No. 05-1656
(CONSOLIDATED WITH No. 05-1654)

In the United States Court of Appeals for the Eighth Circuit

TIERRA MADRE, LLC
MADISON HEMP & FLAX 1806, INC.

Intervenors-Defendants/Appellants,

v.

UNITED STATES OF AMERICA,

Plaintiff/Appellee

On Appeal from the United States District Court
for the District of South Dakota, Western Division
Honorable Richard H. Battey, District Court Judge

Brief of *Amici Curiae* The Oglala Sioux Tribe, The Hemp Industries Association and Vote Hemp Supporting Appellants and Urging Reversal of the District Court's Order

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IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

TIERRA MADRE, LLC	)	
MADISON HEMP & FLAX 1806, INC.,	)	**No. 05-1656**
	)(Consolidated w/ No. 05-1654)	
Intervenors-Defendants/Appellants	)	
	)	
v.	)	
	)	
UNITED STATES OF AMERICA,	)	
	)	
Plaintiff/Appellee	)	

MOTION OF *AMICI CURIAE* OGLALA SIOUX TRIBE, HEMP INDUSTRIES ASSOCIATION, AND VOTE HEMP FOR LEAVE TO FILE ACCOMPANYING *AMICI* BRIEF

Pursuant to Federal Rule of Appellate Procedure Rule 29(b), *amici curiae* Oglala Sioux Tribe, Hemp Industries Association, and Vote Hemp request leave to file the accompanying *amici curiae* brief in support of Intervenors-Defendants/Appellants. Appellants have consented to the filing of this brief; Appellee United States has declined to give its consent.

The Oglala Sioux Tribe (OST) is a federally recognized Indian Tribe located on the 2.8 million acre Pine Ridge Reservation in South Dakota. Pine Ridge has a tribal membership that totals 17,775. The events underlying this case took place on land within the jurisdiction of the Tribe and under authority of duly enacted Tribal ordinances. The Tribal government operates under a constitution consistent with the Indian Reorganization Act of 1934 and approved by the Tribal membership and

Tribal Council of the Oglala Sioux Tribe. The Tribe is governed by an elected body consisting of a 5 member Executive Committee and a 18 member Tribal Council, all of whom serve a four year term.

The Oglala Sioux Tribe has an extraordinary interest in the reversal of the district court decision, since this case directly impacts the legitimacy of tribal ordinances and the right of tribal members to plant industrial hemp pursuant to those ordinances as protected by treaties entered into over 100 years ago by the US Government and the Oglala Sioux.

The Hemp Industries Association (HIA) is a North American based non-profit trade association representing the interests of more than 300 businesses, and organizations active in the industrial hemp industry. Its members currently import hemp raw materials from Canada, Great Briton, Poland, China, Russia, Germany, and many of the other 30 or more countries where industrial hemp is grown. The purpose of the HIA is to represent the interests of the domestic Hemp Industry and to encourage the research and development of new hemp products. One such interest is the re-establishment of sources of hemp fiber and seed in the United States rather than relying on imports from other nations. The HIA was the lead plaintiff in *Hemp Indus. Ass'n v. DEA*, 333 F.3d 1082 (9th Cir. 2003)

(successfully challenging the validity of an agency rule that banned the sale of consumable products containing hemp oil, cake, or seed).

Vote Hemp is a non-profit organization dedicated to the acceptance of and free market for industrial hemp advocating, principally via education, for the re-legalization of growing industrial hemp in the United States.

Accordingly, HIA and Vote Hemp both have a direct interest in matters related to the growing of industrial hemp in the United States and, therefore, an interest in the outcome of this appeal in which the Oglala Sioux Tribe asserts its right to grow industrial hemp pursuant to ordinances passed by its Tribal Council and therefore respectfully requests that this Court grant it leave to file the accompanying *amici curiae* brief.

DATED: June 8, 2005.

Respectfully submitted,

_____

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IDENTITY AND INTEREST OF *AMICI CURIAE*

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The Oglala Sioux Tribe has an extraordinary interest in the reversal of the district court decision, since this case directly impacts the legitimacy of tribal ordinances, and the right of tribal members to plant industrial hemp pursuant to those ordinances as protected by treaties entered into over 100 years ago by the US Government and the Oglala Sioux.

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Vote Hemp is a non-profit organization dedicated to the acceptance of and free market for industrial hemp advocating, principally through education, for the re-legalization of growing industrial hemp in the United States.

Accordingly, all *amici* have a direct interest in matters related to the growing of industrial hemp in the United States and, therefore, an interest in the outcome of this appeal in which members of the Oglala Sioux Tribe assert their right to grow industrial hemp pursuant to treaties and ordinances passed by its Tribal Council.

CORPORATE DISCLOSURE STATEMENT - RULE 26.1

The Hemp Industries Association is a non-profit corporation organized under Internal Revenue Code § 501(c)(6). Vote Hemp is a non-profit organization organized under Internal Revenue Code § 501(c)(4). Neither has issued shares that are publicly traded and neither has any parent, subsidiaries or affiliates that have issued shares to the public.

