UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA
NORTHWESTERN DIVISION

David Monson **-and-** **Wayne Hauge,** **Plaintiffs,** **v.** **Drug Enforcement Administration** **-and-** **United States Department of Justice,** **Defendants.**	**Civ. No. 4:07-cv-00042 (DLH/CSM)** **Affidavit of David Monson**

STATE OF NORTH DAKOTA)
) ss.
COUNTY OF Cavalier (ND))

David Monson, being first duly sworn on oath, deposes and says:

1. I am of legal age and a citizen of the United States and a resident of North Dakota with his principal residence in Osnabrock, in Cavalier County, North Dakota. I make this affidavit upon personal knowledge.

2. I own a farm near Osnabrock. I have farmed on this property for thirty-two years, continuously, with my family.

EXHIBIT
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3. I am a member of the House of Representatives of the North Dakota Legislative Assembly and I currently serve as Assistant Majority (Republican) Leader of the House.

4. I served as Superintendent of the Edinburg School, North Dakota, until January 2007, at which time I became the Secondary Principal at the Edinburg School.

5. In January 2007, I applied to North Dakota Agriculture Commissioner Roger Johnson for a license to cultivate industrial hemp. On February 6, 2007, Commissioner Johnson issued me a license, effective for one year, to cultivate up to 10 acres of industrial hemp on my farm.

6. Pursuant to the license issued by Commissioner Johnson, I plan to cultivate 10 acres of industrial hemp on a field, the exact location of which was provided in the license application. I plan to plant 300 pounds of viable hemp seeds in order to produce approximately 2,420,000 industrial hemp plants in the field.

7. For the initial seed stock, I plan to use one or more of four possible sources. First, I have applied to DEA for a registration (license) to import viable seed from Canada. If that registration is granted, I will be able to obtain seed from Canada. Second, I have been told I could obtain viable seed from Paul Mahlberg, a semi-retired professor in Indiana who has a collection of viable hemp seed in cold storage from his research. Third, North Dakota law authorizes North Dakota State University ("NDSU to conduct baseline research regarding industrial hemp, including the collection of feral hemp steed stock and development of appropriate adapted strains of industrial hemp containing less than three tenths of one percent THC in the dried flowering tops. This law also mandates that Commissioner Johnson monitor the collection of feral hemp seed

stock and certify appropriate stocks for licensed commercial cultivation. If and to the extent that NDSU has available hemp seed stock and Commissioner Johnson has certified appropriate stocks for commercial cultivation, I would make use of such seed stock. Fourth, in the event that I am unable to obtain sufficient seed stock from any of these sources, they would collect feral hemp seed within North Dakota, from areas proximate to my farm; cause it to be tested by a DEA certified laboratory to ensure it meets the requirements of North Dakota law that the seeds would produce plants having no more than three tenths of one percent THC in the dried flowering tops and use only seed meeting that requirement to plant the first crop.

8. After harvesting the industrial hemp plants, I would remove the seeds on the premises of my farm.

9. I would then use a commercial grade oil press on my own premises to press seed into oil, and ship the oil directly to customers.

10. In addition, I may sterilize a portion of the harvested and removed seed using an infrared sterilization process (heat), and ship the sterilized seed to commercial seed pressers located in North Dakota and in neighboring states.

11. Following harvest, no controlled substance of any kind will leave my farm; the only products that will leave my farm are sterilized seed and oil, both of which are specifically exempted from the definition of "Marihuana" under the CSA.

12. I desire to cultivate industrial hemp, pursuant to state law, solely in order to sell the exempt parts of the plant—fiber, seed and oil—which would otherwise be imported from other countries.

13. On February 12, 2007, I applied to DEA for a federal registration to cultivate industrial hemp.

14. On February 12, 2007, I filed a separate application with DEA for a registration to import viable hemp seed from Canada for the purpose of cultivating industrial hemp on his farm in North Dakota.

15. I indicated in my application for a registration to manufacture that in order to utilize my state-issued license, I would need to complete planting by approximately the end of May 2007, and in order to obtain the seed stock and prepare for planting I would need to have the DEA issue the registrations no later than April 1, 2007.

16. It is my understanding that my applications for registration were personally delivered by Commissioner Johnson at a meeting with DEA officials in the Washington, D.C., area on February 12, 2007.

17. On March 5, 2007, Commissioner Johnson wrote a letter to the DEA requesting, among other things, that DEA issue by April 1, 2007, a final decision on the applications, for the same reasons set forth in my application. A copy of this letter is attached hereto as Exhibit A.

