

**UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

UNITED STATES OF AMERICA,)	
)	No. 05-1654
Plaintiff/Appellee,)	Consolidated with No. 05-1656
)	CIV 02-5071-RHB
- vs -)	
ALEXANDER "Alex" WHITE PLUME,)	APPELLANTS' OPENING BRIEF
PERCY WHITE PLUME, their agents,)	
servants, assign, attorneys, and)	
all others acting in concert)	
the named defendants, TIERRA)	
MADRE, LLC, a Delaware limited)	
liability company; and MADISON)	
HEMP AND FLAX COMPANY 1806, INC.,))	
a Kentucky corporation,)	
)	
Defendants/Appellants.)	

I. REQUEST FOR ORAL ARGUMENT.

The Defendants/Appellants Alex and Percy White Plume respectfully request they be permitted twenty minutes oral argument for this Appeal, since amongst the issues presented herein are the errors of the District Court in granting Summary Judgment to Plaintiff/Appellee, are the questions of the first impression for this Circuit regarding the questions of whether genuine issues of material fact exist as to whether “industrial hemp” is “marijuana,” has a “high potential for abuse” as a drug, and a “controlled substance under Schedule I of the Controlled Substances Act, 21 U.S.C. 801 *et seq.*, whether the Agricultural Provisions of the Ft. Laramie Treaty of 1868 guarantee Lakota heads of households the right to grow non-drug crops such as industrial hemp without a DEA permit, and whether the Court erred in concluding the United States was entitled to a permanent injunction as a matter of law.

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III. SUMMARY OF ARGUMENT

The District Court erred in finding there were no genuine issues of material fact as to whether “industrial hemp” was “marijuana” and had a “high potential for abuse” as required for Schedule 1 “controlled substances” under the Controlled Substances Act. The Court erred in concluding “industrial hemp” was subject to the regulation and prohibitions of the CSA and that injunctive relief was necessary to prevent a violation of the Act. The Court further erred in finding no genuine issues of material fact existed that “industrial hemp” could not have been contemplated by the signers of the 1851 and 1868 Treaties as amongst the crops considered appropriate for cultivation under their agricultural provisions, concluding that the Defendants had no sovereign rights and rights under the Treaties to farm the non-drug crop “industrial hemp.” The District Court therefore erred in concluding the United States was entitled to Summary Judgment as a matter of law.

IV. STANDARD OF REVIEW

A. The Court of Appeals will conduct a de novo review of the District Court’s granting of Summary Judgment. Strate v. Midwest Bankcenter, Inc., 398 F.3d 1011 (8th Cir. 2005);

B. Penary review will be conducted of a District Court’s interpretation and application of a federal statute. Burlington Northern Railroad Co. v. Bair, 957 F.2d 599 (8th Cir. 1992).

V. PRELIMINARY STATEMENT

This is an appeal from the Final Order Granting Plaintiff/Appellee’s Summary Judgment Motion by the Hon. Richard Battey, Senior United States District Court Judge, for the District of South Dakota, Western Division. The Plaintiff/Appellee originally brought an action for injunctive relief pursuant to 21

U.S.C. 801 et seq., in the District Court for alleged violations of the Criminal Justice Act, 21 U.S.C. 801 et seq..

A timely Notice of Appeal, was filed with the Clerk's Office on February 25, 2005 [Index to Clerk's Record, No. 106], appealing from the Judgment and Amended Judgment, pursuant to Rule 3, Federal Rules of Appellate Procedure (FRAP). Due to the timeliness of the service and filing of the Notice of Appeal, this Appeal is brought as a matter of the Defendant's right, pursuant to Rule 4(a), FRAP, and 28 U.S.C. 1291, which provides for jurisdiction over a final order from a U.S. District Court.

VI. STATEMENT OF ISSUES

The Appellant raises the following issues on Appeal:

1. Whether the District Court erred in finding no genuine issues of material fact existed as to whether "industrial hemp" was "marijuana" and a plant with a "high potential for abuse" under the Controlled Substances Act. Hemp Industries v. DEA, 357 F.3d 1012 (9th Cir. 2004).
2. Whether the District Court erred in concluding that "industrial hemp" was a "controlled substance" under the Controlled Substances Act. Hemp Industries v. DEA, 357 F.3d 1012 (9th Cir. 2004).
3. Whether the District Court erred in finding no genuine issues of material fact existed as to whether "industrial hemp" was a non-drug crop contemplated and encouraged amongst Indian Tribes around the time of the 1851 and 1868 Treaties.
4. Whether the District Court erred in finding no genuine issues of material fact existed as to whether Defendants would suffer great harm if a permanent injunction was granted in comparison to the harm suffered by the United States if an injunction were not granted.
5. Whether the District Court erred in finding no genuine issues of material fact existed as to whether imposing a permanent injunction the Defendants against was in the public interest.
6. Whether the District Court erred in finding that the Defendants were violating the Controlled Substance Act and likely to continue to do so unless permanently enjoined.

7. Whether the District Court erred in concluding Defendants had not rights under the 1868 Ft. Laramie Treaty to farm the non-drug crop “industrial hemp” as a means of cultivating the soil for a living Ft. Laramie Treaty of 1868; Article VI, United States Constitution

8. Whether the District Court erred in concluding the United States would suffer irreparable harm unless the Defendants were enjoined from farming “industrial hemp”.

9. Whether the District Court erred in concluding the United States would likely prevail on the merits.

10. Whether the District Court erred in concluding the granting of an injunction was in the public interest as a matter of law.

11. Whether the District Court erred in concluding the United States was entitled to Summary Judgment as a matter of law.

VII. STATEMENT OF PROCEEDINGS.

On or about August 9, 2002, the Plaintiff/Appellee United States (hereinafter, “United States” or “Plaintiff”) brought suit for injunctive relief against the Defendants/Appellants (hereafter, “Appellants”, to prohibit what the cultivation of what Government described as the drug “marijuana” being grown on family land. Index to Clerk's Record (hereinafter, “Clerk’s Index,” No. 1. The Defendants Answered the Complaint, denying all substantive and legal contentions. Clerk’s Index, No. 19. An Order granting a Temporary Restraining Order was entered on August 19, 2002. Clerk’s Index, No. 15.

On October 22, 2002, the District Court granted the Motions by Tierra Madre and Madison Hemp, and denied Thomas Ballanco’s Motion to Intervene. Clerk’s Index, No. 31. Ballanco then filed a Notice of Appeal, which stayed all proceedings. Clerk’s Index, No. 53. The denial of Ballanco’s intervention was affirmed by this Court and the mandate entered. Clerk’s Index, No. 56. See, U.S. v. Alexander “Alex” White Plume, No. 03-1074.

The United States filed a Motion for Summary Judgment on October 16, 2002. Clerk’s Index, No. 27. Defendants’ filed a Memorandum in Opposition to Motion for Summary Judgement [Clerk’s Index, No. 50], an Opposition to Plaintiff’s Statement of Material Facts and Statement of Material Facts in Opposition to Summary Judgment with numerous attached affidavits and records [Clerk’s

Index, p. 51], a Supplement by Defendants in Opposition to Plaintiff's Motion for Summary Judgment[Clerk's Index, p. 54], and a Supplemental Memorandum in Opposition to Motion with numerous attached affidavits and records. Clerk's Index, No. 82. On December 28, 2004, the District Court granted the United States' Motion for Summary Judgment [Clerk's Index, No. 99], issued a Memorandum Order [Clerk's Index, No. 98], and an Amended Judgment permanently enjoining Defendants from cultivating "marijuana or hemp" [Clerk's Index, No. 101].

Defendants appeal the Judgment and Amended Judgment.

VII. STATEMENT OF FACTS.

On August 9, 2002, the Plaintiff/Appellee (hereinafter, "Plaintiff" or "government") filed an action pursuant to 21 U.S.C. 822 of the Controlled Substances Act (CSA), seeking temporary and permanent injunctions against the Defendants/Appellants-Alex and Percy White Plume (hereinafter, "Defendants"), to prohibit them and their families from cultivating "industrial hemp" as part of their on-going Tiospaye or Family farming/ranching operation on the Pine Ridge Indian Reservation.