The Oglala Sioux Tribe is not a corporation.

SUMMARY OF THE ARGUMENT

In its Memorandum Granting Plaintiff's [Appellee's] Summary Judgment ("Order"), the district court essentially adopted the legal position of the Plaintiff/Appellee United States ("government"). The district court found that the federal anti-drug Controlled Substances Act ("CSA") applied to prevent the Defendants/Appellants, members of the Lakota Nation who reside on the Pine Ridge Indian Reservation from cultivating *industrial* hemp on their family land pursuant to two Ordinances enacted by the Oglala Sioux Tribe.

While this adoption creates a convenient way to dispose of this unique case of first impression, it runs roughshod over the applicable standards for summary judgment. In holding that there were no "genuine issues of material fact" as required by Rule 56 of the Federal Rules of Civil Procedure ("FRCP"), the district court ignored the factual findings made by the Oglala Sioux Tribal Council, the legislative and administrative body of the Oglala Sioux Tribe, during its hearings and subsequent legislation on the issue of hemp cultivation. The district court also ignored the facts asserted in the numerous affidavits submitted by the Defendants/Appellants. Perhaps because these facts, taken together, are fatal to the government's case, the court simply ignored them.

The district court's order also contradicts more than 150 years of federal Indian Law jurisprudence. Faced with a conflict between the Tribe's asserted treaty right to grow industrial hemp and the government's assertion that the Controlled Substance Act prohibited such conduct, the district erred on the side of the government, and failed to follow established law designed to give full effect to the Tribe's treaty rights. By ignoring the legislative findings of fact of the Oglala Sioux Tribe ("OST") as well as those facts asserted by the Defendants/Appellants, and by applying the CSA, the district court created a new standard for treaty abrogation that has no support in federal Indian Law and is directly opposed to more than a century of rulings by this court and the United States Supreme Court on the subject.

ARGUMENT

I. There Are Only Two Ways for the Government to Circumvent the OST Hemp Ordinances: Either the District Court Must Find That the CSA Abrogates the Treaties of 1851 and 1868; Or the District Court Must Strike Down the Ordinances as Factually Erroneous.

The Defendant/Appellants' activities cannot be properly enjoined without circumventing the duly enacted OST Hemp Ordinances that explicitly retain and assert the right to cultivate industrial hemp reserved in the Treaties of 1851 and 1868. There is an irreconcilable conflict between the government's position, which is encapsulated in the district court's Order,

and the OST Hemp Ordinances, specifically OST Ordinance 98-27 and 00-13. Although the district court acknowledges in the "Facts" summary of its Order that the Defendant/Appellants were cultivating their hemp crops pursuant to tribal ordinances enacted by the OST, it does not again mention those ordinances. Order at 3.

The failure to address the OST Hemp Ordinances is the crux of the district court's error.

A. The Controlled Substances Act Does Not Abrogate the Treaties.

1. Federal law presumes treaties are not abrogated without explicit action by Congress.

The district court failed to acknowledge in its Order that the Defendant/Appellants were acting in compliance with valid OST tribal ordinances. Those ordinances remain in effect today. By failing to properly apply the law related to treaty abrogation and by ignoring the factual findings and assertions of the Oglala Sioux Tribal Council which, were substantially augmented by unchallenged facts averred by the Defendant/Appellants, the district court committed reversible error by ordering summary judgment for the government.

Implicit in the district court's ruling is the finding that the CSA abrogated whatever treaty right the Oglala Lakota had to raise industrial hemp. The court made its determination without reference or support. This

is in direct contravention to the Supreme Court's pronouncements on this issue. In *Menominee Tribe v. United States*, 391 U.S. 404, 412 (1968), the Court ruled that, "We do not construe statutes as abrogating treaty rights in 'a backhanded way.'"

Such a casual or implied abrogation would stand in the face of more than a century of rulings by the United States Supreme Court which requires "clear evidence that Congress actually considered the conflict between its intended action on the one hand and Indian treaty rights on the other, and chose to resolve that conflict by abrogating the treaty." *United States v. Dion*, 476 U.S. 734, 739-740 (1986); *See also*, *South Dakota v. Bourland*, 508 U.S. 679, 693 (1993); *Washington v. Washington Commercial Passenger Fishing Vessel Assn.*, 443 U.S. 658, 690 (1979); *United States v. Santa Fe Pacific R. Co.*, 314 U.S. 339, 353 (1941); *Cook v. United States*, 288 U.S. 102, 120 (1933) ("A treaty will not be deemed to have been abrogated or modified by a later statute unless such purpose on the part of Congress has been clearly expressed."); *Leavenworth, Lawrence, and Galveston RR Co. v. United States,* 92 U.S. 733, 740 (1875); Wilkinson & Volkman, Judicial Review of Indian Treaty Abrogation: "As Long as Water Flows, or Grass Grows Upon the Earth"—How Long a Time Is That?, 63 Calif.L.Rev. 601 (1975).

