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INDUSTRIAL HEMP: THE CROP FOR THE SEVENTH GENERATION

*Robin Lash**

Introduction

On the wind blown plains in Manderson, South Dakota, a barren patch of soil lies as testimony to sovereignty denied, of hope of self-sufficiency ripped from both the soil and the hearts of the Lakota people. Earlier in the summer, the ground nourished and supported life of an ancient plant whose cultivation and use traces back to 8000 B.C. Cultivation of this plant, known as hemp, could bring to the Lakota much needed economic support as well as independence from the federal government.

Although for centuries industrial hemp has been both an ecological wonder and a socially beneficial plant, its similar appearance to its cousin, the marijuana plant, created negative perceptions of hemp in the United States. Ultimately, this negativity led to the outlaw of hemp production in this country.

Regardless of how the federal government classifies this plant, the Lakota people feel they have a right to produce industrial hemp. The Lakota believe this right is grounded both in sovereignty and treaty rights established in 1868.

This comment is an in-depth look at the Lakota's desire to produce industrial hemp as a means of economic development and self-sufficiency. It examines the grounds supporting their right to produce this plant and the reasons why the government refuses to allow production of hemp. This comment calls for a reappraisal of both the language and legislative intent surrounding criminalization of this plant. This comment demonstrates that there is a clear need for congressional review of the Drug Enforcement Administration's (DEA) interpretation of the definitions of "marijuana" and "drug" under the Comprehensive Drug Abuse and Control Act of 1970 — which both, clearly exempt industrial hemp. Additionally, this comment presents the facts supporting the Lakota people's quest to produce industrial hemp as a means of economic development.

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Part I discusses the history of industrial hemp, important distinctions between hemp and marijuana, the United States' criminalization of the plant, and policies of other countries regarding industrial hemp. Sovereignty perspectives of both tribes and the federal government are reviewed in Part II. This part also provides an overview of tribal sovereignty and federal power today. Part III explores the need for tribal economic development, why cultivation of industrial hemp is a good fit for tribes, and actions taken by two tribes to produce industrial hemp. Part IV examines the history of the Lakota people including a look at the 1868 Fort Laramie Treaty and its historic and present effects. This part also presents the story of Lakota tribal member Alex White Plume, and his determination to produce industrial hemp on Pine Ridge. Part IV also analyzes the Lakota stance in conjunction with an examination of the issues surrounding controversial legal definitions and how the DEA exceeded its authority in banning industrial hemp. Part V concludes with a summary of points supporting the Lakota's efforts at producing industrial hemp.

This comment offers a vision of the social, economic, and ecological benefits of industrial hemp production, not only for the Lakota people, but also for society as a whole. This comment is dedicated to Alex White Plume and the Lakota people who are taking a stand to force the government to look at its ridiculous hemp policy.

I. Industrial Hemp

A. Historic Role

Make the most of hemp seed and sow it everywhere.

— George Washington¹

Hemp has been of vital importance to civilization for centuries. Historical records indicate that the Chinese produced hemp fiber as far back as 28 B.C.² The oldest relic of human industry is thought to be a bit of hemp cloth dating back to 8000 B.C.³ Confucius' writings transcribed on hemp paper in 550

1. *Plant Used in Thousands of Products*, ARIZ. REPUBLIC, Sept. 10, 2001, at D1, LEXIS, News Library, MAJPAP File (containing a statement by George Washington, a hemp grower who extolled the virtues of the hemp plant).

2. Hemp Indus. Ass'n, *History of Hemp*, at <http://www.thehia.org/history/history.htm> (last visited Nov. 26, 2002).

3. *Id.*

B.C., and the Gutenberg Bible written in the fifteenth century on hemp paper, verify the historical uses of hemp as paper.⁴

Throughout history, hemp served a variety of other purposes. Ships sailed by Christopher Columbus in 1492 were strung with sails made from hemp canvas, while Rembrandt, Van Gogh, and others painted on canvas made from hemp.⁵

In the early days of the United States, hemp proved a useful and important product. Because of the plant's utility, and the need for products made from hemp, during the Colonial Era and Early Republic, Americans were legally bound to produce hemp crops.⁶

Benjamin Franklin, founder of one of America's first paper mills, used hemp in paper production.⁷ The first drafts of the Declaration of Independence were written on hemp paper.⁸ Later, during westward expansion, tarpaulins made of hemp covered the wagons carrying settlers.⁹ During the California gold rush, prospectors wore Levi Strauss' original jeans, made from hempen sailcloth.¹⁰ Finally, the importance of hemp to the growing country is evidenced by the hemp names given to many towns: Hempfield, Pa.; Hemphill, Ky.; Hemp Island, Fla.; Hempstead, Ohio; Hemp Wallace, Ga.; Hempton Lake, Wis.; and many others.¹¹

Hemp grown for fiber to supply household industry continued to prosper in the United States well into the twentieth century.¹² Hemp is a hardy plant with the ability to grow in many climates and soil types as seen from records indicating its successful cultivation in many states.¹³

In reviewing the expansive history of hemp and noting its popularity and importance in Asian, European, and American history, it is logical to ask why this amazing plant is no longer produced in the United States. The answer lies in the legislative history, congressional action, and unclear interpretation of drug laws criminalizing industrial hemp. Before examining this history,

4. *Plant Used in Thousands of Products*, *supra* note 1.

5. *Id.*

6. *Id.*

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.*

11. HEMPTech, INDUSTRIAL HEMP, PRACTICAL PRODUCTS — PAPER TO FABRIC TO COSMETICS 8 (John W. Roulac ed., 1995).

12. Lester E. Dewey, *Hemp*, in YEARBOOK OF THE UNITED STATES DEPARTMENT OF AGRICULTURE 283 (1913), http://www.naihc.org/hemp_information/content/1913.html (last visited Nov. 26, 2002).

13. *Id.*

however, an understanding of the differences between industrial hemp and its cousin, the marijuana plant, is critical.

B. The Differences Between Hemp and Marijuana

Industrial hemp, like marijuana, is of the genus *Cannabis sativa* L., of the Mulberry family.¹⁴ The double name, *Cannabis sativa*, was first recorded in A.D. 60 by Dioscorides¹⁵ and is derived from the description of the plant in two cultural languages. *Kannabis* is a Greek word from which the present-day word "canvas" is derived,¹⁶ while the Latin word *Sativa* means "useful."¹⁷

Although for centuries the terms *Cannabis* and hemp referred to the entire genus of *Cannabis sativa* species, the critical point is that most types of *Cannabis sativa* do not have psychoactive properties.¹⁸ Resinous *Cannabis* and marijuana refer to the *Cannabis* varieties producing psychoactive effects, while industrial hemp, or simply hemp, refers to the high fiber *Cannabis* strains with no psychoactive effect.¹⁹

Cannabis plants are unique in that they are the only plant genus that produces molecules known as cannabinoids.²⁰ The two main cannabinoids of interest are THC (delta-9 tetrahydrocannabinol) and CBD (cannabidiol).²¹ The psychoactive effect with certain *Cannabis* plants comes from THC in the resin naturally secreted by the plant.²² The resin of the different varieties of *Cannabis* contains varying amounts of psychoactive THC, and CBD, which counteracts the THC.²³ As a result, industrial plants with low THC have a high CBD ratio versus marijuana-type plants with high THC and low CBD ratios.

The purpose of the resin is to protect the plant from insect pests and serve as an ultraviolet light shield in hot, tropical climates.²⁴ The amount of resin and potency of the resin excreted varies in different strains.²⁵ For example,

14. HEMPTECH, *supra* note 11, at 6.

15. CHRIS CONRAD, HEMP FOR HEALTH 7 (1997).

16. *Plant Used in Thousands of Products*, *supra* note 1.

17. CONRAD, *supra* note 15.

18. *Id.* at 5.

19. *Id.*

20. David, P. West, *Hemp and Marijuana: Myths and Realities*, at http://www.naihc.org/hemp_information/content/hemp.mj.html (last visited Nov. 26, 2002).

21. *Id.*

22. CONRAD, *supra* note 15, at 21.

23. Hemp Biotech, *The Brawley California Hemp Research Project of 1994* (on file with author).

24. CONRAD, *supra* note 15, at 21.

25. *Id.*

the strain known as *Cannabis Indicia*, traditionally grown in India and named to honor that country, is a short, stocky, and highly resinous psychedelic *Cannabis sativa* variety.²⁶

Industrial hemp plants cultivated for manufacturing purposes contain only trace amounts of THC ranging from .03% to 1% THC.²⁷ In contrast, desirable marijuana plants have a minimum THC level of 3% and range to 20% and higher.²⁸ Hemp varieties grown in Canada and Europe today are certified to have THC levels below 0.3%.²⁹ There is absolutely no chance of inducing a psychoactive response by ingesting or smoking industrial hemp. Researcher Gilbert Fournier estimated that a person would have to smoke between fifty and 100 hemp cigarettes at the same time in order to obtain even a minimal inebriate effect.³⁰ He noted that there is essentially no THC in the stalks, seeds or roots of the plants.³¹

However, the DEA would like Americans to believe that marijuana and hemp could be produced from the *same* plant. A DEA media advisory report states: "The marijuana portions of the cannabis plant include the flowering tops (buds), the leaves and the resin of the cannabis plant. The remainder of the plant — stalks and sterilized seeds — is what some people refer to as 'hemp.'"³² This type of misleading statement is how the DEA proliferates their unrealistic theory that legalization of hemp will result in an increase in marijuana production and drug trafficking problems.

Not only are there major differences between the two species of plants, they also differ in cultivation methods. Industrial hemp grown for fiber crops are planted only four inches apart to discourage branching and leaf growth among the plants.³³ When mature, 108-120 days, the industrial hemp plant reaches a height of sixteen to twenty feet and has a rounded central stalk and almost no branches or foliage, except near the top.³⁴ In contrast, the medicinal *Cannabis* varieties are planted with at least six feet of space

26. *Id.*

27. Thomas J. Ballanco, Comment, *The Colorado Hemp Production Act of 1995: Farms and Forests Without Marijuana*, 66 U. COLO. L. REV. 1165, 1166 (1995).

28. Christen D. Shepherd, Comment, *Lethal Concentration of Power: How the D.E.A. Acts Improperly to Prohibit the Growth of Industrial Hemp*, 68 UMKC L. REV. 239, 245 (1999).

29. West, *supra* note 20.

30. CONRAD, *supra* note 15, at 10.

31. *Id.*

32. *DEA Clarifies Status of Hemp in the Federal Register*, DEA Media Advisory, Oct. 9, 2001, <http://www.usdoj.gov/dea/pubs/pressrel/pr100901.html>.

33. CONRAD, *supra* note 15, at 7.

34. *Id.*

between each plant to encourage branching and foliage growth.³⁵ This results in a shorter, fatter, mature plant in sixty to ninety days with a leafy, Christmas tree shaped appearance.³⁶ There is no danger of confusing a field of hemp for a field of marijuana.

A main concern among legislators looking into the debate over legalization of industrial hemp is the fear that hemp fields might hide marijuana plants.³⁷ The first considerations invalidating this fear is the extreme difference in methods of growing the plants and the visual difference in the plants while growing.³⁸ Secondly, and more importantly, hemp fields would deter marijuana growers because of the fear that cross-pollination between hemp and marijuana plants would significantly reduce the potency of the marijuana plants.³⁹ A study in Russia indicates that industrial hemp pollen travels twelve kilometers, creating a twelve-kilometer radius within which no marijuana grower would want to establish a crop.⁴⁰

The opposite applies for growers of industrial hemp. Hemp growers do not want to mix marijuana pollen with hemp strains because it destroys the genetic integrity of the variety and produces a plant less fibrous with no appreciable medicinal value.⁴¹ Additionally, hemp growers operate under a permit system where local police inspect fields on a routine basis.⁴² No rational individual would grow marijuana in such a monitored location.

There are many ways to differentiate between the fiber and medicinal *Cannabis* varieties. These include the genetic makeup of the plants, i.e. balance of cannabinoids or THC/CBD ratio, difference in cultivation methods, and markedly different appearances of plant strains while growing and when mature. These differences clearly demonstrate that these plants, though cousins, are in fact easily distinguishable.

