

STATE OF SOUTH DAKOTA



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July 31, 2015

United States Deputy Attorney General Sally Quillian Yates
U.S. Department of Justice
950 Pennsylvania Ave NW
Washington DC 20530-0001

RE: Marijuana in Indian Country

Dear Deputy Attorney General,

The State of South Dakota requests official clarification on whether recent DOJ guidance applies to marijuana use in states where such use is contrary to state law. Specifically, South Dakota requests clarification on whether former Deputy Attorney General James M. Cole's August 29, 2013 Memorandum and EOUSA Director Monty Wilkenson's Policy Statement of October 28, 2014 (hereinafter "the Cole Memorandum"), are applicable to states where marijuana is illegal.

The Cole Memorandum was issued in response to ballot initiatives in Colorado and Washington which legalized recreational marijuana under state law. "The Department's guidance in this memorandum rests on its expectation that" the enacted laws will be implemented with "strong and effective regulatory and enforcement system[s]." The Cole Memorandum specifically requires federal prosecutors to review "whether the operation is demonstrably in compliance with a strong and effective state regulatory system." Based upon this language, the Cole Memorandum would not appear to guide federal law enforcement in those states that have not legalized marijuana in some form.

In South Dakota marijuana is not legal in any form. As such, South Dakota does not have a "strong and effective state regulatory system."

Recently, the Flandreau Santee Sioux Tribe, whose reservation is located entirely within South Dakota, passed a resolution "to open specific lands within its jurisdiction to the possession, consumption, cultivation, processing and distribution of marijuana[.]" See attached Flandreau

Santee Sioux Tribe Resolution No. 15-56. It is our understanding from the Tribe that it intends to make marijuana available to Indians and non-Indians alike, with sales to commence in the fall.

As you know, criminal jurisdiction in states with Indian Country can become complex and depends upon federal, tribal and state cooperation and enforcement efforts to protect all the communities in and around Indian Country. The United States Supreme Court's 1978 *Oliphant* opinion established that inherent criminal jurisdiction of an Indian tribe does not extend to non-Indians. As far back as the 1881 *McBratney* opinion, the U.S. Supreme Court determined that state courts have jurisdiction over, among other matters, victimless crimes committed by non-Indians within Indian Country. Any guidance from the Department of Justice should take into consideration these established legal principles.

Given the above criminal jurisdictional backdrop, the Flandreau Santee Sioux Tribe's regulations, although well-intentioned, would not legally be able to satisfy the Cole Memorandum's "expectation" of a "strong and effective regulatory and enforcement system" for marijuana activity within the boundaries of the reservation. The parameters of criminal jurisdiction in Indian Country would serve to weaken the Tribe's regulatory system. For example, the Tribe would not have criminal jurisdiction over a non-Indian's violation of the Tribe's marijuana regulation. But the State would have criminal jurisdiction over the non-Indian for violation of state law involving a marijuana activity that complies with the Tribe's regulations.

I have great respect for our Tribes and their sovereignty. As the State Attorney General, I am responsible for enforcing State law and ensuring public safety. This includes taking the proper steps to avoid placing both Indian and non-Indian persons unnecessarily at risk from either or both state and federal criminal prosecutions. Accordingly, South Dakota is specifically requesting that you clarify to what extent, if any, the Cole Memorandum provides guidance in jurisdictions such as South Dakota wherein marijuana use and possession is unlawful.

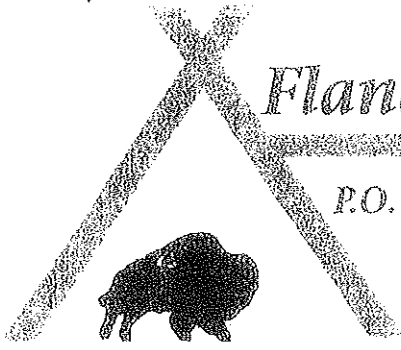
Sincerely,



Marty J. Jackley
ATTORNEY GENERAL

MJJ/lde

cc: Randy Seiler, Acting U.S. Attorney for the District of South Dakota
Governor Dennis Daugaard
U.S. Senator John Thune
U.S. Senator Mike Rounds
U.S. Representative Kristi Noem



