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## NOTE

### ENOUGH ROPE: WHY UNITED STATES V. WHITE PLUME WAS WRONG ON HEMP AND TREATY RIGHTS, AND WHAT IT COULD COST THE FEDERAL GOVERNMENT

Lori Murphy\*

*We have lived in poverty for so many years that it seems to be an accepted way of life. . . . We have to assert our sovereignty.<sup>1</sup>*

-- Alex White Plume, Oglala Lakota

#### I. Context

##### A. Pine Ridge Reservation

It was on the Pine Ridge Reservation of the Oglala Sioux Nation that the U.S. army fired thousands of shots into four hundred Lakota people – mostly families – in December of 1890.<sup>2</sup> This mass execution, now known as the Wounded Knee Massacre,<sup>3</sup> is a visceral illustration of federal power misapplied to Native American communities. The frozen bodies, the Hotchkiss cannons, the mass grave next to which U.S. soldiers posed for a photo.<sup>4</sup> The federal government has distanced itself from the Indian policies of the past.<sup>5</sup> These are images that it would prefer not to resurrect in public memory.

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1. *Standing Silent Nation* (PBS television broadcast July 3, 2007) [hereinafter *Standing Silent Nation*].

2. Hugh McGinnis & Olive Glasgow, “*I Took Part in the Wounded Knee Massacre*,” OUR FAMILY HISTORY: BUILDING & SHARING GENERATIONS, <http://www.ourfamilyhistory.biz/woundedknee.htm> (last visited Apr. 25, 2011) (recounting Wounded Knee and incorporating earlier testimony of Wounded Knee’s last surviving U.S. Army participant, Hugh McGinnis, from a contemporary official investigation).

3. *Id.*

4. *Id.*

5. See, e.g., Larry Echohawk, *Balancing State and Tribal Power to Tax in Indian Country*, 40 IDAHO L. REV. 623, 630 (2004) (quoting Message to Congress on Indian Affairs, 116 CONG. REC. 23,131, (July 8, 1970), 6 WEEKLY COMP. PRES. DOC. 894, 895-96 (1970)) (“[O]ur government has made specific commitments to the Indian people. . . . [T]he special relationship between the Indian tribes and the Federal government which arises from these agreements . . . carr[ies] immense moral and legal force.”).

In 1973, the United States deployed government agents and heavy weaponry to Pine Ridge, this time in response to the American Indian movement's occupation of the Wounded Knee site.<sup>6</sup> A three-month firefight followed, after which the Native American political identity was no longer a force that the mainstream media could entirely sideline.<sup>7</sup> In 2000, with the weight of this history informing its judgment, the federal government sent agents to Pine Ridge, armed with semi-automatic weapons and orders to seize and destroy the property of Oglala tribal members.<sup>8</sup> An unarmed farmer named Alex White Plume had a submachine gun held in his face, on his own property.<sup>9</sup> One might ask, What kind of threat to federal law warranted such a violent intrusion? The answer: a crop of industrial hemp – intended for use in products no more illicit than paper and soap – grown by an Oglala family exercising its treaty right to cultivate it.<sup>10</sup>

The Fort Laramie Treaty of 1868 guarantees farming rights to the Lakota nations.<sup>11</sup> But farming is difficult on the reservation lands of South Dakota.<sup>12</sup> The federal rules of interpretation for Indian treaties mean that the Lakota reserved their rights under the treaty to cultivate any crops the tribes would have considered farming at the time,<sup>13</sup> including hemp – a crop that thrives even in South Dakota.<sup>14</sup> Any crop that will grow productively on Pine Ridge Reservation is desperately needed. This is evident in the lived reality of the people of Pine Ridge, where poverty and desperation are part of daily life.<sup>15</sup>

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6. See PAUL CHAAT SMITH & ROBERT ALLEN WARRIOR, *LIKE A HURRICANE: THE INDIAN MOVEMENT FROM ALCATRAZ TO WOUNDED KNEE* (1996).

7. *Id.*

8. Robin Lash, Comment, *Industrial Hemp: The Crop for the Seventh Generation*, 27 AM. INDIAN L. REV. 313, 341 (2002-2003); *United States v. White Plume*, 447 F.3d 1067, 1069 (8th Cir. 2006).

9. Lash, *supra* note 8, at 341.

10. *Id.* at 340. For a brief explanation of this treaty right, see *infra* notes 50-55 and accompanying text.

11. Fort Laramie Treaty of 1868, U.S.-Sioux Nation, art. VIII, Apr. 29, 1868, 15 Stat. 635.

12. Lash, *supra* note 8, at 337 (“South Dakota [is] a land where most crops do not easily grow.”).

13. See *Tulee v. Washington*, 315 U.S. 681, 684 (1942). The canons of construction for Indian treaties, discussed *infra* Part II.D, require interpretation of treaties as the tribes would have understood them at the time they were negotiated. *Id.*

14. See Ernest Small & David Marcus, *Hemp: A New Crop with New Uses for North America*, in *TRENDS IN NEW CROPS AND NEW USES* 284, 284 (J. Janick & A. Whipkey eds., 2002).

15. Chris McGreal, *Obama's Indian Problem*, *GUARDIAN* (Jan. 11, 2010), <http://www.guardian.co.uk/global/2010/jan/11/native-americans-reservations-poverty-obama>.

For example, “[m]ore than one-third of homes [lack] running water or electricity.”<sup>16</sup> Moreover, *The Guardian*, best known for covering social justice issues in the United Kingdom,<sup>17</sup> reported that, in 2009, more than one hundred people attempted suicide on the reservation, many of them succeeding – and some of them children and teenagers.<sup>18</sup> Demographic data supports the already clear conclusion that the people of the Oglala reservation need all the economic opportunities they can get.

Statistics vary when it comes to Pine Ridge, but by the federal government’s own lowest estimate, 49.8 percent of the people in the Pine Ridge Census Designated Place were living below the poverty level from 2005 to 2009.<sup>19</sup> As Alex White Plume’s wife, Debra, explains, “We have over 16,000 able-bodied people in the workforce, and we have less than 3,000 jobs.”<sup>20</sup> The Red Cloud Indian School on Pine Ridge compiled data placing the unemployment rate at eighty percent, and establishing the sobering life expectancy at forty-eight years for men and fifty-two for women – the lowest in the Western Hemisphere, apart from Haiti.<sup>21</sup> Census data on the actual populations of Indian reservations are notoriously imprecise,<sup>22</sup> but the Oglala Nation itself estimates that 45,000 people live on Pine Ridge,<sup>23</sup> and most of them on far less money than a living wage. “[T]he per capita income is around \$7,000 . . . a year, less than one-sixth of the national average.”<sup>24</sup> The Oglala Sioux Tribal Council articulates the situation with stark clarity: “the Oglala Lakota . . . [are] the economically poorest people in the country.”<sup>25</sup> Yet the United States

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16. *Id.*

17. *Tackling Inequality*, GUARDIAN (Nov. 17, 2008), <http://www.guardian.co.uk/environment/2008/nov/17/katine-guardian-justice>.

