

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH DAKOTA

UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	
)	Civ. No. 02-5071-JLV
vs.)	
)	
ALEXANDER WHITE PLUME,)	
and PERCY WHITE PLUME,)	
)	
Defendants.)	

***AMICUS CURIE* BRIEF OF OGLALA SIOUX TRIBE IN SUPPORT OF MOTION FOR
RULE 60(b) RELIEF TO VACATE INJUNCTION AGAINST TRIBAL MEMBERS
ALEX AND PERCY WHITE PLUME**

INTRODUCTION

The Oglala Sioux Tribe supports Defendant Alex White Plume’s Motion for Rule 60(b) Relief [doc. 124] from the Amended Judgment [doc. 101], entered on or about December 30, 2004, which enjoins Mr. White Plume and his brother, Percy White Plume, enrolled members of the Tribe, from cultivating industrial hemp on the Pine Ridge Indian Reservation. The Tribe submits this brief pursuant to this Court’s order of January 15, 2016 [doc. 139].

BACKGROUND

Industrial hemp is a variety of the cannabis plant that contains 1.0% or less of the psychoactive component tetrahydrocannabinol (“THC”). *See* R. Johnson, HEMP AS AN AGRICULTURAL COMMODITY: CONGRESSIONAL RESEARCH SERVICE REPORT RL32725 1-2 (Feb. 2, 2015). Industrial hemp is a cousin of the marijuana plant, a psychoactive variety of cannabis that typically contains 10% or more THC, but is not the same plant as marijuana or a part of the same plant as marijuana or even the same plant (or a part thereof) at a different stage in its life cycle. *Id.* at 2. It is a different plant altogether. Industrial hemp and marijuana plants have

different physical characteristics and are cultivated differently, and these differences are readily apparent upon visual inspection:

[A]mong the visual plant differences are **plant height** (hemp is encouraged to grow tall, whereas marijuana is selected to grow short and tightly clustered); **cultivation** (hemp is grown as a single main stalk with few leaves and branches, whereas marijuana is encouraged to become bushy with many leaves and branches to promote flowers and buds); and **planting density** (hemp is densely planted to discourage branching and flowering, whereas marijuana plants are well-spaced)....

To maximize production of hemp fiber and/or seed, [hemp] plants are encouraged to grow taller in height. Cultivated plants become a tall stalky crop that usually reaches between 6 and 15 feet, and generally consist of a single main stalk with few leaves and branches. Hemp plants grown for fiber or oilseed are planted densely (about 35-50 plants per square foot) to discourage branching and flowering.... The stalk and seed is the harvested product....

Marijuana is cultivated to encourage the plant to become bushy with many leaves, with wide branching to promote flowers and buds. This requires that plants be well-spaced, by as much as about 1-2 plants per square yard. The flower and leaves are the harvested products.

Id. at 3-4 (emphasis in original).

Marijuana is a psychoactive drug used for recreational and medicinal purposes. In contrast, industrial hemp is a raw material that is used in the manufacture of various products, including foods, beverages, body-care products, nutritional supplements, textiles, and other products, such as hemp oil, wax, resin, rope, pulp, paper, and fuel. *Id.* at 4-6. These hemp-based products are lawfully sold at retail and consumed in the United States. *See, e.g., id.* at 7-8.

Industrial hemp is not ingested or smoked as a psychoactive drug, and there is little, if any, chance that ingesting or smoking industrial hemp could produce a psychoactive response. Research has estimated that a person would have to smoke between fifty and 100 hemp cigarettes at the same time in order to obtain a minimal inebriate effect. C. Conrad, HEMP FOR HEALTH: THE MEDICINAL AND NUTRITIONAL USES OF CANNABIS SALTIVA 10 (1997).

Alex and Percy White Plumes seek to support themselves and their families through the

cultivation of industrial hemp on the allotted lands of their *tiyospaye*, or extended family, within the exterior boundaries of the Pine Ridge Indian Reservation. In so doing, they seek to exercise their treaty-based right to farm within their Tribe's homeland.

The Oglala Sioux Tribe is a federally recognized American Indian tribe and a signatory to the Fort Laramie Treaty of 1868 between the United States and the Great Sioux Nation. *See* Treaty with the Sioux — Brulé, Oglala, Miniconjou, Yanktonai, Hunkpapa, Blackfeet, Cuthead, Two Kettle, Sans Arcs, and Santee — and Arapaho, 1868, Art. 14, 15 Stat. 635 (Apr. 29, 1868). The 1868 treaty guaranteed the right of all tribal members, including the White Plumes, to farm – and more specifically to grow “the most valuable crops” – on Sioux reservation lands. The treaty provided that the Great Sioux Reservation, including all land now within the Pine Ridge Indian Reservation, was “set apart for the absolute and undisturbed use and occupation” of the Sioux Indians as a “permanent home.” *Id.* at Arts. 2, 15. The treaty provided that Sioux reservation lands were set apart for agricultural purposes, among other things, and it established a process whereby tribal members could select allotments on which to “commence farming.” *Id.* at Art. 6. In the treaty, the United States encouraged all tribal members to select allotments “to commence cultivating the soil as farmers.” *Id.* at Art. 3. The government pledged to provide farming implements, instruction, and funds to Sioux farmers, *id.* at Arts. 8, 10, and it encouraged the Sioux to “grow the most valuable crops.” *Id.* at Art. 14.

Today, industrial hemp is one of “the most valuable crops,” and the White Plumes have a treaty-protected right to grow it on the Pine Ridge Indian Reservation. Studies by researchers at the University of Kentucky found that the potential earnings from growing industrial hemp are higher than the potential earnings from growing other crops (corn, soybeans, wheat, hay, etc.), with the exception of tobacco. E. Thompson, *et al.*, ECONOMIC IMPACT OF INDUSTRIAL HEMP IN

KENTUCKY 21 (Univ. of Kentucky July 1998); C. Kaiser, *Industrial Hemp Production* 5 (Univ. of Kentucky Sept. 2015), available at http://www.uky.edu/Ag/CCD/introsheets/hemp_production.pdf (last visited Feb. 16, 2016) (estimating that the return per acre on industrial hemp could reach several hundred dollars for seed only production at the highest productivity level).

