UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH DAKOTA

WESTERN DIVISION

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| UNITED STATES OF AMERICA,<br><br>Plaintiff,<br><br>vs.<br><br>ALEXANDER "ALEX" WHITE PLUME, PERCY WHITE PLUME, their agents, servants, assigns, attorneys, and all others acting in concert with the named Defendants, TIERRA MADRE, LLC, a Delaware limited liability company; and MADISON HEMP & FLAX COMPANY 1806, INC., a Kentucky corporation[1]<br><br>Defendants. | Civil Action No. 5:02-cv-05071<br><br>United States of America's Response to Motion for Rule 60(b) Relief |

Comes now the United States of America, by and through its undersigned attorneys, Randolph J. Seiler, Acting United States Attorney, and Diana Ryan, Assistant United States Attorney, and objects to Defendant Alexander "Alex" White Plume's ("White Plume") motion to vacate the permanent injunction entered against him almost eleven years ago. DE 101, dated December 30, 2004.

[1] The Defendant omitted other named Defendants in this case who are also subject to the permanent injunction that White Plume seeks to vacate.

WHITE PLUME IS NOT ENTITLED TO RELIEF FROM THE PERMANENT INJUNCTION

Rule 60(b)(5) provides in relevant part that a court may relieve a party from a final judgment or order when "applying [the judgment] prospectively is no longer equitable." Fed. R. Civ. P. 60(b)(5). The Supreme Court has recognized the strong interest in final judgments, noting that "there must be an end to litigation someday," *Ackermann v. United States*, 340 U.S. 193, 198 (1950). Accordingly, Rule 60 requires a high threshold showing by those who seek to overturn a court's prior ruling long after the normal time allowed for appeals has passed: "'Relief under Rule 60(b) is an extraordinary remedy and will be justified only under exceptional circumstances." *Prudential Ins. Co. of Am. v. Nat'l Park Med. Ctr., Inc.*, 413 F.3d 897, 903 (8th Cir. 2005) (citations omitted). Allowing parties to re-open and reverse a court's prior ruling absent this high threshold "would create havoc in the Court's administration of its docket." *Timothy A. Garverick & Assocs. v. Heidtman Steel Prods., Inc.*, 807 F. Supp. 430, 434 (E.D. Mich. 1992).

Where a party moves for relief under Rule 60(b)(5), that party "bears the burden of establishing that changed circumstances warrant relief." *Horne v. Flores*, 557 U.S. 433, 447 (2009). However, in evaluating any allegations of changed circumstances, courts must continue to take into account federal law that remains in effect; they "cannot, in their discretion, reject the balance [of equities] that Congress has struck in a statute," such as the Controlled Substances Act ("CSA"). *United States v. Oakland Cannabis Buyers' Co-op.*,

532 U.S. 483, 497 (2001). White Plume has not met his burden of proving exceptional circumstances exist that justify the dissolution of the permanent injunction. Rather, White Plume essentially seeks license, through this motion, to violate the CSA.

Prior to the issuance of the permanent injunction, White Plume and other defendants and interveners repeatedly violated or conspired to violate the CSA by planting industrial hemp crops in 2000, 2001, and 2002 without registration by the Drug Enforcement Administration ("DEA"). Federal law enforcement officers destroyed the illegal hemp crops, and that caused conflict between them and White Plume's family.

In lieu of prosecuting White Plume, a civil action was brought to allow the Court to resolve whether industrial hemp was marijuana as defined under the CSA, and whether tribal sovereignty and treaty rights allowed the defendants to grow industrial hemp on the Pine Ridge Indian Reservation without complying with the CSA. Ultimately, the Court issued a permanent injunction against White Plume and the other named defendants. *See* Clerk's docket entries ("DE") 98 and 101. The final amended order provides that White Plume and the other defendants "are permanently enjoined from cultivating *Cannabis sativa L.*, otherwise known as marijuana or hemp, without a valid Drug Enforcement Administration registration." *Id.* at 101.