18. McGreal, *supra* note 15.

19. *2005-2009 American Community Survey 5-Year Estimates*, U.S. CENSUS BUREAU, [http://factfinder.census.gov/servlet/ACSSAFFacts?\\_event=ChangeGeoContext&geo\\_id=16000US4649660&\\_geoContext=01000US&\\_street=&\\_county=Pine+Ridge&\\_cityTown=Pine+Ridge&\\_state=&\\_zip=&\\_lang=en&\\_sse=on&ActiveGeoDiv=geoSelect&\\_useEV=&pctxt=fph&pgsl=010&\\_submenuId=factsheet\\_1&ds\\_name=ACS\\_2009\\_5YR\\_SAFF&\\_ci\\_nbr=null&q\\_r\\_name=null&reg=null%3Anull&\\_keyword=&\\_industry=](http://factfinder.census.gov/servlet/ACSSAFFacts?_event=ChangeGeoContext&geo_id=16000US4649660&_geoContext=01000US&_street=&_county=Pine+Ridge&_cityTown=Pine+Ridge&_state=&_zip=&_lang=en&_sse=on&ActiveGeoDiv=geoSelect&_useEV=&pctxt=fph&pgsl=010&_submenuId=factsheet_1&ds_name=ACS_2009_5YR_SAFF&_ci_nbr=null&q_r_name=null&reg=null%3Anull&_keyword=&_industry=) (last visited Apr. 25, 2011).

20. *Standing Silent Nation*, *supra* note 1.

21. *Pine Ridge Indian Reservation Demographics*, RED CLOUD INDIAN SCHOOL, [http://www.redcloudschool.org/history/100709\\_RCIS\\_PineRidgeFactSheet.pdf](http://www.redcloudschool.org/history/100709_RCIS_PineRidgeFactSheet.pdf) (last visited Apr. 25, 2011).

22. *See id.*

23. McGreal, *supra* note 15.

24. *Id.*

25. *History and Culture*, OGLALA SIOUX TRIBE, [http://www.oglalalakotanation.org/Oglala\\_Lakota\\_Nation/About\\_the\\_Tribe\\_files/History%20of%20Oglala%20Sioux%20Tribe.pdf](http://www.oglalalakotanation.org/Oglala_Lakota_Nation/About_the_Tribe_files/History%20of%20Oglala%20Sioux%20Tribe.pdf).

government is prohibiting these impoverished people from farming their most viable potential cash crop.<sup>26</sup> As discussed below, the Fort Laramie Treaty preserves land use rights, including the right to cultivate hemp.<sup>27</sup> If Congress intended the Controlled Substances Act of 1970 (CSA)<sup>28</sup> to abrogate that right, it must compensate the Lakota nations for the right's monetary value.<sup>29</sup>

### *B. Industrial Hemp*

Try as you might, you can't get high on industrial hemp. That's not a policy statement; it's science. By definition, industrial hemp contains only trace, non-psychoactive amounts of tetrahydrocannabinol (THC), the active ingredient in medicinal marijuana – and that is according to a congressional report.<sup>30</sup> While the specific THC contents that legally define hemp vary according to local laws and trade agreements,<sup>31</sup> all jurisdictions<sup>32</sup> concur that industrial hemp is “*Cannabis sativa* characterized by low levels of tetrahydrocannabinol.”<sup>33</sup> Australia, which allows states to regulate industrial hemp, has state laws limiting THC to less than one percent for permit purposes.<sup>34</sup> Canada and the European Union place their industrial hemp's THC content at less than 0.3 percent.<sup>35</sup> This low range for THC content is why industrial hemp is not psychoactive.<sup>36</sup> International and U.S. government

26. See *United States v. White Plume*, 447 F.3d 1067, 1076 (8th Cir. 2006) (“It may be that the growing of hemp for industrial uses is the most viable agricultural commodity for that region.”).

27. See *infra* Part II.A.

28. Comprehensive Drug Abuse and Control Act of 1970, Pub. L. No. 91-513, § 1101(b)(3)(A), 84 Stat. 1236, 1292 (codified at 21 U.S.C. §§ 801-971 (2006)).

29. WILLIAM C. CANBY, JR., *AMERICAN INDIAN LAW IN A NUTSHELL* 137 (5th ed. 2009). (“[A]brogation of a treaty may give rise to a claim of compensation when the abrogation destroys a property right. The abrogation itself is [still] effective, but the tribe is entitled to a claim for a ‘taking’ under the Fifth Amendment.”).

30. JEAN M. RAWSON, CONG. RESEARCH SERV., RL 32725, *HEMP AS AN AGRICULTURAL COMMODITY 1* (2005).

31. See *infra* notes 34-35 and accompanying text.

32. Although the United States has not yet explicitly authorized the cultivation of industrial hemp, the most recent bill to allow its production in the United States, proposed in 2009, set its THC content at “0.3 percent” or less, “on a dry weight basis.” Industrial Hemp Farming Act of 2009, H.R. 1866, 111th Cong. § 2(B) (2009).

33. RAWSON, *supra* note 30, at 1.

34. Jason Olsen et al., *An Information Paper on Industrial Hemp (Industrial Cannabis)*, W. AUSTL. DEP'T OF AGRIC. & FOOD (2008), [http://www.agric.wa.gov.au/objtwr/imported\\_assets/aboutus/as/information\\_paper\\_2008.pdf](http://www.agric.wa.gov.au/objtwr/imported_assets/aboutus/as/information_paper_2008.pdf).

35. RAWSON, *supra* note 30, at 1 n.2.

36. See *id.*

sources concur that industrial hemp is characterized by a THC content so low that it is simply unusable as a medicinal or recreational drug because a psychoactive effect requires at least three hundred percent more THC than is contained in industrial hemp.<sup>37</sup>

Industrial hemp is used in products as diverse as foods, furniture, building materials, paper, and textiles.<sup>38</sup> Jean M. Rawson's 2005 congressional report on "Hemp as an Agricultural Commodity" refers the reader to [www.hemptech.com](http://www.hemptech.com) for a more exhaustive list of hemp-containing items,<sup>39</sup> highlighting that information about industrial hemp has become so scarce that even government publications must cite to industry sources. The list of uses also points to the availability of *processed* hemp products in the United States. In fact, most of the industrial hemp legally produced in Canada is used in products that are ultimately exported to the United States,<sup>40</sup> revealing an American market that instead could be supporting tribal or other domestic producers.

And unlike most other crops, hemp will flourish on the Pine Ridge Reservation. The Eighth Circuit Court of Appeals' own language in *United States v. White Plume* states precisely that "the growing of hemp for industrial uses is the most viable agricultural commodity for that region."<sup>41</sup> John Yellowbird Steele, former Oglala Tribal President, describes wild hemp growing like a weed on Pine Ridge, saying that "all along the creeks, it just grows wild. . . . [I]t thrives."<sup>42</sup> In fact, the hemp that flourishes wild on Pine Ridge in the twenty-first century may be descended from "victory hemp" seeds provided by the federal government during World War II, when farmers were explicitly encouraged to produce it to contribute to the war effort.<sup>43</sup>

Recognizing the value of a crop that prospers even in the Northern Plains, North Dakota passed a statute in 1999, defining industrial hemp as having a THC content less than 0.3 percent, and authorizing its cultivation within the

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37. In fact, Canadian law *prohibits* implying industrial hemp is psychoactive. Canada's hemp regulations provide that "[n]o person shall advertise industrial hemp . . . or any product made from [its] derivatives to imply that it is psychoactive." Industrial Hemp Regulations (Controlled Drugs and Substances Act), SOR/98-156 (Can.), *available at* <http://laws.justice.gc.ca/PDF/Regulation/S/SOR-98-156.pdf> (last visited Apr. 25, 2011).