Even the case relied upon by the government for its assertion of jurisdiction reiterates this well-settled point,

> Because of their unique history, Indian reservations differ in certain respects from federal enclaves. Thus if a particular Indian right or policy is infringed by a general federal criminal law, that law will be held not to apply to Indians on reservations unless specifically so provided.

United States v. Blue, 722 F.2d 383 (8th Cir. 1983) citing *United States v. White*, 508 F.2d 453 (8th Cir. 1974).

Courts cannot unilaterally abrogate treaties, only Congress is granted such power. In order for a court to find abrogation of a treaty, it must first find that Congress clearly expressed such an intent. The district court's ruling makes no such finding. Nor could it, as the legislative history of the CSA is void of any reference to considerations made for Indian treaty rights, let alone express intent to abrogate the same. The district court's order holding that the CSA directly controls the question of cultivating hemp on the reservation directly infringes the right asserted by the OST and is in direct contravention to this court's rulings in *Blue* and *White*.

The district court's mistake is perhaps best illustrated by the government in its Plaintiff's Response to Defendant's Alex White Plume and Percy White Plume Opposition to Plaintiff's Statements of Material Facts, where the government curiously asserts that,

> Whether or not there were numerous agricultural uses [of the hemp plant] by the Lakota people *depends upon whether the Controlled Substances Act applies to the Lakota*, irrespective of the Ft. Laramie Treaty.

Plaintiff's Opp at 1 (emphasis added). This Orwellian syllogism ("he who controls the present, controls the past") is invalid in our society; American law and all tenets of fundamental fairness and due process require that an Act of Congress passed in 1970 cannot change historical facts that occurred and were recorded more than a century ago.

It is certainly convenient for the government to assert such a position, as the application of the CSA is the only means for the government to prevail in this case. However, basic principles of justice and nearly two centuries of federal Indian law force the opposite conclusion. It is the facts on the ground at the time of the Treaty of 1868 that determine the applicability of the CSA, not the other way around. The government uses all the right words, simply in the wrong order. The correct statement of the law would read: **Whether or not the Controlled Substances Act applies to the Lakota, depends upon whether there were numerous agricultural uses of the hemp plant by the Lakota people.**

As explained below, section B (2), the record is replete with evidence that there were such historical uses, most likely uses that were strongly advocated by the United States government itself. Applying the appropriate

abrogation standard, the OST Hemp Ordinances create "genuine issues of material fact" on their face sufficient to defeat summary judgment.

2. The Controlled Substances Act does not abrogate the OST treaty rights to grow industrial hemp.

It is a dubious claim indeed to state that the Controlled Substances Act (and its predecessor the Marihuana Tax Act) were intended by Congress to interfere with hemp production in the United States. The simplified "plain language" analysis conducted by the district court assumes that since hemp is a form of cannabis sativa and the federal definition of marijuana makes all forms of the plant cannabis sativa subject to control, ergo hemp is illegal. Order at 7-8.

This assessment, however, does not square with the actual fact that hemp was grown commercially in the United States until 1957 (West Affidavit ¶ 14), a full twenty years after Congress adopted the Marihuana Tax Act which created the definition used by the district court in its analysis. The Department of Agriculture even ran the famous, and successful, "Hemp for Victory" campaign during World War II, well after passage of the Marihuana Tax Act. Given these facts, the Marihuana Tax Act could not have outlawed the production of industrial hemp.

Upon passage of the CSA in 1970, the Marihuana Tax Act was repealed and federal control of marijuana was accomplished via the new act.

[Pub. L. No. 91-513, 84 Stat. 1292 (1970)] The official comment to the CSA describes the drugs, including "marijuana"–the definition of which is lifted verbatim from the Marihuana Tax Act– that are controlled in the Act, pointing out that, "These drugs are those which by law or regulation have been placed under control *under existing law*." [H.R. Rep. No. 1444, 91st Cong., 2d Sess. 12 (1970), reprinted in 1970 U.S.C.C.A.N. 4566, 4569 (emphasis added).]

Hemp production was not illegal under the Marihuana Tax Act and so by the plain language of the statute and the clear Congressional intent, it did not become illegal through enactment of the CSA. The only reason commercial industrial hemp production is restricted in the United States is because the U. S. Drug Enforcement Administration ("DEA") says it is (an agency determination made without applying the procedures required by the CSA) and no court has yet taken the time to look at the actual legal history of industrial hemp production in the United States. cf. *Hemp Indus. Ass'n v. DEA*, 333 F.3d 1082 (9th Cir., 2003) (invalidating DEA rule that banned the sale of consumable products containing hemp oil, cake, or seed).