One hundred thirty five (135) years ago, the United States entered into the Fort Laramie Treaty of 1868 with the sovereign nation of the Lakota. Articles 6 and 8 of the Treaty guaranteed every Lakota head of household who "intends in good faith" to farm "for a living" within "Indian country", the assistance of the United States in terms of providing seeds, tools, and instruction.¹ The role of agriculture in the agreements between the United States and the Lakota was mutually desired by the parties and previously expressed in Article 7 of the 1851 Treaty of Fort Laramie.² See, Defendants' Opposition to Plaintiff's Statement of Material Facts and Statement of Material Facts in Opposition to Summary Judgment Paragraph 5-8, p. 3-4 (hereinafter, "DSMF:5-8, (p. 3-4)"), Clerk's Index No. 51.

While squash and corn were grown by the Miniconjou Band of the Lakota, the very prolific and wild-growing hemp was traditionally gathered and used for its fibers and oil. Transcript of 8/13/02

¹ Article 6 of the Treaty expressly provides:

If any individual belongs to said tribes of Indians...being the head of a family shall desire to commence farming, he shall have the privilege to select...a tract of land within said reservation...so long as he or they ("family") may continue to cultivate it.

Article 8 of the Treaty states in pertinent part that the United States "shall" provide a head of the family which "intends in good faith to commence cultivating the soil for a living...seeds and agricultural implements" for "a period of a year or more."

² Transcript of 8/13/02 TRO Hearing Testimony of DEA Agent John C. Salley, p. 28, 31 (hereinafter, "Testimony of Salley, p. ___").

Testimony of DEA Agent J.C. Salley, p. 28, 31. As a fiber, hemp was pounded and used as a moisture barrier for food caches and for bedding, a rain cover, as a wrap for wounds, as a hanging on tepee poles and in basket weaving. It was an item of commerce between the Lakota and other nations. Hemp was also used as a medicine in the treatment of muscle spasms and cramps, and chest congestion. Declaration of Charlotte Black Elk,³ Declaration of Birgil Kills Straight,⁴ and Declaration of Elaine Quiver.⁵ See, DSMF:1-3 (p. 3).

There was also evidence of interest by the United States in promoting “industrial hemp” farming amongst the Indian nations around the time of the 1851 and 1868 Treaties. To dispel and dispute any suggestion that the United States never encouraged Indian tribes to cultivate industrial hemp, the Defendants submitted the correspondence and other documents of David Myerle obtained from the National Archives. As summarized by Dr. West in his Supplemental Affidavit, Myerle corresponded with Major Richard Cummins, the Indian Agent stationed at Fort Leavenworth and J. Hartley Crawford, who was in charge of the Office of Indian Affairs in Washington D.C. regarding hemp production by members of Indian nations. Myerle’s papers show the United States encouraged and provided hemp seeds to Myerle as part of the effort to promote industrial hemp production amongst tribes in the mid-west in the mid-1800s. The federally archived documents also contain two notes from James Buchanan, at the time a Representative and later Secretary of State under James Polk (who became President in 1857).⁶

For the Lakota, the diminished and parceled land base, together with changed land-use since the signing of the 1868 Treaty made gathering and locating wild fiber and uncultivated food plants difficult, if not impossible. Plants once gathered, such as hemp, turnips, potatoes, amongst others, must

³ Exhibit B to Defendants’ Opposition to Plaintiff’s Statement of Undisputed Facts and Statement of Material Facts In Opposition to Summary Judgment (hereinafter, “Opposition to Undisputed Facts”)[Clerk’s Index No. 51], attached hereto as Appendix 1- 2.

⁴ *Ibid*, Exhibit C, Opposition to Undisputed Facts, attached hereto as Appendix 3 - 6.

⁵ *Ibid*, Exhibit D, Opposition to Undisputed Facts, attached hereto as Appendix 7- 8.

⁶ National Archives records of David Myerle, attached to the Supplemental Affidavit of Dave West, Exhibit B-1 to Defendants’ Supplemental Memorandum in Opposition to Summary Judgment (hereinafter, “Supplemental Memorandum”), attached hereto as Appendix 15 - 87.

now be purchased unless grown by Lakota farmers. See, DSMF:4 (p. 3); Declaration of Kills Straight, Appendix 6.

In the late 1990s, when the United States rejected a written request by the Oglala Sioux Tribal (OST) Council for a meeting with the U.S. Attorney to discuss a proposed ordinance authorizing cultivation of industrial hemp, the OST Council passed Ordinance No. 98-27.⁷ The language of the Tribal law described it as an exercise of sovereignty and agricultural rights under the 1851 and 1868 Treaties. See, Declaration of Melvin Cummings;⁸ Declaration of (former) OST President John Steele;⁹ DSMF:13 (p. 13 (p. 5).

Ordinance No. 98-27 noted the distinctions between “marijuana” the drug and “industrial hemp” the non-drug fiber and oil producing plant, as did the 1961 Single Convention on Narcotic Drugs, the North American Free Trade Agreement (NAFTA), and the General Agreement on Tariffs and Trade (GATT). DSMF:14 (p. 6). By Ordinance No. 98-27, the OST Tribe authorized Tribal members to cultivate industrial hemp, recognizing it as a safe and potentially profitable agricultural commodity. *Ibid*; DSMF:15, p. 6. As the DEA noted, Tribal members have to otherwise import hemp from Canada for use in brick manufacturing for the construction of local homes and other uses.

7/24/00 Memorandum of Sandy Sauser, Slim Butte Land Use Association;¹⁰ **DSMF:16 (p. 6).** The Tribe reaffirmed its position by another Ordinance in 2001. DSMF:18 (p. 6). See, also, Resolution SPO-01-150 of the National Congress of American Indians.¹¹

Following the passage of Ordinance No. 98-27, the Defendant Alex White Plume sent the OST Land Director a notice of his intent to cultivate industrial hemp for a three year period, and requesting assistance. See, 8-9-99 Memorandum of Alex White Plume to Milo Yellow Hair;¹² DSMF:17 (p. 6).

Two Lakota brothers, the Defendants Alex and Percy White Plume, as heads of households, then engaged in the cultivation of industrial hemp on their allotted family land within the Pine Ridge

⁷ Exhibit 1, Plaintiff’s Statement of Material Facts, attached hereto as Appendix 88 - 90.

⁸ Exhibit E, Opposition to Undisputed Facts, attached hereto as Appendix 91-92.

⁹ Exhibit F, Opposition to Undisputed Facts, attached hereto as Appendix 93 - 94.

¹⁰ Exhibit 8 to the Affidavit of Salley, Exhibit 4 to Plaintiff’s Statement of Material Facts, attached hereto as Appendix 478.

¹¹ Exhibit B to Defendants’ Answer and Counterclaim, attached hereto as Appendix 95 - 96.

¹² Exhibit I to Opposition to Undisputed Facts, attached hereto as Appendix 97.

Indian Reservation, in order to make a good faith effort to farm under the 1868 Treaty. **See, TRO Affidavit of J.C.Salley (mislabeling the crop as "marijuana");**¹³ DSMF:19 (p. 6). The District Court noted that Defendants did not have a DEA registration for the cultivation of the “marijuana”. PSMF:5-6.¹⁴

The Defendants did not seek DEA registration pursuant to 21 U.S.C. 822 or 823.¹⁵ As described in Defendant Alex White Plume’s Declaration (Exhibit I), since he did not intend to manufacture or distribute drugs, the registration process was inapplicable to industrial hemp, containing too low or no THC to be used or considered as a drug. Furthermore, the OST Council's passage of Ordinance No. 98-27 authorizing Tribal members to farm industrial hemp under the Ft. Laramie Treaties of 1851 and 1868, also made a DEA permit to manufacture or distribute drugs unnecessary to grow a non-drug crop.¹⁶

Tribal Ordinance No. 98-27 further defined and required that the easily tested hemp grown by Tribal members must contain less than 1% of the psychoactive chemical compound THC. Ibid. THC is a psychoactive substance in Cannabis plants which in the substantially higher levels of THC present in “marijuana,” could be used as a drug. “Marijuana” typically consumed as a drug has a THC level of “5 percent on up”. Testimony of Salley, p. 26; DSMF:22 (p. 7). “Industrial hemp”, as grown by Defendants with virtually non-existent amounts of THC, remains incapable of producing a psychoactive

¹³ Exhibit 4 to Plaintiff’s Statement of Material Facts, attached hereto as Appendix 476-483.