38. RAWSON, *supra* note 30, at 4.

39. *Id.* at 1 n.3.

40. Lash, *supra* note 8, at 325.

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

42. *Standing Silent Nation*, *supra* note 1.

43. *Id.*

state.<sup>44</sup> “Currently, at least 14 states have hemp-related laws in effect,”<sup>45</sup> although federal law presently preempts their application.<sup>46</sup> Former CIA Director James Woolsey observes that

[i]f you have a crop that you can grow on Indian reservations, or any other part of rural North America [on] which people can make hundreds of dollars an acre by harvesting, you change very substantially the employment picture. . . . The substantive case is on the side of legalizing very, very low-THC industrial hemp.<sup>47</sup>

### C. *The Oglala Sioux Treaty Right to Grow Hemp on Pine Ridge*

The Controlled Substances Act of 1970 (CSA) expanded the application of federal marijuana laws to industrial hemp.<sup>48</sup> This overly inclusive legislation has had direct, harmful consequences for the people of the Oglala Nation.<sup>49</sup> Contrary to the holding of the Eighth Circuit Court of Appeals, the Oglala are empowered to grow industrial hemp on Pine Ridge through the Fort Laramie Treaty of 1868, through both the reserved rights doctrine and the proper application of the canons of construction for ambiguous Indian treaty rights.<sup>50</sup> The Eighth Circuit need only have recognized *one* of these fundamental principles of federal Indian law to find in favor of the White Plumes, but failed to apply either. The district court and the appeals court in *White Plume* acted not only in apparent ignorance of the doctrine of reserved treaty rights, but also declined to follow the canon requirements to interpret the Fort Laramie Treaty as the people of the tribes who entered into it would have understood it at the time,<sup>51</sup> and to liberally construe it in favor of the tribes.<sup>52</sup>

44. N.D. CENT. CODE § 4-41-01 (2009).

45. RAWSON, *supra* note 30, at 2.

46. *See, e.g., Maryland v. Louisiana*, 451 U.S. 725, 746 (1981) (“It is basic to this constitutional command that all conflicting state provisions be without effect.”).

47. *Standing Silent Nation*, *supra* note 1.

48. Comprehensive Drug Abuse and Control Act of 1970, Pub. L. No. 91-513, § 1101(b)(3)(A), 84 Stat. 1236 (codified at 21 U.S.C. §§ 801-971 (2000)); *see infra* notes 73-74 and accompanying text (explaining how the CSA’s broad, taxonomically based definition of “marihuana” eliminated previous tax-based distinctions between psychoactive marijuana and industrial hemp).

49. Oglala tribal members have lost thousands of dollars in much-needed income over the application of federal drug laws to non-psychoactive industrial hemp. *See infra* note 53 and accompanying text.

50. For an explanation of the canons of construction and the reserved rights doctrine, *see infra* Part II.D.

51. *See, e.g., Choctaw Nation v. Oklahoma*, 397 U.S. 620, 631 (1970); *United States v.*

Federal interference with the Oglala Nation's treaty rights has already cost the White Plume family and other tribal members hundreds of thousands of dollars in lost income – \$169,000 in unfulfilled contracts in one year alone.<sup>53</sup> This is a catastrophic taking of property, which, because of its relationship to treaty-reserved land use rights, is required, under the Fifth Amendment, to be compensated financially.<sup>54</sup> As Ramona White Plume explains, the tribe's decision to cultivate a traditional crop that had not been farmed on the reservation in decades serves both the community's needs and the federal government's long-term financial interests. She says,

We just came to the consensus that we're tired of living this way. We are tired of being dependent on the U.S. government for food stamps and commodities, and . . . looking for handouts to pay our light bill, and going a couple months without electricity. . . . What can we do? Well, . . . we can grow hemp.<sup>55</sup>

If the federal government persists in preventing the Oglala tribe from exercising its treaty right, the United States will remain responsible not only for providing those "food stamps and commodities," but will also be constitutionally obligated to pay monetary compensation for the abrogation of that right.<sup>56</sup>

## II. Summary of the Law

### A. The Fort Laramie Treaty of 1868

The Fort Laramie Treaty is quite explicit in some of its terms, but fairly vague when it comes to discussing agriculture. Article X, for instance, specifies an annual clothing allowance "[f]or each male person over fourteen years of age," consisting of "a suit of good substantial woollen [sic] clothing, consisting of coat, pantaloons, flannel shirt, hat, and a pair of home-made

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Shoshone Tribe, 304 U.S. 111, 116 (1938).

52. *Choctaw Nation*, 318 U.S. at 431-32.

53. *Standing Silent Nation*, *supra* note 1.

54. *See Shoshone Tribe*, 304 U.S. at 115.

55. *Standing Silent Nation*, *supra* note 1.

56. SUSAN COSNER, IOWA STATE UNIV. EXTENSION, RIGHTS IN PROPERTY AND LAND-USE REGULATION: TRADITION AND TENSIONS IN A CHANGING WORLD 2 (2001) (citing *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1004 (1992)) (clarifying that the Supreme Court has recognized that land use rights can be compensable under a "regulatory takings" analysis).



socks.”<sup>57</sup> “For each female over twelve years of age,” the treaty designates “a flannel skirt, or the goods necessary to make it, a pair of woollen [sic] hose, twelve yards of calico, and twelve yards of cotton domestics.”<sup>58</sup> Article IV provides that “[t]he United States agrees . . . to cause to be erected on said reservation . . . a good steam circular saw-mill, with a grist-mill and shingle machine attached to the same.”<sup>59</sup> In contrast to the specificity of these terms, delineating very particular types of garments, fabric, and machinery, Article VIII, dealing with farming, rather generally provides that “the head of a family or lodge . . . shall be entitled to receive seeds and agricultural implements.”<sup>60</sup>

The treaty places no limitation on what may be cultivated or what seeds may be provided, and therefore reserves to the Lakota tribes the inherent right to farm whatever crops they could grow before entering into the treaty.<sup>61</sup> In fact, Article XIV states that “the sum of five hundred dollars annually, for three years from date, shall be expended in presents to the ten persons of said tribe who in the judgment of the agent may grow the most valuable crops for the respective year.”<sup>62</sup> The Fort Laramie Treaty directly endorses the cultivation of whatever crops are “most valuable,” even rewarding prizes to the top ten most profitable farmers.<sup>63</sup>

Another, more well-known provision of this treaty is the requirement that “[n]o treaty for the cession of any portion or part of the reservation . . . held in common shall be of any validity or force as against the said Indians, unless executed and signed by at least three fourths of all the adult male Indians, occupying or interested in the same.”<sup>64</sup> This clause and its violation by the federal government in the form of federal seizure of the gold-rich Black Hills, with only a small percentage of the required signatories consenting under duress, was the subject of *United States v. Sioux Nation*,<sup>65</sup> arguably the most significant takings case in United States history. In *Sioux Nation*, the Court held that because the Fort Laramie Treaty provided that the “Indians were to hold the lands permanently, . . . compensation must be paid for subsequent

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57. Fort Laramie Treaty of 1868, *supra* note 11, at art. X.