“Approximately 30 countries in Europe, Asia, and North and South America currently permit farmers to grow hemp.” CONGRESSIONAL RESEARCH SERVICE REPORT RL32725, *supra*, at 9. Canada is one of the world’s hemp-producing countries and it is a major supplier of U.S. imports of hemp-based products. *Id.* at 10-11. It has been reported that hemp production in Canada is nearly a \$1 billion a year industry, and that profits from growing hemp exceed those of other crops. *See* D. Fine, *A Tip for American Farmers: Grow Hemp, Make Money*, L.A. TIMES, June 25, 2014.

American farmers have been watching as Canadian farmers clear huge profits from hemp: \$250 per acre in 2013. By comparison, South Dakota State University predicts that soy, a major crop, will net U.S. farmers \$71 per acre in 2014.

Id. Accord, E. Ackerman, *The Latest Buzz on Hemp*, U.S. NEWS & WORLD REP., Mar. 15, 1999, at 50 (reporting that, in Canada, an acre of industrial hemp brought a profit of \$225, whereas in North Dakota, an acre of wheat brought a profit of \$25).

Hemp was widely grown in the United States from the colonial period to end of the 1950’s. CONGRESSIONAL RESEARCH SERVICE REPORT RL32725, *supra*, at 11-12. Many of America’s Founding Fathers grew hemp, including George Washington. *See* D. Jackson, ed., THE DIARIES OF GEORGE WASHINGTON, Vol. 1:xxx, 337, 340-343, Vol. 2:1-8, 14, 18, 28, Vol. 6:157 (Univ. of Virginia 1976-1979).

Throughout his lifetime, George Washington cultivated hemp at Mount Vernon for industrial uses. The fibers from hemp held excellent properties for the making of rope and sail canvas, which was a major need in the age of the sailing ship. In addition, hemp fibers could be spun into thread for clothing or, as indicated in

Mount Vernon records, for use in repairing the large seine fishing nets that Washington used in his fishing operation along the Potomac....

It must be noted that industrial hemp, *Cannabis sativa*, -- the kind that Washington grew -- is not the same strain of the plant as *Cannabis sativa indica* which is used as a drug (marijuana). *Cannabis sativa* (industrial use hemp) contains less than 0.3% tetrahydrocannabinol (THC), and therefore has no physical or psychological effects. *Cannabis sativa indica* grown for marijuana can contain 6% to 20% THC. Therefore, there is no truth to the statement that George Washington was growing marijuana. His hemp crop was strictly the industrial strain needed for the production of rope, thread, canvas, and other industrial applications.

George Washington's Mount Vernon, *George Washington Grew Hemp*, available at <http://www.mountvernon.org/george-washington/the-man-the-myth/george-washington-grew-hemp> (last visited Feb. 16, 2016).

Industrial hemp production in the U.S. reached its peak in 1943 at 150 million pounds. *Id.* at 12. In 1937, Congress enacted the Marihuana Tax Act of 1937, Pub. 238, 75th Congress, 50 Stat. 551 (Aug. 2, 1937), which imposed a tax on the production and sale of marijuana. The production and sale of *cannabis* plants for industrial uses were protected; they were taxed at much lower rates or not at all. *Id.*

In 1970, Congress enacted the Controlled Substances Act ("CSA"), Pub. L. 91-513, 84 Stat. 1236 (Oct. 27, 1970), *codified at* 21 U.S.C. 801, *et seq.*, making it illegal to manufacture, distribute, dispense, or possess controlled substances, including marijuana, except as authorized by the CSA. 21 U.S.C. §§ 841(a)(1), 844(a), 812(c)(Schedule I)(c)(10),(17). The definition of marijuana under the CSA includes "all parts of the plant *Cannabis sativa* L.," excluding

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, salt, derivative, mixture, or preparation 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.

21 U.S.C. § 802(16). Most, if not all, of these excluded items are found in industrial hemp-based

products.

The Oglala Sioux Tribe has an interest in promoting economic development by tribal members, like the White Plumes, who wish to support themselves and their families through the growth and cultivation of industrial hemp. The Pine Ridge Indian Reservation is home to Oglala Lakota County (formerly known as Shannon County), which is the poorest county in the United States. According to the most recent data from the U.S. Census Bureau, 52.3% of all persons in Oglala Lakota County are living below the federal poverty line. *See* U.S. Census Bureau, Quick Facts: State and County Quick Facts (2016), *available at* <http://quickfacts.census.gov/qfd/states/46/46113.html> (last visited January 4, 2016). Given these circumstances, the Tribe has an interest in fostering all lawful forms of economic development on the Reservation.

In the exercise of its inherent right to self-government, the Oglala Sioux Tribe has enacted tribal laws to authorize industrial (non-drug) hemp farming and processing on the Pine Ridge Indian Reservation as a regulated agricultural activity and an engine of rural economic development. In 1998, the Oglala Sioux Tribal Council passed Ordinance No. 98–27 which legalized the growth and cultivation of “industrial hemp,” defined as, “all parts and varieties of the plant *Cannabis sativa*, both indigenous and imported, that are, or have historically been, cultivated and harvested for fiber and seed purposes and contain a tetrahydrocannabinol [THC] concentration of one percent or less by weight.” O.S.T. Ord. No. 98-27 at 3 (1998) (attached hereto as Exhibit B).