C. The Decline in Production of Industrial Hemp

1. The 1937 Marijuana Tax Act

At the beginning of the twentieth century in the United States, hemp, along with flax, were the two fiber plants predicted to yield profits from their production.⁴³ However, negative changes loomed on the horizon not only for

35. *Id.*

36. *Id.*

37. West, *supra* note 20.

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.*

43. Dewey, *supra* note 12.

production of industrial hemp, but also for its cousin, the medicinal hemp plant. Prior to 1937, production of medicinal hemp was legal in the United States. In fact, marijuana was produced in this country for medicinal purposes throughout the nineteenth century and prescribed by doctors to treat a number of ailments.⁴⁴

Around the time of prohibition, Americans first became aware of the Mexican slang term "marijuana" through "yellow journalism" techniques of an "unscrupulous" newspaperman, William Randolph Hearst.⁴⁵ From 1916 to 1937, Hispanics and Blacks were stigmatized as being "'frenzied beasts under the influence of marijuana, who played anti-white voodoo satanic music (jazz).'"⁴⁶ Americans responded to this journalistic hype. In 1926, city officials in New Orleans pointed the finger at marijuana as the culprit for a crime wave that hit their city.⁴⁷ Americans became suddenly aware of this "killer drug" and staunch advocacy against marijuana began to take form.⁴⁸

As a result of the hysteria over marijuana, the Federal Bureau of Narcotics (FBN), the DEA's predecessor, was created.⁴⁹ Suppression of marijuana took place through a "tax smokescreen."⁵⁰ The Marijuana Tax Act, considered constitutional as a revenue measure, was implemented in 1937.⁵¹ The Act did not ban marijuana outright, but instead placed an "occupational excise tax upon dealers, and a transfer tax upon dealings in marijuana."⁵² The purpose of the Act was to raise revenue from marijuana trafficking and to try to eliminate use of marijuana.⁵³ The Act required registration of all marijuana importers, manufacturers, sellers, and distributors with the Secretary of the Treasury, and payment of an occupational tax.⁵⁴ In 1937, the raw *Cannabis* drug sold for one dollar an ounce.⁵⁵ The new transfer tax was \$1 an ounce,

44. Shepherd, *supra* note 28, at 248.

45. *Id.*

46. *Id.*

47. *Id.* at 249.

48. *Id.*

49. *Id.*

50. CONRAD, *supra* note 15, at 154.

51. Shepherd, *supra* note 28, at 252; Marihuana Tax Act of 1937, ch. 553, 50 Stat. 551 (repealed 1970).

52. JACK HERER, THE EMPEROR WEARS NO CLOTHES ch. 4 (11th ed.2000), <http://www.jackherer.com/book/ch04.html> (last visited Sept. 24, 2001).

53. Shepherd, *supra* note 28, at 251.

54. Herer, *supra* note 52.

55. *Id.*

doubling the price of the drug.⁵⁶ If an unregistered dealer was caught with marijuana, the charge was \$100 per ounce.⁵⁷

It is clear from the beginning that Congress intended to exempt industrial hemp from the definition of marijuana under the Act. The 1937 Marijuana Tax Act defined marijuana as:

[A]ll parts of the plant *Cannabis sativa* L., whether growing or not; the seeds thereof; the resin extracted from any such plant; and every compound, manufacture, salt, derivative, mixture, or preparation of such plant, its seeds, or resin; *but shall 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, salt, derivative, mixture, or preparation of such mature stalk (except the resin extracted therefrom), fiber, oil, or cake, or the sterilized seed of such plant which is incapable of germination.*⁵⁸

It is also clear from the language of the bill itself that Congress did not intend to criminalize industrial hemp. This is demonstrated in the recorded speeches made supporting the bill. Bill Hester, Assistant General Council for the Treasury Department, a division of the Bureau of Narcotics, proposer of the 1937 Act, testified as follows:

The form of the bill is such . . . as not to interfere materially with any industrial, medical or scientific uses which the plant may have. Since hemp fiber and articles manufactured therefrom are obtained from the harmless mature stalk of the plant, all such products have been completely eliminated from the purview of the bill by defining the term "marijuana" in the bill, so as to exclude from its provisions the mature stalk and its compounds or manufacturers.⁵⁹

Several industrial hemp advocates opposed the bill but were given assurances that the Act was meant only to target marijuana and not its valuable cousin, the industrial hemp plant.⁶⁰ Commissioner Harry J. Anslinger, of the FBN, told the Senate and individuals working in the hemp

56. *Id.*

57. *Id.*

58. See Marihuana Tax Act of 1937, ch. 553, 50 Stat. 551 (repealed 1970) (emphasis added).

59. West, *supra* note 20.

60. Shepherd, *supra* note 28, at 251.

industry that they were "not only amply protected under this act, but they can go ahead and raise hemp just as they have always done it."⁶¹

Although the Act was meant to target marijuana, the American hemp industry became an inadvertent victim of the 1937 Act.⁶² As a result of the Act, the hemp industry suffered from red tape associated with licensing methods and regulations established to distinguish hemp producers.⁶³ Because technology did not exist in 1937 to test the THC level of plants, FBN agents could only find illegal marijuana crops based on their appearance.⁶⁴ The FBN required farmers to strip the tops of plants of any leaves or flowers prior to shipping the plant for processing.⁶⁵ This additional step added to the already time consuming and physically demanding process of preparing hemp for delivery and processing.⁶⁶ The new industry requirements, along with the stigma of being labeled a possible drug dealer, led to the downfall of the industrial hemp industry.⁶⁷

2. Industrial Hemp Revived

Although production of hemp was sparse in the late thirties and early forties, hemp was in fact produced in the United States. In 1941, Henry Ford unveiled a hemp automobile to the public.⁶⁸ This unique creation was fueled by hemp products and made entirely from hemp. Ford expounded upon this auto that "grew from the soil," however, the hemp automobile was never mass-produced.⁶⁹

In 1942, the United States entered World War II. Cut off by the Japanese from its supply of Philippine imported Manila hemp, the government realized they needed to look to their own farmers to once again revive the wonder crop in the United States.⁷⁰ The government launched an aggressive "Hemp for Victory" campaign to stir patriotic farmers into hemp production for the U.S. forces. The 1942 film *Hemp for Victory* extols the virtues of the ancient plant and its many uses and refers to the plant as a premier world resource.⁷¹

61. West, *supra* note 20.

62. Ballanco, *supra* note 27, at 1166.

63. HEMPTECH, *supra* note 11, at 13.

64. Shepherd, *supra* note 28, at 252.

65. *Id.*

66. *Id.*

67. *Id.*

68. *Plant Used in Thousands of Products*, *supra* note 1.

69. *Id.*

70. West, *supra* note 20.

71. Transcript of HEMP FOR VICTORY (USDA 1942), http://www.Globalhemp.com/Archives/Government_Research/USDA/hemp_for_victory.sht (last visited Sept. 25, 2001).

American farmers rallied as a result of the campaign and between 1942 and 1945, over 400,000 acres of hemp were cultivated⁷² and forty-two hemp mills built to produce hemp products for the war effort.⁷³ In accordance with regulations promulgated following the 1937 Act, farmers were reminded that they should apply for a federal permit and obtain a tax stamp to grow hemp.⁷⁴

Following the war, however, hemp production again declined as the hemp mills shut down and farmers chose to produce crops without oppressive operating regulations. The Rens Hemp Company of Wisconsin was the last producer of industrial hemp in the United States, operating until 1957.⁷⁵

3. The Controlled Substance Act of 1970: Criminalization of a Valuable, Harmless Plant

In 1970, Congress repealed the 1937 Marijuana Tax Act⁷⁶ and replaced it with the Comprehensive Drug Abuse Prevention and Control Act of 1970 (1970 Act).⁷⁷ This Act incorporated the 1937 definition of marijuana which created a distinction between marijuana and hemp. However, under the 1970 Act, the DEA took the new position that the two plants were indistinguishable. Under this statute, both hemp, and its cousin marijuana, were included as Schedule I substances, illegal to produce. It is surprising that the United States took this approach with hemp considering the worldwide recognition hemp received in the 1960s regarding its value as a fiber plant.

In 1961, the United Nations' Single Convention Treaty on Narcotic Drugs specifically addressed the hemp/marijuana issue.⁷⁸ At the convention, the United Nations (UN) made an explicit distinction between *Cannabis* grown for resin (marijuana) and *Cannabis* varieties grown solely for industrial purposes.⁷⁹ This distinction enabled the European hemp producing countries to continue with production and trade. The United States formally signed the Single Convention Treaty in 1968, indicating support of the UN distinction.⁸⁰ However, rather than recognizing the Convention's distinction

72. West, *supra* note 20.

73. Transcript of HEMP FOR VICTORY, *supra* note 71.

74. *Id.*

75. Ballanco, *supra* note 27, at 3.

76. Comprehensive Drug Abuse and Control Act of 1970, Pub. L. No. 91-513, § 1101(b)(3)(A), 84 Stat. 1236, 1292 (codified at 21 U.S.C. §§ 801-971 (2000)) (repealing the Marihuana Tax Act of 1937).

77. *Id.*

78. Ballanco, *supra* note 27, at 3.

79. *Id.*

80. CONRAD, *supra* note 15, at 155.

between hemp and marijuana, the federal government undertook measures to exterminate this plant by criminalizing its production under the 1970 Act.

Congress identified three specific areas the 1970 Act intended to address: (1) provide authority for increased efforts to prevent drug abuse and to rehabilitate its users, (2) provide more effective means of law enforcement with regard to drug abuse prevention and control, and (3) provide a balanced scheme of criminal penalties for drug offenses.⁸¹ Clearly, the hemp ban does not contribute to any of these stated drug-related objectives.

Additionally, under the 1970 Act, Congress established a five schedule system to rate and provide better control measures over dangerous substances.⁸² Under this system, a Schedule I drug includes drugs having "'a high potential for abuse,' 'not currently accepted medical use in treatment in the United States,' and 'a lack of accepted safety for use of the drug . . . under medical supervision.'"⁸³ Through selective interpretation of the 1937 definition of marijuana, the 1970 Act included industrial hemp as a Schedule I narcotic.

Clearly, industrial hemp should not be included as a Schedule I narcotic. Industrial hemp is grown for industrial purposes not medical or psychoactive purposes. Industrial hemp is not a "drug,"⁸⁴ nor is it produced "with intent to affect the structure or any function of the body of man" as the definition of drug indicates.⁸⁵ The placement of hemp under Schedule I narcotics enables federal prohibition of its cultivation for any means, and in almost every instance the DEA refuses to grant permits for industrial hemp research or production.⁸⁶

Another point in this debate considers congressional intent regarding hemp under the 1970 Act. It is clear that Congress' definition of marijuana in the 1937 Act created an exemption for hemp. The definition of marijuana in the 1970 Act is identical to that of the 1937 Act.⁸⁷ Because the 1970 Act did

81. Shepherd, *supra* note 28, at 254.

82. *Id.* at 254-55.

83. CONRAD, *supra* note 15, at 155; Shepherd, *supra* note 28, at 255.

84. Shepherd, *supra* note 28, at 256. The definition of "drug" under the 1970 Act was taken from the Federal Food, Drug and Cosmetic Act:

A) articles recognized in the official United States Pharmacopoeia . . . ; and (B) articles intended for use in the diagnosis, cure, mitigation, treatment, or prevention of disease in man or other animals; and (C) articles (other than food) intended to affect the structure or any function of the body of man or other animals; (D) articles intended for use as a component of any articles specified in clauses (A), (B), or (C) of this paragraph.

21 U.S.C. § 321(g)(1) (2000).

85. *Id.*

86. *Id.*

87. Comprehensive Drug Abuse and Control Act of 1970, Pub. L. No. 91-513, §

not expand the definition of marijuana to include industrial hemp, and because it was the intent of Congress in 1937 to specifically exclude hemp, the result suggests that industrial hemp simply is not covered by the 1970 Act.⁸⁸ Additionally, the policy behind the 1970 Act, coupled with definitions of drugs and Schedule I substances, does not support inclusion of hemp in the Act. The government, however, currently operates under exactly the opposite assumption, suggesting that hemp is no longer recognized as distinct from marijuana.

