UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH DAKOTA

WESTERN DIVISION

FILED

DEC 28 2004

UNITED STATES OF AMERICA,

Plaintiff,

vs.

ALEXANDER "Alex" WHITE PLUME, PERCY WHITE PLUME, their agents, servants, assigns, attorneys, and all others acting in concert with the named defendants, TIERRA MADRE, LLC, a Delaware limited liability company; and MADISON HEMP AND FLAX COMPANY 1806, INC., a Kentucky corporation,

Defendants.

CIV. 02-5071-RHB

MEMORANDUM GRANTING PLAINTIFF'S SUMMARY JUDGMENT

NATURE OF THE CASE

The government commenced this action pursuant to the Controlled Substances Act, 21 U.S.C. § 801, et seq., seeking a declaratory judgment and a preliminary and permanent injunction against defendants prohibiting them from growing cannabis on the reservation without a valid Drug Enforcement Agency (DEA) registration.

FACTS

The Controlled Substances Act made it illegal to import, manufacture, distribute, possess, or improperly use controlled substances. 21 U.S.C. § 801(2). A controlled substance is defined as "a drug or other substance, or immediate precursor, included in schedule I, II, III, IV, or V of part B of this subchapter." 21 U.S.C. § 802(6). 21 U.S.C. § 812(c)(c) sets forth the initial schedules of controlled substances. It states that "[u]nless specifically excepted or unless listed in another schedule, any material, compound, mixture, or preparation, which contains any

quantity of the following hallucinogenic substances, or which contains any of their salts, isomers, and salts of isomers whenever the existence of such salts, isomers, and salts of isomers is possible within the specific chemical designation: . . . (10) Marihuana . . . " is a prohibited substance listed on Schedule I. 21 U.S.C. § 802(16) sets forth the definition of marijuana. It states:

> The term 'marijuana' means all parts of the plant Cannabis sativa L., whether growing or not; the seeds thereof; the resin extracted from any part of such plant; and every compound, manufacture, salt, derivative, mixture, or preparation of such plant, its seeds or resin. Such term does not include the mature stalks of such plant, fiber produced from such stalks, oil or cake made from the seeds of such plant, any other compound, manufacture, salt, derivative, mixture, or preparation of such mature stalks (except the resin extracted therefrom), fiber, oil, or cake, or the sterilized seed of such plant which is incapable of germination.

Congress did, however, provide a way for people to manufacture or distribute a controlled substance legally. 21 U.S.C. § 822(a)(1) states that "[e]very person who manufactures or distributes any controlled substance or list I chemical, or who proposes to engage in the manufacture or distribution of any controlled substance or list I chemical, shall obtain annually a registration issued by the Attorney General in accordance with the rules and regulations promulgated by him." The statute goes on to state that

> The following persons shall not be required to register and may lawfully possess any controlled substance or list I chemical under this subchapter:
>
> (1) An agent or employee of any registered manufacturer, distributor, or dispenser of any controlled substance or list I chemical if such agent or employee is acting in the usual course of his business or employment.
>
> (2) A common or contract carrier or warehouseman, or an employee thereof, whose possession of the controlled substance or list I chemical is in the usual course of his business or employment.
>
> (3) An ultimate user who possesses such substance for a purpose specified in section 802(25) of this title.

The Historical and Statutory Notes to § 822 indicate that the reference to the definition in § 802(25) has been redesignated as § 802(27). Section 802(27) provides that "[t]he term

'ultimate user' means a person who has lawfully obtained, and who possesses, a controlled substance for his own use or for the use of a member of his household or for an animal owned by him or by a member of his household."

In 1998, the Oglala Sioux Tribe (Tribe) drafted a tribal ordinance redefining the term marijuana to exclude industrial hemp. Plaintiff's Statement of Material Fact (PSMF), 1. The ordinance defined industrial hemp as

> any specimen of the plant genus cannabis which contains a delta-9 tetrahydrocannabinol (THC) concentration that does not exceed one percent, on a dry weight basis; or any part of the specimen, the seeds thereof, the resin extracted from any such specimen, or every compound, manufacture, salt, derivative, mixture, or preparation of such specimen, its seeds, or resin.