The Tribe legalized the cultivation of industrial hemp to encourage and “develop sustainable, land-based, economic opportunities for tribal members.” O.S.T. Ord. No. 98-27 at 1. The Tribe recognizes that, “industrial hemp was a viable and profitable crop grown in the Pine Ridge region when the treaties were entered between the United States and the Oglala Sioux

Tribe,” and today, “it is a safe and profitable commodity in the international marketplace.” *Id.*

The Oglala Sioux Tribe did not legalize marijuana. To the contrary, the Tribe expressed its resolve “to maintain its current policy of prohibiting the use and proliferation of marijuana on the reservation.” *Id.* The Tribe recognized

that there is a consistent, predictable, genetically based difference between the varieties of *Cannabis sativa* that produce marijuana and those that produce industrial hemp and that the difference is based on the amount of tetrahydrocannabinol [THC] present in the plant, and ... law enforcement agents can learn to readily distinguish between the different varieties of *Cannabis sativa*....

Oglala Sioux Tribal President John Yellow Bird Steele communicated the Tribe’s intent to allow the growth and cultivation of industrial hemp on the Pine Ridge Indian Reservation to Acting U.S. Attorney Randolph Seiler in a letter dated May 7, 2015. *See* Exhibit A (“Steele Letter”). In his letter, President Yellow Bird Steele informed the United States that:

The Oyate [‘People’] of the Oglala Sioux Tribe at Pine Ridge Indian Reservation suffer under terrible economic conditions which may be relieved in part [if] tribal members are able to cultivate, process and use industrial hemp products that would otherwise need to be [purchased] from off the Reservation such as hemp soaps, oils animal feed, ropes, fabrics rugs, furniture covers, tablecloths, building materials, insulation, and fuel.... The Oglala Sioux Tribe therefore endorses the efforts of the White Plumes and other members of the Oglala Sioux Tribe to grow, process, store and use and transport industrial hemp and looks forward to exploring hemp farming and the production of hemp food, oil and other legal hemp products on the Reservation.... Having the White Plume Hemp Injunction lifted is an important step in supporting sustainable rural economic development at Pine Ridge Indian Reservation so that the White Plumes and the other members of the Oglala Sioux Tribe will have an opportunity to realize the benefits of industrial hemp as an agricultural product and potential revenue generator for the Tribe and tribal members.

*Id.*¹

¹ The Oglala Sioux Tribe seeks formal government-to-government consultations with the United States on the growth of industrial hemp in Indian country, as pledged by the United States Department of Justice in the recent memorandum by Monty Wilkinson, Director of the Executive

The laws of the United States now recognize the difference between industrial hemp and marijuana. In the Agricultural Act of 2014, Congress legalized the growth and cultivation of industrial hemp in certain circumstances, notwithstanding any contrary provision of the Controlled Substances Act, 21 U.S.C. § 801, *et seq.*, or any other Federal law. Pub. L. 113-79, § 7606, 128 Stat 649 (Feb. 7, 2014), *codified at* 7 U.S.C. § 5940. Congress defined “industrial hemp” as “the plant *Cannabis sativa* L. and any part of such plant, whether growing or not, with a delta-9 tetrahydrocannabinol [THC] concentration of not more than 0.3 percent on a dry weight basis.” 7 U.S.C. § 5940(b)(2). Through its enactment of the Agricultural Act of 2014, Congress has made it clear that the United States regulates, but does not prohibit, the growth, cultivation, and study of hemp for industrial purposes.

The industrial hemp provision of the Agriculture Act of 2014 is consistent with numerous international conventions and agreements that recognize the difference between industrial hemp and marijuana. The United Nations Single Convention on Narcotic Drugs of 1961, the North American Free Trade Agreement (“NAFTA”), and the World Trade Organization (“WTO”) Agreement on Agriculture all recognize that industrial hemp is an agricultural commodity that is separate and distinct from any narcotic or psychoactive drug. *See, e.g.*, U.N. General Assembly, Single Convention on Narcotic Drugs, 1961 Art. 28(2) (Mar. 30, 1961) (providing that, “[t]his Convention shall not apply to the cultivation of the cannabis plant exclusively for industrial

Office for U.S. Attorneys. Memorandum from Monty Wilkinson, Director, Executive Office for United States Attorneys, to all United States Attorneys, Criminal Chiefs, Appellate Chiefs, OCDETF Coordinators, and Tribal Liaisons on “Policy Statement Regarding Marijuana Issues in Indian Country” (Oct. 29, 2014) (discussing Memorandum from James M. Cole, Deputy Attorney General, to all United States Attorneys on “Guidance Regarding Marijuana Enforcement” (Aug. 29, 2013), and applying same to Indian country). The Wilkinson memorandum states that, “in evaluating marijuana enforcement activities in Indian Country, each United States Attorney should consult with the affected tribes on a government-to-government basis.” Wilkinson Memorandum at 3.

purposes (fibre and seed) or horticultural purposes”); NAFTA, Art. 708 (Dec. 8, 1993) (designating raw hemp as an “agricultural good,” not a drug); WTO Agreement on Agriculture (Apr. 15, 1994) (same).

It is now time to recognize and honor the treaty-protected right of the White Plumes and other members of the Oglala Sioux Tribe to cultivate industrial hemp on the Pine Ridge Indian Reservation.

ARGUMENT

I. THE OGLALA SIOUX TRIBE AND ITS MEMBERS HAVE AN INHERENT, TREATY-PROTECTED RIGHT TO GROW AND CULTIVATE INDUSTRIAL HEMP ON THE PINE RIDGE INDIAN RESERVATION AND THAT RIGHT HAS NEVER BEEN LAWFULLY EXTINGUISHED.

A. The Principles of Natural Law Provide that All Men and Women Are Created Equal and the Just Powers of Government Derive From the Consent of the Governed.

As a constitutional democracy, the United States of America is founded on principles of natural law. On its first day, the United States through the Declaration of Independence proclaimed:

We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.--That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed....

Declaration of Independence, Continental Congress, July 4, 1776.

Native Americans are human beings. *United States ex rel. Standing Bear v. Crook*, 25 F.Cas. 695, 697 (C.C.D. Neb. 1879). The Lakota understand the fundamental principles of natural law. Chief Red Cloud said: “The Great Spirit raised both the white man and the Indian.” Chief Swift Bird said: “All men red, white, black, and yellow are equal, and we come together as friends. The same Creator is the father of all.” Chief Sitting Bull said:

Is it wrong for me to love my own? Is it wicked for me because my skin is red? Because I am Lakota? Because I was born where my father lived? Because I would die for my people and my country? God made me Lakota.