58. *Id.*

59. *Id.* at art. IV.

60. *Id.* at art. VIII.

61. See *United States v. Winans*, 198 U.S. 371, 381 (1905) (“[T]he treaty was not a grant of rights to the Indians, but a grant of right from them,—a reservation of those not granted.”).

62. Fort Laramie Treaty of 1868, *supra* note 11, at art. XIV.

63. See *id.*

64. *Id.* at art. XII.

65. 448 U.S. 371 (1980).

taking.”<sup>66</sup> The tribes in *Sioux Nation*, however, sought not monetary but equitable relief: the return of the Black Hills land reserved by the treaty. The judgment of \$17,000,000, plus five percent interest, accruing since 1877, remains unclaimed.<sup>67</sup> In *Sioux Nation*, the Court offered monetary relief for the unauthorized taking of land. As with the abrogation of land, compensation is also due for the abrogation of land use rights under the Fort Laramie Treaty.

### *B. The Controlled Substances Act*

There is clear, documented evidence that, as of its passage of the Marihuana Tax Act in 1937, Congress intended to exempt industrial hemp from the penalties imposed by legislation addressing the sale of psychoactive marijuana. “In 1937, Congress passed the first federal law to discourage *Cannabis* production for marijuana while still permitting industrial uses of the crop (the Marihuana Tax Act). Under this statute, the government actively encouraged farmers to grow hemp for fiber and oil during World War II.”<sup>68</sup> In fact, the government-produced film, *Hemp For Victory*, proudly announced that “in 1942, patriotic farmers at the government’s request planted 36,000 acres of seed hemp.”<sup>69</sup>

As the court of appeals states in the *White Plume* opinion, “While in 1937 Congress had indicated in legislative history that production for industrial uses would be protected, . . . we can find no indication that Congress in 1970 gave any thought to how its new statutory scheme would affect such production.”<sup>70</sup> In fact, in drafting the CSA, Congress lifted language directly – and, according to the Eighth Circuit, without examination – from the Marihuana Tax Act.<sup>71</sup> This view is corroborated by the 2005 congressional report:

Congress adopted in the Controlled Substances Act (CSA) the same definition of *Cannabis sativa* that appeared in the 1937 Marihuana Tax Act. The CSA definition reads: “The term marijuana means all parts of the plant *Cannabis sativa* L. . . . Such term does not include

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66. *Id.* at 415 n.29.

67. Frederic J. Frommer, *Black Hills Are Beyond Price to Sioux*, L.A. TIMES (Aug. 19, 2001), <http://articles.latimes.com/print/2001/aug/19/news/mn-35775>.

68. RAWSON, *supra* note 30, at 2.

69. *Hemp for Victory* (U.S. Department of Agriculture 1942), transcript available at <http://www.hempmuseum.org/SUBROOMS/HEMP%20FOR%20VICTORY.htm>.

70. *United States v. White Plume*, 447 F.3d 1067, 1072 (8th Cir. 2006) (quoting *New Hampshire Hemp Council, Inc. v. Marshall*, 203 F.3d 1, 7 (1st Cir. 2000)).

71. *Id.* at 1072 (“The possibility remains that Congress would not have adopted the 1970 statute in its present form *if it had been aware* of the effect on cultivation of plants for industrial uses.”) (emphasis added).

the mature stalks of such plant, fiber produced from such stalks, oil or cake made from the seeds of such plant, [or] any other compound . . . or preparation of such mature stalks.”<sup>72</sup>

This comprehensive definition incorporates both forms of cannabis – psychoactive marijuana and industrial hemp – as well as clarifies why *processed* hemp products are currently legal for import and sale under the CSA. As the *Marshall* case cited in the *White Plume* opinion explains, “Congress’s main vehicle for protecting industrial-use plant production in 1937 was not its basic definition of ‘marijuana,’ which included plants . . . destined for industrial use; it was the complex scheme of differential tax rates and other requirements for transfers.”<sup>73</sup> Because the CSA eliminated these differential tax rates but did not amend the 1937 definition, industrial hemp was essentially grandfathered into the federal statutes as a Schedule I drug, despite not having “a high potential for abuse” as required for placement on Schedule I.<sup>74</sup>

Many potential industrial hemp producers, including the appellants in *White Plume*, have argued that Congress did not consider the consequences of the CSA on non-psychoactive hemp.<sup>75</sup> The *White Plume* opinion observes that the “argument that Congress did not intend to criminalize the growing of marijuana for industrial purposes is plausible, but ultimately not persuasive, for . . . [there is] no evidence that Congress intended otherwise.”<sup>76</sup> Congress might very well have accidentally criminalized industrial hemp. But that their treaty right may have been denied through an oversight is of little help to the Oglala farmers losing income over it.

Whatever the legislative rationale (or lack thereof), the Drug Enforcement Agency (DEA) now has jurisdiction over a crop that people have grown for rope and textiles for thousands of years.<sup>77</sup> Moreover, the DEA requires a type of permit for industrial hemp that even the Eighth Circuit acknowledges that the DEA does not, in practice, issue to would-be hemp growers who apply for it,<sup>78</sup> creating a functional bar to regulatory compliance. To date, only one

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72. RAWSON, *supra* note 30, at 2.

73. *White Plume*, 447 F.3d at 1072 (quoting *Marshall*, 203 F.3d at 7).

74. 21 U.S.C. § 812(b)(1)(A) (2006).

75. *White Plume*, 447 F.3d at 1071.

76. *Id.* at 1072.

77. See Small & Marcus, *supra* note 14, at 284.

78. See RAWSON, *supra* note 30, at 6 (“Strictly speaking, the CSA does not make *Cannabis* illegal; rather, it places the strictest controls on its production, making it illegal to grow the crop without a DEA permit. DEA officials confirm issuing a permit for an experimental plot in

industrial hemp permit has ever been issued, and it went to a private research operation in Hawaii.<sup>79</sup> “The DEA required that the one-quarter acre plot of land be surrounded by chain link fencing with a razor wire top and a twenty-four-hour infrared security system.”<sup>80</sup>

### *C. Oglala Sioux Tribal Penal Code*

In 1998, the Oglala tribal council voted to amend the Oglala Sioux Tribal Penal Code to provide penalties for cultivating, gathering, and distributing marijuana – but with a definition that specifically excluded “[a]ll parts and varieties of the plant *Cannabis sativa* . . . that are, or have historically been, cultivated and harvested for fiber and seed purposes and contain a tetrahydrocannabinol concentration of one percent or less by weight.”<sup>81</sup> This definition brings the Oglala Penal Code in line with the legislation of other nations that permit industrial hemp cultivation.<sup>82</sup> In carefully setting a definition for industrial hemp, the Oglala Council demonstrated their good faith intention to support the *actual* drug laws of the United States, while endorsing their citizens’ treaty right to farm a viable, valuable industrial crop.