4. *Hemp in Canada*

Currently, hemp is grown legally in twenty-nine countries around the world.⁸⁹ In 1998, Canada joined twenty-eight other countries producing hemp when it approved production of industrial hemp within its borders. Canada took this important step for both economic and ecological reasons.⁹⁰ Canada's Industrial Hemp Regulations defines industrial hemp as:

the plants and plant parts of the genera *Cannabis*, the leaves and flowering heads of which do not contain more than 0.3% THC w/w, and includes the derivatives of such plants and plant parts. It also includes the derivatives of non-viable cannabis seed. It does not include plant parts of the genera *Cannabis* that consist of non-viable cannabis seed, other than its derivatives, or of mature cannabis stalks that do not include leaves, flowers, seeds or branches, or of fibre derived from those stalks.⁹¹

The distinction between hemp and marijuana is further supported in Canada's regulations under its Prohibitions that state, "No person shall advertise industrial hemp, its derivatives, or any product made from those derivatives to imply that it is psychoactive."⁹² Canada oversees hemp production by requiring that each person importing or exporting industrial hemp hold a license to do so, as well as a permit for each shipment of industrial hemp that is imported or exported.⁹³ It is interesting to note that

1101(b)(3)(A), 84 Stat. 1236, 1292 (codified at 21 U.S.C. §§ 801-971 (2000)).

88. Shepherd, *supra* note 28, at 256.

89. West, *supra* note 20.

90. Kevin A. Ablett, *Hemp Holds Key to Canada's Future Prosperity*, at http://www.globalhemp.com/News/2001/September/hemp_holds_key_to_canadas.shtml (last visited Sept. 25, 2001).

91. Controlled Drugs and Substances Act, Industrial Hemp Regulations, C.R.C., ch. 19 (1998) (Can.), <http://laws.justice.gc.ca/en/c-38.8/sor-98-156/74627.html>.

92. *Id.*

93. *Id.*

while the United States bans the production of hemp, it imports the majority of Canada's hemp crop.⁹⁴

5. America Legislates to Revive Hemp

While Canada has broken step with the United States by legalizing hemp production, the United States adamantly refuses to lift its ban. Many Americans are very interested in pursuing legalization of industrial hemp. A recent study shows that nineteen states are currently taking action to bring back the commercial hemp industry.⁹⁵ States which have passed pro-hemp resolutions or have hemp legislation pending include Arizona, Arkansas, California, Hawaii, Idaho, Illinois, Iowa, Kentucky, Maryland, Minnesota, Montana, Nebraska, New Hampshire, New Mexico, North Dakota, South Dakota, Oregon, Vermont, and Virginia.⁹⁶

The progress for some states, however, has been slow. In last year's legislative session in South Dakota, a bill to allow hemp production again failed.⁹⁷ Senate Majority Leader Barbara Everist, a Republican from Sioux Falls, said the bill was unsuccessful in past legislative sessions because "[w]e haven't been convinced that the crop can be readily distinguished from marijuana"⁹⁸

However, interest and support for industrial hemp in South Dakota continues to increase. In December 2001, the South Dakota Farmers Union unanimously voted to support a petition to legalize industrial hemp production.⁹⁹ Supporters of the petition plan to get the required 13,010 valid signatures by May 2002 so that the initiative will be placed on the general election ballot in November.¹⁰⁰ "We truck Canadian hemp right past barely surviving South Dakota farms," said Bob Newland, President of SoDak-NORML, "the absurdity of the situation is glaringly obvious."¹⁰¹

Kentucky is another state with pending hemp legislation.¹⁰² In the nineteenth century, Kentucky was a leading producer of hemp.¹⁰³ Along

94. Bob Newland, *Hemp Policy Absurd*, at <http://www.sodaknorml.org/rcjml102001.htm> (last visited Feb. 19, 2002).

95. North Am. Indus. Hemp Council, Inc., *State Legislative Action for the Development of a Hemp Industry in the U.S.* (on file with author).

96. *Id.*

97. Bob Newland, *US SD: Industrial Hemp Gets Backing*, at <http://www.mapinc.org/drugnews/v01/n2029/a06.html> (last visited Feb. 19, 2002).

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.*

102. North Am. Indus. Hemp Council, Inc., *supra* note 95.

103. Susan David Dwyer, Note, *The Hemp Controversy: Can Industrial Hemp Save*

with the many industrial uses for hemp, Kentucky sees hemp as a "viable alternative to tobacco for Kentucky farmers" to help in easing "the strain of tobacco's demise" in Kentucky.¹⁰⁴

Oregon residents and federal foresters are alarmed by the heavy losses of old growth forest in that state as a result of clear cutting.¹⁰⁵ Many Oregon residents support the idea of growing hemp as an alternate method of producing their current wood products, i.e., paper.¹⁰⁶ Because Oregon's economy relies heavily on the wood industry, it is vital that some other form of agriculture be brought in to provide jobs for the more than 63,000 individuals dependent on the wood industry for support.¹⁰⁷

In 1999, North Dakota became the first state since 1937 to legalize and set guidelines for cultivation of industrial hemp.¹⁰⁸ Other states have followed suit. Currently, Hawaii and Maryland have also passed legislation legalizing hemp.¹⁰⁹

Of these states, only Hawaii was granted a federal permit by the DEA to grow industrial hemp for private research purposes.¹¹⁰ In granting this permit, the DEA set strict, and quite ridiculous requirements for construction of a hemp cultivation facility. The DEA required that the one-quarter acre plot of land be surrounded by chain link fencing with a razor wire top and a twenty-four-hour infrared security system.¹¹¹ These requirements do nothing more than demonstrate the government's misunderstanding of hemp. Great Britain, a producer of hemp nationwide since 1993, has had few incidents of crop theft or diversion from illicit sources.¹¹² Clearly, the United States overreacts with regard to this harmless plant.

6. Revival of Industrial Hemp by the Tribes

States are not the only governments interested in revitalizing industrial hemp cultivation. Tribal governments are also interested in industrial hemp production and the potential economic benefits that hemp would bring to

Kentucky? 86 Ky. L.J. 1143, 1157 (1997-1998).

104. *Id.* at 1180.

105. Marty Bergoffen & Roger Lee Clark, *Hemp as an Alternative to Wood Fiber in Oregon*, 11 J. ENVTL. L. & LITIG. 119, 119 (1996).

106. *Id.*

107. *Id.*

108. Cheryl Maday, *Hemp, Hemp HOORAY!*, MOTHER EARTH NEWS, Oct. 1, 1999, at 16, LEXIS, News Library, ARCNWS File.

109. North Am. Indus. Hemp Council, Inc., *supra* note 95.

110. *DEA Permits Hawaii to Plant Industrial Hemp for the First Time in US History*, PR NEWswire, Dec. 14, 1999, LEXIS, News Library, ARCNWS File.

111. *Id.*

112. West, *supra* note 20.

their people and their tribal economy. In fact, one tribal government, the Oglala Lakota Nation on the Pine Ridge Reservation in South Dakota, legislatively beat the states to the punch.¹¹³

In 1998, the Lakota passed Tribal Ordinance 98-27 distinguishing hemp from marijuana and outlining procedures that must be followed for cultivation of industrial hemp by Lakota farmers on reservation land.¹¹⁴ The Lakota law requires growers to form Land Use Associations (LUA's) and register with the Oglala Sioux Tribe (OST) Land Committee, which serves as an interface between tribal members and law enforcement.¹¹⁵ Over the past two years, some Lakota tribal members attempted to grow industrial hemp on their own lands under tribal law.¹¹⁶

On July 20, 2000, the Navajo Nation Council approved amendments to the Navajo law, distinguishing between industrial hemp and marijuana.¹¹⁷ Council delegate, Ervin Keeswood, sponsor of the industrial hemp legislation, said that the distinction between marijuana and industrial hemp is based on the percentage of THC in the plants.¹¹⁸

The Navajo see industrial hemp production as a healthy means of economic development that will not damage Mother Earth and her life forms.¹¹⁹ Additionally, the Navajo feel hemp production will benefit the tribe by addressing the reservation's problems with diabetes.¹²⁰ Because exercise is so important to the prevention and control of diabetes, farming hemp would increase physical labor and help tribal members maintain a healthier life style.¹²¹ Following creation and approval of legislation regulating industrial hemp within the tribe, the Navajo intend to follow federal requirements for hemp production, including obtaining a federal permit from the DEA to cultivate hemp.¹²²

In contrast to the procedure the Navajo plan to follow, the Lakota have not asked the federal government for a permit to grow industrial hemp and do

113. Bill Weinberg, *Land, Hemp and Sovereignty at Pine Ridge*, NATIVE AM., Sept. 2001, at 15.

114. *Hemp Agriculture Case Should Travel to Congress*, INDIAN COUNTRY TODAY, Aug. 13, 2001, http://globalhemp.com/News/2001/August/hemp_agriculture_case.shtml.

115. Weinberg, *supra* note 113, at 15.

116. *Id.*

117. Marley Shebala, *Navajo Council Passes Historic Hemp Bill*, NAVAJO TIMES (Window Rock, Ariz.), <http://www.electricemperor.com/enter/navahemp/navhemp.html> (last visited Sept. 7, 2001).

118. *Id.*

119. *Id.*

120. *Id.*

121. *Id.*

122. *Id.*

not plan to petition for a federal permit.¹²³ The Lakota believe that their right to grow industrial hemp stems from the sovereignty of the tribe to make their own rules and be governed by them and from rights granted to the tribe under the 1868 Fort Laramie Treaty, which includes agricultural objectives.¹²⁴

In response to the crops planted by Lakota farmers in 2000 and 2001, the federal government sent the FBI and DEA to the Pine Ridge Reservation to destroy the crops.¹²⁵ The Lakota farmers were told that should they continue to produce industrial hemp, they risked arrest and a ten-year prison sentence.¹²⁶

II. Sovereignty Perspectives

The legal definition of "sovereignty" is "1. Supreme dominion, authority, or rule. 2. The supreme political authority of an independent state."¹²⁷ "Sovereign power" is defined as "the power to make and enforce laws."¹²⁸ "Inherent power" is, "a power that necessarily derives from an office, position, or status."¹²⁹ Therefore, "inherent tribal sovereignty" is authority, to make and enforce laws, derived from the status of being Indian.

A. Sovereignty from the Native American Perspective: Independent Origin

*In 1492 there were eight million Indians in this country.
Today there is only one million.
Where are the grandchildren of those eight million?
Where are the murderers of Buddy LaMont, Raymond Yellow
Thunder, Chief Crazy Horse, and the women of Sand Creek?
Let the truth be known.
Who are the Criminals?
Who should be on trial?*

— Stan Holder¹³⁰

123. Weinberg, *supra* note 113, at 15.

124. *Id.* at 11, 16.

125. *Id.* at 11.

126. *Id.*

127. BLACK'S LAW DICTIONARY 1402 (7th ed. 1996).

128. *Id.* at 1401.

129. *Id.* at 1189.

130. LEONARD CROW DOG & RICHARD ERDOES, CROW DOG 221 (1995).

When Christopher Columbus mistakenly stumbled across the North American continent in 1492, he did not discover unused lands void of human existence, he found rich lands already inhabited.

When Columbus came ashore in the late fifteenth century, an estimated one million to fifteen million people lived on the North American continent.¹³¹ These people spoke over 200 different languages.¹³² The political organizations of these native inhabitants ranged from groups organized in small bands of hunters and gatherers, to groups which exhibited "highly sophisticated theocracies" and political organizations.¹³³

It is from this original occupancy and the fact that Indians governed themselves, free from any external interference or control, that Indian tribes today derive their inherent sovereignty.¹³⁴ Early on, European governments recognized this sovereignty and knew they had two choices if they wanted to obtain lands in America. They could massacre all Indian people or they could recognize the inherent sovereignty of the Indian people and obtain land from them, by consent, through treaties and agreements.¹³⁵ Because Europeans knew that use of brute force to take the land would cost time, money, and their own lives, they opted to treat the tribes as political entities, recognizing their sovereignty and then negotiating agreements with their tribal representatives.¹³⁶

It is from this historic independence and inherent sovereignty that tribes today base their right to remain distinct nations with the ability to make their own laws and be governed by them.

