

## A New Paradigm For Industrial Hemp Farming On Tribal Lands

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With use dating back to the Neolithic Age in China, hemp is one of the earliest known domesticated plants.[1] Its history in North America predates European settlement, as noted by Jamestown, Virginia's Captain Gabriel Archer, who observed it being cultivated by members of a Powhatan village in 1607.[2] In fact, so prevalent was hemp in the early English settlements in America that in 1619, the Virginia House of Burgesses passed an act requiring all planters in Virginia to sow "both English and Indian hemp" on their plantations.[3]

Despite its long history in America and as an indigenous crop for many tribes, hemp has been linked with marijuana since the Federal Marihuana Tax Act of 1937[4] and has been strictly regulated by the U.S. Department of Justice and the Drug Enforcement Agency since passage of the Controlled Substances Act in 1970.[5] Though grown from the same *Cannabis sativa L.* plant, industrial hemp is different in nature and use than marijuana.



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Marijuana involves cannabis flowers that contain 5-10 percent or more of tetrahydrocannabinol ("THC") — the compound responsible for marijuana's psychoactive effect if present in a high enough percentage. Industrial hemp, by contrast, involves the use of the cannabis stalk and seeds for textiles, foods, papers, body care products, detergents, plastics, and building materials. Cannabis strains used for industrial purposes contain a THC concentration of 1 percent or less by weight. With such a low THC level, it is impossible to use industrial hemp for any psychoactive effect

Although the past two decades have seen 22 states and many tribal governments pass laws permitting industrial hemp cultivation, pushback from the federal government and a persistent association of hemp to marijuana has prevented American Indian farmers from pursuing this cash crop. Ironically, however, a recent DOJ memo prompted by state actions legalizing marijuana could usher in a new area for industrial hemp farming on tribal lands. The DOJ's August 2013 "Cole memo" set forth the DOJ's priorities for marijuana enforcement in light of state decision to legalize marijuana for recreational use. A subsequent DOJ guidance memo in October 2014 expressly made the Cole memo's priorities applicable in Indian Country.

This article traces the litigation history of industrial hemp farming, describes the changed paradigm the

Cole memo has brought to the issue of industrial hemp farming, and identifies the remaining question that tribes and their lawyers will need to answer as they move forward to explore the new economic development opportunity of industrial hemp farming on tribal lands.

### **Pathfinders: Ahead of the Curve**

Historically, the DOJ and DEA have blocked industrial hemp farming in Indian Country. Alexander White Plume, an Oglala Sioux Tribal member, has been trying to grow industrial hemp on the Pine Ridge Indian Reservation for over a decade. In 1998, the Oglala Sioux Tribal Council passed tribal ordinance number 98-27, which amended the Tribal Penal Code Title 9, Section 106 and redefined “marijuana” to specifically exclude “industrial hemp” which was defined, in part, as having a THC concentration of one percent or less by weight.

Under that ordinance, White Plume planted and raised an industrial hemp crop on tribal land in 2000. In August 2000, the United States government obtained a warrant, sampled the crop and ultimately destroyed it. This process was repeated in 2001 and 2002. In August 2002, the United States sought a temporary restraining order against White Plume and his family preventing them from farming industrial hemp. This prohibition was made permanent in 2004 and affirmed by the Eighth Circuit in May 2006.[6]

Both the district court and Eighth Circuit held that Congress made no distinction between marijuana and industrial hemp in the Controlled Substances Act and therefore courts could do no more than interpret the plain language of the law, not redraft it.[7] The Eighth Circuit acknowledged “the challenges faced by members of the Tribe to engage in sustainable farming on federal trust lands” and that “the growing of hemp for industrial uses [may be] the most viable agricultural commodity for that region,” but still refused to deviate from what it deemed black letter law.[8]

North Dakota farmers seeking to grow industrial hemp faced similar obstacles.[9] In 1999, the North Dakota Legislature established regulations authorizing its Department of Agriculture to issue permits for industrial hemp farming. Farmers David Monson and Wayne Hauge wanted to cultivate industrial hemp under this new law and obtained permits from the state in 2007. Because the North Dakota law also required farmers to obtain federal permits, the North Dakota Department of Agriculture applied for DEA permits on behalf of Monson and Hauge. When the DEA refused, the North Dakota Legislature amended its industrial hemp statute to provide that state licensing was “not conditioned on or subject to review or approval by” the DEA.[10]

Rather than risk arrest or prosecution for cultivating industrial hemp without a federal permit, Monson and Hauge sought a declaratory judgment that the DEA could not criminally prosecute North Dakota industrial hemp farmers under the CSA. The farmers argued that the type of cannabis plant classified as “industrial hemp” under the North Dakota statute was not a controlled substance under the CSA; accordingly, a DEA permit was not required to farm industrial hemp.