Native Americans are equal to all other peoples. Native Americans as equal peoples have the right to life, liberty and the pursuit of happiness. For Native Americans, liberty is self-government and self-determination on Native American lands.

At the time of the Constitution, the Framers acknowledged Native Americans as peoples with equal rights and liberty. The Northwest Ordinance of 1787, 1 Stat. 52 (July 13, 1787), enacted the year that the Constitutional Convention began and provides:

The utmost good faith shall always be observed toward the Indians; their lands and property shall never be taken from them without their consent; and in their property, rights, and liberty they never shall be invaded or disturbed, unless in just and lawful wars authorized by Congress....

After the Constitution was ratified, the Northwest Ordinance was re-enacted with the same provision and President Washington signed it into law on August 7, 1789. 1st Cong. Sess. I, Ch. 8 (1789); 1 Stat. 50 (1789).

B. Native Nations Are the Original American Sovereigns with a Government-to-Government Relationship with the United States Based on Treaties.

Indian nations were independent sovereign nations prior to the formation of the United States. *McClanahan v. Arizona Tax Comm'n*, 411 U.S. 164 (1973). Great Britain, Spain, France, and the Netherlands entered treaties with Indian nations to make peace, promote friendship and commerce, and secure recognition of colonial territory.

In his Statement on Indian Policy of January 24, 1983, President Reagan acknowledged:

When European colonial powers began to explore and colonize this land, they entered into treaties with sovereign Indian nations. Our new nation continued to make treaties and to deal with Indian tribes on a government-to-government basis....

President Reagan, *Statement on Indian Policy*, PUB. PAPERS OF RONALD REAGAN 96 (1981-1989).

In 1776, General Washington sought help from the Delaware Nation in securing food and supplies for his army, and the United States entered its first Indian treaty to secure the American-Delaware Nation military alliance. *See Treaty with the Delawares*, 1778, 7 Stat. 13 (Sept. 17, 1778).

Under the Articles of Confederation, during the American Revolutionary War period, the new American Republic entered 16 treaties: 9 Indian treaties² and 7 foreign treaties.³ When the Constitution was ratified in 1789, the Treaty Clause provided for treaty-making as the law-making process to establish United States' relations with fellow nations. The Supremacy Clause mandates that, "all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land...." U.S. Const. Art. VI. By its express language, the Supremacy Clause places all prior and future Indian treaties among "the supreme law of the land."

Pre-constitutional Indian treaties were made with the Delaware Nation, the Cherokee Nation, Choctaw, Chickasaw, Shawnee, the Six Nations, and "the Indian Nations" of the

² *See Treaty with Delawares*, 1778, 7 Stat. 13 (Sept. 17, 1778). *Treaty at Fort Stanwix with the Six Nations of the Iroquois Confederacy*, 1784, 7 Stat. 15 (Oct. 22, 1784); *Treaty with the Wyandot, etc.*, 1785, 7 Stat. 16 (Jan. 21, 1785); *Treaty of Hopewell with the Cherokee*, 1785, 7 Stat. 18 (Nov. 28, 1785); *Treaty with the Chocktaw*, 1786, 7 Stat. 21 (Jan. 3, 1786); *Treaty with the Chickasaw*, 1786, 7 Stat. 24 (Jan. 10, 1786); *Treaty with the Shawnee*, 1786, 7 Stat. 26 (Jan. 31, 1786); *Treaty with the Wyandot, etc.*, 1789, 7 Stat. 28 (Jan. 9, 1789); *Treaty with the Six Nations*, 1789, 7 Stat. 33 (Jan. 9, 1789).

³ *Treaty of Amity and Commerce with France*, Feb. 6, 1778; *Treat of Alliance with France*, Feb. 6, 1778; *Act Separate and Secret with France*, Feb. 6, 1778; *Paris Peace Treaty*, Sept. 30, 1783; *Treaty of Amity and Commerce with Prussia*, Sept. 10, 1785; and *Treaty of Peace and Friendship with Morocco*, June 28 & July 15, 1786. A seventh international treaty, the Jay-Gardoqui Treaty with Spain, was negotiated and signed under the Articles of Confederation, but it was not ratified.

Northern Department: the Wyandot, Ottawa, Chippewa, Potawatomi and Sac Nations. With affirmation of the earliest United States-Indian nation treaties, the Constitution's Treaty and Supremacy Clauses embody America's recognition of the sovereignty of "Indian nations."

This is the true, original meaning of the Constitution and it is borne out by President Washington's first act in the field of Indian affairs: the 1790 Creek Nation Treaty, a nation-to-nation treaty establishing perpetual peace, friendship and commerce. The United States pledged to furnish instruments of agriculture, including domesticated animals, and the Treaty is "obligatory" on both parties, i.e., the Creek Nation *and* the United States.

Using the protocol for the Creek Nation Treaty, President Washington established the standard method for securing the advice and consent of the Senate for all subsequent treaties, Indian and foreign. It is still used for treaties today.

The Commerce Clause is one of the most important sources of Federal power. The Indian Commerce Clause authorizes Congress to regulate commerce "with the Indian Tribes," preempting contrary state authority. It is a recognition of Indian Tribes as governments parallel to the Foreign Commerce Clause—"with foreign Nations." *The Constitution's use of the phrase "Commerce ... with the Indian Tribes" establishes a government-to-government relationship with Indian tribes.* U.S. Const. Art. I, sec. 8, cl. 3.

The true, original meaning of the Constitution concerning Native Nations is reflected in the signature act of Thomas Jefferson's Presidency, the Louisiana Purchase Treaty with the French Republic, where:

The United States promise to execute Such treaties and articles as may have been agreed between Spain and the tribes and nations of Indians until by *mutual consent* of the United States and the said tribes or nations other Suitable articles Shall have been agreed upon.