B. Sovereignty from the Federal Government's Perspective: Sovereignty "Redefined" Through Federal Action

[U]tmost good faith shall always be observed towards the Indians; their lands and property shall never be taken from them without their consent.

— Northwest Ordinance, 1787¹³⁷

131. NAT'L CONFERENCE OF STATE LEGISLATURES, STATES AND TRIBES, BUILDING NEW TRADITIONS 2 (1975).

132. *Id.*

133. *Id.*

134. DAVID GETCHES ET AL., CASES AND MATERIALS ON FEDERAL INDIAN LAW 2 (1979).

135. *Id.*

136. *Id.*

137. PETER NABOKOV, NATIVE AMERICAN TESTIMONY 119 (1991); Act of Aug. 7, 1789, art. III, ch. 8, § 1 Stat. 50, 52.

No Indian nation or tribe within the territory of the United States shall be acknowledged and recognized as an independent nation, tribe or power with whom the United States may contract by treaty.

— Indian Appropriation Act, 1871¹³⁸

History has shown that outside interests in the Indian community are driven mostly by an economic desire for Indian land and resources.¹³⁹ The United States, who obtained title of this country from European Nations, followed the same theory of political and international law as their predecessors: A weaker nation, dominated by a stronger nation, yields to the "overriding legislative authority of the dominant nation, and may depend on the stronger nation for protection."¹⁴⁰

The authority of the federal government over Indians is first referenced in the Constitution of the United States.¹⁴¹ Article I of the Constitution, the Indian Commerce Clause, establishes federal authority over Indian affairs for the purpose of functions relating to commerce.¹⁴² In this clause, the tribes are categorized with other countries as sovereigns.¹⁴³

Later, Supreme Court decisions cited this section of the Constitution in support of the idea that the federal government has "broad and exclusive federal powers and responsibilities in Indian affairs."¹⁴⁴ This theory was developed by the federal government through two legal doctrines known as the Plenary Power and Trust Doctrines.

The Plenary Power and Trust Doctrines were established in the early 1800s. At that time, Chief Justice John Marshall decided three important cases,¹⁴⁵ which held that the Commerce Clause of the Constitution, as well as treaties, created a duty for the federal government to protect Indian nations.¹⁴⁶ Chief Justice Marshall held that the duty to protect entitles the

138. *Id.*; Indian Appropriations Act, ch. 120, § 1, 16 Stat. 544, 566 (1871).

139. GETCHES ET AL., *supra* note 134, at 26.

140. *Id.* at 232.

141. *Id.*

142. U.S. CONST. art. I, § 8, cl. 3.

143. GETCHES ET AL., *supra* note 134, at 232.

144. *Id.* at 233.

145. Reference to the Marshall trilogy include the following cases: *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543 (1823); *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831); *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832).

146. Wallace Coffey & Rebecca Tsosie, *Rethinking the Tribal Sovereignty Doctrine: Cultural Sovereignty and the Collective Future of Indian Nations*, 12 STAN. L. REV. 191, 192 (2001).

government to exercise authority over Indian affairs as, "domestic dependent nations."¹⁴⁷ The concept of tribal sovereignty as "autonomous, although subject to an overriding federal authority" created a basis for the Plenary Power and Trust Doctrines.¹⁴⁸

The Plenary Power Doctrine is first seen in the birth of the guardian-ward concept developed in the 1886 case of *United States v. Kagama*.¹⁴⁹ In *Kagama*, two Indians committed murder on a reservation and challenged the jurisdiction of the federal government to prosecute the crimes.¹⁵⁰ The Court held that treaties and the federal government's historic dealings with tribes establish the absolute power of the federal government over Indians.¹⁵¹ This case marked a change in the federal government's view of Indians from independent sovereigns to the government as protector and the Indians as the protected.

Seventeen years later, in *Lonewolf v. Hitchcock*, the Court found that Congress could abrogate treaties, or parts of treaties, because it holds plenary power over tribes.¹⁵² Although the source of this plenary power is extra-constitutional, grounded solely in the guardian-ward relationship, the Plenary Powers Doctrine holds that there are no limitations on congressional power with regard to Indians and that this is a political power that is non-judicial.¹⁵³

The Federal Trust Doctrine outlines trust responsibilities to Indians and Indian nations. As discussed, this doctrine evolved judicially from *Cherokee Nation v. Georgia*, where Chief Justice Marshall established the concept of tribes as domestic dependent nations in relationship to the federal government as ward to guardian.¹⁵⁴

The required standard of conduct for federal officials and Congress under this trust obligation includes recognition of fiduciary duties and implementation of federal action toward Indians as outlined in treaties, agreements, statutes, executive orders, and administrative regulations.¹⁵⁵ Additionally, the trust obligation requires that these agreements and administrative regulations

147. *Id.*

148. *Id.*

149. 118 U.S. 375 (1886).

150. *Id.*

151. *Id.* at 384.

152. *Lonewolf v. Hitchcock*, 187 U.S. 553 (1903).

153. Lindsey Robertson, Remarks, Comparative Indigenous Law Course, University of Oklahoma, College of Law (Jan. 24, 2002).

154. FELIX S. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 220 (Rennard S. Strickland et al. eds., 1982) [hereinafter COHEN].

155. *Id.*

be construed favorably toward tribes in light of the trust responsibility.¹⁵⁶ When Congress is exercising its power over Indians, the trust obligation requires that such exercise be based on a determination to protect the Indians.¹⁵⁷

Canons of treaty construction were established under this trust obligation.¹⁵⁸ Courts establish that these canons require "that treaties be liberally construed to favor Indians."¹⁵⁹ They also require that "ambiguous expressions in treaties be resolved in favor of Indians, and that treaties should be construed as the Indians would have understood them" at the time the treaty was negotiated.¹⁶⁰

The need for canons of treaty construction results from the unequal bargaining power between the United States and the Indian nations present at the time the treaties were drafted and signed. As noted earlier, there were over 200 languages spoken by the Indian people in this country. Because of language and literacy barriers, the Indians were always at a disadvantage during treaty negotiations. Red Cloud, a Lakota chief said, "In 1868 men came out and brought papers. We could not read them, and they did not tell us truly what was in them . . . when I reached Washington the Great Father explained to me what the treaty was, and showed me that the interpreters had deceived me."¹⁶¹

In order to balance the disadvantaged position from which tribes negotiated treaties, the courts outlined the above canons for treaty interpretation.¹⁶² The trust obligation also implies a duty of loyalty by administrative officials in their dealings with Indians, and a faithful discharge of trust obligations by federal officials.¹⁶³

History has shown that this was rarely done. In 1879, two years after he surrendered, Chief Joseph of the Nez Perce Tribe addressed cabinet members and congressmen,

I cannot understand how the Government hands a man out to fight us, as it did General Miles, and then breaks its word. Such a Government has something wrong about it . . . I do not understand why nothing is done for my people. I have heard talk and talk, but nothing is done.¹⁶⁴

156. *Id.*

157. *Id.* at 221.

158. *Id.*

159. *Id.* at 222.

160. *Id.*

161. NABOKOV, *supra* note 137, at 118.

162. COHEN, *supra* note 154, at 222.

163. *Id.* at 227-28.

164. T.C. MCLUHAN, *TOUCH THE EARTH: A SELF-PORTRAIT OF INDIAN EXISTENCE* 123

The Trust Doctrine was established for the government to "protect Indian trust rights over conflicting public purposes," unless Congress specifically authorizes certain action.¹⁶⁵

With regard to the status of tribal sovereignty today, recent cases have established a reconceptualized notion of inherent tribal sovereignty because of the dependent status of tribes.¹⁶⁶ In *Oliphant v. Suquamish Indian Tribe*, the court held that absent express congressional authorization, Indian tribes do not have criminal jurisdiction over non-Indians.¹⁶⁷ This holding indicated that because of their dependent status, tribes are divested of part of their inherent sovereignty.¹⁶⁸

In conclusion, the federal perspective on tribal sovereignty today appears to be as follows: the powers of tribes are inherent powers of limited sovereignty, which were never extinguished. Tribes retain sovereignty over their own lands and over their tribal members, unless a treaty or federal statute state otherwise.

III. Production of Industrial Hemp by Tribes

A. The Need for Economic Development

There was no longer hope for us on this earth, and the Great Spirit seemed to have forgotten us.

— Red Cloud, *Oglala Lakota*¹⁶⁹

"American Indians are the most impoverished minority in the United States."¹⁷⁰ The poverty that Indians experience today is directly tied to the history they have endured — a history created by the United States government. This history for Indian people began with disease, dispossession, and being cast as subjects of federal control.¹⁷¹ This history continued through shifting tides of federal policy comprised of destructive periods of legislation including the Allotment and Assimilation Era in 1887, and the un-

(1971).

165. COHEN, *supra* note 154, at 228.

166. Coffey & Tsosie, *supra* note 146, at 193.

167. *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 208 (1978).

168. *Id.*

169. VINE DELORIA, JR. & DAVID E. WILKINS, *TRIBES, TREATIES & CONSTITUTIONAL TRIBULATIONS* 68 (1999).

170. GETCHES ET AL., *supra* note 134, at 15.

171. STEPHEN CORNELL & JOSEPH KALT, *WHAT CAN TRIBES DO? STRATEGIES AND INSTITUTIONS IN AMERICAN INDIAN ECONOMIC DEVELOPMENT* v (1995).

conscionable Termination Period that began in 1945.¹⁷² Throughout this history, Indian people have experienced poverty, death, loss, and destruction.

The 1990 census indicates that 31% of Indian people live below the poverty level¹⁷³ compared to 13% of all U.S. race populations.¹⁷⁴ Per capita, income for Native Americans is estimated at \$8300, less than half the national level.¹⁷⁵ In 1991, studies showed the Native American unemployment rate at 45%.¹⁷⁶ This is 37% higher than the average unemployment rate for the rest of the U.S. population.¹⁷⁷

The living conditions on Pine Ridge Reservation reflect this poverty. Pine Ridge is located in Shannon County, South Dakota, the poorest county in America.¹⁷⁸ Forty percent of reservation housing is listed as substandard, and one-fifth of the homes do not have indoor plumbing or telephone services.¹⁷⁹

Because federal substantive policy has never kept pace with the needs of the Indian people, the tribes, during the Self-Determination Era of the 1960s, began struggling with the federal government for increased control over their own affairs.¹⁸⁰ The tribes were successful in this struggle. Tribes realized that hope for the future involved tribal financial activities not directly tied to federal support.¹⁸¹ They understood that the key to self-determination lay in organizing and maintaining sustainable tribal economic development.

Today, when most non-Indians think about Native Americans, they think about tribes who have become rich from gaming operations. The reality is that of the nation's 556 federally recognized tribes,¹⁸² less than half of those tribes have gaming operations.¹⁸³ Of the tribes that do have gaming

172. *Id.*

173. GETCHES ET AL., *supra* note 134, at 15.

174. Rose L. Pfefferbaum et al., *Providing for the Health Care Needs of Native Americans: Policy, Programs, Procedures, and Practices*, 21 AM. INDIAN L. REV. 4 (1997).

175. GETCHES ET AL., *supra* note 134, at 15.

176. *Id.*

177. *Id.*

178. *Pine Ridge Reservation*, at <http://www.lakotastory.org/pineridge.html> (last visited Nov. 4, 2002).

179. *Id.*

180. CORNELL & KALT, *supra* note 171.

181. GETCHES ET AL., *supra* note 134, at 24.

182. Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs, 65 Fed. Reg. 13,298 (Mar. 13, 2000), <http://www.artnatam.com/tribes.html> (last visited Nov. 4, 2002) (giving notice as of March 13, 2000, of the 556 tribal entities currently recognized by the federal government and eligible for funding and services from the Bureau of Indian Affairs).

183. Dave Bydalek, Address on Indian Gaming to the General Affairs Committee of the Nebraska BiCameral (Feb. 5, 2001), http://www.familyfirst.org/news_releases/lr6testimony.

operations, only very small percentages have become really successful through gaming. As a result, tribes are looking for alternatives to create economic development.

B. Why Production of Industrial Hemp by Tribes Makes Sense

Our land is everything to us . . . I will tell you one of the things we remember on our land. We remember that our grandfathers paid for it — with their lives.