However, even assuming *arguendo* that the DEA mythos is correct and the CSA somehow, and for reasons unshared and unrecorded, expanded the federal prohibition against marijuana to include the cultivation of

industrial hemp, the record is absolutely void of any indication that Congress "actually considered the conflict" between the CSA and Indian treaty rights and "chose to resolve that conflict by abrogating the treaty," let alone the "clear evidence" of such an intent that the Supreme Court deems "essential" to a finding of treaty abrogation. *United States v. Dion,* 476 U.S. at 739-740.

During Congressional hearings on the Marihuana Tax Act, after the World War II Hemp For Victory campaign, the Senate Committee on Finance ensured that it had not been mistaken about the reach of the legislation. The following exchange took place between Senator La Follette and William Wood, the deputy commissioner of the Federal Bureau of Narcotics ("FBN"):

> Sen. La Follette: Because it is perfectly clear if you read those Senate committee hearings that the Senate committee was very much concerned to be certain that in enacting this drastic piece of legislation (the Marihuana Tax Act) they weren't putting the [FBN] in a position to wipe out this legitimate hemp industry.
>
> Mr. Wood: Which, of course, the [FBN] doesn't want to do.

Hemp and Marijuana: Hearings on H. R. 2348 Before the Senate Comm. On Finance, 79th Cong., 1st Sess. 18, (1945). At the hearings to which Senator La Follette referred, the Senate Committee was assured by the Assistant General Counsel of the U.S. Dept. of Treasury that, "The production and

sale of hemp and its products for industrial purposes will not be adversely affected by this bill." Taxation of Marijuana: Hearings on H.R. 6906 Before the Senate Comm. On Finance, 75th Cong., 1st Sess. 7 (1937). The Commissioner of the FBN made similar representations to the committee, "I would say [persons engaged in the legitimate uses of the hemp plant] are not only amply protected under this act, but they can go ahead and raise hemp just as they have always done it." *Id*. at 17.

These repeated assurances certainly precluded Congress from detecting, or considering, any conflict between its "intended action on the one hand and Indian treaty rights" to grow hemp on the other. *Dion,* 739-740, *See also, South Dakota v. Bourland*, 508 U.S. 679, 693 (1993) (applying the *Dion* standard). It is noteworthy that since OST Ordinance 98-27 maintains the OST prohibition against psychoactive marijuana, merely distinguishing industrial hemp by means of internationally accepted, predictable science, the drug control features of the CSA are not frustrated on the Pine Ridge Reservation. Any potential conflict would have to be specific to industrial hemp cultivation, an activity that Congress did not intend to prohibit. As discussed above, since the CSA was not intended to broaden the reach of the Marihuana Tax Act, there is absolutely no evidence to indicate that Congress ever considered any conflict with Indian treaty

rights to raise hemp. Neither the government's many filings in this case, nor the district court's Order add a shred of evidence to this void.

B. There is No Evidence In the Record to Support Striking Down the Factual Bases for the OST Hemp Ordinances.

Without evidence to support abrogation of the Treaties of 1851 and 1868 by the CSA, and there is none, the only way for the government's theory of the case, adopted by the district court in its Order, to legally prevail is to invalidate the OST Hemp Ordinances.

1. The District Court failed to give due consideration to the OST Hemp Ordinances, which unequivocally state the Tribe's position regarding industrial hemp agriculture.

While the district court's Order goes to great pains to avoid looking at the Congressional legislative history regarding the prohibition of marijuana and its intended effect (or non-effect) on industrial hemp cultivation, it does not apply its own exacting standard of statutory construction to the legislation promulgated by the OST.

The Oglala Sioux Tribal Council is the "governing body of the tribe" that is constitutionally empowered to "manage all economic affairs and enterprises of the Oglala Sioux Tribe," and "to promulgate and enforce ordinances, governing the conduct of persons on the Pine Ridge Indian Reservation, and providing for the maintenance of law and order and the

administration of justice." OST Constitution Art. III Sec. 1, Art. IV Sec. 1f, k. In enacting OST Ordinance 98-27 and 00-13, the Oglala Sioux Tribal Council was legislating in its most important and most protected areas– treaty interpretation, conduct of tribal members on the Pine Ridge Reservation and internal economic development. *United States v. Wheeler*, 435 U.S. 313, 322 (1978) ("In sum Indian tribes still possess those aspects of sovereignty not withdrawn by treaty or statute"); *United States v. Mazurie*, 419 U.S. 544, 557 (1975) ("Indian tribes are unique aggregations possessing attributes of sovereignty over both their members and their territory"); *United States v. Kagama*, 118 U.S. 375, 381-382 (1886)("[Indian tribes] remain a separate people, with the power of regulating their internal and social relations").

Due to its early recognition of the legal imbalance between the United States and Indian parties to treaty negotiations, the United States Supreme Court has delineated three primary rules of interpretation: "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." *McClanahan v. State Tax Comm'n*, 411 U.S. 164 (1973); *Choctaw Nation v. Oklahoma*, 397 U.S. 620 (1970); *Minnesota v. Mille Lacs*

Band of Chippewa Indians, 526 U.S. 172, (1999); *See generally* Wilkinson & Volkman, supra, 63 Calif.L.Rev. 601 (1975).