¹⁴ Defendants’ expressly “disputed” the use of the term “marijuana” rather than “industrial hemp” or “fiber hemp” in the verbiage contained in each of the Plaintiff’s Statement of Material Facts (Nos. 5-7, 9-11, 13, 15, 18, 20-23, 25, 27) cited in by the District Court in its granting Summary Judgment to the United States. See, Defendants’ Opposition to Plaintiff’s Statement of Undisputed Facts, No. 1, p. 1.

As Defendants’ cited to the District Court, the government's own expert, Dr. Mahmoud ElSohly described the Defendants' crops to be "fiber-type hemp". Exhibit 18 to Plaintiff's Statement of Material Facts. Defendants’ expert, Dr. David West provided opinion evidence that it would be improper to the use of the term "marijuana" when describing Defendants' crops. Ibid., Affidavit of Dr. David West, Exhibit G to Defendants’ Opposition to Undisputed Facts, Appendix: 109.

¹⁵ 18 U.S.C. 823, entitled: "Registration requirements", reflects the intent of Congress to allow for the cultivation and distribution of even the Schedule I drug-marijuana under some circumstances. 21 U.S.C. 823 states that the Attorney General "shall" register and thereby authorize the manufacture and distribution of a such a "controlled substance", when it is "consistent...with United States **obligations** under **international treaties**...in effect on May 1, 1971". (Emphasis added).

¹⁶ Due to Treaty obligations of the United States towards Defendants, the public interest in promoting economic self-sufficiency, including farming non-drug fiber and oil producing crops, the easy monitoring of THC and CBD levels by local law enforcement, the cultivation of industrial hemp in compliance with regulatory Tribal laws, the Defendants not having drug convictions, with three years of experience in manufacture of hemp, and the fact that an industrial hemp plant is safe, Defendants meet all of the criteria to require the Attorney General ("shall") to register them to manufacture and distribute industrial hemp, if such registration was indeed required. See, 18 U.S.C. 823(a) and (b).

effect when ingested. Testimony of Salley, p. 24, 26; Affidavit of Dr. West, supra, Appendix 109; Affidavit of Dr. Paul Mahlberg;¹⁷ Laboratory Reports;¹⁸ DSMF:21 (p. 7). Agent Salley testified at the TRO Hearing that THC levels twenty-five (25) times higher than found in Defendants' plants would be necessary to ingest the plant as a drug to get "high." Testimony of Salley, p. 26, 27. From such undisputed evidence and independent research on hemp and marijuana, Defendants' experts concluded that "industrial hemp" could not be used or abused as a drug. Affidavit of Mahlberg, supra, Appendix 363.

In addition to THC, the cannabinoid CBD is also present in Cannabis plants. Ingested, CBD works as an anti-THC compound for Cannabis plants containing THC. At levels equal to or greater than the presence of THC, CBD serves to negate any psycho-active effect of THC, further rendering industrial hemp as incapable being used as a drug. DSMF:31; Affidavit of Mahlberg, supra, Appendix 362.

Dr. Paul Mahlberg, Ph.D., a recently retired professor of Biology at the University of Indiana, like Dr. West, is a federally licensed marijuana and hemp researcher who has extensively researched and written about the differences between hemp and marijuana plants. Karl Hillig was a doctoral candidate who conducted research with Dr. Mahlberg. Their research has led to the conclusion the two plants should be biologically separated into distinct species. Affidavit of Mahlberg, supra, p. 3, Appendix 362;¹⁹ Affidavit of Karl Hillig.²⁰ See, e.g., Hillig and Mahlberg, "A Chemotaxonomic Analysis of Cannabinoid Variation in Cannabis (Cannabaceae)", American Journal of Botany 91(6); 966-975 (2004).²¹

Amongst the biological differences found and published by researchers is the strong evidence of the existence of two chemotypes: a THC/CBD ration >1.0 characteristic of "drug-type" plants known as "marijuana", and a THC/CBD ration <1.0 characteristic of "fiber-type" plants referred to as "hemp".

¹⁷ Exhibit A-1 to Defendants' Supplemental Memorandum in Opposition to Motion for Summary Judgment (hereinafter, "Supplemental Memorandum"), attached hereto as Appendix 363.

¹⁸ Exhibits 20 and 21 to Plaintiff's Statement of Material Facts, attached hereto as Appendix 104, 105, 106;

¹⁹ Exhibit A-1, Supplemental Memorandum in Opposition, Appendix 362.

²⁰ Exhibit D-1, Supplemental Memorandum in Opposition, Appendix 370.

²¹ Article attached to Dr. Mahlberg's Affidavit (D-1), Appendix 377-379.

Defendants' industrial hemp meets this criteria. Doctoral researcher Karl Hillig determined in this recent study that most of the 157 accessions studied derived from two major gene pools that correspond to either *C. sativa* or *C. indica*. Dr. Mahlberg and Hillig observed that the THC/CBD chemotype of these plants can be readily determined through testing at a young age, remains stable beyond the seedling stage, and throughout the life of the plant. See, also, Affidavit of Hillig, supra, p. 4, Appendix 369.

Testing and monitoring of crops for THC/CBD ratios to ascertain the type of cannabis grown, is an easy task -- done in this case; done regularly in Canada. See, Affidavit of West, supra, p. 5, Appendix 111; Affidavit of Hillig, supra, p. 5, Appendix 370.

In testimony at the Hearing held on Plaintiff's Motion for a Temporary Restraining Order (TRO), the DEA's local marijuana eradication expert, DEA Agent Salley acknowledged an awareness of two different kinds of Cannabis plants. One was Cannabis sativa L. He could not remember the other. Testimony of Salley, p. 20. The DEA lab analysis of Defendants' industrial hemp crop did not attempt to distinguish plant type. Ibid, p. 21. Agent Salley further testified that industrial hemp is "used to make fabrics much like any fiber of cotton or things like that" [Ibid, p. 27] and that industrial hemp farming has been part of South Dakota farming history most recently in the 1940s, and that hemp, a very prolific weed [p. 31], currently growing wild in the State [Ibid, p. 28].

The DEA tested Defendants hemp crops for their Cannabinoid levels. Government analysis reports showed there was either no THC or a di minimis amount (all less than 1%) and significantly higher levels of CBD. The Defendants' 2000 hemp crop had a THC levels of **0.0%** and a CBD level of **1.75%**,²² and a THC level of **.19%** and a CBD level of **2.84%**.²³ DSMF:32 (p. 9), Appendix 106. The 2001 hemp crop had a THC level of **0.77%** THC with a CBD level of **4.49%**. Lab Report;²⁴ DSMF:33. Upon reviewing "analytical records" from a lab of the THC and CBD levels during 2000 and 2001, the government's expert, Dr. Mahmoud ElSohly easily determined the Defendants were growing "fiber-type hemp". Paragraph 11 of Declaration of Dr. ElSohly, Appendix 11; DSMF:34 (p.

²² See, 7/27/00 FD-302 of SA Charles Cresalia, Exhibit 5 to the Affidavit of Salley (Exhibit 4), Plaintiff's Statement of Material Facts, attached hereto as Appendix 382.

²³ See, lab reports, supra, Appendix 104, 105, 106.

²⁴ Ibid.

9). See, also, Affidavit of Dr. West, p. 3, Appendix 109. See, Defendant's Opposition to Plaintiff's Statement of Material Facts, Paragraph 1, p. 1. The Defendants' industrial hemp consistently could not be used as a drug and therefore had no "high potential for abuse" as a drug, a requirement for inclusion as a Schedule I "controlled substance." Affidavit of Dr. West, Appendix 109.

By farming "industrial hemp", the Defendants were attempting to meet the growing demand for the raw materials of fiber and oils²⁵ for American and international markets manufacturing, whole selling, and retailing hemp products. Such products include increasingly common high protein/nutritious health foods,²⁶ soaps, shampoos, clothing, paper,²⁷ rope-fiber, construction materials, amongst other uses.²⁸ Testimony of Salley, pp. 27, 33-34. Last year, a number of manufacturers needing hemp oil and fibers as raw materials for their products gave written Orders to Defendants for the 2004 growing season alone. Fulfillment of these orders would have nearly quadrupled the Tiospaye's gross annual income. This would be the difference between bare subsistence and a reasonable combined family income. Ultimately the manufacturers had to go to importers from Canada, China, and France for these raw materials and the Family operation remained subsistence for another year due to the injunction against Defendants. Affidavit of Alex White Plume,²⁹ p. 5, Appendix 391. As submitted by Defendants, there is evidence that currently they, as members of a sovereign Indian nation in the Dakotas, may have a competitive advantage in the production and cultivation of industrial hemp immediately. Affidavit of Dr. West, supra, citing Kranzel, et al., Industrial Hemp as an Alternative Crop in North Dakota: A White

²⁵ Testimony of Salley, p. 27; DSMF:26 (p. 8).