— John Wooden Legs, *Cheyenne*¹⁸⁴

The land, or Mother Earth as she is referred to by Indian people, has always been cherished and held in the highest regard. "The Great Spirit is our father, but the earth is our mother," said Bedagi or Big Thunder, of the Wabanakis Nation back in 1900.¹⁸⁵ "She nourishes us; that which we put into the ground she returns to us, and healing plants she gives us likewise."¹⁸⁶

Each tribe has their own unique creation story, explaining how they came to be on this earth. One similarity in these creation stories is the acknowledgment of the earth as a mother, a giver of life. The importance of the earth is still acknowledged by tribal people today. N. Scott Momaday, a Kiowa writer said, "We humans must come again to a moral comprehension of the earth and air. We must live according to the principle of a land ethic. The alternative is that we shall not live at all."¹⁸⁷

Industrial hemp is recognized as one of the most ecologically beneficial and prolific crops that a farmer could choose to cultivate. Instead of stripping the soil of its nutrients as most crops do, hemp tends to improve the soil where it is planted.¹⁸⁸ A 1913 report by the USDA noted that hemp "improves its [soil] physical condition, destroys weeds, and does not exhaust its [soil] fertility."¹⁸⁹ Additionally, hemp is a hardy plant and has been grown successfully over a wide range of different soil types and in many different climates in the United States.¹⁹⁰ Most importantly, because it

shtml.

184. CONCHO FARM & RANCH, ANNUAL REPORT 2001, at 5 (2001) [hereinafter CONCHO REPORT].

185. MCLUHAN, *supra* note 164, at 22.

186. *Id.*

187. CONCHO REPORT, *supra* note 184, at 3.

188. Dewey, *supra* note 12, at 22.

189. *Id.*

190. *Id.*

requires virtually no pesticides and less fertilizer than other crops, hemp cultivation is environmentally friendly.¹⁹¹

Because of the tribes' innate tie with the land, and because cultivating the plant does not require special soil types, expensive machinery, and pesticide, production of hemp by tribes makes sense. Tribes have tried establishing economic development on their lands through various methods. Some tribes focused on bingo and gaming while other tribes tried to attract new private business ventures onto tribal lands by promoting business tax advantages.¹⁹²

Even with various incentives, many businesses have not relocated to Indian lands for a variety of reasons.¹⁹³ These reasons may include fear or misunderstanding of tribal sovereign immunity, mistrust of tribal government or concerns about political turnover and structural soundness of tribal governments.¹⁹⁴ More often, however, economic development seems to be hindered by more tangible barriers. "Territorial remoteness, inadequate public infrastructure base, capital access barriers, land ownership patterns, and an under-skilled labor and managerial sector . . . stifle Indian Country development and investment."¹⁹⁵

The Lakota, like many other tribes, have plenty of land.¹⁹⁶ They also have sufficient manpower to grow hemp.¹⁹⁷ Production of industrial hemp would not necessitate infrastructure facilities, skilled labor, proximity to cities, or other factors that tend to prohibit economic development. More importantly,

191. David Morris, *Overcoming Our Fear of Hemp*, J. COM., Sept. 8, 1994, at 8A, LEXIS, News Library, MAJPAP File.

192. Chambers & Jackson, PC, *A New Way of Business in Indian Country*, at <http://www.cpa-ok.com/in-business.htm> (last visited Nov. 4, 2002). The Omnibus Reconciliation Act of 1983 created unique incentives for companies to establish businesses in Indian country. Special accelerated depreciation of assets is offered to any for-profit business which invests in Indian Country between January 1, 1994, and December 31, 2003. For wages paid to a Native American or their spouse, Congress allows a tax credit of 20% of the first \$20,000 from those qualified wages. This provides companies with a possible tax savings of up to \$4000 for each employee hired and working for businesses in Indian Country. *Id.*

193. CORNELL & KALT, *supra* note 171, at 6 -7.

194. *Id.*

195. Robert A. Williams, Jr., *Small Steps on the Long Road to Self-Sufficiency for Indian Nations: The Indian Tribal Governmental Tax Status Act of 1982*, 22 HARV. J. ON LEGIS. 335, 341 (1985).

196. Fed. Emergency Mgmt. Agency, *Oglala Sioux Tribe of the Pine Ridge Reservation of South Dakota*, at <http://www.fema.gov/regions/viii/tribal/oglabg.shtm> (last visited Nov. 3, 2002) [hereinafter *Oglala Sioux Tribe*] (providing historical and statistical information about the Oglala Lakota Nation of Pine Ridge Reservation in South Dakota, listing trust acreage of the reservation at 1,783,741).

197. The tribal enrollment on the Pine Ridge Reservation is 39,734. *Id.*

hemp production means money. Whereas an acre of wheat brings a profit of only \$25, in Canada, an acre of industrial hemp brings \$225.¹⁹⁸

Additionally, production of industrial hemp benefits the land and saves environmental resources. Hemp yields several times as much pulp per acre as do trees¹⁹⁹ and is ready to harvest in only seventy to 110 days.²⁰⁰ Hemp production would bring an end to clear cutting trees for wood pulp.²⁰¹ Hemp fibers and hemp oils can be used in place of fossil fuels.²⁰² This distinction is very important to tribal members who witnessed serious desecration of their own lands over the years through mineral and grazing leases approved by the BIA, with little input from the Indian people who own the land.²⁰³

IV. The Lakota Controversy

A. Lakota History to Present Day

They treat us like an ethnic minority. We are not an ethnic minority. We are sovereign. We are Lakota. And we are going to reclaim our rights.

— Alex White Plume, *Lakota*²⁰⁴

Alex White Plume and the Lakota Nation have taken a unique stance in this nationwide interest in the revitalization of the industrial hemp industry. The Lakota, acting under their own laws and operating under rights granted by treaty in 1868, have begun to produce industrial hemp on tribal lands.²⁰⁵ In South Dakota, a land where most crops do not easily grow, the Lakota see cultivation of this versatile, hardy crop as a means to restore a land-based way of life to Pine Ridge and to return the Indian lands to Indian control.²⁰⁶

198. Elise Ackerman, *The Latest Buzz on Hemp*, U.S. NEWS & WORLD REP., Mar. 15, 1999, at 50, LEXIS, News Library, ARCNWS File.

199. HEMPTech, *supra* note 11, at 29.

200. *Id.* at 20.

201. *Id.* at 5, 29.

202. *Id.* at 30.

203. Judith Royster, *Mineral Development in Indian Country: The Evolution of Tribal Control over Mineral Resources*, 29 TULSA L.J. 541, 522 (1994).

204. *The Planting: Return to Pine Ridge*, 2 HEARTLAND REV. NEWS (2001), at <http://www.music.barrow.org/2001/Q2/planting.htm> (discussing Alex White Plume's growing of two crops of industrial hemp on his Pine Ridge land under the sovereignty and treaty rights of the Lakota Nation of which he is a member).

205. See generally Weinberg, *supra* note 113.

206. *Id.* at 11.

1. *The 1868 Fort Laramie Treaty*

In 1868, after two long years of hard-fought resistance by the Lakota people against the influx of white soldiers and settlers onto Lakota land, the Oglala Chief *Mahpiya Luta* or Red Cloud, won his war for the Powder River Country.²⁰⁷ The 1868 Fort Laramie Treaty (1868 Treaty), a treaty of peace,²⁰⁸ reserved to the Lakota people the lands that they had fought to keep for so long "for the absolute and undisturbed use and occupation"²⁰⁹ The agreement set aside land that included a vast amount of the area comprising half of present-day South Dakota — including the sacred *Paha Sapa* or Black Hills.²¹⁰ Additionally, areas of land in Nebraska, Wyoming, and Montana were also established under the treaty as "unceded" hunting grounds.²¹¹ In exchange for ceded lands, the government vowed to provide agricultural assistance, clothing, and food for the Lakota.²¹²

The Lakota were satisfied with this agreement and signed the treaty. Nine years later, *Sinte Gleska* or Spotted Tail, leader of one of the seven Lakota bands, commented on the government's actions following the 1868 Treaty, "These promises have not been kept . . . [a]ll the words have proven to be false."²¹³

The Lakota history with the government following the 1868 Treaty is fraught with dispossession, violence, and broken promises. The government violated part of the 1868 Treaty by confiscating the sacred Black Hills.²¹⁴ Loss of more lands followed in 1889 through the creation of separate reservations.²¹⁵ Additional loss of lands occurred under the 1887 General Allotment Act (GAA) when the government further divided reservation lands into 320-acre private holdings for each adult.²¹⁶ In 1909, under the GAA, the land not assigned to the Lakota was sold to non-Indians as "surplus and waste" land.²¹⁷

207. DEE BROWN, *BURY MY HEART AT WOUNDED KNEE: AN INDIAN HISTORY OF THE AMERICAN WEST* 145 (1970).

208. COHEN, *supra* note 154, at 104.

209. Fort Laramie Treaty of 1868, Apr. 29, 1868, U.S.-Lakota/Arapaho, art. II, 15 Stat. 635, 636.

210. Weinberg, *supra* note 113, at 11.

211. *Id.*

212. *Id.*

213. BROWN, *supra* note 207, at 146.

214. Alexandra New Holy, *The Heart of Everything That Is: Paha Sapa, Treaties, and Lakota Identity*, 23 OKLA. CITY U. L. REV. 317, 321 (1998).

215. Weinberg, *supra* note 113, at 11.

216. *Id.* at 12.

217. *Id.*

2. Pine Ridge Today

Today, of the original three million acres of Oglala land that comprised Pine Ridge, only a little over half remains trust land.²¹⁸ This is one result of the Allotment Era.²¹⁹ Most of the trust land left is leased to non-Indian farmers — a reflection of the problem of fractionated ownership of the land.²²⁰ Because trust lands can not be sold, the land "descends equally among the owners' heirs" through testate or intestate succession.²²¹ The result is fractionated ownership of parcels of land.²²² This "fractionated heirship" can result in 100 heirs owning a single parcel of land.²²³ Because too many people own one piece of land, in many instances, the Bureau of Indian Affairs (BIA) negotiates leases for these trust lands, with minimal contact or approval from the land's owners.²²⁴

Historically, the Lakota government was comprised of *tiospayes*, extended families living and working together to support themselves.²²⁵ These *tiospayes* were very contra to white policy for the Indian people. The government saw the only way to assimilate and civilize Indians was to break up these tribal groups and force tribes to change from decentralized, nomadic political groups to a group with centralized, political objectives and agricultural values.²²⁶

Reformers in Congress attempted, through the Indian Reorganization Act, to organize tribes into self-governing communities better able to deal with

218. *Id.*; see also *Oglala Sioux Tribe*, *supra* note 196.

219. Weinberg, *supra* note 113, at 12; see also Kathleen R. Guzman, *Give or Take an Acre: Property Norms and the Indian Land Consolidation Act*, 85 IOWA L. REV. 595, 606 (2000). As a result of the allotment era, Indian owned lands dropped "from 138 million acres in 1887 to 48 million acres by 1934." *Id.*

220. Weinberg, *supra* note 113, at 12.

221. Kenneth H. Bobroff, *Retelling Allotment: Indian Property Rights and the Myth of Common Ownership*, 54 VAND. L. REV. 1559, 1587 (2001).

222. *Id.*

223. Weinberg, *supra* note 113, at 12; see also Bobroff, *supra* note 221, at 1616-17. The author discusses an Army Corps of Engineers and Bureau of Indian Affairs 1957 land survey of a 116-acre allotment on the Yankton Sioux Reservation. The land was held as a tenancy in common among ninety-nine heirs of the original land allottee. The heir with the largest interest was determined to own an estimated 7% of the parcel which translated to about eight acres. The estimated value of this interest was \$586. The heir with the smallest interest owned a little more than 0.005 percent of the land which, "if partitioned, [was] about the size of an average American living room." *Id.* The value of this land interest was calculated to be \$0.37. *Id.*

224. Weinberg, *supra* note 113, at 12.

225. *Id.* at 11, 12.