The District of North Dakota disagreed, holding that the CSA’s definition of marijuana “unambiguously” included industrial hemp. The court also held that the CSA didn’t violate the Commerce Clause of the U.S. Constitution because local cultivation of controlled substances affects interstate traffic of the same substances. Monson and Hauge appealed, but the Eighth Circuit agreed with the District of North Dakota’s ruling.[11]

### **A New DOJ Paradigm: The Cole Memo**

In recent years, the legal landscape surrounding the CSA has changed, paving the way for developments in industrial hemp farming. As the cultivation and use of both marijuana and industrial hemp have become increasingly legalized under state and local laws, the federal government has refocused its enforcement priorities.

In August 2013, following state ballot initiatives in Colorado and Washington that legalized the possession of small amounts of marijuana and provided for the robust regulation of marijuana production, processing, and sale, then-Deputy U.S. Attorney General James Cole issued a memorandum to all U.S. attorneys offering “Guidance Regarding Marijuana Enforcement” (the “Cole memo”).[12] The memorandum acknowledged the DOJ’s commitment to enforcing the CSA but recognized its concurrent commitment “to using its limited investigative and prosecutorial resources to address the most significant threats in the most effective, consistent, and rational way.”[13]

The Cole memo strikes this balance by setting out eight enforcement priorities of “particular” importance to the federal government that will “continue to guide the DOJ’s enforcement of the CSA against marijuana-related conduct.” Priorities include:

- Preventing the distribution of marijuana to minors;
- Preventing revenue from the sale of marijuana from going to criminal enterprises;
- Preventing the diversion of marijuana from states where it is legal under state law in some form to other states;
- Preventing state-authorized marijuana activity from being used as a cover or pretext for other illegal activity;
- Preventing violence and the use of firearms in the cultivation and distribution of marijuana;
- Preventing adverse public health consequences associated with marijuana use;
- Preventing the growing of marijuana on public lands; and
- Preventing marijuana possession or use on federal property.[14]

With these priorities in mind — especially in jurisdictions that have legalized marijuana in some form and have implemented “strong and effective regulatory and enforcement systems to control the cultivation, distribution, sale, and possession of marijuana” — the Cole memo explains that the “primary question” in all federal enforcement actions is “whether the conduct at issue implicates one or more of the enforcement priorities.”[15]

Since issuance of the Cole memo and the related “Policy Statement Regarding Marijuana Issues in Indian Country,”[16] which explicitly made the eight enforcement priorities applicable to marijuana enforcement efforts in Indian Country, federal prosecutors have struck a balance between protecting the public from the dangers associated with controlled substances and honoring the actions of state and local governments who have legalized certain marijuana-related activities.

### **Legislative Legitimization**

In the years since White Plume, Monson and Hauge attempted to farm industrial hemp, states and the federal government have continued to pass legislation legalizing and regulating industrial hemp. To date, 22 states have laws specifically addressing industrial hemp.[17] Thirteen of these states — California, Colorado, Indiana, Kentucky, Maine, Montana, North Dakota, Oregon, South Carolina, Tennessee, Vermont, Virginia and West Virginia — have allowed commercial industrial hemp programs.[18] Another seven — Delaware, Hawaii, Illinois, Michigan, Nebraska, New York and Utah —

limit industrial hemp programs to agricultural or academic research.[19] And three more — Nevada, Florida and New Mexico — may soon join these ranks.[20]

Further, the most recently passed Farm Bill contains additional good news for prospective industrial hemp farmers. Section 7606 of the Agriculture Act of 2014 is titled “Legitimacy of Industrial Hemp Research,” and it expressly makes the CSA inapplicable to efforts by state agriculture departments and universities to grow industrial hemp for research purposes in states that have legalized industrial hemp.[21]

Given this legal framework, researchers and commercial farmers in some of these states are already growing industrial hemp. Several universities in Kentucky, including the University of Kentucky, are growing hemp to research the viability of certain types of hemp seed in Kentucky soil, cultivation for medical research, applications for cleaning tainted soil, and agricultural issues such as production cost.[22] Pilot projects in 2014 were extremely successful, yielding substantial data about farming techniques and alternative uses for industrial hemp.[23] Hundreds of applicants sought permits for the 2015 programs there.[24] Oregon has also issued its first hemp farming permit. [25]

Though the DEA has screened seeds and monitored the import process in these states, federal officials have not blocked these hemp farms. This is not surprising. Given industrial hemp’s extremely low THC level, it is impossible to use the plant for any psychoactive effect, and therefore, it can be strongly argued that the cultivation and processing of industrial hemp does not implicate any of the Cole factors.

### **Industrial Hemp Farming on Tribal Lands: The Way Forward**

States are moving, under the current DOJ policies and the Cole memo, to take advantage of the substantial economic opportunities that exist for the cultivation of industrial hemp. Many tribes may soon want to follow suit. Some important questions remain for tribes interested in exploring these opportunities including:

- what constitutes a strong and effective regulatory and enforcement system under the Cole memo for cultivating and processing industrial hemp on Tribal land;
- the applicability of the Farm Bill’s industrial hemp CSA loophole for tribal agricultural departments and tribal colleges;
- the applicability of Cole memo factors to situations where tribes may seek to cultivate industrial hemp in a state where industrial hemp has not been legalized; and
- the position of a tribe’s local United States attorney’s office regarding the applicability of Cole memo factors to a tribe’s industrial hemp program.