The district court's Order acknowledges two of these three interpretation standards. Order at 9. However, it fails to accurately appraise the situation regarding the treaty rights being asserted. The district court writes that, "Defendants contend that the Treaty of Fort Laramie of 1868 preserves their right to plant whatever crops they wish." Order at 8. The district court, however, summarily dismissed what it perceived to be the Defendant/Appellants' contentions surmising that, "Since the Treaty requires the government to provide seeds and implements for the members to use in cultivating crops, it is unlikely that the Tribe thought that they could choose which crops would be planted." *Id*. at 9.

The district court is mistaken in its belief that it must speculate as to what "the Tribe thought." It is this mistaken assessment of the situation and subsequent errant supposition that must cause the district court's ruling to fail. The "Tribe" is not silent on this issue. The OST has made it very clear what its position is through its elected governing body, the Oglala Sioux Tribal Council.

While the Defendants/Appellants may have adopted this position as their own, it is the OST acting through the Oglala Sioux Tribal Council that

has unequivocally stated that, "The right to cultivate industrial hemp on the reservation was retained by members of the Oglala Lakota (Sioux) Tribe in the various treaties between the United States and the Oglala Lakota (Sioux) nation, specifically the Treaty of 1868." OST Ordinance 00-13, addendum section 4 (a). And further, "that the Oglala Sioux Tribal Council does hereby expressly reserve and retain jurisdiction to enact legislation relating to industrial hemp agriculture…." OST Ordinance 98-27, p 2. The OST also found that, "Feral industrial hemp growing on the reservation indicates that it has previously been grown there." OST Ordinance 00-13, addendum section 4 (a).

The district court conjures its own determination of what "the Tribe" must have believed, where no such construction is necessary. The OST Hemp Ordinances speak directly to these issues in language that is plain and unambiguous. The Oglala Lakota (Sioux) Tribe is expressly asserting a reserved treaty right. There is no question as to what the Tribe believes. The legislative body of the OST has spoken directly to that issue.

Applying its own standards regarding the plain language of the statutes, the district court's analysis is woefully inadequate in its failure to consider or even mention the OST Hemp Ordinances. *See,* Order at 7 ("In interpreting a statute, the Court is required to apply the plain meaning of the

statute unless the statute is ambiguous." citing *Dowd v. United Steel Workers of America*, 253 F.3d 1093, 1099 (8th Cir. 2001) *and* ("A statute is unambiguous if it is 'plain to anyone reading [it] that the statute encompasses the conduct at issue.'" *quoting United States v. Sabri*, 326 F.3d 937, 942 (8th Cir. 2003) and *Salinas v. United States*, 522 U.S. 52, 60 (1997). The district court further finds that "[T]he judiciary may not sit as a superlegislature to judge the wisdom or desirability of legislative policy determinations made in areas that neither affect fundamental rights nor proceed along suspect lines…." *Id*. at 9 *quoting United States v. Fogarty*, 692 F.2d 542, 547 (8th Cir. 1982) and *New Orleans v. Dukes*, 427 U.S. 297, 303 (1976). The district court applied these standards to the US government's legislative acts, but not to the legislative findings and conclusions of the Oglala Lakota (Sioux) Tribe. The district court cannot assert such standards on the one hand and refuse to apply them on the other, particularly where the OST is providing its own interpretation of treaty rights and legislating in areas reserved to it.

The OST Hemp Ordinances also reflect the prevailing policy towards the Lakota people at the time of the Treaty of 1868. According to the district court's reasoning that, "Since the Treaty requires the government to provide seeds and implements for the members to use in cultivating crops, it

is unlikely that the Tribe thought that they could choose which crops would be planted," it would follow that the Lakota would be in a state of perpetual reliance on the United States. Order at 9. By the district court's rationale, the Lakota would only cultivate what they were provided by the United States and would be expected to forever rely on such provisions for their cultivation and ultimately their survival.

This necessary conclusion of the district court's rationale is directly contradicted by the Supreme Court's ruling on the very same issue. In *Ex Parte Crow Dog*, the Supreme Court was asked to determine whether the United States could assert jurisdiction over a member of a Lakota tribe who commits a crime against another member of the same tribe. *Ex Parte Crow Dog*, 109 U.S. 556 (1883). After exploring the meaning of the Fort Laramie Treaty of 1868 and related acts, the Supreme Court based its ruling in favor of Crow Dog and, thus, tribal jurisdiction over Indians on Indian matters largely on the basis that at the time the 1868 treaty was ratified by the Indians, and the terms of the subsequent Act of 1877 were negotiated with them, the Indians understood that the cumulative effect of the treaty and the act were meant to fulfill the larger purpose of the United States government; namely, their civilization, self-support, and self-government. *See*, *Crow Dog*, 109 U.S. 556 at 564, *see also,* Act of February 28, 1877, 19 St. 254.