226. *Id.*

outside influences from the dominant society.²²⁷ This Act further divided traditional *tiospayes* and gave power to a centralized form of government led by politically motivated mixed-bloods.²²⁸

In an attempt to restructure *tiospayes*, LUA's were organized.²²⁹ LUA's sought consolidation of allotments into one tract of land, the pooling of family resources, and access to farm equipment.²³⁰ In the 1930s and 1940s Lakota families were successful with the LUA's, producing hay and raising livestock.²³¹ Even in this effort, the federal government did not cooperate with the Lakota. In the 1950s, as a result of a federal tax assessment, livestock were confiscated.²³² Tom Cook, current development director for the Slim Butte LUA, said the 1930s LUA program was shut down in the 1950s because, "[t]hey decided development was impossible in remote, resourceless areas."²³³ "And you wonder why there's so much alcoholism on the reservation," said Beatrice Weasel Bear.²³⁴ In spite of federal policy, Cook, Weasel Bear, and other Lakota are trying to revive the LUA program, which operates without federal funds, relying on assistance from private organization donations.²³⁵

3. The White Plume Story

Alex White Plume is the head of the White Plume *tiospaye*, which is comprised of 4000 acres and 180 family members.²³⁶ On April 29, 2000, the 132nd anniversary of the signing of the Fort Laramie Treaty, Alex White Plume ceremonially planted his first crop of industrial hemp on 1.5 acres of land²³⁷ with wild seeds found locally on Pine Ridge.²³⁸

White Plume planted the crop to provide hemp for research experiments and to provide a means of self-sufficiency for he and his family.²³⁹ White Plume announced the planting of his crop on the local reservation KILI

227. GETCHES ET AL., *supra* note 134, at 192.

228. Weinberg, *supra* note 113, at 12.

229. *Id.* at 13.

230. *Id.*

231. *Id.* at 14.

232. *Id.*

233. *Id.* at 13.

234. *Id.* at 14.

235. *Id.* at 13.

236. *Id.* at 15.

237. *Id.*

238. *Id.* at 16.

239. *Id.* at 15.

Radio and invited representatives from the BIA and State Attorney's office, though they chose not to attend.²⁴⁰

White Plume even provided a sample of the crop to the DEA for testing.²⁴¹ Although the test from the federally contracted lab "revealed that the plants contained no detectable quantity of THC," on August 24, 2000, just prior to harvesting the crop, White Plume's land was invaded by thirty heavily armed agents including DEA, FBI, and U.S. Marshals.²⁴² When White Plume arrived at his field, an M-16 was put in his face and he was ordered not to move.²⁴³ White Plume and his family then watched as the agents chopped down and hauled away 3782 non-psychoactive industrial hemp plants.²⁴⁴ White Plume was warned that under federal law he could face a ten-year prison term — for a field of hemp that contained no detectable level of THC.²⁴⁵

In the spring of 2001, the White Plumes planted again.²⁴⁶ In the morning hours of July 30, 2001, federal agents destroyed and removed three acres of White Plume's industrial hemp.²⁴⁷ A peaceful agreement was reached ahead of time between White Plume and Michelle Tapken, U.S. Attorney for South Dakota.²⁴⁸ If White Plume agreed not to resist the agents when they came to destroy his crops, the government would not file charges against him.²⁴⁹ "The Feds 'are not particularly excited about prosecuting someone facing so many years in prison' for such an innocuous crime," said Bruce Ellison, one of White Plume's attorneys.²⁵⁰ White Plume, who plans on filing suit to establish his right to grow hemp based on the 1868 Treaty said, "We didn't back down in any way, we just allowed it to be pulled because we needed time to strategize. We're not going to give up."²⁵¹

The White Plumes hemp field was scheduled to be sold for \$250 a bale.²⁵² The crop had an estimated worth of between \$12,000 to

240. *Id.*

241. *Id.*

242. *Id.*

243. *Id.*

244. *Id.*

245. *Id.*

246. Emily Huber, *Sioux vs. DEA, Round Two*, at http://www.motherjones.com/web_exclusives/features/news/hemp_update.html (last visited Sept. 10, 2001).

247. *Id.*

248. *Id.*

249. *Id.*

250. *Id.*

251. *Id.*

252. *Id.*

\$20,000.²⁵³ Currently, the White Plumes make \$450 a year leasing 160 acres to a cattle rancher for grazing.²⁵⁴

B. Legal Analysis

1. The Lakota Stance

In the old days, they could not tell the difference between good Indians and bad ones so they killed us all. Now they do not know the difference between hemp and marijuana so they kill all of it.

— Debra White Plume, *Lakota*²⁵⁵

The Lakota feel they have the right to grow industrial hemp, stemming from their status as a sovereign nation, and from the 1868 Treaty, the objective of which was to transform the Lakota into an agrarian society.²⁵⁶

Cultivation of industrial hemp is sanctioned by the Lakota Nation's tribal government under Tribal Ordinance 98-27. This Ordinance distinguishes hemp from marijuana and permits its cultivation.²⁵⁷ In a July 18, 2001, letter to South Dakota's U.S. Attorney, Michelle Tapken, Oglala Lakota President Yellow Bird Steele wrote, "[W]e regard the enforcement of our hemp ordinance and prosecution of our marijuana laws as tribal matters. I respectfully request that you direct the law enforcement agencies under your authority to refrain from further contact with our tribal members regarding the cultivation of industrial hemp."²⁵⁸

The sovereign power of tribes over their own people was recognized in the 1883 case *Ex Parte Crow Dog*.²⁵⁹ In *Crow Dog*, the defendant was convicted and sentenced to death for murdering another tribal member in Indian country.²⁶⁰ The defendant challenged the jurisdiction of the government through a writ of habeas corpus.²⁶¹ The Supreme Court found that the government did not in fact have jurisdiction over *Crow Dog* and held that

253. Don Trent Jacobs, *A Dance of Deception*, MOTHER JONES, Feb. 20, 2001, http://motherjones.com/reality_check/pineridge_contradiction.html.

254. *Id.*

255. *Id.* Debra White Plume lives with her husband, Alex White Plume, on the Pine Ridge Reservation in South Dakota.

256. Fort Laramie Treaty of 1868, Apr. 29, 1868, U.S.-Lakota/Arapaho, art. VI, 15 Stat. 635, 637.

257. Weinberg, *supra* note 113, at 15.

258. Huber, *supra* note 246, at 2.

259. *Ex parte Crow Dog*, 109 U.S. 556 (1883).

260. *Id.* at 557.

261. *Id.* at 571, 572.

tribal members are subject to the laws and jurisdiction of their own tribal governments and are only subject to federal laws enacted with express reference to Indians.²⁶²

The Lakota do not consider production of industrial hemp to be a crime under their tribal laws because hemp is not a drug.²⁶³ However, the federal government refuses to recognize this fact.

2. Federal Jurisdiction? The DEA's Stance

There are three types of statutes governing federal criminal jurisdiction over Indian lands.²⁶⁴ Two types are specifically codified and the third type includes statutes of general application.²⁶⁵

The first codified statute known as the Indian Country Crimes Act,²⁶⁶ originated under the Trade and Intercourse Act of 1790.²⁶⁷ This Act extends federal enclave law to Indian country and governs interracial crimes that occur there.²⁶⁸ Section 1152 does not extend federal jurisdiction over agricultural production of drugs because the act of drug production includes no interracial component.²⁶⁹

The second codified statute, the Major Crimes Act,²⁷⁰ was passed in 1885 following the *Crow Dog* case. This act was implemented to rectify the federal government's problem with lack of jurisdiction over Indian offenders committing crimes in Indian country. To create jurisdiction under this statute,

262. *Crow Dog*, 109 U.S. at 572.

263. Weinberg, *supra* note 113, at 15.

264. ROBERT N. CLINTON ET AL., *AMERICAN INDIAN LAW CASES AND MATERIALS* 278 (3d ed. 1991) (stating that Indian lands or "Indian Country" is defined in 18 U.S.C. § 1152). According to the definition, "Indian Country" includes:

(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.

Id.

265. *Id.*

266. 18 U.S.C. § 1152 (2000).

267. Act of July 22, 1790, ch. 33, 1 Stat. 137.

268. GETCHES ET AL., *supra* note 134, at 471.

269. For a broader discussion of jurisdiction over victimless crimes in Indian Country, see CLINTON ET AL., *supra* note 264, at 278.

270. 18 U.S.C. § 1153 (2000).

however, the crime must be one of fourteen enumerated crimes under the Act.²⁷¹ The revised statute includes the following crimes:

murder, manslaughter, kidnaping, maiming, a felony under chapter 109A, incest, assault with intent to commit murder, assault with a dangerous weapon, assault resulting in serious bodily injury (as defined in section 1365 of this title), an assault against an individual who has not attained the age of sixteen years, arson, burglary, robbery, and a felony under section 661 of this title within Indian country²⁷²

Under this Act, controlled substance abuse is not one of the listed crimes, providing no federal jurisdiction over hemp production on Pine Ridge.

The third type of statute is a statute wherein "federal crimes applicable to the nation as a whole are also applicable to Indian lands."²⁷³ It is under this type of statute that the federal government, through the DEA, claims criminal jurisdiction to stop hemp production at Pine Ridge.

The 1970 Act is a federal statute of nationwide application. Under the statute of general applicability theory, a violation of the 1970 Act constitutes a federal crime.²⁷⁴ However, there is a very important exception to this rule. "If the crime is a federal crime of nationwide application, federal jurisdiction exists irrespective of the locus of the crime or the status of the parties *unless the prosecution for the crime would interfere with Indian treaty or other rights.*"²⁷⁵

The DEA does not have jurisdiction over hemp production at Pine Ridge because the 1868 Treaty not only encouraged the Lakota to farm, but guaranteed them the right to "commence farming"²⁷⁶ and "cultivate the soil"²⁷⁷ with plants available at that time. The subsequent discussion regarding the 1868 Treaty and application of the canons of treaty construction demonstrates that the Lakota could produce hemp in the late nineteenth century, resulting in a reservation of a right to do so today.

271. CLINTON ET AL., *supra* note 264, at 284.

272. 18 U.S.C. § 1153 (2000).

273. CLINTON ET AL., *supra* note 264, at 278; Fed. Power Comm'n v. Tuscarora Indian Nation, 362 U.S. 99, 142 (1960).

274. CLINTON ET AL., *supra* note 264, at 278.

275. *Id.* at 294 (emphasis added); *see also* Donovan v. Coeur d'Alene Tribal Farm, 751 F.2d 1113, 1116 (9th Cir. 1985).

276. Fort Laramie Treaty of 1868, Apr. 29, 1868, U.S.-Lakota/Arapaho, art. VI, 15 Stat. 635, 637.

277. *Id.* at art. III, 15 Stat. at 636.

3. Interpreting the 1868 Fort Laramie Treaty

In 1868, the federal government saw education and agricultural activities as a means to "insure the civilization of the Indians."²⁷⁸ This is clear from the many sections of the 1868 Treaty, which support and encourage the Lakota to pursue farming.²⁷⁹

Article 6 states:

If any individual . . . shall desire to commence farming, he shall have the privilege to select . . . a tract of land within the reservation, not to exceed three hundred and twenty acres in extent . . . certified and recorded in the (Sioux) "land-book" . . . shall cease to be held in common . . . held in exclusive possession of the person selecting it . . . so long as he or they continue to cultivate it . . . any Indian or Indians receiving a patent for land under the foregoing provisions, shall . . . become . . . a citizen of the United States and be entitled to all the privileges and immunities of such citizens . . . at the same time, retain all his rights to benefits accruing to Indians under this treaty.²⁸⁰

Article 8 states:

When the head of a family . . . selects lands and received his certificate . . . and the agent shall be satisfied that he intends in good faith to commence cultivating the soil for living, he shall be entitled to receive seeds and agriculture implements . . . and for each succeeding year he shall continue to farm . . . shall receive instructions from the farmer herein provided for and whenever more than one hundred persons shall enter upon the cultivation of the soil, a second blacksmith shall be provided, with such iron, steel and other materials as may be needed.²⁸¹

Article 10 states: "And it is further stipulated that the United States will furnish and deliver to each lodge of Indians . . . who shall . . . commence

278. *Id.* at art. VII, 15 Stat. at 637.