PSMF, 2. The United States Attorney for the District of South Dakota informed the Tribe that the production of marijuana or hemp without a valid DEA registration would be a violation of the law and would be prosecuted. PSMF, 3. Regardless of the warning, the Tribe passed the ordinance. PSMF, 3.

Pursuant to the tribal ordinance, and without a valid DEA registration, Alex White Plume cultivated a cannabis crop on federal trust land in the spring and summer of 2000. PSMF, 5-6. White Plume entered into a contract to sell his crop to Tierra Madre, LLC. Defendants' Statement of Material Facts (DSMF), 2. In August of 2000, the government obtained a search warrant and obtained samples of the crop. PSMF, 7-10. The government then filed a "Motion for Destruction Order" requesting permission to destroy the crop. PSMF, 11. The motion was granted and the crop was destroyed. PSMF, 13.

In May of 2001, Percy White Plume informed government officials that he was cultivating a cannabis crop. PSMF, 16. Though an application for DEA registration was sent, it was never completed and a valid DEA registration was never issued for the crop. In July of 2001, Alex White Plume consented to the search and destruction of the crop despite having

contracted to sell his crop to Madison Hemp. PSMF, 20.

Again, in the spring of 2002, Alex White Plume began to cultivate a cannabis crop on federal trust land. PSMF, 23. White Plume once again contracted to sell his crop to Madison Hemp. Memorandum in Support of Motion to Intervene (Docket #22). Again the government executed a search warrant and samples of the crop were taken. PSMF4-25. The samples, when tested, revealed traces of THC. PSMF, 24-25.

The government moves this Court to declare that defendants are in violation of the Controlled Substances Act and order a permanent injunction, prohibiting defendants from manufacturing or distributing the cannabis plant.

STANDARD OF REVIEW

Under Rule 56(c) of the Federal Rules of Civil Procedure, a movant is entitled to summary judgment if the movant can "show that there is no genuine issue as to any material fact and that [the movant] is entitled to judgment as a matter of law." In determining whether summary judgment should issue, the facts and inferences from those facts are viewed in the light most favorable to the nonmoving party, and the burden is placed on the moving party to establish both the absence of a genuine issue of material fact and that such party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 106 S. Ct. 1348, 1356-57, 89 L. Ed. 2d 538 (1986). Once the moving party has met this burden, the nonmoving party may not rest on the allegations in the pleadings, but by affidavit or other evidence must set forth specific facts showing that a genuine issue of material fact exists.

In determining whether a genuine issue of material fact exists, the Court views the evidence presented based upon which party has the burden of proof under the underlying substantive law. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 106 S. Ct. 2505, 2513, 91 L. Ed. 2d 202 (1986). The Supreme Court has instructed that "summary judgment procedure is

properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed to 'secure the just, speedy, and inexpensive determination of every action.'" Celotex Corp. v. Catrett, 477 U.S. 317, 327, 106 S. Ct. 2548, 2555, 91 L. Ed. 2d 265 (1986). The nonmoving party "must do more than show that there is some metaphysical doubt as to the material facts," and "[w]here the record as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no 'genuine issue for trial.'" Based on the foregoing, the trilogy of Celotex, Anderson, and Matsushita provides the Court with a methodology in analyzing a motion for summary judgment. See generally 1 Steven A. Childress & Martha S. Davis, Federal Standards of Review § 5.04 (2d ed. 1991) (discussing the standards for granting summary judgment that have emerged from Matsushita, Celotex, and Anderson). Under this trilogy, it is incumbent upon the nonmoving parties to establish significant probative evidence to prevent summary judgment. See Terry A. Lambert Plumbing, Inc. v. Western Sec. Bank, 934 F.2d 976, 979 (8th Cir. 1991).