The Supreme Court found that the chief purpose of the 1868 treaty and its subsequent amendment codified in the Act of 1877, was to introduce the Indians to the "arts of civilized life." *Id*. at 568. In addition, it was understood by the Indians that the entire Sioux nation was to be removed by operation of the Act of 1877 to a new permanent reservation where they were to be instructed in and encouraged to adopt the practice of agriculture. Id. at 569-70. *See also,* Act of February 28, 1877, 19 St. 254 (Article 4 stating, "The government of the United States and the said Indians being mutually desirous that the latter shall be located in a country where they may eventually become self-supporting and acquire the arts of civilized life . . .").

The Supreme Court found that a major part of the entire scheme of the agreement was to urge the Indians, "as far as it could successfully be done, into the practice of agriculture." *Id*. Lest there be any confusion regarding the district court's assumption that "it is unlikely that the Tribe thought they could choose which crops would be planted," Article 4 of the Act of 1877 further directs that, "the Indians agree that they will remove to…a country suitable for a permanent home, *where they may live like white men*." *Id*. at 566 *quoting* Act of February 28, 1877, 19 St. 254 (emphasis added). As is well documented by the Defendants/Appellants and noted by the Oglala Sioux Tribal Council, hemp was a profitable, "necessary" crop widely

grown by "white men" throughout the Great Plains region, including Nebraska and the Dakotas. West affidavit ¶ 35, OST Ordinance 98-27, 1. Furthermore, as noted in the OST Hemp Ordinances, there is strong, albeit silent, testimony of thousands of patches of hemp currently growing on the Pine Ridge Reservation; there can be no doubt *somebody* cultivated hemp there.

2. *The Oglala Sioux Tribal Council's findings regarding hemp cultivation in Ordinances 98-27 and 00-13 are supported by the historical record*

That the policy identified by the Supreme Court and asserted by the OST is precisely the one advocated by hemp entrepreneur David Myerle in the 1840s is more than mere happenstance.

The decade of the 1840s was a watershed for federal Indian policy. Up until that time, the United States' "solution" to the "Indian problem" was always accomplished through removal. *See e.g.,* Indian Removal Act of 1830. Eastern tribes that were not wiped out could always be pushed farther west, ahead of the advancing American nation. The most famous of these relocations, the Cherokee "Trail of Tears" took place between 1838 and 1840. With the new decade came the Oregon Trail of 1843 and the concept of "Manifest Destiny." The American Nation realized that it would require an entire swath of continent stretching from the Atlantic to the Pacific

Ocean. This new strategy forced a change of policy regarding the remaining tribes that would be caught in the middle between expanding populations of European Americans on the East and West coasts.

With relocation no longer an option for these remaining tribes, the new strategy became "assimilation." The Indians would have to be "civilized" so that they could "live like white men." Act of February 1878. Into this transitional period entered a young lawyer with an interesting proposition.

The historical documents submitted in the record below by Defendant/Appellants referred to collectively as the "Myerle Papers" provide an amazing insight into the role that industrial hemp cultivation played in this era of changing policy towards Indian tribes. The Myerle Papers indicate that at the urging of both then-Senator (and future President) James Buchanan and the Secretary of the Navy, David Myerle set out to secure a domestic supply of "water-rotted hemp" an article deemed "necessary" to both the "Navy and Commercial Marine." Myerle1.jpeg (Sept. 2, 1850 Letter of James Buchanan).

Myerle's correspondence with the Secretary of the Navy was forwarded to the Commissioner of Indian Affairs for action as Myerle hatched upon the idea of inducing the "warrior tribes of the interior" to give

up hunting and begin "cultivating hemp for a living." Myerle70.jpeg (Aug. 4, 1843 Letter from J. Hartley Crawford-Commissioner of Indian Affairs to David Myerle acknowledging receipt of correspondences from Secretary of Navy.); Myerle64-67.jpeg (Aug. 28, 1843 Letter from David Myerle to Crawford, "[A]cknowledging [your] receipt of my letter to the Hon. Sec. of Navy laying before him the prospects of my success encouraging the Tribes of Indians to the culture of hemp, and water rotting it, for the use of the Navy.") In a series of letters to Crawford, Myerle details his plans to instruct the Indians in the method of "water rotting" hemp then in use by the Russians accomplishing the two-fold purpose of providing the Indians with a means of sustenance and securing a domestic supply of hemp. Myerle49-67.jpeg.

That this was a novel concept is spelled out in Crawford's early response to Myerle's idea:

> The government is anxious by all the means within its reach to promote the happiness & prosperity of the Indian race & as a measure by which to contribute to them have (sic) taken the necessary steps to ascertain how far your suggestion for the raising of hemp by the Indians can be carried out. Maj. Cummins, the agent for the tribes alluded to by you has been written to this day & requested to obtain all the facts he can on the subject & submit them to this office.