Louisiana Purchase Treaty of 1803, Art. 6, 8 Stat. 200 (Apr. 30, 1803) (emphasis added);); H.

Miller, 2 *Treaties and Other International Acts of the United States* (GPO 1931). The requirement of mutual consent between Indian nations and the United States reflects the status of Indian nations as prior sovereigns. The United States' commerce with Indian Tribes was to be conducted cooperatively through treaties between the nations, such as the 1826 Sioux Nation Treaty.

In the Constitution's original Apportionment Clause, "Indians not taxed" are excluded from Apportionment of Congress (House seats) and direct taxation. U.S. Const. Art. I, sec. 2, cl. 3. *In America's formative years, the Constitution recognized Native Americans as citizens of Native Nations, not citizens of the United States. Accordingly, the original right of Native Americans to self-determination is our right to liberty on our own lands.*

At the end of the Civil War, the United States desired peace and it had just been through disastrous Plains wars with the Sioux Nation, the Cheyenne, the Arapaho, the Kiowa, and the Comanche. The Army had just forced the Navajo on the Long Walk. The Indian Peace Commission was sent to negotiate treaties, and the Commission negotiated treaties, including the 1868 Sioux Nation Treaty.

In 1868, Congress was framing and later ratifying the 14th Amendment to create a framework for Reconstruction in the South. To protect freedmen from state oppression, the Citizenship Clause provides that: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States...." U.S. Const. Amend. XIV, sec. 1, cl. 1.

Congress intended to enfranchise freed slaves as U.S. citizens in the Citizenship Clause, but once again, Indians were excluded from automatic U.S. Citizenship by birth: Native Americans as tribal citizens were not "subject to the jurisdiction" of the United States, as its text

required. Congress understood that our native peoples were subject to Native Nation jurisdiction. *The Citizenship Clause acknowledges the jurisdiction of Indian nations over Indians, that is: Indian Self-Determination.*

When the 14th Amendment's revised Apportionment Clause removed the constitutional original reference to slavery ("3/5s of other persons"), it now said: "All persons, excluding Indians not taxed" should be counted for congressional representation. U.S. Const. Amend XIV, sec. 1, Cl. 1. When a legal document is amended with repeated use of the language of the original, the amendment is understood to approve the provision that is repeated and the prior usage under the provision. The 14th Amendment affirms the prior century of treaty-making with Indian nations.⁴ *Elk v. Wilkins*, 112 U.S. 94 (1884). *With the repeated reference to "Indians not taxed," the 14th Amendment Apportionment Clause affirms the status of Indians as citizens of Indian nations.*

When American Indians became citizens through the 1924 Indian Citizenship Act, tribal leaders such as Henry Standing Bear sought to preserve tribal citizenship and tribal rights, and Congress included a provision to do so. Indian Citizenship Act ("*Provided That the granting of*

⁴ Mr. Trumbull, the author of the 14th Amendment, stated:

[S]ubject to the jurisdiction thereof...." That means "subject to the complete jurisdiction thereof." Now, does the Senator from Wisconsin pretend to say that the Navajoe Indians are subject to the complete jurisdiction of the United States?... Not owing allegiance to anyone else. That is what it means. Can you sue a Navajoe Indian in court? Are they in any sense subject to the complete jurisdiction of the United States? By no means. We make treaties with them, and therefore they are not subject to our jurisdiction. If they were, we would not make treaties with them.... Do we pass a law to control them? Are they subject to our jurisdiction in that sense? Is it not understood that if we want to make arrangements with the Indians to whom he refers we do it by means of a treaty?...

Congressional Globe, 39th Congress, 1st Sess. 2893 (1866).

such citizenship shall not in any manner impair or otherwise affect the right of any Indian to tribal or other property.") Approved, June 2, 1924. June 2, 1924. [H. R. 6355.] [Public, No. 175.], 68th Congress Sess. I, CHS. 233. (1924); codified at 8 U.S.C. 1401(b). A few years after the passage of the 1924 Indian Citizenship Act, President Calvin Coolidge said:

There are over two hundred tribes and bands in the United States, each with its own name, tongue, history, traditions, code of ethics and customs, which have the effect of law with Indian tribes.... *There are some 370 treaties which have been made with the Indian tribes many of which are still in effect.*

Speech to the Oglala Sioux Indians, Pine Ridge Indian Reservation, August 27, 1927.

C. The Principle of Consent of the Governed is Embodied in Indian Treaties: Native Americans Consent to the Government of Native Nations on Indian Lands.

Indian nations reserved our original rights to self-government in our treaties. For example, construing the 1868 Sioux Nation Treaty and related documents, the Supreme Court in *Ex Parte Crow Dog*, 109 U.S. 556, 568-570 (1883), explained:

among the arts of civilized life which it was the very purpose of all these arrangements to introduce and naturalize among them was the highest and best of all -- that of self-government, the regulation by themselves of their own domestic affairs, the maintenance of order and peace among their own members by the administration of their own laws and customs.

The Supreme Court explained that the goal of United States—Sioux Nation relations was to promote “self-supporting and self-governed society.” *Id.* at 569. For the Sioux Nation, the United States promoted our “establishment as a people upon a defined reservation as a permanent home, who were to be urged, as far as it could successfully be done, into the practice of agriculture.” *Id.* at 570.

The 1868 Sioux Nation Treaty was entered into on a Nation-to-Nation basis by the United States and the Great Sioux Nation based upon mutual consent, in accordance with the requisites of the 1803 Louisiana Purchase Treaty. *See* 1803 Louisiana Purchase Treaty, Article

VI (The United States promised to enter into treaties with Indian nations based upon mutual consent when it proclaimed its interest in the Louisiana Purchase area, including South Dakota, and Pres. Jefferson acknowledged that the United States' claim was subject to the prior rights of Indian nations); Anthony Wallace, *Jefferson and the Indians* (2001) (Jefferson proposed a constitutional amendment acknowledging the right of Indian nations to self-government but was told that the Constitution already contemplated the issues outlined in his proposed amendment). The Oglala Sioux Tribe and the Sioux Nation maintain that the 1868 Sioux Nation Treaty may only be altered with the consent of 3/4s of our adult citizens, as required by its terms, 1868 Sioux Nation Treaty, Art. XII, and by natural law. U.S. Declaration of Independence (1776) (just powers of government derive from the consent of the governed).