### *D. Federal Legal Guidelines for Interpreting Indian Treaties*

The United States has not always dealt equitably with tribal nations. Because of the often unequal bargaining positions of tribal nations relative to the United States, principles rooted in the interpretation of adhesion contracts came to apply to the construction of Indian treaties.<sup>83</sup> In cases of ambiguity, where differing interpretations could arise, federal Indian law adopted “canons of construction,” intended to protect the integrity of tribal interpretations and expectations.<sup>84</sup> The three principles of these canons of construction are that “ambiguous expressions must be resolved in favor of the Indian parties concerned; Indian treaties must be interpreted as the Indians themselves would

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Hawaii in the 1990s (now expired), and they confirm that DEA still has not ruled on an application submitted in 1999 by a North Dakota researcher. Hemp industry officials assert that the security measures the DEA requires are substantial and costly, and deter both public and private interests from initiating research projects requiring growing plots.” (citation omitted).

79. Lash, *supra* note 8, at 326.

80. *Id.*

81. OGLALA SIOUX TRIBAL PENAL CODE tit. 9, § 106.00, available at <http://www.narf.org/nill/Codes/oglalacode/chapter09-penal.htm> (last visited Apr. 25, 2011).

82. See *supra* notes 31-35 and accompanying text.

83. 17 C.J.S. *Contracts* § 12 (2010).

84. DAVID GETCHES ET AL., *CASES AND MATERIALS ON FEDERAL INDIAN LAW* 129 (5th ed. 2005).

have understood them; and Indian treaties must be liberally construed in favor of the Indians.”<sup>85</sup>

In addition to the likelihood of a power differential when treaty terms were negotiated, “Indian tribes at treaty negotiations also faced a language barrier. The Indian treaties were written only in English, making it a certainty that semantic and interpretational problems would arise.”<sup>86</sup> The principle of liberal construction is articulated in *United States v. Washington*,<sup>87</sup> which held that fishing rights the tribe held “in common” with other citizens meant an equal one-half share, and not just some undefined shared portion.<sup>88</sup> Part of the persuasive authority in *Washington* was a contemporary Webster’s dictionary definition from the era when the treaty at issue was initially negotiated, demonstrating that the phrase “in common” implied, at the time, an equal portion.<sup>89</sup> The principle of interpreting treaties according to contemporary meanings and assumptions supports the Oglala view that the agricultural provisions of the Fort Laramie Treaty included whatever crops the tribe could have cultivated in 1868 – and certainly hemp would be one of them.<sup>90</sup>

Another federal Indian law principle vital to proper treaty interpretation is the reserved rights doctrine. This doctrine grew out of *United States v. Winans*,<sup>91</sup> a 1905 case that ruled that treaty negotiations reserved rights that were not explicitly articulated in the documents themselves.<sup>92</sup> Crucially, the reserved rights doctrine encodes the principle that treaties are not grants of rights to tribal nations from the federal government, but the inverse: Indian treaties are grants to the federal government from the tribes.<sup>93</sup> If a treaty is silent on a particular issue, it is therefore a right reserved to the tribe.<sup>94</sup> This doctrine corrects a profound misunderstanding on the nature of treaties still held by many federal judges, no doubt including those on the Eighth Circuit

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85. *Id.*

86. Charles F. Wilkinson & John M. 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, 610 (1975).

87. 384 F. Supp. 312 (W.D. Wash. 1974).

88. *Id.* at 333.

89. *Id.* at 356.

90. Affidavit of David P. West, Ph.D., *United States v. White Plume*, United States District Court, District of South Dakota, Western Division, Dec. 2002, 14, available at <http://www.industrialhemp.net/pdf/Whiteplume.affadavit.pdf>.

91. 198 U.S. 371 (1905).

92. *Id.* at 381.

93. *Id.*

94. COHEN’S HANDBOOK OF FEDERAL INDIAN LAW 123 (Nell Jessup Newton et al. eds., LexisNexis 2005) [hereinafter COHEN] (citations omitted).

Court of Appeals.<sup>95</sup> Under an analysis appropriately guided by this fundamental doctrine of federal Indian law, the Lakota nations reserved the right to grow hemp under the Fort Laramie Treaty because they did not cede that right to the United States.

The district court and courts of appeals in *White Plume* failed to interpret the Fort Laramie Treaty as required by the canons of construction, on the assertion that the treaty was not ambiguous.<sup>96</sup> This is not an uncommon tactic for courts that appear to be doctrine-shopping for a way to avoid the trust obligation to liberally construe treaties in favor of the tribes. The courts “now dismiss[] the canons by declaring that no true ambiguity exists.”<sup>97</sup>

### *III. Why the Eighth Circuit Got it Wrong and Why Hemp Is Right for Pine Ridge*

#### *A. The Court System Has Played an Extremely Active Role in Shaping Federal Indian Policy*

The Eighth Circuit Court of Appeals, despite recognizing the economic and material value of industrial hemp to the people of Pine Ridge, concluded that it was not the judiciary’s role to participate in federal Indian policy decisions.<sup>98</sup> The court’s supposition that “these are policy arguments better suited for the congressional hearing room than the courtroom”<sup>99</sup> calls into question the Eighth Circuit’s appreciation of the federal bench’s longstanding role in the evolution of Indian law. “Essentially, what [the White Plumes and other] Appellants seek” is *not*, as the court of appeals characterizes it, “amendment of the CSA.”<sup>100</sup> What they seek is a fulfillment of the judiciary’s responsibility to interpret treaties according to federal obligations and legislation to facilitate the federal government’s duties under the trust relationship that the Supreme Court itself articulated in *United States v. Kagama*.<sup>101</sup>

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95. *United States v. White Plume*, 447 F.3d 1067, 1074 (8th Cir. 2006). The Court of Appeals in *White Plume* asserts that because the Fort Laramie Treaty “mentions nothing about farming hemp,” there is no reservation of that right. *Id.* To require that a treaty explicitly “mention” a right to preserve it ignores the reserved rights doctrine established by the Supreme Court in *Winans*.

96. *Id.*

97. David H. Getches, *Conquering the Cultural Frontier: The New Subjectivism of the Supreme Court in Indian Law*, 84 CALIF. L. REV. 1573, 1620-22 (1996).

98. *See White Plume*, 447 F.3d at 1076.

99. *Id.*

100. *Id.* at 1072.