Myerle70.jpeg (Aug. 4, 1843 Letter from J. Hartley Crawford-Commissioner of Indian Affairs to David Myerle). Thus began an internal

policy discussion within the Department of Indian Affairs that would eventually include Indian agents from the Missouri Territory all the way to California. In his response to Crawford's inquiry, Maj. Cummins writes that he:

> laid the subject before … the Tribes assembled to receive their annuities…and took great pains to explain to them the operation of growing hemp and the benefit that would result if they would engage in that and other *agricultural pursuits* and lay aside their guns, bows & arrows.

Myerle41-42.jpeg (Nov. 4, 1843 Letter from Maj. Cummins to Commissioner Crawford) (emphasis added). Another letter in the Myerle Papers from the Indian Agent for the Wyandotts to the Secretary of War further explains both the novelty and the policy implications of Myerle's project:

> From the information I am able to collect, I am decidedly of the opinion that the object of the Bureau David Myerle in furnishing the Indians with hemp seeds and teaching them the proper method of growing and fitting the same for market is a laudable one and well worthy the aid of Government. So far as my experience has taught me I am of the opinion that education in *agricultural pursuits* is worth far more to the Indian than anything that has as yet been introduced among them.

Myerle3.jpeg (Apr. 19, 1844 Letter from Maj. Hewitt, Agent for Wyandotts to Hon. W. L. Marcy Secretary of War) (emphasis added). In describing the motivations behind his projects, Myerle writes,

> My heart directs me to the Poor Indians, I feel that it is a duty, that I owe, to Humanity, to ameliorate their situation, and endeavor to promote their happiness and prosperity, and with this object, of the hemp, I can do it.

Myerle67.jpeg (Aug. 28, 1843 Letter from David Myerle to Crawford). This language is significant, as it is nearly echoed by D. D. Mitchell, the Indian Commissioner who negotiated the 1851 Treaty in his letter reporting the conclusion of the treaty and details of the negotiations that was submitted to the Senate concurrent with the treaty. Mitchell wrote:

> Humanity calls loudly for some interposition on the part of the American Government to save if possible, some portions of these ill fated tribes; and this it is thought, can only be done by furnishing them the presents, and gradually their attention to *agricultural pursuits*.

Treaty of Fort Laramie, Sept. 17, 1851, 11 Stat. 749, reprinted in C. Kappler, Indian Affairs – Laws and Treaties Vol. IV, Laws p 1075 (compiled to March 4, 1927) Washington: Government Printing Office (1929). Starting with the Treaty of 1851, every subsequent treaty or attempt at treaty-making between the United States and the various bands of the Lakota includes the inducement to "agricultural pursuits."

Hemp was not only one sample agricultural commodity that was a part of this "civilization" stratagem, the Myerle letters demonstrate that hemp was ***the*** agricultural commodity that led to the adoption of the agricultural policy in the first place. There can be no question that those

Lakota who chose to settle on the reservation and take up farming pursuant to the Treaty of 1851 and 1868 could grow hemp. It is almost certain that those Lakota were actively encouraged to grow hemp as that was a prevailing policy in the Department of Indian Affairs at the time.

While suffering initial setbacks due to weather, Myerle's project was happily accepted by many tribes. In one of his letters to Commissioner Crawford after the project was under way he reports the observations of Maj. Harvey, the Missouri Agent:

> In passing through the Delaware Country [Kansas/Nebraska] some weeks since I was agreeably surprised to see the zeal and energy with which some of the Indians were engaged in handling their hemp. They seem to be entirely ignorant of any machine of the kind for cleaning hemp. Men, women and children were engaged in stripping the lint from the stalk by hand.
>
> I think your efforts to induce the Indians to raise hemp highly laudable and I doubt not if your efforts are followed up with energy that they may lead to success beyond your own sanguine expectations.

Myerle14.jpeg (Nov. 1, 1844 Letter from David Myerle to Commissioner Crawford). Myerle also reported that there were initially not enough seeds for all the Indians who wished to cultivate hemp. He informed Crawford that, "Having upwards of 200 seeding their Land, manifesting the strongest determination to submit themselves to my instructions. [I] could have distributed 100 bushels more seed amongst the Tribes included, also other

Tribes from the interior." Myerle25.jpeg (May 24, 1844 Letter of David Myerle to Commissioner Crawford).

Myerle ended up purchasing more seeds for some of these tribes out of his own pocket, though he was quick to inform Crawford that seeds would not be a perpetual cost:

> To avoid any further expense for the coming years for seed for these Tribes, in addition for sowing for lint I have caused each man to plant for seed hemp next year that they may be in possession of plenty of seed and provide others that have not sowed. As many of the permanent hunters say if they succeed they will abandon the hunting and go to raising hemp.

Myerle23.jpeg (May 31, 1844 Letter of David Myerle to Commissioner Crawford).