D. Treaty Rights Continue in Force And Effect and Cannot Be Overturned Absent Tribal Consent.

The Fort Laramie Treaty of 1868 provided that the Great Sioux Reservation, including all land now within the Pine Ridge Indian Reservation, was “set apart for the absolute and undisturbed use and occupation” of the Sioux Indians as a “permanent home.” Treaty with the Sioux — Brulé, Oglala, Miniconjou, Yanktonai, Hunkpapa, Blackfeet, Cuthead, Two Kettle, Sans Arcs, and Santee — and Arapaho, 1868, Arts. 2, 15, 15 Stat. 635 (Apr. 29, 1868). The treaty provided that Sioux reservation lands were set apart for agricultural purposes, among other things. The treaty allowed tribal members to select allotments on which to “commence farming.” 1868 Treaty, Art. 6. In the treaty, the United States encouraged all Indians to select allotments and pledged to provide additional lands to the Sioux, above and beyond those set apart by the treaty, if necessary to allow all Indians “to commence cultivating the soil as farmers.” *Id.* at Art. 3. The government pledged to provide seeds, farm animals, farm implements, instruction, and funds to each Indian who “intends in good faith to commence cultivating the soil for a living.”

Id. at Arts. 8, 10. The government encouraged the Sioux to “grow the most valuable crops.” *Id.* at Art. 14.

The 1868 Treaty did not limit the crops the Sioux people could cultivate on their lands. Contrary to the Court’s decision on summary judgment in this case, the treaty promise by the United States to provide seeds to the Sioux did not limit the ability of tribal members to choose which crops they would plant. *Cf.*, Memorandum Granting Plaintiff’s Summary Judgment 9 (Dec. 28, 2004) [doc. 98]. The treaty certainly did not make the U.S. the sole source of seeds. The Sioux people had a culture of agriculture that preceded the treaty, as evidenced by the name of one of the seven bands of the Lakota, *Mnicoujou*, which means plants by the water or gardens by the water. Corn, beans, and squash were traditional staples of the Lakota, and wild plants were gathered and used for food, medicine, coloring clothing, and other uses.

In the 1868 Treaty, the Sioux Nation and its constituent tribes and bands reserved the right to cultivate crops as a self-supporting society. They also reserved their inherent right to self-government. *See Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832); *Ex Parte Crow Dog*, 109 U.S. 556 (1883). The Federal government recognizes the importance of agriculture in Indian country. In the American Indian Agricultural Resource Management Act of 1993, Pub. L. 103-177, 107 Stat. 2011 (Dec. 3, 1993), the Congress found that:

- (1) the United States and Indian tribes have a government to government relationship;
- (2) the United States has a trust responsibility to protect, conserve, utilize, and manage Indian agricultural lands consistent with its fiduciary obligation and its unique relationship with Indian tribes;
- (3) Indian agricultural lands are renewable and manageable natural resources which are vital to the economic, social, and cultural welfare of many Indian tribes and their members; and
- (4) development and management of Indian agricultural lands in accordance with integrated resource management plans will ensure proper management of Indian agricultural lands and will produce increased economic returns, enhance Indian self-determination, promote employment opportunities,

and improve the social and economic well-being of Indian and surrounding communities.

Id.

The Oglala Sioux Tribe has never given up its right to self-government, and the United States does not have a right to take away that right. There is no legal justification for such a deprivation. It has no place in a constitutional democracy.

The Oglala Sioux Tribe asserts that its treaty rights cannot be abrogated or overturned without tribal consent. Treaty rights not surrendered. The United States does not have a unilateral right to modify treaty rights. Those rights were established by mutual consent. The Tribe reserved its self-government over its own lands, and it is a violation of the Tribe's liberty to impose Federal laws on its people without their consent. The Court should recognize this principle because it is a bedrock principal of natural law that is enshrined in the Declaration of Independence and in international law. The United Nation Declaration on the Rights of Indigenous Peoples provides that:

States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions *in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.*

Id. at Art. 19 (emphasis added).

Even under Federal law, there can be no abrogation of Indian treaty rights without a clear statutory expression to abrogate those rights. The Supreme Court has held that a statute that is silent with respect to Indians does not divest a tribe of its sovereign authority. *Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9, 18 (1987) (citing *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 149, n. 14 (1980); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 60 (1978)). Further, the courts have held that Federal regulatory schemes do not apply to tribal governments exercising their

sovereign authority absent express congressional authorization. *Dobbs v. Anthem BCBS*, 600 F.3d 1275, 1283 (10th Cir. 2010); see also *NLRB v. Pueblo of San Juan*, 276 F.3d 1186, 1196 (10th Cir. 2002).

The Agriculture Act of 2014 makes clear that the Federal law regulates, but does not prohibit, the production of industrial hemp. It is a regulatory regime, and Federal regulatory regimes do not disrupt self-government and treaty rights in the absence of a clear congressional expression of statutory intent to do so.

The Eighth Circuit's conclusion that the Tribe's right to farm does not include a right to farm industrial hemp was based on flawed conceptions of industrial hemp and the Indian Country Crimes Act. In respect to hemp, the Court erroneously concluded that hemp is derived from a portion of the marijuana plant. See *United States v. White Plume*, 447 F.3d 1067, 1071 (8th Cir. 2006) (citing *New Hampshire Hemp Council, Inc. v. Marshall*, 203 F.3d 1, 3 (1st Cir. 2000), for the proposition that "both the drug commonly known as marijuana and various industrial products (e.g., rope) derive from different portions of the plant popularly called the hemp plant and designated *Cannabis sativa* in the Linnaean system of botanical classification."). As shown above, this is simply not true. Industrial hemp is not derived from marijuana (drug) plants.