²⁶ The hemp seed used in food products is an 'achene,' or small nut, that is either hulled for direct consumption or crushed for oil. It 'contains 20 percent high-quality, digestible protein, which can be consumed by humans.' U.S. Dept. of Agriculture, Industrial Hemp in the United States: Status and Market Potential 15 (Jan. 2000). Hemp seed oil 'has a better profile of key nutrients, such as essential fatty acids and gamma-linolenic acid, than other oils...and a similar profile of other nutrients, such as sterols and tocopherols.' Thompson, Berger & Allen, Univ. of Kentucky Center for Business and Economic Research, Economic Impact of Industrial Hemp in Kentucky, 7-8 (July 1998). Hemp Industries v. DEA, 357 F.3d 1012, 1013 n.2 (9th Cir. 2004).

²⁷. As with the Declaration of Independence, the Constitution of the United States, and the Fort Laramie Treaty of 1868, the original of Appellants' Opening Brief is printed on paper made from industrial hemp.

²⁸ The Criminal Division of Plaintiff's Department of Justice does not prohibit the importation into the United States of cannabis fiber and some food products despite tests showing they contain "small amounts of naturally occurring tetrahydrocannabinol (THC)", but similarly "at levels too low to trigger a psychoactive effect and are not purchased, sold or marketed with the intent of having a psychoactive effect." March 23, 2000 Letter from John Roth, Chief, Narcotic and Dangerous Drug Section, DOJ. Exhibit H to Opposition to Undisputed Facts, attached hereto as Appendix 383.

²⁹ Exhibit C-1, Defendants' Supplemental Memorandum In Opposition, attached hereto as Appendix 391.

Paper Study of the Markets, Profitability, Processing, Agronomics and History, North Dakota State University, Institute for Natural Resources and Economic Development (July 1998), p. 11;³⁰ DSMF:28 (p. 28).

The “industrial hemp” and “marijuana” plants are also visibly distinguishable in part by appearance and in part by the way each is cultivated. Industrial hemp grown for fiber is grown close together in close rows so as to maximize stalk and not branch growth. Marijuana is grown to maximize branching. In addition to manner of cultivation, stalk and seed development rather than seedless flowers with extensive branching, industrial hemp is easily monitored by law enforcement authorities through random testing of THC and CBD levels. See, Affidavit of West, supra;³¹ DSMF:29 (p. 8).

Due to the inability to use and abuse industrial hemp for any psycho-active drugs effect and easy visual and chemical monitoring [Affidavit of West, Appendix 112-113; DSMF:30], there is no need for security measures other than one would take to protect any other non-drug crop. Ibid; DSMF: 35 (p. 9).

Nevertheless, the response of the United States was to obtain a search warrant and to seize and destroy the 2000 crop prior to maturity. PSMF:7-11. The Defendants similarly cultivated an industrial hemp crop in 2001. The crop was destroyed pursuant to a consent search and destruction. PSMF:20. A 2002 crop contracted to Madison Hemp was seized pursuant to a search warrant and destroyed. PSMF:4-25.

The United States then filed this action for a permanent injunction in the late Summer of 2002. The Complaint alleged the Defendants were growing the drug “marijuana” without a DEA registration and in violation of the Controlled Substances Act-- rather than the non-drug fiber and oil “industrial hemp” they were actually cultivating.

³⁰ Exhibit 4 to Affidavit of Dr. West, Opposition to Undisputed Facts, attached hereto as Appendix 290.

³¹ See, also, Photographs attached as Exhibits 15 through 17 to the Affidavit of Salley, Exhibit 4 of Plaintiff's Statement of Material Facts.

The District Court granted Summary Judgment to the United States. See, Judgment, Addendum 1. In granting the Government's Motion for Summary Judgment, the District Court concluded that Defendants' "industrial hemp" was "marijuana" and properly regulated by the CSA as a drug with a "high potential for abuse". As an alleged "controlled substance", it was a violation of the CSA for Defendants' to cultivate "industrial hemp" without a DEA registration. The Court also ruled that the 1868 Treaty was inapplicable since it could neither authorize cultivation of drugs in violation of federal law, nor was intended to include industrial hemp in its right to farm provisions. See, Memorandum Granting Plaintiff's Motion for Summary Judgment, Addendum 2. An Amended Judgment was issued which authorized a permanent injunction against the Defendants cultivation of "industrial hemp". Amended Judgment, Addendum 3.

Defendants appeal from the Judgment and Amended Judgment of the District Court. Defendants' contend the District Court improperly granted Summary Judgment despite the existence of genuine issues of material fact and erred in concluding the United States was entitled to a permanent injunction as a matter of law. The Judgment and Amended Judgment should be reversed and this matter remanded to the District Court for a trial on the merits.

VIII. ARGUMENT.

A. Appellate Review Standards.

“On summary judgment, the question before...this court on appeal, is whether the record, when viewed in the light most favorable to the non-moving party, shows that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.” Strate v. Midwest Bankcentre, Inc., 398 F.3d 1011 (8th Cir. 2005) [citing, FRCP 56(c); Celotex Corp. V. Catrett, 477 U.S. 317, 322-323 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249-250 (1986)].

Defendants respectfully contend the District Court ignored genuine issues of material facts, failed to accept Defendants’ substantive evidence or inferences in any favorable light, and erred in concluding the United States was entitled to Summary Judgment as a matter of law.

B. Summary Judgment Is Not Appropriate Where Genuine Issues Of Fact Remain And The Moving Party Is Not Entitled To Judgment As A Matter Of Law.

1. Genuine Issues Of Material Fact Existed In The Record.

The District Court granted the Plaintiff’s request for Summary Judgment pursuant to Rule 56, Federal Rules of Civil Procedure (FRCP), concluding no genuine issues of material fact existed for the legal issues in the action. The Defendants respectfully contend that the District Court was in error and Summary Judgment wrongfully granted.

Rule 56(c), FRCP, states that summary judgment is not appropriate unless the pleadings, stipulations, affidavits, and admissions in the case "show that there exists **no** genuine issue as to **any** material fact." (Emphasis added).

As the Eighth Circuit explained nearly two decades ago in Vette Co. v. Aetna Casualty and Surety Co., 612 F.2d 1076, 1077 (8th Cir. 1980), summary judgment is "an extreme and treacherous remedy" appropriate only in those cases where the movant has unquestionably established its right to judgment with such clarity as to leave no room for controversy, and the other party is not entitled to a favorable judgment under any discernible circumstances. Equal Employment Opportunity Commission

v. Liberty Loan Corp., 584 F.2d 853, 857 (8th Cir. 1978); Green v. Associated Milk Producers, 692 F.2d 1153, 1154 (8th Cir. 1982).

In determining a motion for summary judgment, the Court:

[I]s required to view the facts in the light most favorable to the party opposing the motion and to give that party the benefit of all reasonable inferences to be drawn from the underlying facts disclosed in the pleadings and affidavits filed in this case. Adickes v. S.H. Kress & Co., 398 U.S. 144, 158-159, 90 S.Ct.1598... (1970); Equal Employment Opportunity Comm. v. Liberty Loan Corp., *supra*.

Vette v. Aetna Casualty, *supra*, 612 F.2d at 1077. See, Holloway v. Lockhart, 813 F.2d 874, 878 (8th Cir. 1987).

Where a moving party met its burden, the non-moving party "must do more than show there is some **metaphysical** doubt as to the material facts" to survive Summary Judgment, i.e., "[w]here the record as a whole could not lead a rational trier of fact to find for the nonmoving party". (Emphasis added). Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586-587 (1986).

As the Supreme Court expressed in Anderson v. Liberty Lobby, Inc., *supra*: "As to **materiality**, the substantive law will identify which facts are material. Only **disputes over facts that might affect the outcome** of the suit under the governing law will properly **preclude** the entry of **summary judgment**." (Emphasis added). *Ibid*.