The Lakota's nearest neighbors and trading partners, including the Shawnee, Delaware, Kickapoo, Chippewa, Wyandotts, Stockbridge and Omaha were induced by Myerle to take to cultivating hemp as evidenced by the Myerle Papers. *See e.g.,* Myerle41-42.jpeg; Myerle12.jpeg and Supplemental Affidavit of Dr. David West. At least one of the tribes that Myerle introduced to the culture of hemp, the Omahas, were historical allies and trading partners that intermarried with the Lakota and Dakota. This historical verity, taken together with the fact that hemp grows wild on the Pine Ridge reservation certainly seems to indicate that hemp growing was practiced by the Lakota in the early-reservation era.

These facts[1], either misunderstood or simply ignored by the district court are dispositive of the issues now before this court. If the treaty era Lakota were able to grow hemp, and did, then the CSA cannot be read to restrict them from doing so now. The federal law regarding the abrogation of treaties is clear.

CONCLUSION

The findings, declarations and law of the OST promulgated by the Oglala Sioux Tribal Council; the numerous affidavits submitted by the Defendant/Appellants; the Myerle Papers and the feral industrial hemp growing on the Pine Ridge Reservation demonstrate that there were, in fact, historical uses of the hemp plant by the Lakota at the time of the Treaties of 1851 and 1868.

The agricultural production of hemp was being encouraged by an official government program sponsored and funded by the Commissioner of Indian Affairs at the same time the Lakota were negotiating their treaties. David Myerle is an ubiquitous figure, not only in Indian Country, but in the

[1] This court reviews de novo a grant of summary judgment. *Evergreen Invs., LLC v. FCL Graphics, Inc.,* 334 F.3d 750, 753 (8th Cir. 2003). Summary judgment is proper only if, after viewing the evidence and construing it in a light most favorable to the nonmoving party**,** there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Id*.; Fed. R. Civ. P. 56(a).

Department of Indian affairs as evidenced by his associations with virtually every policy maker in that department from Senator and future President James Buchanan to the Cabinet level Secretary of War, the Commissioner of Indian Affairs and several Indian Agents in the field from the Missouri and Kansas River basins all the way out to California. All of them spoke favorably of his idea to turn the nomadic hunting tribes to agriculture through the cultivation of hemp and all supported his project.

It is not only likely, it is unquestionable, that Myerle was promoting turning the "permanent hunters" and "warrior tribes of the interior" to agricultural pursuits via the introduction of the hemp culture among them. It was during this very period when Myerle was having his correspondences with these various policy makers that "inducing the tribes to agricultural pursuits" became the official policy of the United States as reflected in the treaties entered after that time. It hardly requires a standard as liberal as "the light most favorable to the non-moving party" to conclude that it was likely the Lakota themselves who were the historic cultivators of hemp on the Pine Ridge Reservation.

It is this reasonable and well supported conclusion that not only requires the reversal of the district court's order, but must also cause the government's case in the main to fail. The government's case relies on, and

requires, the application of the CSA on the reservation to prohibit hemp farming. Without the CSA, the government's case dissolves. The only historic facts in the record support previous hemp cultivation by the Lakota, which legally precludes application of the CSA. Neither the government, nor the district court has averred, let alone demonstrated a single contradictory fact.

Absent a factual showing on the part of the government, nothing prevents a rational trier of fact from reasonably concluding that at the time of the Treaties of 1851 and 1868, the Oglala Lakota were actively engaged in the gathering and use of hemp and that they were permitted and encouraged to cultivate it under the terms of the treaties. The rights asserted by the OST in the Hemp Ordinances and the facts averred in the Myerle Papers and in the Defendant/Appellants' supporting affidavits regarding the historical use of hemp by the Lakota have not been disproven, they have been ignored. The district court's Order fails to dispose of this compelling fact situation. If the district court had correctly applied the federal law relating to treaty abrogation, then the case would turn on these facts.

At the very least, when the appropriate legal analysis is applied to the case, the OST Hemp Ordinances, the Myerle Papers and the numerous affidavits certainly present "genuine issues of material fact."

For the foregoing reasons, proposed *Amici Curiae* respectfully request this court grant Appellants request and reverse the summary judgment order of the district court, or in the alternative, enter summary judgment on behalf of the Appellants.

DATED this ___ day of June, 2005.

_____
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CERTIFICATE OF COMPLIANCE WITH RULE 32 (A)(7)(b)

Case No. 05-1656
Consolidated with No. 05-1654

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because:

☐ this brief contains 6690 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), *or*

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Attorney for Amici Curiae

CERTIFICATE AS TO COMPUTER DISK

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

Dated this ___ day of June, 2005.

_____
Kenneth R. Friedman

CERTIFICATE OF SERVICE

I hereby certify that on this ____ day of June, 2005, I served a total of two copies of the foregoing Brief for *Amici Curiae* Hemp Industries Association and Vote Hemp Supporting Appellants and Urging Reversal of the District Court's Order by first-class mail, postage prepaid on all parties herein to the following addresses:

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