Flandreau Santee Sioux Tribe

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RESOLUTION NO. 15-56

- WHEREAS, the Flandreau Santee Sioux Tribe is a federally-recognized Indian Tribe organized pursuant to the Constitution and By-laws approved by the Secretary of Interior and Commissioner of Indian Affairs on April 24, 1936, amended February 7, 1941, further amended November 16, 1967, further amended November 14, 1984, and further amended May 17, 1997; and
- WHEREAS, Article III, Section 1 of the Tribe's Constitution and By-laws provides that the governing body of the Tribe shall be the Executive Committee; and
- WHEREAS, Article VIII, Section 1(e) of the Constitution vests the Executive Committee with the power to acquire, lease, or otherwise manage all lands or other assets, either real or personal, for the benefit of the Tribe as authorized by law except that where lands or assets are under the jurisdiction of the Federal government; and
- WHEREAS, Article VIII, Section 1(f) of the Constitution vests the Executive Committee with the power to promulgate and enforce ordinances governing and regulating the conduct of all persons on the reservation; and
- WHEREAS, Article VIII, Section 1(h) of the Constitution vests the Executive Committee with the power to shall have the power to adopt resolutions consistent with such Constitution and By-laws, regulating the procedure of the Executive Committee itself and of other tribal agencies, tribal officials or tribal organizations of the Tribe; and
- WHEREAS, the federal Controlled Substances Act, 21 U.S.C. section 801 et seq., classifies marijuana as a Schedule 1 drug and prohibits any possession or use of marijuana except in the course of federally approved research projects, and the Controlled Substances Act makes it unlawful, under federal law, for any person to cultivate, manufacture, distribute or dispense, or possess with intent to manufacture, distribute or dispense, marijuana; and
- WHEREAS, on August 29, 2013, U.S. Department of Justice Deputy Attorney General James M. Cole issued a memorandum to all United States Attorneys providing updated guidance to federal prosecutors concerning marijuana enforcement under the federal Controlled Substances Act; and
- WHEREAS, the guidance memorandum applies to all of the Department of Justice's federal

enforcement activity, including civil enforcement and criminal investigations and prosecutions, concerning marijuana in all states, and it reiterates Congress's determination that marijuana is a dangerous drug and that the illegal distribution and sale of marijuana is a serious crime that provides a significant source of revenue to large-scale criminal enterprises, gangs, and cartels; and

WHEREAS, it also notes that the Department of Justice is committed to using its investigative and prosecutorial resources to address the most significant threats in the most effective, consistent, and rational way, and in furtherance of those objectives, the guidance memorandum provides guidance to the Department of Justice attorneys and law enforcement to focus their enforcement resources on persons or organizations whose conduct interferes with any one or more of the following important priorities: (a) preventing the distribution of marijuana to minors; (b) preventing revenue from the sale of marijuana from going to criminal enterprises, gangs, and cartels; (c) preventing the diversion of marijuana from states where it is legal under state law in some form to other states; (d) preventing state-authorized marijuana activity from being used as a cover or pretext for the trafficking of other illegal drugs or other illegal activity; (e) preventing violence and the use of firearms in the cultivation and distribution of marijuana; (f) preventing drugged driving and the exacerbation of other adverse public health consequences associated with marijuana use; (g) preventing the growing of marijuana on public lands and the attendant public safety and environmental dangers posed by marijuana production on public lands; and (h) preventing marijuana possession or use on federal property; and

WHEREAS, on October 28, 2014 the United States Department of Justice, Executive Office for United States Attorneys Director Monty Wilkinson issued a memorandum to all United States Attorneys entitled "Policy Statement Regarding Marijuana Issues in Indian Country" which provides that the eight priorities in the August 29, 2013 guidance memorandum will also guide United States Attorneys' marijuana enforcement efforts in Indian Country, including in the event that sovereign Indian Nations seek to legalize the cultivation or use of marijuana in Indian Country; and