18. On March 27, 2007, DEA Deputy Assistant Administrator Joseph T. Rannazzisi wrote a letter to Commissioner Johnson indicating, "it would be unrealistic (and unprecedented) to expect DEA to make a final decision on any application to manufacture any controlled substance within the timeframe you suggest—approximately seven weeks." A copy of this letter is attached hereto as Exhibit B.

19. DEA's March 27, 2007, letter indicated that it would require considerably more time to consider the federal registration applications, in particular, in order to

"conduct an on-site investigation of the premises to ... ensure that there are adequate safeguards against diversion." DEA's letter further revealed that DEA did not intend to account for the non-drug nature of industrial hemp cultivation, and suggested that there would be need for severe security measures given that "the substance at issue is marijuana—the most widely abused controlled substance in the United States," and that the two farmers are seeking "to grow marijuana on a larger scale than any DEA registrant has ever been authorized to undertake." Exhibit B.

20. On June 1, 2007, DEA published in the Federal Register the required notification, to other applicants and registrants, that I had filed my applications. This simple first step in processing the application took DEA almost four months after I submitted my applications for registration to DEA, despite my request to expedite the processing of their applications in order to prepare for Spring 2007 planting.

21. After DEA's March 27, 2007, letter was brought to the attention of the North Dakota Legislative Assembly, the Legislative Assembly amended the state law, on April 27, 2007, to provide that, "A license required by this section is not conditioned on or subject to review of or approval by the United States Drug Enforcement Agency." N.D. Cent. Code § 4-41-02 as amended by House Bill 1020, to repeal Commissioner Johnson' regulations (N.D. Admin. Code § 7-14-02-04(2) & (3)) which had required that a license (registration) be issued by DEA.

22. Thus the state license issued to me by Commissioner Johnson is legally effective now, under state law, and does not require, as a condition for such effectiveness, the issuance of any registration by DEA.

23. Based on DEA's statement in its March 27, 2007, letter to Commissioner Johnson that I am seeking "to grow marijuana," I face the risk of immediate criminal prosecution under the CSA, by Defendants DEA and USDOJ, if I proceed to cultivate industrial hemp under the licenses issued by Commissioner Johnson pursuant to North Dakota state law.

24. Inasmuch as I face imminent criminal prosecution if I proceed to cultivate industrial hemp in accordance with my state-issued licenses, I have no adequate remedy at law with respect to the enforcement of the CSA.

Dated this 14th day of September, 2007

David Monson

Subscribed and sworn to before me this 14th day of September, 2007.

(SEAL)

Notary Public 565715

CYNTHIA STREMICK
Notary Public
State of North Dakota
My Commission Expires Oct. 25, 2008

Roger Johnson
Agriculture Commissioner
www.agdepartment.com

North Dakota Department of Agriculture

Phone (701) 328-2231
Toll Free (800) 242-7535
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600 E Boulevard Ave., Dept. 602
Bismarck, ND 58505-0020

March 5, 2007

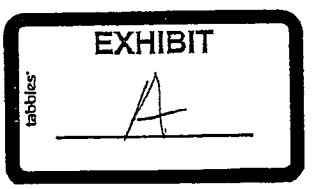
Ms. Karen Tandy, Administrator
U.S. Drug Enforcement Administration
Mailstop: AES
2401 Jefferson Davis Highway
Alexandria, VA 22301

Dear Administrator Tandy:

I want to thank your staff for taking the time to meet with me on February 13, to discuss the applications I submitted on behalf of two North Dakota farmers for registrations to cultivate industrial hemp and on behalf of one of those farmers for a registration to import viable seed, as well, for purposes of such cultivation.

In the letter sent to me by Mr. Rannazzisi on February 1, prior to the meeting, DEA indicated that it would not waive the requirement for DEA registration for North Dakota-licensed industrial hemp farmers. DEA explained that, "as a practical matter, the registration requirement is the primary means by which DEA ensures that legitimate handlers of controlled substances abide by the regulatory requirements of the CSA and DEA regulations." Further, DEA declined to grant the State of North Dakota authority to regulate the cultivation of industrial hemp on the grounds that "Congress envisioned when it enacted the CSA that the states—through enforcement of uniform state controlled substances laws, which were designed to complement the CSA—would act in harmony with the federal government to prevent illegal controlled substance activity."