In the instant case, the critical factual issue of whether "industrial hemp" is reasonably considered the drug "marijuana" and whether the CSA is applicable turns in part on the statutory requirement of 21 U.S.C. 812(b)(1)(A), that for a substance to be considered a "controlled substance," there must be "high potential for abuse" as a drug. The District Court cited the statute in its Memorandum [p. 6], but failed to discuss the substantial evidence submitted by Defendants that "industrial hemp" in general and Defendants' DEA tested hemp crops sampled by the DEA in particular, could not have been used, and certainly not abused as a drug. Therefore, the CSA was inapplicable, no violation of law was occurring, and the TRO should have been lifted, rather than a permanent injunction issued.

a. The "Industrial Hemp" Plant Is A Different

Plant Than The “Marijuana” In The CSA.

The Defendants contend that the District Court ignored material and genuine issues of material facts in the record which disputed its factual findings and pertinent authority in reaching its incorrect ultimate conclusion that “industrial hemp” was the drug “marijuana” as defined by the Controlled Substances Act.

In its Memorandum Granting Plaintiff’s Summary Judgment, the District Court noted that 21 U.S.C. 802(2) makes it illegal to manufacture, distribute, or possess “a controlled substance”, amongst other things. 21 U.S.C. 802(6) defined a “controlled substance” as “a drug or other substance, or immediate precursor, included in schedule I, II, III, IV, or IV of part B” of the subchapter. It also referenced 21 U.S.C. 812(c)(C) setting forth the “initial schedules of controlled substances which includes in Schedule I, “(10) Marihuana.” The Court then cited 21 U.S.C. 802(16) which defines “marijuana” as:

[A]ll parts of the plant *Cannabis sativa* L. Whether growing or not; the seeds thereof; the resin extracted from any part of such plant; and every compound, manufacture, salt, derivative, mixture, or preparation of such plant, its seeds or resin.

The Subsection continued:

Such term does not include the mature stalks of such plant, fiber produced from such stalks, oil or cake made from the seeds of such plant, any other compound, manufacture...of such mature stalks (except the resin extracted therefrom), fiber, oil or cake, or the sterilized seed of such plant which is incapable of germination.

Thus, Congress outlawed the pre-mature growing or harvesting of the “hallucinogenic” or drug “marijuana”, while specifically exempting from regulation under the CSA, the raw materials of even the drug version of the fully mature *Cannabis* plant, including stalks and oils from its seeds.

The Defendants were simply trying to farm the non-drug version of the *Cannabis* plant to produce and market the same exempt raw materials to manufacturers.

As Dr. West concluded from his decades of research, there are readily identifiable and observable differences in physical appearance, biochemistry, and manner of cultivation of industrial

hemp-cannabis grown for fiber and seed-oil, as opposed to marijuana-cannabis grown for use as a drug. Affidavit of West, supra, p. 15, Appendix 121. Indeed, the government's own expert, Dr. Mahmoud ElSohly recognized and described the Defendants' crops to be a "fiber-type hemp". Declaration of ElSohly, Appendix 11. Dr. David West is of the opinion, based upon his research, that the use of the term "marijuana" would be improper to describe the Defendants' crops. Affidavit of West, supra, p. 3, Appendix 109.

Recognizing the differences between "industrial hemp" and "marijuana", the Ninth Circuit stated in Hemp Industries Assoc. v. DEA, supra, that "non-psychoactive hemp is explicitly excluded from the definition of marijuana" in the CSA Ibid, 357 F.3d at 1017.

At the very least, genuine issues of material facts exists as to whether "industrial hemp" is the drug "marijuana" and a "controlled substance" under the CSA.

b. Defendants' "Industrial Hemp" Crop Did Not Have A "High Potential For Abuse" As A Drug, As Required For The Schedule I Substances Under The CSA.

21 U.S.C. 812(b), requires that "a drug or other substance may not be placed in any schedule unless the findings required for such schedule are made with respect to such drug or other substance." Specifically, to be a Schedule I "controlled substance" such as "marijuana", "industrial hemp" must be shown to have "**a high potential for abuse**" as a drug. 21 U.S.C. 812(b)(1)(A). The Government's marijuana expert (at the TRO Hearing) acknowledged this was a requisite for application of the CSA. Testimony of Salley, p. 24.

The District Court, rather than considering the substantial scientific evidence submitted by Defendants that not only was "industrial hemp" not "marijuana", but it could not be abused as a drug, instead cited the determination by Congress in that "marijuana" was a threat the health and welfare of the United States. 21 U.S.C. 801(2). Memorandum Opinion, p. 6.

As the Supreme Court held in Anderson v. Liberty Lobby, supra: "summary judgment will not lie if the dispute about a material fact is 'genuine,' that is, if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Ibid, 477 U.S. at 248. And, "the court must give the

benefit of all favorable factual inferences to the party opposing summary judgment.” Lambert Plumbing, Inc. v. Western Security Bank, 934 F.2d 976 (8th Cir. 1991).

The Liberty Lobby Court further held that under Rule 56, “the judge’s function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial.” Ibid, 477 U.S. at 249. And it is the legal issues which frame the materiality of facts necessary for their determination. Where, as here, there is material evidence presented in conflict with the District Court’s factual findings used to otherwise justify summary judgment, then a genuine issue of material facts exists, making summary judgment improper. Ignoring the substantial evidence in the record of a “genuine issue for trial” that the “industrial hemp” being grown by Defendants was not the CSA regulated psycho-tropic drug “marijuana,” with arguably a “high potential for abuse” as a drug,, was clear error by the District Court.

In Hemp Industries Association v. DEA, supra, members of the industrial hemp manufacturing industry challenged DEA regulations restricting cosmetics, foods, and other products made in part from industrial hemp containing small amounts of THC. The DEA claimed that the presence of even a minute percentage of THC in these products placed them under the terms of the CSA and required they be banned as a drug. In ruling for the plaintiffs, the Court of Appeals permanently enjoined the DEA from enacting Rules and Regulations "with respect to non-psychoactive hemp or products containing it." Ibid, 357 F.3d at 1019.

The Hemp Industries Court first observed that the Merriam-Webster Dictionary definition of a "psychoactive" substance was "'one affecting the mind or behavior,'" and then noted that the appellants' products were made from a different type of plant, a "**non-psychoactive hemp**" which "derived from **industrial hemp** plants grown in Canada and in Europe". (Emphasis added). Ibid, 357 F.3d at 1018, n.2.

At the TRO Hearing, Agent Salley, described the federal monitoring of the Defendants' hemp crops. The Agent acknowledged an awareness of information that the Defendants were not growing hemp for drugs, but for fiber and oils. Testimony of Salley, supra, p. 32-34. Federal agents took samples and conducted testing to ascertain whether or not the Defendants were growing the drug

marijuana. However, analysis of the industrial hemp being grown revealed evidence which disputed any suggestion Defendants' hemp could be used as a drug. DEA analysis showed the hemp contained little or no THC, that a "lot more" THC ("25 times") the levels found with Defendants' plants were necessary to get the drug "high" commonly associated with "marijuana".

The DEA Agent's conclusions were supported by scientific studies, some on-going for decades. As the Affidavit of Dr. Mahlberg, the two Affidavits of Dr. West. and the Affidavit of Hillig attested, the high CBD and extremely low THC content of industrial hemp (such a Defendants), cannot be used as a drug. There was substantial evidence disputing the Court's reliance and determination on the Congressional determination that "marijuana", and therefore industrial hemp, had a "high potential for abuse" as a drug.

Further substantial evidence which disputed the District Court's finding the Defendants' industrial hemp had a "high potential for abuse" is the low level of THC and the significantly higher CBD levels commonly found in Defendants' industrial hemp. Dr. West and Dr. Mahlberg's research shows that the cannabinoid CBD increases in concentration as the THC level diminishes in hemp and marijuana plants. CBD levels are extremely low in high THC marijuana plants, and very high, in no or low THC level hemp. In addition, CBD bio-chemically counteracts any di minimis psychoactive effect of the minute amounts of THC in hemp. At the very low levels of THC found in industrial hemp, such as Defendants, the significantly higher level of CBD would make it essentially unusable to be abused as a drug.

If "industrial hemp" cannot itself be used as a drug, it cannot have a "high potential for abuse" as required for it to be the Schedule I controlled substance "marijuana". 21 U.S.C. 812(b)(1).

The District Court erred in concluded no genuine issue of material fact existed as to whether "industrial hemp" was a "controlled substance" under the CSA. Therefore the Court's granting of Summary Judgment should be reversed and the matter set for trial.