The permanent injunction was affirmed on appeal. *United States v. White Plume*, 447 F.3d 1067 (8th Cir. 2006). The Court of Appeals specifically held

that industrial hemp is subject to the CSA, and that the Treaty of Fort Laramie of 1868 did not grant a treaty right allowing tribal members to grow industrial hemp. *Id.* at 1070, 1073-74.

Now White Plume asks this Court to overturn its considered ruling based upon an alleged "changing Cannabis landscape," Def. Br. (DE 125) at 5. In particular, White Plume cites 7 U.S.C. § 5940, enacted as part of The Agricultural Act of 2014 ("Farm Bill," Pub. L. 113-79). The statute is titled "Legitimacy of Industrial Hemp Research." The law establishes narrow exceptions to the CSA that allow the growing of industrial hemp for research purposes. Specifically, an institution of higher education or a state department of agriculture may grow or cultivate industrial hemp[2] as part of an "agricultural pilot program" administered under state regulations. 7 U.S.C. § 5940. White Plume contends that this provision represents a significant change in law that requires this Court to lift the permanent injunction against him. In addition, White Plume cites Department of Justice prosecutorial guidance contained in memoranda issued to United States Attorney's Offices, which set forth federal enforcement priorities but make clear that marijuana remains a Schedule I controlled substance under the CSA.

[2] The term "industrial hemp" means the plant *Cannabis sativa L.* and any part of such plant, whether growing or not, with a delta-9 tetrahydrocannabinol concentration of not more than 0.3 percent on a dry weight basis. 7 U.S.C. § 5940(b)(2). For the purposes of this brief, the term industrial hemp or hemp is intended to have this meaning.

The injunction should be sustained because White Plume has failed to identify changed circumstances that warrant vacating the injunction under Rule 60(b)(5). There has been no change in federal law as it applies to White Plume's cultivation of hemp. Rule 60(b)(5) may not be used to challenge the legal conclusions on which a prior judgment or order rests. *Horne*, 557 U.S. at 447. Accordingly, the legal conclusion that the CSA prohibits the cultivation of hemp or industrial hemp on the Pine Ridge Indian Reservation is not properly challenged under Rule 60(b)(5). Moreover, White Plume does not fall within the narrow exceptions created in 7 U.S.C. § 5940. White Plume is not an institution of higher learning or a state department of agriculture, nor is he conducting research under an agricultural pilot project, as defined in the statute. Neither the 2014 Farm Bill nor any Department of Justice memorandum has removed industrial hemp from the CSA list. Accordingly, White Plume is still required to obtain a valid DEA registration prior to cultivating hemp notwithstanding the alleged changes that he cites.

THE CSA CONTINUES TO PROHIBIT WHITE PLUME FROM CULTIVATING HEMP, NOTWITHSTANDING THE 2014 FARM BILL

The CSA continues to include industrial hemp within its prohibitions against marijuana. Thus, it continues to be the case, as this Court previously recognized, that "the plain language of the [CSA] prohibits the cultivation of hemp without a valid DEA registration." *United States v. White Plume*, No. CIV 02-5071-RHB (D.S.D. Dec. 28, 2004) at 7.

Contrary to White Plume's argument, there has been no change in the "legal landscape," Def. Br. at 11, relevant to White Plume. The 2014 Farm Bill provides a narrow exception to the general prohibitions regarding hemp cultivation, which strictly limits the entities to which the exception applies and the circumstances under which these entities may grow or cultivate industrial hemp. As discussed below, White Plume does not qualify for any exception set forth in the Farm Bill. Accordingly, the Farm Bill does not provide any grounds for lifting the injunction.

