20.

[11] *Id.* at n. i.