WHEREAS, this memorandum states each United States Attorney should consult with the affected tribes on a government-to-government basis when evaluating marijuana enforcement activities in Indian Country; and

WHEREAS, the Executive Committee and the Tribal Attorney met with Brenden Johnson, the then United States Attorney for the District of South Dakota, and Randolph Seiler, the current US Attorney, on January 29, 2015 in Sioux Falls, South Dakota and discussed the memorandum at great length; and

WHEREAS, the Executive Committee has participated in regional, national, and other informational resources that discussed the lawful cultivation and consumption of marijuana in Indian Country and elsewhere; and

WHEREAS, the legalization of marijuana has been discussed with the Tribe's membership at two general council meetings, and the people have been polled through an official survey distributed by the Tribe to its members at their last known addresses; and

WHEREAS, the Executive Committee has come to the conclusion that the economic possibility and medical benefits associated with the cultivation and distribution of marijuana will benefit the Tribe, its members, and the surrounding community; and

WHEREAS, the Tribe has therefore decided to open specific lands within its jurisdiction to the possession, consumption, cultivation, processing and distribution of marijuana by enacting this Title to the Flandreau Tribal Law and Order Code; and

NOW THEREFORE BE IT RESOLVED that the Flandreau Santee Sioux Tribe Executive Committee hereby approves Title 29 entitled "Marijuana Control Ordinance" and makes it effective upon the passage of this resolution; and

BE IT FURTHER RESOLVED that nothing in this resolution or ordinance shall expressly or impliedly waive the sovereign immunity of the Flandreau Santee Sioux Tribe, its elected officials, its employees, its agents, or its businesses in any forum; and

BE IT FURTHER RESOLVED that all laws inconsistent with this title are hereby revoked; and

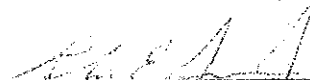
BE IT FINALLY RESOLVED that this ordinance shall be the law of the Flandreau Santee Sioux Tribe on all lands within its jurisdiction until a time in which the ordinance is amended, revoked, or otherwise modified by law.

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CERTIFICATION

The foregoing Resolution was duly enacted and adopted on this 11th day of June, 2015 by the Executive Committee of the Flandreau Santee Sioux Tribe during a duly called meeting with a quorum established, and a vote of 12 In Favor, 1 Opposed, 0 Abstaining, 0 Absent, and 1 Not Voting, as follows:

| | | | | |
|---|--------------------------------------|-------------------------------------|-------------------------------|-----------------------------------|
| Vice President, Cynthia J. Weddell: | <input checked="" type="radio"/> YES | <input type="radio"/> NO | <input type="radio"/> ABSTAIN | <input type="radio"/> NOT PRESENT |
| Secretary, Gordon Jones, Jr.: | <input checked="" type="radio"/> YES | <input type="radio"/> NO | <input type="radio"/> ABSTAIN | <input type="radio"/> NOT PRESENT |
| Trustee I, Jean Paul Roy: | <input checked="" type="radio"/> YES | <input type="radio"/> NO | <input type="radio"/> ABSTAIN | <input type="radio"/> NOT PRESENT |
| Trustee II, Roxee Johnson: | <input type="radio"/> YES | <input checked="" type="radio"/> NO | <input type="radio"/> ABSTAIN | <input type="radio"/> NOT PRESENT |
| Trustee III, Michael Weston: | <input checked="" type="radio"/> YES | <input type="radio"/> NO | <input type="radio"/> ABSTAIN | <input type="radio"/> NOT PRESENT |
| Trustee IV, Kenny Weston: | <input checked="" type="radio"/> YES | <input type="radio"/> NO | <input type="radio"/> ABSTAIN | <input type="radio"/> NOT PRESENT |
| President, Anthony Reider (<i>If Required</i>): | <input type="radio"/> YES | <input type="radio"/> NO | <input type="radio"/> ABSTAIN | <input type="radio"/> NOT PRESENT |



Gordon Jones, Jr., Tribal Secretary



Anthony Reider, Tribal President