

The Path Forward For Industrial Hemp In Indian Country

By Michael Reif, Robins Kaplan LLP

Law360, New York (January 5, 2017, 4:04 PM EST) --On Oct. 24, 2016, Reuters and Forbes reported that the Navajo Nation, whose reservation is the largest by square miles in the United States, was in the final stages of partnering with CannaNative to grow industrial hemp on portions of its 70,000 acre farmland. The announcement made headlines throughout Indian Country and the hemp agricultural community — especially because of the obstacles facing the Navajo Nation. Not only is industrial hemp not yet legal in New Mexico, the state in which the Navajo Nation’s farmland is found, but the tribe had yet to formally legalize hemp production on the reservation. Unsurprisingly, just days after the initial announcement, Navajo Nation officials clarified that the hemp-growing plans were far from final.



Michael D. Reif

What was behind that busy (and contradictory) week for the Navajo Nation? The answer involves the untapped promise of industrial hemp — an agricultural commodity with deep roots in American history that has been cast in the shadows for generations because of its U.S. Drug Enforcement Administration classification as a Schedule I drug. Although hemp is a variety of the *Cannabis sativa* L plant, unlike marijuana, it contains less than 0.3 percent THC and therefore has no psychoactive properties. Hemp fibers and stalks are used in clothing, construction materials, paper, biofuel and plastic composites. Hemp seeds and flowers are used in health foods, organic body care products and other nutraceuticals. The plant requires less water to grow than other crops, and it can be grown without pesticides. Even with the current growing restrictions, the total retail value of U.S. hemp products is more than \$600 million, and a senior Navajo economic adviser has suggested that industrial hemp could one day overtake gaming as an employment and revenue leader for tribes.

But that promise remains out of reach for many in Indian Country. Though a South Dakota federal judge acknowledged a “significant shift in the legal landscape” for industrial hemp in the past decade in a March 2016 order lifting a hemp-growing injunction against Oglala Sioux member and hemp pioneer Alex White Plume, Tribes face barriers to freely growing hemp and reaping its economic benefits.

In the 2014 Farm Bill, Congress for the first time separately defined industrial hemp — distinguishing it from marijuana — and allowed farmers to grow and cultivate a hemp crop. Though the Farm Bill restricts farmers to participating in pilot programs in conjunction with institutions of higher education and departments of agriculture in states in which industrial hemp is legal, it was an important step in normalizing industrial hemp in the United States.

In 2015, spurred by the new law and the promise of industrial hemp, the Menominee Indian Tribe of Wisconsin sought to apply the Farm Bill's guidance to its own pilot program. Working with the College of Menominee Nation, the tribe planted an industrial hemp crop on reservation trust land located not far from Green Bay, Wisconsin. In spite of the tribe's offer to the DEA to sample and test the hemp crop to measure THC levels, federal and local authorities entered the reservation and destroyed the tribe's hemp crop in October 2015. The tribe sued in federal court over the raid, seeking a declaration that it could cultivate industrial hemp pursuant to the Farm Bill. In May 2016, Federal District Judge William Griesbach dismissed the tribe's action. Though setting aside the government's procedural arguments for dismissal and reaching the merits of the tribe's claims, Judge Griesbach ultimately held that the tribe could not grow industrial hemp under the Farm Bill because industrial hemp was illegal under Wisconsin law. In the court's view, that matter of state law overrode the tribe's arguments that its tribal council had passed a law legalizing industrial hemp, that under the Indian canon of construction federal laws should be read to benefit tribes, and that as a sovereign entity the tribe was due statelike status under the Farm Bill.

Faced with this narrow interpretation of the Farm Bill and a refusal of federal courts to honor the full measure of tribal sovereignty, what can tribes interested in hemp farming do? One approach is to push back. Emboldened by the recent historic victory by the Standing Rock Sioux Tribe and its coalition of supporters in their battle against the Dakota Access Pipeline project in North Dakota, many in Indian Country are calling for further action that promotes self-determination and the sovereign powers of Indian Nations. Planting industrial hemp regardless of state law would be one means of asserting that sovereignty while pursuing tribal economic interests.

But such a strategy — though laudable in ideology — carries great risks. This is even truer given the uncertainty surrounding the Department of Justice and U.S. Department of the Interior in the incoming administration and their as-yet unknown views on cannabis, drug enforcement, tribal sovereignty and Indian Country writ large. Even in the current regulatory environment, the safest course for tribes is to pursue industrial hemp opportunities only if located in one of the 32 states that have legalized hemp.

If located in a state that meets that important requirement, tribes have two options for pursuing industrial hemp growth. First, they may apply to participate in a pilot program run by that state's designated institution of higher education or Department of Agriculture. Second, the tribes could create their own pilot program — working in conjunction with their own institution of higher education or department of agriculture. Such a program should be modeled closely on the state's own industrial hemp law and should carefully mirror the legal and agricultural safeguards that state law requires — an approach that tribes have successfully followed in pursuing the growth and sale of medical cannabis in states that have legalized that industry. Although this second strategy requires significant tribal effort and infrastructure, it has the benefit of acknowledging state law (as directed by Judge Griesbach in the Menominee matter) while asserting tribal sovereignty.

Though realizing the full promise that hemp can offer remains an elusive goal, Tribes acting now under the options described above can ensure that they are not losing ground relative to farmers outside of Indian Country as the movement for nation-wide industrial hemp legalization marches on.

Michael D. Reif is a principal in the Minneapolis office of Robins Kaplan LLP.

DISCLOSURE: *The author and Robins Kaplan LLP represented White Plume and the Menominee Indian Tribe of Wisconsin in the cases discussed in this article. Anything referenced in the article about these*

cases is public information.

The opinions expressed are those of the author(s) and do not necessarily reflect the views of the firm, its clients, or Portfolio Media Inc., or any of its or their respective affiliates. This article is for general information purposes and is not intended to be and should not be taken as legal advice.

All Content © 2003-2017, Portfolio Media, Inc.