In respect to the Indian Country Crimes Act, the court erroneously held that it incorporated to Indian country the CSA's prohibition against the cultivation of *cannabis* plants. The Supreme Court made clear in *United States v. Quiver*, 241 U.S. 602 (1916), that Federal law does not incorporate victimless crimes to Indian country.

The Court should reconsider the injunction to correct these misconceptions and bring justice to the White Plumes and the Lakota people.

CONCLUSION.

Justice, fairness, equality, and most importantly, the treaty-protected right to farm on the Pine Ridge Indian Reservation counsel the Court to vacate the Amended Judgment and its injunction against on-reservation industrial hemp farming by the White Plumes. Industrial hemp contains *di minimis* amounts of THC and is easily monitored. The White Plumes seek to cultivate it for fiber and oils, which cannot be used as psychoactive drugs. This Court's recognition of the treaty right to farm industrial hemp would not imperil the Federal government's interests.

For the foregoing reasons, the Tribe respectfully submits that the Court should grant the Defendants' Motion and vacate the existing permanent injunction.

ORAL ARGUMENT REQUESTED

The Oglala Sioux Tribe respectfully requests oral argument in this matter and supports the request by Mr. White Plume for oral argument.

Dated this 16th day of February 2016.

Respectfully submitted,

OGLALA SIOUX TRIBE

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Attorneys for Oglala Sioux Tribe

CERTIFICATE OF SERVICE

I certify that on February 16, 2016, I caused a true and correct copy of the foregoing to be served upon all counsel and parties of record by operation of the Court's Case Management/Electronic Case Filing system.

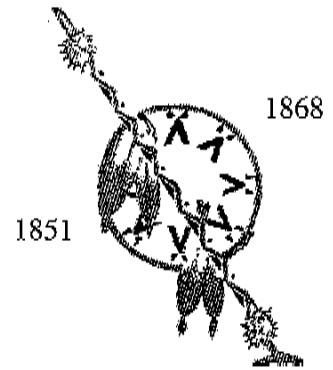
/s/ Steven J. Gunn
Steven J. Gunn



Oglala Sioux Tribe

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May 7, 2015

Mr. Randolph J. Seiler
Acting United States Attorney
District of South Dakota
U.S. Attorney's Office
P.O. Box 2638
Sioux Falls, South Dakota 57101-2638
Randy.Seiler@usdoj.gov

Re: Government-to-Government communication concerning Industrial Hemp;
Alexander White Plume; Percy White Plume; White Plume Hemp Injunction

Dear Mr. Seiler:

I write today as President of the Oglala Sioux Tribe to you as the Acting United States Attorney for the United States Department of Justice on behalf of our tribal members Mr. Alexander White Plume and Mr. Percy White Plume. I understand that the White Plumes are subject to a federal court injunction which restrains them from growing industrial hemp.

Hemp farming is legal on the Pine Ridge Reservation under Tribal Ordinance 98-27. This law specifically excludes industrial hemp from the definition of "marijuana" under the Tribal Penal Code. The Ordinance defines "Industrial hemp: as "all parts and varieties of the plant cannabis sativa, both indigenous and imported, that are, or have historically been, cultivated and harvested for fiber and seeds purposes and contain a tetrahydrocannabinol concentration of **one percent or less** by weight." Under Tribal Ordinance 98-27, the ban against drug marijuana remains in effect.

The White Plumes and other members of the Oglala Sioux Tribe would like to cultivate industrial hemp and to process, transport, store and use industrial hemp for its fiber, seed cake, oil, building materials, fabrics and other non-drug uses. The Oyate of the Oglala Sioux Tribe at Pine Ridge Indian Reservation suffer under terrible economic conditions which may be relieved in part if tribal members are able to cultivate, process and use industrial hemp products that would otherwise need to be purchased from off the Reservation such as hemp soaps, oils, animal feed, ropes, fabrics, rugs, furniture covers, tablecloths, building materials, insulation, and fuel. Several of these uses have been demonstrated by Alexander and Percy White Plume who have built a nice home out of 'hemp-crete' made of imported hemp fiber that they obtained lawfully in order to prove their point.

The Oglala Sioux Tribe therefore endorses the efforts of the White Plumes and other members of the Oglala Sioux tribe to grow, process, store and use and transport industrial hemp and looks forward to

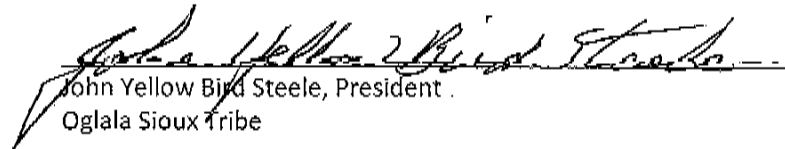
exploring hemp farming and the production of hemp seed oil and other legal hemp products on the Reservation. Mr. Alexander White Plume will be a valuable consultant and leader in these efforts.

Having the White Plume Hemp Injunction lifted is an important step in supporting sustainable rural economic development at Pine Ridge Indian Reservation so that they White Plumes and the other members of the Oglala Sioux Tribe will have an opportunity to realize the benefits of industrial hemp as an agricultural product and potential revenue generator for the Tribe and tribal members.

We are also aware that the State of Oregon has issued commercial hemp licenses to at least one of its citizens and, if the White Plume Hemp injunction is not promptly lifted, the Oglala Sioux Tribe will require a formal response from United States Department of Justice explaining why our members of the Oglala Sioux Tribe are not being treated favorably than a citizen of the State of Oregon who is similarly situated. Such response should include an explanation of how and why such different treatment complies with the trust responsibility owed to the Oglala Sioux Tribe as well as the treaty obligations of the United States to the members of the Oglala Sioux Tribe under the Ft. Laramie Treaties of 1851 and 1868.