2. The District Court Erred In Concluding Plaintiff Was Entitled To A Permanent Injunction As A Matter Of Law.

As the District Court noted, 21 U.S.C. 822(a) provides authority for a District Court to issue an injunction against the manufacture and distribution of a “controlled substance”. Memorandum, p. 5. Thus, the critical nature of genuine issues of material facts existing in this case as to whether “industrial hemp” was a “controlled substance”, the drug marijuana under the definitions and requirements of the CSA, as discussed above.

Hemp farming has been an important facet of American agriculture since the early 1600s. See, Affidavit of West , Appendix 11. In Congressional Hearings before enactment of a 1937 Act, the government clearly distinguished in its taxation scheme between those who manufactured the "drug" "marihuana" and fiber-hemp farmers. Hearings on H.R. 6906 Before a Senate Subcommittee of the Committee on Finance, 75th Cong. 1st Sess. (1937), cited in Smith v. United States, 269 F.2d 217, 219 (D.C. Cir. 1959).

Harry J. Anslinger, Commissioner of the Federal Bureau of Narcotics (the predecessor to the DEA), assured Congress that industrial hemp farmers "are not only amply protected under this act (1937 tax statute), but **they can go ahead and raise hemp just as they have always done before .**" (Emphasis added). Taxation of Marijuana, Hearings Before House Committee on Ways and Means on H.R. 6385, 75th Cong. 1st Sess. 8 (1937). DSMF:37. Under the 1937 Act, fiber-hemp farmers were taxed at a different rate than persons involved in the manufacture of marijuana for drug use. See, Affidavit of Dr. West, Appendix 11; DSMF:38. Congress and regulators in 1937 had no difficulties distinguishing between and treating the cultivation of the two plants differently.

a. **Standard for Injunctive Relief.**

As long recognized by in our Circuit, a District Court sitting in equity, must apply the four factors described in Dataphase Systems, Inc. v. C.L. Systems, Inc., 640 F.2d 109 (8th Cir. 1981), in determining whether to grant or deny a party injunctive relief:

- (1) the threat of irreparable harm to the movant;
- (2) the state of the balance between this harm and the injury that granting the injunction will inflict on other parties litigant;
- (3) the probability that movant will succeed on the merits; and
- (4) the public interest.

Ibid, 640 F.2d at 112.

i. **The Threat Of Irreparable Harm To The Movant.**

In determining the threat of irreparable harm to the movant-United States, the District Court noted the “well-established rule that where Congress has expressly provides for injunctive relief to prevent violations of a statute, a plaintiff does not need to demonstrate irreparable harm to secure an injunction...**The proper role of the courts is simply to determine whether a violation of the statute has or is about to occur’.**” (Emphasis added). See, Memorandum Granting Permanent Injunction, p. 6 (Addendum 2)[quoting, Burlington Northern Railroad Co. v. Bair, 957 F.2d 599 (8th Cir. 1992)]. In Burlington Northern, the Court presumed such irreparable harm and granted an injunction to enforce a federal statute where the evidence clearly showed, unlike the instant case, that the defendant was violating "the very purpose" of the statute. However, where compliance with the statute sought to be enforced by injunction is factually in issue, plaintiff is not entitled to a waiver of its responsibility of proof regarding the issue of irreparable harm. Naval Orange Admin. Comm. v. Exeter Orange Co., 722 F.2d 449, 453 (9th Cir. 1983).

In the instant case, the District Court's analysis of whether a statute was violated was limited to reference to selected portions of the CSA dealing with the prohibition of cultivation of the drug "marijuana", the absence of a DEA registration by Defendants to grow a "controlled substance". Memorandum Opinion, Addendum 2. The Court noted that it was required to apply the plain meaning of an unambiguous statute, and found that it "cannot say that the statute is ambiguous." Memorandum Opinion, p. 7 (Addendum: 2). It then cited the statutory definition of "marijuana" in 21 U.S.C. 802(16) as including Cannabis sativa L, and the evidence in the record that Cannabis sativa L was the kind of plant being grown by Defendants. Ibid. However, the Court ignored the evidence that the drug "marijuana" sought to be regulated was really Cannabis indicus, and that Congress had erred in considering the two to be the same.

And while unambiguous statutes are to be applied by the District Court, the Court ignored the requirement of 21 U.S.C. 12(b)(1)(A) and the substantial evidence in the record, as also discussed above, that the "industrial hemp" being grown by Defendants had no realistic potential, and therefore not "a high potential for abuse" as a drug.

The District Court further concluded that "marijuana" cultivation without a DEA registration violated federal criminal law which was applicable to Indian reservations, citing Appellate Decisions affirming federal jurisdiction to prosecute drug (including "marijuana") offenses there. United States v. Blue, 722 F.2d 383, 385-386 (8th Cir. 1983) and United States v. Brisk, 171 F.3d 514, 520 (7th Cir. 1999). That is not the issue here. This is not about drugs but a fiber and oil raw materials producing crop. The District Court misconstrued the Defendants' position as contending that general federal criminal laws did not apply on Indian reservations, and that they were asserting a Treaty right "to plant whatever crops they wished." Memorandum Opinion, p. 8. While the Defendants might well argue that the sovereignty of the Lakota Nation and Article 1 of the Ft. Laramie Treaty of 1868 would bar any United States subject-matter jurisdiction over events within "Indian country", Defendants' opposition to Summary Judgment was premised upon their substantial evidentiary basis showing they were cultivating "industrial hemp", not the drug "marijuana." There was no violation of the CSA occurring which needed to be enjoined. Defendants were simply exercising their sovereign and Treaty agricultural rights

under Article 6 to farm a non-drug crop, i.e., “industrial hemp.” Ignoring the express mention of Treaties as part of the Supreme Law of the Land under Article VI of the Constitution, the District Court [Memorandum, p. 9] observed that in the Second Circuit case of United States v. Fogarty, 692 F.2d 542 (2nd Cir. 1982), the Court of Appeals stated that “[b]ecause there is no fundamental constitutional right to import sell, or possess marijuana [or hemp]³² the legislative classification...must be upheld **unless it bears no rational relationship to a legitimate government purpose.**” (Emphasis added). *Ibid*, 692 F.2d at 547. In Fogarty, the Eighth Circuit found that due the potential for abuse, it was not irrational to classify **marijuana** as a Schedule I “controlled substance”. *Ibid*, 692 F.2d at 547.³³

The District Court found that “hemp” and “marijuana” are “different varieties” of the “same plant”, being *Cannabis sativa L.*, and “differentiate only chemically”, it was not irrational for “hemp to be included with marijuana as a Schedule I drug.” Memorandum Opinion, p. 10. However, it was the chemical differentiation which permitted a definitive test for determination of whether a plant was “hemp” or “marijuana”, the difference easily distinguished the plants and which made “industrial hemp” grown by Defendants not a drug-producing plant and gave “marijuana” its psycho-active qualities. Due to the undisputed non-existent or di minimis THC levels and high CBD levels, the facts in this case show that with respect to Defendants' hemp crop, there is simply no "evil at hand for correction" accomplished by treating a fiber, non-drug crop as a drug, and imposing restrictions under the CSA as though it was. *Ibid*, 692 F.2d at 547 [quoting, Williams v. Lee Optical, Inc., 348 U.S. 483, 488, 75 S.Ct. 461, 464 (1954)].

And the District Court further ignored the proffered expert testimony through Affidavits from scientists who have researched the differences between “industrial hemp” and “marijuana” who are of the opinion that “industrial hemp” is a different plant than the “marijuana” plant, that while “industrial

³². Added by Court to original quotation by 2nd Circuit Panel.

³³ This is a case of first impression for this Court and within the Eighth Circuit. While our Court of Appeals in United States v. Fogarty, 692 F.2d 542 (8th Cir. 1982), explored and determined the constitutionality of the listing of "marijuana" as a Schedule I "drug", it has never conducted a separate analysis for non-drug, fiber-type hemp. In Fogarty, the defendant failed to meet his heavy burden of proving the irrationality of the Schedule I classification due to the "ongoing vigorous dispute as the physical and psychological effects of marijuana, its potential for abuse, and whether it has any medical value." *Ibid*, 692 F.2d at 548.

hemp” is properly classified as *Cannabis sativa* L, that the drug plant “marijuana” is really *Cannabis indicus*, that due to cross-pollination with THC levels going to the lowest denominator, drug marijuana would not be reasonably grown in a hemp field, and that a hemp crop can be readily and easily tested to ensure too-low-to-be-used as a drug THC and comparatively high CBD levels, as in done in Canada and France.