101. 118 U.S. 375, 384 (1886) (“From [the tribes’] very weakness and helplessness, so

The phenomenal impact of federal court rulings on the Indian policies of the United States began with the Marshall Court and continues in full force. The foundational concept that tribal nations, which existed as fully formed political entities before contact with Europeans, have the status of “domestic dependent nations,” comes from Chief Justice Marshall’s opinion in *Cherokee Nation v. Georgia*.<sup>102</sup> That three-word phrasing has disproportionately served as a touchstone for federal Indian law ever since, as though one judge’s personal word choice had the power to *determine* the political status of hundreds of nations, rather than just *interpret* that status. If John Marshall had chosen different diction the day he wrote that sentence, the course of federal Indian policy may have run quite differently. To deny the policy-forming role of the courts is to dismiss the principle of *stare decisis*.<sup>103</sup>

Even statutory changes in policy have often been enacted in response to court rulings. *Ex parte Crow Dog*,<sup>104</sup> which held that the district court of Dakota did not have jurisdiction over a Lakota defendant charged with an intra-tribal murder,<sup>105</sup> led directly to the passage of the 1885 Major Crimes Act,<sup>106</sup> ensuring that the federal government *would* have such jurisdiction in the future.<sup>107</sup> In fact, the Eighth Circuit’s rather dismissive take-it-up-with-Congress approach in *White Plume* echoes that found in *Lone Wolf v. Hitchcock*,<sup>108</sup> the very case that established the plenary power doctrine that shaped Indian affairs for decades.<sup>109</sup> In *Lone Wolf*, the Court held that congressional power over Indian affairs “has always been deemed a political one, not subject to be controlled by the judicial department of the government.”<sup>110</sup> The opinion goes even further, articulating the counter-

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largely due to the course of dealing of the federal government with them, and the treaties in which it has been promised, there arises the duty of protection, and with it the power.”)

102. 30 U.S. (5 Pet.) 1, 13 (1831).

103. BLACK’S LAW DICTIONARY 1537 (Bryan A. Garner ed., 9th ed. 2009) (defining *stare decisis* as “[t]he doctrine of precedent, under which a court must follow earlier judicial decisions when the same points arise again in litigation”).

104. 109 U.S. 556 (1883).

105. *Id.* at 557, 572.

106. SIDNEY L. HARRING, *CROW DOG’S CASE: AMERICAN INDIAN SOVEREIGNTY, TRIBAL LAW, AND UNITED STATES LAW IN THE NINETEENTH CENTURY* 101 (1994).

107. 18 U.S.C. § 1153 (2006) (providing federal jurisdiction over fifteen named crimes when committed by one Native American against another, even in Indian Country).

108. 187 U.S. 553, 567-68 (1903).

109. Wallace Coffey & Rebecca Tsosie, *Rethinking the Tribal Sovereignty Doctrine: Cultural Sovereignty and the Collective Future of Indian Nations*, 12 STAN. L. & POL’Y REV. 191, 193 (2001).

110. *Lone Wolf*, 187 U.S. at 565.

historical position that “[w]e must presume that Congress acted in perfect good faith in the dealings with the Indians,”<sup>111</sup> assuring that, in the wake of *Lone Wolf*, the federal government could not be sued for breaching its trust obligations.

This discharge of judicial responsibility for judging the appropriateness of congressional action does seem like a sound legal basis for the Eighth Circuit to dismiss the White Plumes’ arguments and direct them to Congress – or it would, were it still good law. But that element of *Lone Wolf* was soundly and explicitly overturned in 1970 by *Delaware Tribal Business Committee v. Weeks*.<sup>112</sup> *Weeks* established that it is in the purview of the federal court system to determine whether the federal government has breached its trust relationship with a tribal nation.<sup>113</sup>

Judges, of course, do not rule from a vacuum where statutes and case law are the only factors. As Crow Creek Sioux scholar Elizabeth Cook-Lynn observes,

In fantasies of a perfect world, idealized models exist in which justice never fails, and people always get what they deserve. The reality is that for all of us in this world, and for American Indians in particular, there is a complex mixture of social, political, institutional, experiential, and personal factors from which courts pick and choose, lawyers argue, and judges rule.<sup>114</sup>

But whatever their position on tribal sovereignty or the trust relationship, federal judges ruling on cases that have immediate, life-changing consequences for Native peoples at least have the obligation to do their homework on whether the principles on which they rely are actually valid law.

### *B. Industrial Hemp Is Clearly Distinguishable from Psychoactive Marijuana*

The court in *White Plume* cites *Marshall* for the proposition that “at ‘some stage’ *Cannabis sativa* may contain such low levels of THC that it would be impractical to use as a drug,”<sup>115</sup> a scientifically inaccurate characterization of

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111. *Id.* at 568.

112. *Delaware Tribal Bus. Comm. v. Weeks*, 430 U.S. 73 (1977).

113. *Id.* at 84.

114. ELIZABETH COOK-LYNN, *WHY I CAN’T READ WALLACE STEGNER AND OTHER ESSAYS* 125 (1996).

115. *United States v. White Plume*, 447 F.3d 1067, 1073 (8th Cir. 2006) (citing *New Hampshire Hemp Council, Inc. v. Marshall*, 203 F.3d 1, 7 (1st Cir. 2000)).



cannabis. Low-THC industrial hemp and psychoactive marijuana, with enough THC to function as a medicinal or recreational drug, are members of the same species – but are not the same individual *plants* at different stages of their life cycle,<sup>116</sup> as the court implies. A field of cannabis is not hemp one moment and marijuana the next. These two types of *Cannabis sativa*, cultivated for distinct purposes, have different characteristics and are not, as the courts imply in *Marshall* and *White Plume*, unduly difficult to tell apart,<sup>117</sup> particularly when (as in the case of Percy White Plume’s 2001 crop) the government is notified in advance what type of cannabis is being grown.<sup>118</sup>

Even if someone expended a great deal of effort *attempting* to derive a psychoactive effect from industrial hemp, his labors would go unrewarded. “There is absolutely no chance of inducing a psychoactive response by ingesting or smoking industrial hemp.”<sup>119</sup> One researcher “estimated that a person would have to smoke between fifty and 100 hemp cigarettes at the same time in order to obtain even a minimal inebriate effect.”<sup>120</sup> If someone actually went to the trouble of rolling fifty hemp cigarettes and power-smoking them all at once, his efforts would yield nothing more than a painful cough.

There is also very little danger of public misperception that industrial hemp is psychoactive. The unlikely mistake of conflating the two different strains of cannabis has even been the subject of pop-culture jokes. As the character Dwight Schrute, a beet-and-hemp-growing farmer on NBC’s sitcom *The Office*, observed upon recognizing a pizza delivery boy in a 2007 episode, “I’ve seen this kid before. He’s one of the kids that sneaks onto my farm and steals my hemp.” “Yeah, I know that guy,” retorts the teen. “He’s that farmer that grows really crappy weed.”<sup>121</sup> On the chance a real-life trespasser, desperate for a high, tried smoking industrial hemp, all he would be left with are sore lungs and a sense of disappointment.

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116. Lash, *supra* note 8, at 317-18.

117. *Id.* (“[D]esirable [psychoactive] marijuana plants have a minimum THC level of 3% and range to 20% and higher. . . . Not only are there major differences between the . . . plants, they also differ in cultivation methods. Industrial hemp grown for fiber crops are planted only four inches apart to discourage branching and leaf growth among the plants. When mature . . . the industrial hemp plant reaches a height of sixteen to twenty feet and has a rounded central stalk and almost no branches or foliage, except near the top. In contrast, the medicinal *Cannabis* varieties are planted with at least six feet of space between each plant to encourage branching and foliage growth. This results in a shorter, fatter, mature plant. . . . There is no danger of confusing a field of hemp for a field of marijuana.”).

118. *White Plume*, 447 F.3d at 1070.