## WHITE PLUME IS NOT AN ENTITY AUTHORIZED TO GROW HEMP UNDER THE 2014 FARM BILL

The new hemp research statute only allows "an institution of higher education" or "a State department of agriculture" to grow or cultivate industrial hemp, provided that certain conditions are satisfied. 7 U.S.C. § 5940(a). Because White Plume is neither of these, the Farm Bill is simply inapplicable to him. [3]

[3] White Plume suggests that farmers in States that allow the cultivation of industrial hemp have been able to "work with institutions of higher learning or State departments of agriculture" to grow and cultivate industrial hemp under the terms of § 5940. *See* Def. Br. at 14. However, he provides no evidence that this is the case. In any event, mere speculation that, absent the injunction, White Plume might be able to work with an entity growing or cultivating industrial hemp in accord with § 5940 is insufficient to warrant vacating the injunction. The fact remains that the CSA continues to prohibit individuals, including White Plume, that do not meet the criteria of § 5940 from growing or cultivating hemp without a DEA registration. That fact alone precludes this Court from lifting the injunction. *See Oakland Cannabis Buyers' Co-op.*, 532 U.S. at 497.

Moreover, one of the conditions that must be satisfied is that "the industrial hemp is grown or cultivated for purposes of research conducted under an agricultural pilot program or other agricultural or academic research." *Id.* § 5940(a)(1). An "agricultural pilot program," in turn, is limited to a program that "ensures that only institutions of higher education and State departments of agriculture are used to grow or cultivate industrial hemp." *Id.* § 5940(b)(1)(B)(i). Again, White Plume does not claim to be engaged in any such activity.

SOUTH DAKOTA PROHIBITS CULTIVATING HEMP

The hemp research statutory exception requires that to qualify as an industrial hemp "agricultural pilot program," the program must operate in a State whose laws permit the growth or cultivation of industrial hemp. There is no dispute that South Dakota does not authorize the growing or cultivating of industrial hemp under its current laws. *See State Industrial Hemp Statutes*, NAT'L CONFERENCE OF STATE LEGISLATURES, at http://www.ncsl.org/research/agriculture-and-rural-development/state-industrial-hemp-statutes.aspx. Until South Dakota permits the growing of industrial hemp, there can be no qualifying agricultural pilot program in South Dakota. 7 U.S.C. § 5940(b)(1)(A). For this additional reason, the new law pertaining to the cultivation of industrial hemp for research purposes does not represent a significant change in law that could warrant relief under Rule 60(b)(5) in this case.

TRIBAL AUTHORIZATION OF HEMP CULTIVATION IS NOT ADDRESSED IN THE 2014 FARM BILL

White Plume contends that the Oglala Sioux Tribe's legalization of industrial hemp cultivation should be treated the same as the State of Kentucky's legalization of industrial hemp for purposes of determining whether an institution of higher education or a State department of agriculture within the Tribe's jurisdiction is authorized to grow industrial hemp pursuant to § 5940. DE 125 at pp. 14-15, referencing "The Marshall Trilogy[4]," and *citing Cherokee Nation v. Georgia*, 30 U.S. 1, 16 (1831) and *Worcester v. Georgia*, 31 U.S. 515 (1832). However, the language of the statute is limited to States and omits any mention of Tribal governments. Because Tribal governments were not included in the language of the 2014 Farm Bill, even lifting the injunction would not allow White Plume to legally cultivate hemp.

Moreover, White Plume's argument on this point is not well taken. While the Supreme Court has recognized the unique position of Tribes, there is no general rule that the word "State" in federal law always applies to Tribes. The cases cited by White Plume describe the early relationship between Indian tribes and the United States. The *Cherokee Nation v. Georgia* case held that an Indian tribe or nation within the United States is not a foreign state in the sense of the U.S. Constitution and could not maintain an action against the state of Georgia to restrain and enjoin the state from enforcing Georgia state

[4] This is a reference to Chief Justice John Marshall who authored three important decisions involving Native American issues.

laws and executing service of process within the Cherokee Nation's territory. *Cherokee Nation*, 30 U.S. at 14. The court explained "the relationship of the tribes to the United States resembles that of a ward to its guardian" and declared Indian Tribes to be "domestic dependent nations." *Id.* at 13. The U.S. Supreme Court denied the injunction against Georgia on the ground that the court lacked jurisdiction to hear a controversy brought by an Indian tribe under Article III's limitation of judicial power to decide "controversies between a state or the citizens thereof, and foreign state, citizens, or subjects." *Id.* at 16. The court conclusively found that Indian tribes "are not a state of the union." *Id.*