However, given industrial hemp’s promise of a sustainable industry and the improved public safety and health effects that economic growth associated with hemp farming could provide on tribal lands, many tribes may decide to begin working with their attorneys to seek answers to these questions and to move forward toward cultivation of industrial hemp. With careful legal study and planning, tribes and individual tribal members have the opportunity to become key players in the industrial hemp industry renaissance.

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***DISCLOSURE: Robins Kaplan LLP currently represents Alex White Plume in connection with the government's injunction against him. Tim Purdon also represented David Monson and Wayne Hauge in their declaratory judgment suit against the DEA. All observations herein about these cases are based solely on publicly available sources.***

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[1] "Information paper on industrial hemp (industrial cannabis)."

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[2] Gabriel Archer, *A Relatyon of the Discoverie of Our River...*, in *Archaeologia Americana* 44 (1860).

[3] *Proceedings of the Virginia Assembly, 1619*, available at

<http://content.wisconsinhistory.org/cdm/ref/collection/aj/id/5029> (last visited Apr. 13, 2015). Cf. *The 1633 Act: Hening's Statutes at Large* 218, available at <http://vagenweb.org/hening/vol01-09.htm> (last visited Apr. 13, 2015).

[4] *The Marihuana Tax Act of 1937*, available at

<http://www.druglibrary.org/schaffer/hemp/taxact/mjtaxact.htm> (last visited Apr. 10, 2015).

[5] *Comprehensive Drug Abuse Prevention and Control Act of 1970*, Pub. L. 91-513 (Oct. 27, 1970).

[6] See *United States v. White Plume*, 447 F.3d 1067, 1076 (8th Cir. 2006).

[7] See *id.* at 1072-73.

[8] *Id.* at 1076.

[9] *Monson v. DEA*, 522 F. Supp. 2d 1188, 1191 (D.N.D. 2007).

[10] *Id.* at 1194.

[11] *Monson v. DEA*, 589 F.3d 952, 955 (8th Cir. 2009).

[12] Memorandum from James M. Cole, Deputy Attorney Gen., to all United States Attorneys providing "Guidance Regarding Marijuana Enforcement" (Aug. 29, 2013).

[13] *Id.* at 1.

[14] Id. at 2-3.

[15] Id. at 3. Importantly, the “size or commercial nature of a marijuana operation alone” should not be considered a “proxy for assessing whether marijuana trafficking implicates the Department’s enforcement priorities.” Id.

[16] Memorandum from Monty Wilkinson, Director, Exec. Office for United States Attorneys, to all United States Attorneys, First Assistant United States Attorneys, Criminal Chiefs, Appellate Chiefs, OCDETF Coordinators, and Tribal Liaisons providing “Policy Statement Regarding Marijuana Issues in Indian Country” (Oct. 28, 2014).

[17] National Conference of State Legislatures, State Industrial Hemp Statutes, <http://www.ncsl.org/research/agriculture-and-rural-development/state-industrial-hemp-statutes.aspx> ((March 26, 2015) (last visited March 30, 2015).

[18] Id.

[19] Id.

[20] Riley Snyder, Lawmaker Introduce Industrial Hemp Farming Bill, Capital Press (March 17, 2015, 9:33 a.m.), <http://www.capitalpress.com/State/Nevada/20150317/lawmaker-introduces-industrial-hemp-farming-bill> (last visited March 31, 2015) (Nevada); Bill Cotterell, Senate Approves Hemp Bill, 10 News Tampa Bay Sarasota (March 23, 2015, 6:19 p.m.), <http://www.wtsp.com/story/news/politics/2015/03/23/senate-approves-hemp-bill/70348428/> (last visited March 31, 2015) (Florida); and Milan Simonich, Ringside Seat: Industrial Hemp Measure’s Future Rests with Governor, Santa Fe New Mexican (March 30, 2015, 12:15 a.m.) (New Mexico).

[21] Agricultural Act of 2014, Pub. L. 113-79, § 7606(a) (2014).

[22] Gregory A. Hall, Kentucky Announces 5 Hemp Pilot Projects, USA Today (February 17, 2014, 9:11 p.m.), <http://www.usatoday.com/story/news/nation/2014/02/17/kentucky-hemp-pilot-projects/5566925/>; see also Paresh Dave, After DEA Approves Hemp Seed Import, Kentucky Plants a Landmark Crop, LA Times (May 27, 2014, 5:20 p.m.), <http://www.latimes.com/nation/nationnow/la-na-nn-kentucky-hemp-dea-20140527-story.html> (last visited March 31, 2015).

[23] Dan Dickson, Hemp Pilot Projects Finding Fertile Ground in Kentucky, Business Lexington (March 26, 2015), <http://bizlex.com/2015/03/hemp-pilot-projects-finding-fertile-ground-in-kentucky/> (last visited March 31, 2015).

[24] Id.

[25] Damian Mann, First Hemp Permit Holder Now Just Needs Some Seed, Mail Tribune (Feb. 11, 2015, 6:59 p.m.), <http://www.mailtribune.com/article/20150211/NEWS/150219894/101064/NEWS> (last visited March 30, 2015).