119. Lash, *supra* note 8, at 317.

120. *Id.*

121. *The Office: Launch Party* (NBC television broadcast Oct. 11, 2007).

*C. The Lakota Tribes Reserved the Right to Grow Hemp Under the Fort Laramie Treaty*

Because hemp farming on trust lands was actively encouraged at the time of the Fort Laramie Treaty and throughout the nineteenth century,<sup>122</sup> it is more than plausible that the farming rights and policies associated with the treaty anticipated hemp as an included crop. That the treaty language does not explicitly identify any crops included or excluded from its coverage does not, as the court constructs it, mean that there is no ambiguity to resolve in the tribe's favor. Ambiguity is evident because, as the intensity of the debate indicates, differing interpretations of the treaty reveal a legitimate controversy between the tribe's construction and the federal government's.<sup>123</sup> This conflict in interpretation is precisely the sort of context that the canons of construction were designed to address.

An indigenous "Lakota word for the *Cannabis* plant" – "*wahupta*"<sup>124</sup> – along with anthropological evidence of widespread pre-contact hemp cultivation by Native American peoples,<sup>125</sup> supports the interpretation that hemp was a crop that the tribes signing the Fort Laramie Treaty reserved the right to grow. As White Plume attorney Tom Ballanco explains, "[T]here's a word for the plant in tribal language. . . . [That] means it's got a history . . . that precedes contact with Europeans."<sup>126</sup> Across indigenous North America, hemp had long been a fiber crop both harvested from the wild and purpose-grown for use.<sup>127</sup>

In addition to having a history that predates Europeans in North America, hemp was heavily promoted by the federal government during the nineteenth century. Ballanco states that, during the mid-nineteenth century, the

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122. See *infra* notes 130-31 and accompanying text.

123. Lash, *supra* note 8, at 347 ("They [the Lakota tribes] would have understood that they were able to produce any crop available at that time for farming because the treaty did not contain any planting restrictions.").

124. *Id.*

125. The name of the "Tuscarora" nation, in their own Iroquoian language, means "hemp gatherers." Tuscarora, BRITANNICA ONLINE ENCYCLOPEDIA, available at <http://www.britannica.com/EBchecked/topic/610553/Tuscarora> (last visited Apr. 25, 2011).

126. Lash, *supra* note 8, at 347.

127. Nancy J. Turner & Dawn C. Leowen, *The Original "Free Trade": Exchange of Botanical Products and Associated Plant Knowledge in Northwestern North America*, 40 ANTHROPOLOGICA 54-55 (1998).

government specifically promoted hemp among the plains tribes, even employing one David Myerle to “furnish the Indians with seed and instruct them in growing hemp,” as an 1845 letter documents.<sup>128</sup> By the time the Lakota nations entered into the Fort Laramie Treaty in 1868, the federal government had, for at least a generation, specifically intended hemp farming to be part of the general project of transitioning the tribes to agrarianism.<sup>129</sup> And more than twenty years after Fort Laramie, the government was still promoting hemp as an ideal crop for Indian nations to cultivate.<sup>130</sup>

*D. Because the Oglala Nation Reserved the Right to Cultivate Hemp, the Federal Government’s Argument that the CSA Prohibits Growing Industrial Hemp on Pine Ridge Implies that the CSA Abrogated that Treaty Right*

*Lone Wolf v. Hitchcock*, on which the court of appeals may have relied with misplaced emphasis, does in fact entrench in case law the proposition that Congress may unilaterally “abrogate the provisions of an Indian treaty.”<sup>131</sup> And *United States v. Dion*,<sup>132</sup> which dealt with the enforcement of the Bald Eagle Protection Act on the Yankton Reservation, considered whether statutes of general applicability can override treaty terms.<sup>133</sup> The Court in *Dion* ruled that treaty rights can be abrogated by federal statutes that preempt provisions to the contrary.<sup>134</sup> The government contends that this preemption is how the CSA prohibits hemp on Pine Ridge. But the canons of construction that apply to treaties with Indian nations can also be appropriately applied in statutory construction.<sup>135</sup> Given the legitimate question of a 1937 definition of “marihuana” (complete with its quaintly archaic spelling), this is certainly an instance where ambiguity abounds, to the detriment of tribal nations.

Even if Congress did intend the CSA to abrogate the Fort Laramie treaty right to cultivate hemp, the federal courts may be able to award equitable relief

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128. *Standing Silent Nation*, *supra* note 1.

129. The files of the BIA show that David Myerle claimed “expenses incurred [for] introducing the culture of hemp among the Indians” between 1843-1851. Records of the Bureau of Indian Affairs, Entry 98, Special Files M574, rolls 1-85, *available at* <http://freepages.genealogy.rootsweb.ancestry.com/~texlance/records/specialfiles.htm> (last visited Apr. 25, 2011).

130. ANNUAL REPORT OF THE COMMISSIONER OF INDIAN AFFAIRS 223 (1891) (suggesting explicitly that western tribes manufacture hemp for cordage).

131. 187 U.S. 553, 566 (1903).

132. 476 U.S. 734 (1986).

133. *Id.* at 735-36.

134. *Id.* at 746.

135. COHEN, *supra* note 94, at 119-20 (citations omitted).

in the form of a limited injunction against its application. *Pyramid Lake Paiute Tribe of Indians v. Morton*<sup>136</sup> confirmed that the courts are empowered to award not only monetary compensation, but equitable relief as well, in that case in the form of an injunction preventing diversion of a certain amount of water from a river on which the tribe depended for livelihood.<sup>137</sup> A good look at Pine Ridge makes it vividly clear that livelihoods are at risk.

In the absence of equitable relief, abrogated treaty rights involving property rights are compensable under a takings clause analysis.<sup>138</sup> First articulated in *Pennsylvania Coal v. Mahon*<sup>139</sup> in 1922, the doctrine that a qualified taking must be compensated by the government entered federal Indian case law the next decade in *Creek Nation v. United States*.<sup>140</sup> *Creek Nation*, decided by the Supreme Court in 1938, established the precedent for federal compensation of a tribe.<sup>141</sup> The same year, *United States v. Shoshone Tribe* verified that the government is financially responsible to tribal nations for land taken counter to treaty provisions.<sup>142</sup>

Land use, and not merely land title, is a compensable property right under the Fifth Amendment.<sup>143</sup> The Court has recognized a class of “regulatory taking” in instances “[w]here regulation has denied the landowner all ‘economically viable use’ of the land.”<sup>144</sup> In the extreme agricultural conditions of the Pine Ridge reservation, barring the Oglala Nation from cultivating what the Eighth Circuit itself recognizes as perhaps “the most viable agricultural commodity”<sup>145</sup> constitutes just such a denial of “economically viable use.”

The DEA destroyed the Pine Ridge hemp crops, an extension of land use property rights guaranteed by treaty, at a devastating financial cost. As Alex White Plume told the DEA agents who destroyed his family’s livelihood, “This is our family land. This is our *tiospaye*’s land. You’re violating us, and you’re taking something that we planted. We are going to sell that, we got

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136. 354 F. Supp. 252 (D.D.C. 1973).

137. *Id.* at 258.