DISTINCTION BETWEEN STATES AND INDIAN TRIBES

The recognition of the difference between foreign nations, states, and Indian tribes remains true today. White Plume's argument incorrectly assumes that "State" automatically or always encompasses "Indian country" when used in federal legislation. To the contrary, Congress generally sets forth a definition that specifically includes Tribes when it intends that a reference to States in federal legislation also refer to Tribes. There are many examples where Congressional legislation includes separate references to tribal entities or tribal governments. For example, tribal governments are included in USDA laws concerning competitive grants related to the maple syrup industries. *See* 7 U.S.C. § 1632c. *See also,* 28 U.S.C. § 1442(d)(6), the removal statute for civil actions against the United States or federal agencies or persons acting in their

official capacity ("[t]he term 'State court' includes the Superior Court of the District of Columbia, a court of a United States territory or insular possession, and a tribal court"). Another example is found at 42 U.S.C. § 629a (a)(4) which provides that the term "State" "includes an Indian tribe or tribal organization, . . . ." Moreover, Congress has often utilized the term "Indian country" as defined in 18 U.S.C. § 1151 for purposes of federal criminal law enforcement on Indian Reservations.[5] The term "Indian country" is not interchangeable with the term "State."

"As in any case of statutory construction, our analysis begins with 'the language of the statute. And where the statutory language provides a clear answer, it ends there as well." *Hughes Aircraft Co. v.* Jacobson, 525 U.S. 432, 438 (1999) (citations omitted). If Congress had intended to include tribal governments or Indian country in the limited exceptions allowed for the cultivation of industrial hemp under § 5940, it could have done so. It is clear from a plain reading of the hemp research statute that the narrow exception from the CSA, which allows the cultivation of industrial hemp for research purposes, is limited to State government agencies and institutions of higher

[5] Indian country is defined as "except as otherwise provided in sections 1154 and 1156 of this title, the term 'Indian country'", as used in this chapter, means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

education in states where the legalization of industrial hemp exists. This Court should "interpret and apply the statute as written by Congress." *White Plume*, 447 F.3d at 1076. Indian tribal governments and individual Native Americans, such as White Plume, are not allowed to cultivate industrial hemp in Indian country under the terms of 7 U.S.C. § 5940. There is no injustice created by maintaining the injunction.

TRIBES HAVE NO EXCLUSIVE AUTHORITY TO REGULATE HEMP ON TRIBAL LAND

White Plume attempts to bolster his argument that the word "State" in § 5940 includes Indian tribes by suggesting that State laws could not in any case prohibit the cultivation of hemp on Tribal land. However, neither of the cases that he cites supports that conclusion. In *Worcester v. Georgia*, 31 U.S. 515 (1832), the Supreme Court held unconstitutional a Georgia law that prohibited white persons from living on the Cherokee Nation without a license or permit from the governor, and without having taken an oath to support and defend the constitution and laws of the state of Georgia. *Id.* at 519. In *Nat'l Farmers Union Ins. Co. v. Crow Tribe*, 471 U.S. 845 (1985), the Court held that the petitioners must exhaust available remedies before a tribal court before bringing a claim in district court that the tribal court lacked jurisdiction over a non-Indian property owner. *Id.* at 852-53. While these cases addressed the relationship between States and Tribes, and between Tribes and the federal government, they have no bearing on the interpretation of the word "State" in § 5940. Indeed, by defining "State" in § 5940 without reference to Tribes,