Thank you for your consideration of this matter and I would appreciate a response from you or the Attorney General of the United States to this Government-to-Government communication not later than the end of May, 2015.

Sincerely,


John Yellow Bird Steele, President
Oglala Sioux Tribe

ORDINANCE NO. 98-27

ORDINANCE OF THE OGLALA SIOUX TRIBAL COUNCIL
OF THE OGLALA SIOUX TRIBE
(An Unincorporated Tribe)

ORDINANCE OF THE OGLALA SIOUX TRIBAL COUNCIL AMENDING THE OGLALA SIOUX TRIBAL PENAL CODE RELATED TO INDUSTRIAL HEMP.

WHEREAS, the Oglala Sioux Tribe recognizes that industrial hemp is a safe and profitable commodity in the international marketplace and is grown in more than thirty countries including Canada, France, England, Russia, China, Germany and Australia, and

WHEREAS, treaties signed between the Oglala Sioux Tribe and the United States government acknowledge that the tribe retains the right to grow food and fiber crops from the soil, and

WHEREAS, the Oglala Sioux Tribe recognizes that industrial hemp was a viable and profitable crop grown in the Pine Ridge region when the treaties were entered between the United States and the Oglala Sioux Tribe, and

WHEREAS, the Oglala Sioux Tribe seeks to develop sustainable, land-based, economic opportunities for tribal members, and

WHEREAS, the Oglala Sioux Tribe recognizes that there is a consistent, predictable, genetically based difference between the varieties of *Cannabis sativa* that produce marijuana and those that produce industrial hemp and that the difference is based on the amount of tetrahydrocannabinol present in the plant, and

WHEREAS, law enforcement agents and farmers can learn to readily distinguish between the different varieties of *Cannabis sativa*, and

WHEREAS, the Oglala Sioux Tribe seeks to maintain its current policy of prohibiting the use and proliferation of marijuana on the reservation, and

WHEREAS, international treaties and trade agreements including the 1961 Single Convention on Narcotic Drugs, the North American Free Trade Agreement (NAFTA) and the General Agreement on Tariffs and Trade (GATT) specifically classify industrial hemp as a commodity that is separate and distinct from any narcotic, and

ORDINANCE NO. 98-27

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WHEREAS, the law enforcement policies of the United States Government are inconsistent, severely overburden industrial hemp agriculture, and do not adequately carry out the original intent of Congress regarding industrial hemp and marijuana, now

THEREFORE BE IT ORDAINED, that the Oglala Sioux Tribal Council does hereby expressly reserve and retain jurisdiction to enact legislation relating to industrial hemp agriculture and amends the Oglala Sioux Tribe Penal Code to clarify its policy allowing agricultural and economic development while retaining its existing policy against marijuana, and

BE IT FURTHER ORDAINED, that any members of the Oglala Sioux Tribe who wish to harvest or cultivate industrial hemp must first organize, or join an existing, a land use association. Each land use association making use of industrial hemp will then appoint, and arrange for the compensation of, a liaison who will file a quarterly report to the Land Committee of the Oglala Sioux Tribal Council, delineating with specificity the industrial hemp acreage to be cultivated and/or harvested, the end products to be manufactured and the progress since the previous report. The liaison will serve as the interface between the land use association, the Oglala Sioux Tribal Council and any interested law enforcement agencies, and

BE IT FURTHER ORDAINED, that the Oglala Sioux Tribal Penal Code, Title 9, Section 106 - Marijuana and Section 106.00 - Controlled Drugs and Substances are amended as follows:

a) TITLE 9, SECTION 106 - MARIJUANA is amended to read:

Any Indian who shall plant, grow, cultivate, harvest or gather, sell, barter, or give away or have in possession any Marijuana shall be deemed guilty of an offense and upon conviction thereof, shall be sentenced to labor for a period not to exceed six (6) months, or to a fine not to exceed three hundred and sixty dollars (\$360.00), or to both such fine and imprisonment, with costs.

b) The definition of "Marijuana" in TITLE 9, SECTION 106.00 (e) is amended to read:

"Marijuana"--All parts of the plant of the genus *Cannabis* whether growing or not, the seeds thereof, resin extracted from any part of such plant, and every compound, manufacture, salt, derivative, mixture, or preparation of the plant, its seeds, or its resin THAT CONTAINS ONE PERCENT OR MORE CONCENTRATION OF TETRAHYDROCANNABINOL BY WEIGHT. MARIJUANA DOES NOT INCLUDE INDUSTRIAL HEMP AS DEFINED IN THIS SECTION.

ORDINANCE NO. 98-27

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c) The following definition of "Industrial Hemp" shall be added to TITLE 9, SECTION 106.00 as appropriate:


"Industrial Hemp"-- All parts and varieties of the plant *Cannabis sativa*, both indigenous and imported, that are, or have historically been, cultivated and harvested for fiber and seed purposes and contain a tetrahydrocannabinol concentration of one percent or less by weight.

and,

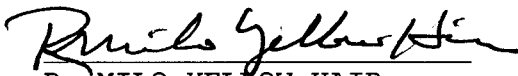
BE IT FURTHER ORDAINED, that all ordinances, resolutions, policy letters, memoranda of understanding or agreement and any other official documents created by, or entered into by, the Oglala Sioux Tribal Council that relate to marijuana are hereby amended to encompass the distinction now created in TITLE 9, SECTION 106.00.

C-E-R-T-I-F-I-C-A-T-I-O-N

I, as undersigned Recording Secretary of the Oglala Sioux Tribal Council, hereby certify that this Ordinance was adopted by a vote of: 8 for; 4 against; 0 abstain; 0 not voting, during a REGULAR SESSION held on the 28th day of JULY, 1998.


STACY L. TWO LANCE
Recording Secretary
Oglala Sioux Tribe

A-T-T-E-S-T


R. MILO YELLOW HAIR
Vice-President
Oglala Sioux Tribe