138. Alex Tallchief Skibine, *Applicability of Federal Laws of General Application to Indian Tribes and Reservation Indians*, 25 U.C. DAVIS L. REV. 85, 98 (1991).

139. 260 U.S. 393, 415 (1922).

140. 302 U.S. 620 (1938).

141. *Id.* at 622.

142. 304 U.S. 111, 117 (1938).

143. JAMES R. PEASE, OR. STATE U. EXTENSION SERV., PROPERTY RIGHTS, LAND STEWARDSHIP, AND THE TAKINGS ISSUE 2 (1998).

144. COSNER, *supra* note 56, at 2.

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

people coming to buy that. You can't do this to us."<sup>146</sup> Alex White Plume is correct. No, in fact, the government cannot do that – not without making compensation.<sup>147</sup>

Interpreting the Fort Laramie Treaty of 1868 according to the canons of construction for federal Indian law that the trust relationship obligates the courts to follow, the Lakota tribes reserved the right to cultivate any crop that they contemplated farming at the time the treaty was made. If Congress intends non-psychoactive industrial hemp to be prohibited under the CSA, it abrogated the reserved treaty right of the Oglala Nation to farm it. As the extinguishment of a land use right, this abrogation is compensable under the takings clause of the Fifth Amendment.<sup>148</sup> If the Court is correct in its contentions about the trust relationship,<sup>149</sup> the breadth of the CSA,<sup>150</sup> and the validity of the Constitution,<sup>151</sup> the United States owes the Oglala Lakota monetary compensation for the value of the right to cultivate hemp for every year since the CSA took effect in 1970.

#### *IV. Conclusion: The "End of the Failed Metaphor"*<sup>152</sup>

*In the final analysis, you see, what kind of seed is implanted matters to Mother Earth. To continue to use her as a receptacle for the seeds of exploitation and extermination . . . holds no promise for the future.*<sup>153</sup>

-- Elizabeth Cook-Lynn, *Crow Creek Sioux*

146. *Standing Silent Nation*, *supra* note 1. "Tiospaye" means, briefly, "extended family." Lash, *supra* note 8, 339.

147. See COSNER, *supra* note 56, at 2; Katherine R. Guzman, *Give or Take an Acre: Property Norms and the Indian Land Consolidation Act*, 85 IOWA L. REV. 595, 622 (2000) ("The Supreme Court has long maintained and recently reaffirmed that regulation unaccompanied by physical invasion can require compensation, even categorically so when it reduces the economic viability of the regulated property to zero.").

148. Guzman, *supra* note 147, at 622.

149. *United States v. Kagama*, 118 U.S. 375, 384 (1886) ("From [the tribes'] very weakness and helplessness, so largely due to the course of dealing of the federal government with them, and the treaties in which it has been promised, there arises the duty of protection, and with it the power.").

150. See *New Hampshire Hemp Council, Inc. v. Marshall*, 203 F.3d 1, 7 (1st Cir. 2000).

151. The Fifth Amendment requires compensation for private property taken by the federal government, and this extends to tribal property rights reserved by treaty. See CANBY, JR., *supra* note 29, at 137 ("The abrogation itself is effective, but the tribe is entitled to a claim for a 'taking' under the Fifth Amendment.").

152. COOK-LYNN, *supra* note 114, at 142.

153. *Id.* at 148.

Elizabeth Cook-Lynn lays it out plainly: Wounded Knee is not a metaphor.<sup>154</sup> Mainstream U.S. culture has, to some extent, walled off Pine Ridge as a symbol – a site of history we would rather look past. That compartmentalization is, in part, how a country that surrounds the Oglala Nation on all sides manages to overlook its very real, very current pain. The Wounded Knee Massacre itself even recedes into history as an idea, and not as a bloody, screaming execution. It is real violence that happened to real people in a physical location that still exists and still suffers. Hugh McGinnis, a U.S. soldier who participated in what the army called the “Battle” of Wounded Knee, never forgot “[t]he pitiful wailing cries of babies and children mixed with the dull explosions of the old fashioned Hotchkiss machine guns . . . [and] [t]he sickening thuds as these big lead bullets smashed into the body of a baby or a child, arms and head all flying in different directions.”<sup>155</sup> Twenty-first century America may have managed to forget; to separate itself from that visceral horror. But violence is alive on Pine Ridge. One-hundred suicides a year is the equivalent of a Wounded Knee Massacre every election cycle.<sup>156</sup> The violence of deprivation and despair take their toll more quietly, but no less destructively. Wounded Knee is not a metaphor, and Pine Ridge is not lost to history. On a reservation where livelihoods must be fought for, deploying armed DEA agents to destroy crops intended for use as rope and paper is difficult to defend as a necessary tactic in the drug war.

And hemp is not a metaphor. Industrial hemp is not just an incidental casualty of the war on drugs; it is a livelihood actively denied by a federal policy that serves no one. Burning hemp is not a message that we are serious about fighting drugs. Burning hemp is simply government agents destroying families’ crops, and in turn, their livelihoods. The DEA allowed the White Plumes to grow their hemp to maturity, expending resources and labor, and then destroyed it just before the point of harvest.<sup>157</sup> This is yet another act of violence in the last place that needs more violence.

The courts of the United States are our last recourse when our rights are threatened. The federal courts failed the White Plumes. Rather than

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154. *Id.* at 144.

155. McGinnis & Glasgow, *supra* note 2.

156. *See* McGreal, *supra* note 15 (noting that “[m]ore than 100 people, mostly adults, tried or succeeded in taking their own lives on Pine Ridge reservation last year”). If about four hundred Lakota people died at Wounded Knee in 1890, then every four years as many Lakota people could be lost to suicide as were killed in the massacre. *See also supra* note 2 and accompanying text.

157. *Standing Silent Nation*, *supra* note 1.

interpreting the relevant statutory and treaty provisions in favor of the tribe, as required by the Indian canons of construction, the Eighth Circuit, at every step, construed them as unfavorably as possible. For federal judges, like for private citizens, ignorance of the law is no defense.<sup>158</sup> Actively pursuing an outcome in direct contradiction with established legal principles and that carries immediate, devastating consequences for Native peoples – for no other discernible reason than to avoid a controversial ruling – is indefensible.

The fiduciary duties that attend the trust relationship, as explicitly encoded in the canons of construction, obligate the federal courts to interpret the Fort Laramie Treaty in the manner in which the Lakota peoples would have understood it at its inception, and in the manner most favorable to the contemporary tribes its terms still affect.<sup>159</sup> Because of the canons of construction and the reserved rights doctrine, the most appropriate conclusion is that the Oglala and other Lakota tribes reserved the right to grow hemp under the terms of their treaty with the United States. Either the White Plumes and other Oglala tribal members may grow industrial hemp on Pine Ridge, or Congress must clarify that it has abrogated that land use right and compensate the tribe fairly, as required by the Constitution.

The federal government has another chance to act in good faith to meet its responsibility to the Oglala Nation. The issue is not academic. Lives are at stake.

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158. BLACK'S LAW DICTIONARY, *supra* note 103, at 815 (translating the Latin phrase *ignorantia juris non excusat* to stand for the maxim that "ignorance of the law is no excuse").

159. *See supra* Part II.D.