Congress itself made State law – not Tribal law – the relevant reference point for purposes of whether an institution of higher education or a State department of agriculture might be allowed to engage in industrial hemp cultivation under the statute. There is no question that the Federal Government can regulate hemp cultivation on Tribal land by reference to State law. *See Michigan v. Bay Mills Indian Cmty*, 134 S. Ct. 2024, 2033 and n.5 (2014) (recognizing that another federal statute, 18 U.S.C. § 1166, "ma[de] a State's gambling laws applicable 'in Indian country' as federal law'").[6] That is exactly what § 5940 does. Like the provision considered in *Bay Mills*, § 5940 does not attempt to subject Tribes to State enforcement authority; rather, it simply defines federal authorization by reference to State law. In other words, § 5940 provides a narrow exception to the CSA for hemp cultivation by an institution of higher education or a State department of agriculture on any land within a State—whether Tribal land or not—but makes the availability of this

[6] Although White Plume appears to challenge this principle, Def. Br. at 15, this argument was already raised and rejected in prior proceedings. The district court held that the Treaty of Fort Laramie of 1868 does not preserve defendants' right to plant whatever crops they wish, and that the CSA does not infringe on their inherent rights. *United States v. White Plume,* Civ. No. 02-5078, DE 98 at pp. 8-9. On appeal, the Eighth Circuit agreed, holding that, "given that 'the general laws of the United States as to the punishment of offenses committed in any place within the sole and exclusive jurisdiction of the United States . . . shall extend to the Indian country,'" the CSA's prohibition on hemp cultivation without a DEA registration applies to White Plume. *White Plume,* 447 F.3d at 1074 (quoting 18 U.S.C. § 1152). Rule 60(b)(5) may not be used to challenge the legal conclusions on which a prior judgment or order rests. *Horne v. Flores*, 557 U.S. 433, 447 (2009). Accordingly, the legal conclusions that the CSA prohibits the cultivation of hemp or industrial hemp on the Pine Ridge Indian Reservation is not properly challenged under Rule 60(b)(5).

federal law exception dependent on the relevant State (not Tribal) law regarding hemp cultivation. Therefore, the statute does not exempt an individual hemp farmer like White Plume—both because he is not an "institution of higher education" or a "State department of agriculture," and because he would not be growing or cultivating hemp for research purposes within a State where such growing or cultivation is allowed under State law.

THE PROSECUTORIAL GUIDANCE CONTAINED IN DEPARTMENT OF JUSTICE MEMORANDA DOES NOT CHANGE FEDERAL LAW

Finally, White Plume contends that the Department of Justice's guidance to all United States Attorneys regarding marijuana-related enforcement efforts in areas where states and tribal governments have legalized marijuana provides an alternative basis for relief under Rule 60(b)(5). It is erroneous, however, to interpret that guidance to mean that the Department of Justice no longer considers marijuana an illegal drug under the CSA. There is nothing in the guidance that alters the authority or the jurisdiction of the United States to enforce the CSA in Indian Country or elsewhere. A Department of Justice memo cannot repeal any part of the CSA. This guidance merely provides a framework of priorities to help guide prosecutorial decisions. *See United States v. Canori*, 737 F.3d 181, 183–85 (2d Cir. 2013) (recognizing that these memos merely provide prosecutorial guidance to federal prosecutors in certain states, but in no way prevent those prosecutors from enforcing federal drug laws); *West v. Holder*, – F. Supp. 3d –, 2015 WL 3750144, at *5 (D.D.C. June 16, 2015) (similar); *United States v. Pickard*, – F. Supp. 3d – 2015 WL 1767536, at

*23-24 (E.D. Cal. Apr. 17, 2015) (similar). Thus, that guidance does not alter the legal landscape so as to allow White Plume to violate the CSA by growing industrial hemp without a DEA registration.

## CONCLUSION

Where a party seeks to dissolve a court's injunction, "[t]he moving party must satisfy the initial burden of showing a significant change either in factual conditions or in the law." *Rufo v. Inmates of Suffolk County Jail*, 507 U.S. 367, 384 (1992). Here, because the industrial hemp research statute is not applicable to White Plume, he fails to meet that burden.

Dated this 28th day of September, 2015.

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**CERTIFICATE OF SERVICE**

I hereby certify that on this 28th day of September 2015, I caused copies of the foregoing United States of America's Response to Motion for Rule 60(b) Relief to be served upon the following:

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