While a case of first impression for this Court, the Ninth Circuit recently explored whether food products made from “industrial hemp” and containing trace amounts of THC were regulated as a “controlled substance” under the CSA. See, Hemp Industries Association v. DEA, *supra*. Noting that in its earlier Decision, the Court of Appeals in Hemp Industries Association v. DEA, 333 F.3d 1082, 1089 (9th Cir. 2001) concluded “**that THC naturally-occurring within non-psychoactive hemp products does not fall under DEA regulation.**” (Emphasis added). *Ibid*, 357 F.3d at 1014. It then held last year that “**Congress did not regulate non-psychoactive hemp in Schedule I.**” *Ibid*, 357 F.3d at 1015. See, *Ibid*, 357 F.3d at 1018 (“non-psychoactive hemp is not included in Schedule I”).

The Defendants respectfully submits that there is no rational relationship to a legitimate government purpose by enjoining cultivation of the Defendants’ “industrial hemp” crop, easily tested for THC content and shown to be a non-drug crop, whose mature raw products are regularly imported and legally possessed in this country as manufacturing products, by simply and erroneously claiming it is the drug “marijuana”, a Schedule I “controlled substance” under the CSA with the requisite “high potential for abuse”, a conclusion only made possible by ignoring the substantial evidence and case law in the record to the contrary.

(1) The District Court Erred In Concluding Defendants Had No Right To Cultivate Industrial Hemp Under the 1868 Treaty.

Articles 6 and 8 of the Ft. Laramie Treaty of 1868 contain general agricultural rights guaranteed to the Lakota by the United States and were not limited to crops being cultivated by the Lakota at the time of the signing of the Treaty. See, U.S. Constitution, Art. VI (Treaties Supreme Law of the Land).

The cultivation of industrial hemp (and not the drug "marijuana") by the White Plume Family on Lakota land, being an effort to "cultivate the soil for a living", is a protected activity within "Indian Country" by agreement between the United States and the sovereign Lakota Nation under the Fort Laramie Treaty of 1868.

The agricultural provisions continue in effect to this day as Article 1 of the 1868 Treaty established its terms as: "From this day forward..." Plaintiff's Answer to Defendants' Counterclaim, Paragraph 6; DSMF:10 (p. 5). As the Eighth Circuit noted in United States v. White, 508 F.2d 453 (8th Cir. 1974): "[A]reas traditionally left to tribal self government, those most often the subject of treaties, have enjoyed an exception from the general rule that congressional enactments, in terms of applying to all persons, includes Indians and their property interests." Ibid, 508 F.2d at 455 [citing, Federal Power Comm. v. Tuscarora Indian Nation, 362 U.S. 99, 123, 80 S.Ct. 543, 557 (1960)].

In United States v. Blue, supra, the defendant sought reversal of his convictions for distribution of the drug marijuana, claiming the District Court lacked jurisdiction to try him for the drug crime committed on the Turtle Mountain Reservation and outlawed in 21 U.S.C. 841(a)(1), since it was not one of the offenses enumerated in the Major Crimes Act, 18 U.S.C. 1153. In rejecting this contention, the Eighth Circuit noted that a federal prosecution for a drug crime "did not represent any further infringement upon tribal sovereignty or self-government." Ibid, 722 F.2d at 385. The Court of Appeals noted however, that "**if a particular Indian right or policy is infringed by a general federal criminal law, that law will be held not to apply to Indians on reservations unless specifically so provided.**" (Emphasis added). Ibid.

The Indian sovereignty doctrine is relevant, then,...because it provides a backdrop against which the applicable treaties and federal statutes must be read. It must always be remembered that the various Indian tribes were once independent and sovereign nations, and that their claim to sovereignty long predates that of our Government...But is nonetheless still true, as it was in the last century, that "...They were, and always

have been, regarded as having a semi-independent position when they preserved their tribal relations...as a separate people, with the power of regulating their internal and social relations, and thus far not brought under the laws of the Union'.

McClanahan v. Arizona State Tax Commission, 411 U.S. 164, 172-173, 93 S.Ct. 1257, 1262 (1973).

"While the power to abrogate [treaty] rights exists, `the intention to abrogate or modify a treaty is not to be lightly imputed to the Congress.'" United States v. White, *supra*, 508 F.2d at 456 [quoting Menominee Tribe of Indians v. United States, 391 U.S. 404, 412-413, 88 S.Ct. 1705, 1711 (1968)]. As the Eighth Circuit observed in Mille Lacs Band of Chippewa Indians v. State of Minnesota, 124 F.3d 904 (8th Cir. 1997), "Congress can abrogate treaty rights with the Indians only when its intention is expressed clearly and plainly." *Ibid*, 124 F.3d at 929. See, Cook v. United States, 288 U.S. 102, 120, 53 S.Ct. 305 (1933). Quoting United States v. Dion, 476 U.S. 734, 106 S.Ct. at 2216 (1986), the Mille Lacs Court noted: "[w]hat is essential is clear evidence that Congress actually considered the conflict between its intended action on the one hand and Indian treaty rights on the other, and chose to resolve that conflict by abrogating the treaty." *Ibid*, 124 F.3d at 929. There was no legislative history cited for the Court's determination which even suggests Congress considered and resolved the inclusion of fiber-type hemp in the CSA³⁴ and its impact on the agricultural Treaty rights of the Lakota.

The CSA made no express reference to usurping the Treaties rights of the Lakota or any other indigenous nation to farm non-drug fiber-type hemp. In the absence of such express language, especially for this plant which is not rationally a "controlled substance" included in the prohibitions of the drug "marijuana", the infringing CSA restrictions should not apply.

In granting Summary Judgment, including a permanent injunction against Defendants, the District Court observed that the Supreme Court in Minnesota v. Mille Lacs Band of Chippewa Indians, *supra*, mandated that "we interpret Indian treaties to give effect to the terms as the Indians themselves would have understood them" and that any ambiguous provisions should be construed in favor of the Indians, citing as authority, Hagen v. Utah, 510 U.S. 399, 423-424 n.1-3 (1994). Defendants agree.

³⁴ Far from being considered by Congress, the New Hampshire Hemp Council Court observed: "we can find no indication that Congress in 1970 gave any thought to how its new statutory scheme would affect such [industrial hemp] production." *Ibid*, 203 F.3d at 7.

However, the Defendants respectfully contend, the District Court failed to do so. Instead, it concluded that “it is unlikely that the Tribe thought that they could choose which crops would be planted”, including the drug “marijuana.” See, Memorandum Opinion, p. 9. The Court cites no evidence in the record as a basis for this finding.

The Defendants respectfully submit the District Court failed to cite any record indicating that Lakota farmers were unable to request certain specific seeds for cultivation. Indeed, the Defendants submitted evidence showing that the "hohwoju" Lakota or planters (known also as the Miniconjou), were already farmers, and therefore there was Lakota insistence on farming rights within the Treaty, and therefore evidence the Lakota previously had their own interest in and sources for agricultural seeds.

While the Lakota had an interest in securing agricultural rights within the Treaties, the United States wanted the agricultural provisions in the Treaty to make the Lakota into farmers instead of hunters and gatherers. One of the crops being encouraged around the time of the Treaty signing was industrial hemp.

As described above, in granting Summary Judgment to the United States, the District Court ignored the evidence in the record of the historic, hand-written notes of David Myerle, who documented his efforts to encourage the cultivation of industrial hemp for raw fiber material amongst mid-West tribes in the mid-1800s, with the approval and funding of the United States. It also ignored the Affidavits of experts in traditional Lakota culture as to the historic and traditional uses of hemp by the Lakota. To suggest that there was no substantive evidence supporting the Defendants’ contention that both the Lakota Treaty signers and the United States contemplated “industrial hemp”, along with corn, squash, and other plants or vegetables amongst the crops which would be encouraged, including seeds provided by the United States, was clear error, which should have barred Summary Judgment for the Plaintiff, if not an ultimate determination in favor of Defendants on the merits after trial.

Thus, it was error for the District Court to assume an absence of a historical basis in the record for this Court to conclude that when the United States signed the Ft. Laramie Treaty of 1868, specifically recognizing the rights of Lakotas to engage in farming, that industrial hemp was not one of the crops being contemplated. Indeed, the evidence in the record was clearly to the contrary.