279. See generally Paul Wess, *The Treaty of 1868, A Field of Industrial Hemp, And the Controlled Substances Act: A Test Case for Indian Treaty Abrogation*, at <http://www.nativesunite.org/hemp/treaty.CSA/index.html> (presenting relevant provisions of the Treaty of 1868) (last visited Oct. 19, 2001).

280. Fort Laramie Treaty of 1868, art. VI, 15 Stat. at 637.

281. *Id.* at art. VIII, 15 Stat. at 638.

farming, one good American cow, and one good well-broken pair of American Oxen."²⁸²

Article 14 states: "It is agreed that the sum of five hundred dollars annually, for three years from date, shall be expended in presents to the ten persons of said tribe who . . . may grow the most valuable crops for the respective year."²⁸³

It is clear the government's objectives for the Lakota included ending their nomadic ways and instructing them in cultivation of the land. Under the 1868 Treaty, the Lakota were to receive free farm equipment, seed, and oxen, along with yearly allotments of clothing and cash if they agreed to farm the land.²⁸⁴

Although the treaty does not specifically list hemp as a crop for production, the canons of treaty construction favor the Lakota's right to produce hemp. The courts have relied on the following maxim when construing treaties:

[W]e will construe a treaty with the Indians as 'that unlettered people' understood it, and 'as justice and reason demand in all cases where power is exerted by the strong over those to whom they owe care and protection,' and counterpoise the inequality 'by the superior justice which looks only to the substance of the right without regard to technical rules.'²⁸⁵

The canons of treaty construction were created in recognition of the trust responsibility of the government to correct the unequal bargaining position of the tribes.²⁸⁶ In cases where treaty rights are not clearly expressed, the courts are liberal in recognizing the existence of rights by applying the following three rules: "ambiguous expressions must be resolved in favor of the Indian parties concerned; Indian treaties must be interpreted as the Indians themselves would have understood them; and Indian treaties must be liberally construed in favor of the Indians."²⁸⁷

In applying the rules of treaty construction to the 1868 Treaty the following is found: the 1868 Treaty language is ambiguous because the treaty does not clearly list what crops the Lakota could produce. Examining what crops were popular in 1868 resolves any ambiguity over what crops the Lakota could have grown. "[A]t the time of the treaty hemp was the only

282. *Id.* at art. X, 15 Stat. at 638.

283. *Id.* at art. XIV, 15 Stat. at 640.

284. FERGUS M. BORDEWICH, KILLING THE WHITE MAN'S INDIAN 228 (1997).

285. CLINTON ET AL., *supra* note 264, at 229.

286. GETCHES ET AL., *supra* note 134, at 130.

287. *Id.* at 131.

available product for making cloth and other items."²⁸⁸ An inference can be made that the Lakota could also have produced industrial hemp. Because the Lakota would have the right in 1868 to grow industrial hemp, that right remains with the Lakota today.

The second analysis involves determining the Indians' understanding of their rights under the 1868 Treaty.²⁸⁹ The Lakota knew that in exchange for retaining specific areas of their traditional lands and all rights of self-government and customs not explicitly relinquished by the treaty, they promised the white man peace.²⁹⁰ The Lakota knew that the whites were encouraging them to farm, to learn a new way of life in order to support themselves in a more limited area than they traditionally roamed.²⁹¹ The Lakota also knew they no longer had limitless hides from herds of buffalo and other game roaming their lands.²⁹² They would have known that they would need to look for alternatives to feed and clothe themselves. They would have understood that they were able to produce any crop available at that time for farming because the treaty did not contain any planting restrictions.²⁹³ Industrial hemp, a popular crop in those days, would have provided the Lakota with a fibrous plant for clothing and its seeds would have been readily available for production.

Because the Lakota have a word for hemp in their own language, it is very likely that they did produce hemp. *Wahupta* is the traditional Lakota word for the *Cannabis* plant.²⁹⁴ Tom Ballanco, attorney for Alex White Plume, states that because "there's a word for the plant in tribal language . . . means it's got a history . . . that precedes contact with Europeans."²⁹⁵ In recent history, when the U.S. government needed the hemp plant during WWII, the Lakota grew hemp on Pine Ridge.²⁹⁶ Proof of the Lakota's support for the

288. David Rooks, *Lakota Hemp Growers Headed for Legal Showdown*, INDIAN COUNTRY TODAY, May 24, 2000, <http://www.indiancountry.com/?2045> (arguing that wild-hemp growing today on the Reservation indicates historical production of hemp on Pine Ridge).

289. See generally Wess, *supra* note 279 (explaining that treaty interpretation includes interpreting the "treaty and its terms as the Indians would have understood them").

290. See generally Fort Laramie Treaty of 1868, Apr. 29, 1868, U.S.-Lakota/Arapaho, 15 Stat. 635.

291. *Id.*

292. *History of The American Buffalo*, at <http://www.nebraskastatebuffalo.org/history.html> (last visited Nov. 26, 2002).

293. See generally Fort Laramie Treaty of 1868.

294. Jon Bonne, *Sioux Fight Feds, This Time Over Hemp*, at <http://www.msnbc.com/news/616149.asp?cpl=1> (last visited Sept. 25, 2001).

295. *Id.*

296. *Id.*

war effort is visible today from the wild hemp plants still growing on the reservation.²⁹⁷

The last step of the treaty construction analysis involves liberally construing the treaty in favor of the Lakota. Under a liberal construction of the 1868 Treaty, it is clear that the Lakota have the right today to grow industrial hemp on their land. The Lakota are only trying to pursue a way of life that the government supported and encouraged 134 years ago. "'This is the very kind of thing that the treaty was designed to encourage,' said Frank Pomershiem, an expert on tribal law at the University of South Dakota. "'Here they are being thwarted trying to engage in the very sort of act the federal government was trying to encourage at that time.'"²⁹⁸

4. *The Right to Grow Hemp Not Abrogated*

Although it is possible for Indian people to lose treaty rights through abrogation of part or all of the treaty by an inconsistent statute, evolving after treaty rights were granted,²⁹⁹ this has not happened here. "The courts have consistently treated the relevant judicial inquiry as a search for clearly expressed congressional intent to abrogate the treaty."³⁰⁰ The 1970 Act does not explicitly speak to extinguishing treaty rights of Indian people, thereby creating a bright-line in determining abrogation of those rights. Neither does congressional intent behind promulgation of the 1970 Act explicitly ban hemp production. Congressional intent has always been to establish a distinction between marijuana and industrial hemp,³⁰¹ to protect and proliferate the production of industrial hemp.³⁰² Clearly, the treaty rights of the Lakota to undertake agricultural endeavors were never abrogated. Thus, the 1970 Act creates no jurisdictional basis for the DEA to impede production of industrial hemp on Pine Ridge.

5. *The Ban on Hemp: Ridiculous*

Most importantly, at the very base of the controversy between the Lakota and the federal government lies the premise for the DEA's ban on cultivation of industrial hemp. First, there are currently twenty-nine

297. *Id.*

298. *Id.*

299. CLINTON ET AL., *supra* note 264, at 224.

300. *Id.*

301. Marihuana Tax Act of 1937, ch. 553, 50 Stat. 551 (repealed 1970).

302. West, *supra* note 20. Bill Hester, Assistant General Council for the Treasury Department, a division of the Bureau of Narcotics testified that the intent of 1937 Act was not to interfere with industrial hemp plant production. *Id.*

countries producing industrial hemp and prospering from its production.³⁰³ Prospering both financially and ecologically. China, England, and France alone produce a half million acres of industrial hemp each year.³⁰⁴

The United Nations has taken a realistic and responsible stance with regard to industrial hemp. Because it acknowledges the importance of this crop both economically and as a conservation measure for rapidly dwindling, irreplaceable natural resources, the UN distinguishes between hemp and marijuana.³⁰⁵ For example, in 1913 the annual world consumption for paper was fourteen million tons.³⁰⁶ By the 1990s the world's paper consumption skyrocketed to 250 million tons per year.³⁰⁷ Since the late 1930s, it is estimated that half of the forests in the world have been clear-cut to make paper.³⁰⁸ Hemp can limit or bring an end to this destruction of our environment. Depending on the climate, hemp yields between 2.5 and six tons of dry stalks per acre.³⁰⁹ This yield is several times higher than that of trees, which take decades to grow.³¹⁰

In creating its distinction between hemp and marijuana, it is clear that the United Nations realizes the value of hemp. This distinction allows foreign countries to trade both the raw industrial hemp plant and products made from industrial hemp. Over 25,000 different products can be made using industrial hemp.³¹¹ In 2001 alone, worldwide industrial hemp sales are expected to reach \$600 million.³¹²

These impressive figures indicate the economic potential of industrial hemp cultivation. It is clear that the Lakota people would profit immensely should they produce industrial hemp. The federal government must acknowledge that by not permitting production of hemp, they are eliminating potential economic success for Lakota people and are violating their trust obligation to protect and support the Lakota.

The federal government's main argument supporting criminalization of industrial hemp is that drug crimes will increase if the hemp ban is lifted.³¹³ The evidence controverting this fear comes from the federal

303. *Id.*

304. HEMPTECH, *supra* note 11, at 16.

305. Ballanco, *supra* note 27.

306. HEMPTECH, *supra* note 11, at 17.

307. *Id.*

308. *Id.* at 5.

309. *Id.* at 20.

310. *Id.* at 29.

311. *Id.* at 41.

312. *Id.* at 22. These estimates for worldwide industrial hemp sales do not include figures for China.

313. West, *supra* note 20, at 15.

government's own reports.³¹⁴ The United States government creates a annual list identifying countries considered drug-exporting nations.³¹⁵ The list has never included the names of any of the major hemp-growing and hemp-exporting nations.³¹⁶ This indicates that marijuana is not being produced by these countries, for export to the United States, in conjunction with hemp production.

The government's unrealistic ban on industrial hem is costing its citizens financial gains, but more importantly, the ban contributes to the declining health of people and viability of the environment. Because of the ban on industrial hemp in this country, in addition to the environment depleting logging business, Americans are forced to rely on cotton production for fiber. The increased pollution generated from production of cotton crops is staggering. Half of the pesticides used in America today are sprayed on cotton.³¹⁷ To give an indication of the volume of pesticides used on cotton, California alone uses over 6000 pounds of pesticides and defoliants.³¹⁸

The potential health hazards and contamination from runoff of pesticides in our groundwater are well documented. In the Corn Belt, the highest rates of leukemia, prostate, and pancreatic cancer deaths strike farmers regularly exposed to chlorinated hydrocarbon pesticides used on their crops.³¹⁹

Regardless of these facts, the government and courts hold to their fears and continue in their zeal to suppress hemp production, which they regard as "fostering marijuana use."³²⁰ As seen by the growing list of countries producing industrial hemp, these fears appear unfounded. In *Kentucky v. Harrelson*, the court found "there is sufficient testimony from law enforcement that there would be serious difficulties for law enforcement in controlling marijuana trafficking if hemp were legalized."³²¹ Again, this projection is simply a presupposition, unconfirmed by countries currently producing hemp.

314. *Id.*

315. *Id.*

316. *Id.*

317. HEMPTECH, *supra* note 11, at 19.

318. *Id.*

319. *Id.*

320. *N.H. Hemp Council v. Marshall*, 203 F.3d 1, 11 (1st Cir. 2000).

321. *Kentucky v. Harrelson*, 14 S.W.3d 541 (Ky. 2000).

6. The Marijuana "Definition" Still Excludes Hemp

Although the above information supports the Lakota in their desire to produce industrial hemp, their strongest argument lies in the ambiguity of the 1970 Act, which currently bans industrial hemp production. This ambiguity centers on whether industrial hemp is included in the definition of marijuana in federal law.

The 1937 Act was created to control the sale and use of marijuana.³²² It is clear from the language and legislative history surrounding the 1937 Act, that hemp was to be excluded from the definition of marijuana.³²³ Production of hemp following 1937 was legal and in the 1940s, encouraged by the federal government.³²⁴

The government repealed the 1937 Act in 1970, creating the Comprehensive Drug Abuse Prevention and Control Act.³²⁵ In this Act, the government listed marijuana as a Schedule I substance.³²⁶ If the government also intended to include industrial hemp in the definition, the definition should have been amended to clearly reflect that position. Instead, Congress simply adopted the 1937 definition, *word for word*, which clearly distinguishes between the two plants and excludes hemp from the marijuana definition: "The term 'marihuana' means all parts of the plant *Cannabis sativa* L., . . . [s]uch term *does not include* the mature stalks of such plant, any other compound . . . or preparation of such mature stalks"³²⁷ Hemp is clearly excluded from the definition of marijuana and should not be considered a Schedule I substance.