DISCUSSION

21 U.S.C. § 882(a) provides the Court with the authority to issue an injunction. It states, "[t]he district courts of the United States and all courts exercising general jurisdiction in the territories and possession of the United States shall have jurisdiction in proceedings in accordance with the Federal Rules of Civil Procedure to enjoin violations of this [Act]." 21 U.S.C. § 822(a). In deciding whether an injunction should issue the Court must consider "(1) the threat of irreparable harm to the movant; (2) the state of balance between this harm and the injury that granting the injunction will inflict on other parties litigant; (3) the probability that movant will succeed on the merits; and (4) the public interest." Dataphase Systems, Inc., v. CL Systems, Inc., 640 F.2d 109, 114 (8th Cir. 1981).

First, "[i]t is a well-established rule that where Congress expressly provides for

injunctive relief to prevent violations of a statute, a plaintiff does not need to demonstrate irreparable harm to secure an injunction. . . . The proper role of the courts is simply to determine whether a violation of the statute has or is about to occur." Burlington Northern Railroad Co. v. Bair, 957 F.2d 599, (8th Cir. 1992) (citations omitted). As stated previously, the Controlled Substances Act prohibits the cultivation of marijuana without a valid DEA registration. Hemp is included in the definition of marijuana. Defendants do not possess a valid DEA registration, nor are they exempt from the requirement of such registration. The Court, therefore, finds that the statute has been violated. As a result, the Court finds that the government need not show irreparable harm under the first prong of the Dataphase test.

In the second prong of the test, the Court is to consider the balance between the harm of violating the statute and the injury caused to the other litigants if the injunction is granted. Congress has already determined that "[t]he illegal importation, manufacture, distribution, and possession and improper use of controlled substances have a substantial and detrimental effect on the health and general welfare of the American people." 21 U.S.C. § 801(2). Congress further determined that marihuana was among those controlled substances with "a high potential for abuse." 21 U.S.C. § 812(b)(1)(A). If a permanent injunction were granted, it would simply mean that defendants would have to obtain a valid DEA registration in order to grow their hemp crop. Thus, the harm of violating the statute outweighs the injury inflicted on defendants.

The third factor looks at the probability that the movant will succeed on the merits. This Court determined that success was likely when the preliminary injunction was granted. As the Court has already determined that the statute has been violated, the likelihood of success weighs in favor of the government.

The Court also finds that the public interest weighs in favor of granting a permanent injunction. As stated previously, Congress has determined that cannabis presents a threat to the

public. Moreover, Congress legislates the will of the public. Accordingly, the Court finds that it is in the public's interest, and that it is their desire, to tightly regulate the cultivation of cannabis.

Defendants contend, however, that the industrial hemp they were growing is not the same as marihuana and therefore, the Controlled Substances Act is not applicable. The Court finds this argument without merit. In interpreting a statute, the Court is required to apply the plain meaning of the statute unless the statute is ambiguous. See Dowd v. United Steel Workers of America, 253 F.3d 1093, 1099 (8th Cir. 2001) (citing United States v. McAllister, 225 F.3d 982, 986 (8th Cir. 2000)). A statute is unambiguous if it is "'plain to anyone reading [it] that the statute encompasses the conduct at issue.'" United States v. Sabri, 326 F.3d 937, 942 (8th Cir. 2003) (quoting Salinas v. United States, 522 U.S. 52, 60, 118 S. Ct. 469, 139 L. Ed. 2d 352 (1997)). In this instance, the Court cannot say that the statute is ambiguous. Congress specifically made it illegal to possess marihuana which it defined as

> all parts of the plant Cannabis sativa L., whether growing or not; the seeds thereof; the resin extracted from any part of such plant; and every compound, manufacture, salt, derivative, mixture, or preparation of such plant, its seeds or resin. Such term does not include the mature stalks of such plant, fiber produced from such stalks, oil or cake made from the seeds of such plant, any other compound, manufacture, salt, derivative, mixture, or preparation of such mature stalks (except the resin extracted therefrom), fiber, oil, or cake, or the sterilized seed of such plant which is incapable of germination.

21 U.S.C. § 802(16). Hemp is a variety of Cannabis sativa L. See Affidavit of Paul G. Mahlberg, Ph.D., 9; Affidavit of Karl Hillig, 3-5; Hemp Industries Assoc. v. Drug Enforcement Agency, 333 F.3d 1082, 1085 (9th Cir. 2003); and Webster's New Collegiate Dictionary 534 (1975). As a result, the plain language of the statute prohibits the cultivation of hemp without a valid DEA registration.