**(2) The Balance Between This Harm And
The Injury That Granting The Injunction
Will Inflict On Other Parties Litigant.**

The District Court concluded in its Memorandum [p. 6] that since Congress determined 21 U.S.C. 801(2) determined that the manufacture, distribution, possession and improper use of “controlled substances” have a substantial and detrimental effect on the health and welfare of the American people, and in 21 U.S.C. 812(b)(1)(A), that “marijuana” was a “controlled substance” with “a high potential for abuse,” the ability of the Defendants to apply for a DEA registration in order to grow their “hemp crop” showed that the harm of “violating the statute outweighs the injury inflicted on defendants.” Memorandum Opinion, p. 6 (Addendum 2).

However, in granting Summary Judgment to the United States, the District Court ignored the substantial evidence in the record raising a genuine issue of material facts as to whether “industrial hemp” was a “controlled substance” since it could not have any, and certainly not a “substantial” or detrimental effect on America’s health and welfare. See, Hemp Industries Assoc. V. DEA, *supra*, 357 F.3d at 1014, 1015.

The District Court further ignored the substantial evidence in the record, as also discussed above, that the “industrial hemp” as, being grown by Defendants, had no realistic potential, and therefore not “a high potential for abuse” as a drug. Therefore, “industrial hemp” is not a drug or “controlled substance” regulated by the CSA and therefore Defendants cultivation, processing, and distribution of the fiber and oil raw-material producing plant would not be a violation of any statute. *Ibid.* Since “industrial hemp” is not a controlled substance under the CSA, no DEA registration by Defendants was/is necessary, an injunction would improperly issue to require one prior to hemp farming.

The economic harm to Defendants in the record due to the existence of a preliminary injunction in this case, cost their subsistence Family farming operation approximately \$170,000 gross income, which together with the infringement and violation of the Defendants’ sovereign, Treaty, and Tribal rights and authorization to grow non-drug crops such as “industrial hemp”, further shows any balancing of the evidence and law would be strongly in favor of the Defendants, not the United States.

The District Court erred in concluding that a balancing of interests would weigh heavily in favor of the United States, requiring reversal of the grant of Summary Judgment.

(3) The Probability That Movant Will Succeed On The Merits.

Without further discussion, the District Court in its Memorandum Opinion [p. 6] cited its earlier determination in granting the Preliminary (actually a “Temporary” Restraining Order) Injunction, “that the movant will succeed on the merits.” Essentially, the Court had early determined that “industrial hemp” was “marijuana” and therefore controlled by the CSA. Granting a restraining order on the merits, according to the District Court, was therefore appropriate since the United States sought an injunction to prevent a violation of the CSA.

Since TRO decision was made only after the testimony of a DEA agent’s testimony at the Hearing held at the start of this action and before Defendants’ submission of the substantial scientific and other evidence subsequently into the record which raised genuine issues of disputed fact as to whether “industrial hemp” was the Schedule I drug “marijuana” and a “controlled substance” under the CSA, the District Court clearly erred in ultimately granting Summary Judgment upon the same conclusion that the movant would succeed on the merits. The record shows not only these are highly disputed is of material fact, but that Defendants would likely thereupon prevail upon a fair determination of the evidence and application of the law.

In United States v. Nutri-Cology, 982 F.2d 394 (9th Cir. 1992), the Court of Appeals held that where the government makes "merely a colorable showing" that a defendant was factually and undisputedly "violating" a federal statute, the many presumptions which otherwise might avail themselves on the side of the United States for an injunction, do not exist. If the government cannot show irreparable harm, or prevail in a balancing of harms, or show an injunction would be in the public interest, it cannot succeed on the merits. Ibid, 982 F.2d at 398 [citing Naval Orange Admin. Comm. v. Exeter, supra].

(4) The Public Interest.

The District Court also concluded that the public interest weighs in favor of the granting of a permanent injunction since Congress has determined that “cannabis presents a threat to the public.” Memorandum Opinion, pp. 6-7.

While there may be a public interest in controlling the manufacture, distribution, and possession of psycho-active drugs, there is no public interest in an erroneous determination that the non-drug “industrial hemp” is the drug “marijuana” and a “controlled substance” which should therefore be regulated as a drug, even if it wrongfully deprives hemp farmers such as Defendants with a viable means of supporting their families by producing the manufacturing raw materials of hemp fiber and oil which otherwise must be imported from countries such as Canada, China, and France.

In United States v. Oakland Cannabis Buyer's Coop., 532 U.S. 483 (2001), the Supreme Court presumed an injunction was in the "public interest" involving preventing distribution of "marijuana" the "drug". Ibid, 532 U.S. at 498. The issue involved the drug, medical marijuana. The public policy in the 1937 tax act, similar in purpose to the CSA, was to condemn "traffic in marijuana...as part of...a unitary congressional purpose to outlaw non-medicinal sales of **narcotics**." (Emphasis added). Smith v. United States, supra, 269 F.2d at 220. Yet, the Defendants' were not cultivating narcotics or other drugs, but a non-drug hemp and fiber plant.

Here, the unrefuted evidence is that the United States is not seeking an injunction to prevent distribution of "marijuana" the "drug", but the easily distinguishable "industrial hemp" which cannot be reasonably considered a "drug" with a "high" or any "potential for abuse" under Schedule I.

There is no public interest or rational basis for the District Court's erroneous inclusion of “industrial hemp” as a Schedule I controlled substance under the CSA, especially where, as here, it results in the deprivation of Defendants' ability to exercise their Treaty rights, to cultivate Tribally authorized industrial hemp production as part of their ranch/farm operation.

**(a) The District Court Ignored the
Government's Trust Responsibilities.**

Granting Summary Judgment to permanently enjoin Defendants from farming hemp was also error as a matter of law since it violated "the distinctive obligation of trust incumbent upon the

Government in its dealings with these dependent and sometimes exploited people." Seminole Nation v. United States, 316 U.S. 286, 296 (1942). See, Minnesota v. Hitchcock, 185 U.S. 373, 396 (1902).

The Supreme Court has noted that the history of the United States' "failure" to honor the "sacred trust" it assumed by formal written agreement, "has been the principal cause of the present plight of the average Indian." United States v. Mitchell, 463 U.S. 206 (1983)(quoting, 78 Cong.Rec., at 11726).

In this case, honoring the Defendants' Treaty rights to farm non-drug crops such as industrial hemp would have had a fairly immediate and dramatic improvement in their Tiospaye's income and quality of life. It also would seem to similarly inhibit efforts by other Lakota farmers, weavers, construction material and clothing manufacturers, and others from seeking to improve their destitute economic situation in part through a hemp fiber and oil-based economy for a rapidly growing market national an international market. A permanent injunction could not but be a violation of the lawful trust responsibility long recognized and assumed by the United States, and therefore be contrary to the public interest. Dataphase Systems v. C.L. Systems, *supra*, 640 F.2d at 112.

The District Court's conclusion that a Permanent Injunction was in the public interest, was clear error, requiring a vacating of the Injunction, and a reversal of Summary Judgment..

IX. CONCLUSION.

For all the above argument and authority, the Summary Judgment granted the United States and the Amended Judgment imposing a Permanent Injunction against the Defendants should be reversed and vacated and this matter remanded to the District Court for a trial on the merits.
Dated this ___ day of May, 2005.

Respectfully submitted,

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And the White Plume Tiospaye

CERTIFICATE OF SERVICE

It is hereby certified that two true and correct copies of the Appellant's Opening Brief, Addendum, and Appendix were mailed, U.S. postage paid, to Mark Vargo, U.S. Attorneys Office, 515 9th Street, Rapid City, S.D. 57701 and Jamie Damon, P.O. Box 1115, 115 E. Sioux Ave., Pierre, S.D. 57501.

Dated this ____ day of May, 2005.

CERTIFICATE OF COMPLIANCE

It is hereby certified that the Defendant's principle brief is less than 14 thousand words and it contains less than 1,300 lines of text.

Dated this ____ day of May, 2005.

CERTIFICATE AS TO COMPUTER DISK

The undersigned hereby certifies that he provided the Clerk of this Court with a computer disk containing a copy of the Appellant's Opening Brief and that the disk was free of any virus which our system is capable of detecting.

Dated this ____ day of May, 2005.