This position is supported by a First Circuit Court case, *New Hampshire Hemp Council, Inc. v. Marshall*, decided in January 2000.³²⁸ In *New Hampshire Hemp Council*, the Appellant unsuccessfully requested declaratory relief to prevent the DEA from prosecuting hemp producers.³²⁹ The New Hampshire Hemp Council argued that the statutory definition of marijuana did not criminalize non-psychoactive hemp. In response the court stated:

[t]he basic [1937] definition covered all *Cannabis sativa* plants whether intended for industrial use or drug production . . . but

322. CONRAD, *supra* note 15, at 154.

323. Marihuana Tax Act of 1937, ch. 553, 50 Stat. 551 (repealed 1970).

324. *See supra* notes 70, 71 and accompanying text.

325. 21 U.S.C. § 801 (2000).

326. *Id.* § 812(c)(10).

327. *Id.* § 802(16) (emphasis added).

328. N.H. Hemp Council v. Marshall, 203 F.3d 1 (1st Cir. 2000).

329. *Id.* at 8.

the statute effectively distinguished between them by taxing them differently. . . . [N]o tax was applied to transfers of the mature stalk of the plant, which is useful only for industrial use, and which was specifically excluded from the definition of 'marijuana.'³³⁰

The *New Hampshire Hemp Council* court acknowledged that the 1937 legislative history protects hemp production and stated that in carrying forward the definition of marijuana into the present criminal ban, "[w]e can find no indication that Congress in 1970 gave any thought to how its new statutory scheme would affect such production."³³¹ Although the court found for the DEA, the court acknowledged that, "[t]he possibility remains that Congress would not have adopted the 1970 statute in its present form if it had been aware of the effect on cultivation of plants for industrial uses. But that is only a possibility"³³²

Following Congress's intent in 1937 regarding the language used today it is apparent, as stated by the First Circuit, that the "mature stalk of the plant, . . . useful only for industrial use, . . . was specifically excluded from the definition of 'marijuana.'"³³³ Courts today acknowledge that in 1937, hemp was excluded from the definition of marijuana. The Supreme Court had the opportunity to address this definitional conflict under *New Hampshire Hemp Council*, but declined to hear the case.

7. The DEA Exceeds Their Authority

The DEA's determination to ban hemp under the 1970 Act is improper. In *New Hampshire Hemp Council*, a DEA agent testified that "regardless of intended 'industrial' use, the DEA views the cultivation of *Cannabis sativa* plants as the manufacture of marijuana and therefore illegal under federal law."³³⁴ The DEA's view and resulting criminalization of hemp, clearly is not within their authority. This is established through application of the *Chevron Doctrine*.

The *Chevron Doctrine* involves a two-part analysis for determining whether action by an agency, in response to legislation, is valid or invalid.³³⁵ Under *Chevron*, the first step in the analysis is determining whether the language of the statute is ambiguous.³³⁶ If the language is not ambiguous, then the

330. *Id.* at 7.

331. *Id.*

332. *Id.*

333. *Id.*

334. *Id.* at 3 (emphasis added).

335. *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

336. *Id.* at 842.

agency may not act in opposition to specific congressional intent.³³⁷ If congressional intent is unclear, either by silence or ambiguous expression, then the second step allows for deference to the agency, *if their actions are reasonable*.³³⁸

The intent of Congress in 1937 was explicitly clear. Industrial hemp was specifically excluded from the definition of marijuana.³³⁹ The 1970 Act took its definition of marijuana word-for-word from the 1937 Act, and Congress made no comment regarding interpretation of the language.³⁴⁰ Because the intent of Congress is clear as to the specific language used in the 1937 Act, later adopted into the 1970 Act, the matter is resolved. There is no question that hemp is distinguished from marijuana.

Even if the argument does extend into the second part of the analysis, the DEA's actions are still improper because they are unreasonable. An agency is given power by Congress to formulate policy and rules to fill gaps in a statute.³⁴¹ The court must determine whether the agency, when filling these gaps, has "properly exercised its discretion within the sphere of its delegated authority."³⁴² The question here is whether the DEA's action of including hemp as a Schedule I substance is reasonable. Clearly it is not.

There are two reasons why the DEA's inclusion of hemp as a Schedule I substance is not reasonable. First, hemp does not fit the definition of the term "drug" within the 1970 Act. Section 802(12) of the 1970 Act incorporates the Federal Food, Drug, and Cosmetic Act definition of "drug":

(A) articles recognized in the official United States Pharmacopoeia . . . ; and (B) articles intended for use in the diagnosis, cure, mitigation, treatment, or prevention of disease in man or other animals; and (C) articles (other than food) intended to affect the structure or any function of the body of man or other animals; and (D) articles intended for use as a component of any article specified in clauses (A), (B), or (C) of this paragraph.³⁴³

Hemp clearly does not fit this definition as either a drug grown for medical purposes or as a substance with great potential for abuse. Regardless, the DEA has included hemp as a Schedule I substance. Secondly, advocates for hemp have provided the DEA with insurmountable evidence of hemp's safe,

337. *Id.*

338. *Id.* at 843 (emphasis added).

339. West, *supra* note 20; Marihuana Tax Act of 1937, ch. 553, 50 Stat. 551.

340. Shepherd, *supra* note 28, at 256.

341. *Id.* at 260.

342. *Id.*

343. *Id.* at 255.

non-psychoactive, qualities but the DEA refuses to consider this information.³⁴⁴ It is astoundingly clear that the DEA ignored the intent of Congress to allow the production of industrial hemp and that the DEA's classification of hemp as a Schedule I substance is unreasonable.

V. Conclusion

Government is not reason, it is not eloquence, it is forceful; like fire, a troublesome servant and a fearful master. Never for a moment should it be left to irresponsible action.

— George Washington³⁴⁵

Since the 1868 Treaty, the United States government treated the Lakota people unfairly. By cultivating industrial hemp, as many countries in the world today, the Lakota are exercising their sovereign right to make their own laws and to support themselves through agriculture. The United States government granted these unabrogated rights in the 1868 Treaty.

The Lakota tribal governments' actions to legalize production of industrial hemp on Pine Ridge were specifically intended to create self-sufficiency and economic benefits for their people. Historically, the federal government has been more interested in exerting its power and control over the tribes and less concerned with its trust responsibilities and humane treatment of the Lakota and other Indian people. This is an opportunity for the government to make amends.

If the government will not honor the sovereignty of the Lakota and the rights given to them under the 1868 Treaty, then the government must at least acknowledge the need to review and amend the 1970 Act. The government must concede that the definition of marijuana, taken word for word from the repealed 1937 Act and incorporated into the 1970 Act, creates a presumption that hemp is still exempt from the prohibitions placed on marijuana. This presumption is further supported by a lack of congressional intent in 1970 to do otherwise. In reviewing this situation, the government will find that in light of the clear intent of Congress in distinguishing between hemp and marijuana, the DEA's classification of hemp as a Schedule I substance is unreasonable and beyond their power.

Most importantly, the government must take a hard look at the plant's ecological benefits already acknowledged by many other countries. These

344. *Id.* at 261.

345. Hemp Indus. Ass'n, *VoteHemp*, at <http://www.votehemp.com/> (last visited Sept. 24, 2001).

benefits must be balanced against the unjustified and unsubstantiated fears of possible drug enforcement problems should hemp production be legalized. Allowing this country to be stripped of its natural resources and poisoned by pesticides due to unfounded fears are not responsible, humane actions of a government established by the people for the people.

The Lakota, and specifically the White Plume *tiospaye*, are to be congratulated for the steps they have taken to stand up for their rights as a sovereign nation and to fight an injustice. There are nineteen states and many organizations calling for the legalization of industrial hemp, but their requests have fallen on deaf ears. Through the brave, determined acts of the Lakota, the federal government is forced to look into this matter and must acknowledge the interests and rights of its people. Industrial hemp cultivation could be the economic development answer for the Lakota Nation and the government must recognize that, in the long run, cultivation of industrial hemp benefits this country and all its people.

Afterword

In early April 2002, while the South Dakota winter still lingered on Pine Ridge Reservation, Alex White Plume and his family planted their third crop of industrial hemp on their land near Manderson, South Dakota.³⁴⁶ In late July, White Plume harvested the 3.5 acres of hemp before federal agents could destroy it.³⁴⁷

The crop was intended for delivery to the Madison Hemp & Flax Co. of Lexington, Kentucky.³⁴⁸ "This was a contract between our family and that company from Kentucky," said White Plume. "We just wanted to keep our word that we could deliver."³⁴⁹ The government made sure that never happened.³⁵⁰

On August 9, 2002, United States Attorney Mark Vargo filed a Civil Summons, Motion for a Temporary Restraining Order, Motion for Preliminary Injunction, and Complaint against "Alexander 'Alex' White Plume, Percy White Plume, their agents, servants, assigns, attorneys and all

346. Heidi Bell Gease, *Hemp Planters Hope 3rd Time's A Charm*, RAPID CITY J., Apr. 6, 2002, <http://www.sodakhemp.org/planting2002.htm>.

347. *US Obtains Civil Injunction Against Lakota Hemp Growers, Supporters Celebrate Successful Harvest*, WK. ONLINE WITH DRCNET, Aug. 16, 2002, at <http://www.drcnet.org/wol/250.html#lakotahemp>.

348. Heidi Bell Gease, *Manderson Area Family Harvests Hemp Crop*, RAPID CITY J., Aug. 2, 2002 (on file with author).

349. *Id.*

350. Hazel Bonner, *Federal Court Stops Sale of White Plume Hemp*, at <http://www.sodakhemp.org/bonner081402.htm> (last visited Nov. 7, 2002).

others acting in concert with the named Defendant."³⁵¹ The purpose of the Temporary Restraining Order and Motion for Preliminary Injunction were to enjoin the defendants from possessing, manufacturing, or distributing "marijuana" to the Madison Hemp and Flax Company of Lexington, Kentucky or to any other individual or entity.³⁵² The Motions were granted on Tuesday, August 13, 2002.³⁵³ Should the White Plume family violate the injunctions by growing or selling industrial hemp, they will be held in contempt of court and could face up to six months in jail.³⁵⁴

To date, the hearing for a continuation of the preliminary and permanent injunction was postponed pending resolution of the plaintiff's Motion for Summary Judgment filed October 16, 2002. The defendants have until December 12, 2002, to submit their response to the motion and the government will reply to the defendants' response no later than December 23rd.³⁵⁵ No further court date has been set.³⁵⁶

This new civil strategy by the government seems to reflect a hesitancy to "throw the book at" the White Plumes for planting industrial hemp. The government's actions alone in this situation seem to support the conclusion that there is a distinction between marijuana and hemp. If hemp truly were a Schedule I substance, dangerous to the public due to its "high potential for abuse"³⁵⁷ and "lack of accepted safety for use,"³⁵⁸ surely White Plume and his family members would have been arrested. This civil approach makes it apparent that the federal government might be concerned as to whether they could, in fact, obtain a conviction against the defendants by a jury of White Plume peers.

Regardless of the final outcome in this "war on the war on hemp"³⁵⁹ Alex White Plume and his family are not in jail awaiting trial and a possible ten-year sentence for committing a felony offense. To this end, it appears that the White Plumes have made their stand and have won.

351. United States v. White Plume, CIV 02-5071 (D.S.D. filed Aug. 9, 2002).

352. *Id.*

353. Smith, *supra* note 347.

354. *Id.*

355. *Id.*

356. *Id.*

357. Complaint at 5, *White Plume* (CIV 02-5071) (referencing substances to be placed as Schedule 1 Substances under the Comprehensive Drug Abuse Prevention and Control Act of 1970, 21 U.S.C. § 812(b)).

358. *Id.*

359. Bob Newland, *US Attorney Throws White Plume a Softball*, at http://www.global-hemp.com/News/2002/August/us_attorney_throws_white.shtml (last visited Oct. 10, 2002).