The United States Supreme Court has held that "'[o]nly the most extraordinary showing of contrary intentions in the legislative history will justify a departure from [the statutory]

language.'" Sabri, 326 F.3d at 942 (quoting United States v. Albertini, 472 U.S. 675, 680, 105 S. Ct. 2897, 86 L. Ed. 2d 536 (1985)). No such showing has been made. Accordingly, the Court will not deviate from the plain language of the statute.

Defendants further argue that the Controlled Substances Act is not applicable on the reservation. The Controlled Substances Act is a general federal criminal law intended to be applicable to all those in the United States including the Native American tribes. See United States v. Blue, 722 F.2d 383, 385-86 (8th Cir. 1983); United States v. Brisk, 171 F.3d 514, 520 (7th Cir. 1999). However, "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." Blue, 722 F.2d at 385 (citing United States v. White, 508 F.2d 453 (8th Cir. 1974)).

Defendants contend that the Treaty of Fort Laramie of 1868 preserves their right to plant whatever crops they wish. As a result, defendants contend that the Controlled Substances Act is not applicable because it infringes on their rights. Defendants rely on Articles 6 and 8 of the Treaty as support for their argument that they have retained these rights. Article 6 states in pertinent part that

> If any individual belonging to said tribes of Indians, or legally incorporated with them, being the head of a family shall desire to commence farming, he shall have the privilege to select, in the presence and with the assistance of the agent then in charge, a tract of land within said reservation. . . .

Upon making his selection, the choice is recorded in the Land-Book and a certificate containing a description of the land is issued. The Article goes on to reserve the right of the United States to pass laws regarding the alienation and descent of property amongst the Indians and their property.

Article 8 of the Fort Laramie Treaty states in part that

> When the head of a family or lodge shall have selected lands and received his certificate . . ., and the agent shall be satisfied that he intends in good faith to

> commence cultivating the soil for a living, he shall be entitled to receive seeds and agricultural implements for the first year . . . .

The Court finds that neither Article preserves the right of the Tribe or its members to grow cannabis. The United States Supreme Court has held that "we interpret Indian treaties to give effect to the terms as the Indians themselves would have understood them." Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172, 119 S. Ct. 1187, 143 L. Ed. 2d 270 (1999). Furthermore, any ambiguous provisions should be construed in favor of the Indians. See Hagen v. Utah, 510 U.S. 399, 423-24 n. 1-3, 114 S. Ct. 958, 127 L. Ed. 2d 252 (1994). Since the Treaty requires the government to provide the 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. Accordingly, the Court finds that there is no particular Indian right or policy which is hampered by the Controlled Substances Act. See also United States v. White, 508 F.2d 453, 461 n. 8 (1974).

Defendants also argue that the classification of the industrial hemp variety of marijuana as a Schedule I drug is irrational and unconstitutional. "Because there is no fundamental constitutional right to import, sell, or possess marijuana [or hemp], the legislative classification . . . must be upheld unless it bears no rational relationship to a legitimate government purpose." United States v. Fogarty, 692 F.2d 542, 547 (1982) (citing United States v. Kiffer, 477 F.2d 349, 352 (2nd Cir. 1972) cert denied, 414 U.S. 831, 94 S. Ct. 165, 38 L. Ed. 2d 5 (1973)). "'[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. . . .'" Fogarty, 692 F.2d at 547 (quoting New Orleans v. Dukes, 427 U.S. 297, 303, 96 S. Ct. 2513, 2516, 49 L. Ed. 2d 511 (1976)). Furthermore, the United States Supreme Court has stated that "'[i]t is enough that there is an evil at hand for correction, and that

it might be thought that the particular legislative measure was a rational way to correct it.'" Fogarty, 692 F.2d at 547 (quoting Williamson v. Lee Optical, Inc., 348 U.S. 483, 488, 75 S. Ct. 461, 464, 99 L. Ed. 563 (1954)).

To be placed in Schedule I, a substance should meet three criteria - (1) a high potential for abuse, (2) no medically accepted use, and (3) no safe use even under medical supervision. See 21 U.S.C. § 812(b)(1). The Eighth Circuit has held that these criteria must "not be read as cumulative or exclusive." Fogarty, 692 F.2d at 548. In examining whether marijuana was properly classified in Schedule I despite scientific evidence of possible medicinal uses, the Eighth Circuit found that the classification of marijuana in Schedule I was not irrational due to the dispute as to the effects of marijuana and its potential for abuse. Id. It also noted that "Congress [had] provided an efficient and flexible means of assuring the continued rationality of the classification of controlled substances, such as marijuana." Id.

Defendants argue that hemp has no potential of abuse and can safely be used for many purposes. Defendants also argue that hemp is "readily distinguishable" from marijuana in that it contains less than 1% of THC and in the way that it is cultivated - with hemp plants being placed close together to encourage stalk growth and marijuana plants being placed further apart to maximize leaf growth. Nonetheless, hemp and marijuana are different varieties of the *same* plant. The Court finds that Congress is legitimately attempting to regulate the use of marijuana. Furthermore, the Court finds that since the hemp form and the drug form of marijuana are both Cannabis sativa L., and differentiate only chemically, it is not irrational that hemp would be included with marijuana as a Schedule I drug.

Defendants' final argument is that "the DEA's interpretation contained in the DEA Legal Opinion constitutes rulemaking" and that the agency did not follow the Administrative Procedures Act as required when promulgating rules. The Court notes that defendants fail to cite

authority to support their position. Furthermore, the Court notes that the DEA has previously published a similar ruling in the Federal Register. See New Hampshire Hemp Council, Inc., v. Marshall, 203 F.3d 1, 5 (1st Cir. 2000). Thus, the Court finds that this argument lacks merit. Accordingly, it is hereby

ORDERED that plaintiff's motion for summary judgment (Docket #27) is granted.

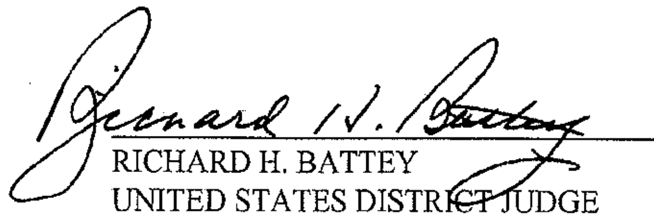
IT IS FURTHER ORDERED that defendants' motion for partial summary judgment (Docket #80) is denied.

IT IS FURTHER ORDERED that defendants' request for oral argument (Docket#80) is denied.

IT IS FURTHER ORDERED that judgment shall issue in favor of the plaintiff together with costs to be assessed and inserted by the Clerk.

Dated this 28th day of December, 2004.

BY THE COURT:



RICHARD H. BATTEY
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH DAKOTA

WESTERN DIVISION

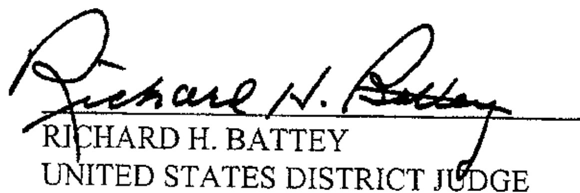
UNITED STATES OF AMERICA, Plaintiff, vs. ALEXANDER "Alex" WHITE PLUME, PERCY WHITE PLUME, their agents, servants, assigns, attorneys, and all others acting in concert with the named defendants, TIERRA MADRE, LLC, a Delaware limited liability company; and MADISON HEMP AND FLAX COMPANY 1806, INC., a Kentucky corporation, Defendants.	)	CIV. 02-5071-RHB JUDGMENT

Based upon the Court's Order dated this same day, it is hereby

ORDERED, ADJUDGED, AND DECREED that judgment shall issue in favor of plaintiff, and against defendants with prejudice.

Dated this 28th day of December, 2004.

BY THE COURT:



RICHARD H. BATTEY
UNITED STATES DISTRICT JUDGE