DEA should reconsider that position. Under North Dakota law, by definition, industrial hemp must have less than three-tenths of one percent THC in a mature seed or in a growing plant with a THC level above three-tenths of one percent if the CBD to THC ratio is not less than two to one. Such plants cannot produce any psychoactive effect and are therefore useless as drug marijuana. As William M. Pierce, Jr., Associate Professor Pharmacology and Toxicology at the University of Louisville School of Medicine has written, under "the most fundamental principles of pharmacology, it can be shown that it is absurd, in practical terms, to consider industrial hemp useful as a drug." (Pierce, W. M. Jr., Ph.D., letter to Andy Graves, President, Kentucky Hemp Growers' Cooperative Association, January 24, 1997.) The DEA should exercise its discretion under the CSA to initiate a rulemaking proceeding to waive the registration requirement for cultivation of industrial hemp pursuant to state law and under state government supervision.



If DEA is not prepared to waive the registration requirement or grant state authority to regulate cultivation of industrial hemp, I would respectfully suggest that DEA is now required to afford careful and reasoned consideration of the registration applications which have been properly submitted to DEA. These farmers have already been licensed pursuant to state authority to cultivate industrial hemp in North Dakota.

Under the CSA, 21 U.S.C. §823(a), the DEA is *required* to register an applicant to manufacture a controlled substance in Schedule I *if* the agency "determines that such registration is consistent with the public interest and with United States obligations under international treaties, convention or protocols..." The statute then sets forth several factors which must be considered by DEA in determining the public interest:

1. "maintenance of effective controls against diversion of particular controlled substances...into other than legitimate, medical, scientific, research or industrial channels, by limiting the importation and bulk manufacture of such controlled substances to a number of establishments which can produce an adequate and uninterrupted supply of these substances under adequately competitive conditions for legitimate medical, scientific, research, and industrial purposes;
2. compliance with applicable State and local law;
3. promotion of technical advances in the art of manufacturing these substances and the development of new substances;
4. prior conviction record of applicant under Federal and State laws relating to the manufacture, distribution or dispensing of such substances;
5. past experience in the manufacture of controlled substances, and the existence in the establishment of effective control against diversion; and
6. such other factors as may be relevant to and consistent with the public health and safety."

In a press release dated March 12, 1998, entitled "Statement from the Drug Enforcement Administration on the Industrial Use of Hemp," DEA confirmed its obligation to consider these statutory criteria in consideration of an application for registration to cultivate industrial hemp.

I believe that any fair consideration of the subject registration applications from the North Dakota farmers will lead to the conclusion, first, that there is simply no risk of diversion of the cannabis plant or any of its parts "into other than legitimate...industrial channels..." As State Representative Monson explains in the cover letter to his registration application, he would obtain viable hemp seed from Canada (if a separate import license is granted); or domestically from a researcher, from North Dakota State University or from feral plants. None of these are sources of seed for plants that can in any way enter the stream of commerce for marijuana.

In harvesting the hemp plants, Rep. Monson would remove the seeds, on the premises of his farm, and process them in two ways: (1) by using a commercial grade oil press on his own premises to press seed into oil, and shipment of the oil directly to customers; and/or (2) by sterilizing a portion of the harvested and removed seed using an infrared sterilization process (heat) and shipping the sterilized seed to commercial seed pressers located in North Dakota and in neighboring states. Thus, following harvest, *no controlled substance of any kind* would leave Rep. Monson's farm. The only products that will leave his farm would be sterilized seed and oil, both of which are specifically *exempted* from the definition of "Marihuana" under the CSA, 21 U.S.C. §802(16).

Concern about potential diversion of the controlled parts of growing cannabis plants, including seed, from the farmer's premises, is misplaced. As noted, these plants, under state law which my agency will enforce, will contain less than three-tenths of one percent THC. For that reason, they are absolutely useless as drug marijuana. For the same reason, the seeds of industrial hemp plants, even if they were diverted in viable form, would be useful only to cultivate more hemp plants which would themselves be useless as a narcotic drug, *i.e.*, useless for other than legitimate industrial purposes. Indeed, the experience of Canada and other countries shows that there is no realistic risk of diversion of industrial hemp plants into other than legitimate industrial channels for legitimate industrial purposes.

Since at this point, only two farmers are applying for registrations, DEA has no occasion to reach the issue of limiting bulk manufacture, i.e., cultivation, of industrial hemp to that number of establishments that would "produce an adequate and uninterrupted supply" of industrial hemp "for legitimate...industrial purposes." 21 U.S.C. §823(a)(1). The number of establishments required to meet that standard is surely greater than two so DEA can leave that question for another day.

With respect to the second factor, the applicants in these cases would be complying with applicable state and local law since they have been specifically licensed under state law to cultivate industrial hemp.

As to the third factor, the only possibility of promoting technical advances in the cultivation of industrial hemp in the U.S. is to permit such cultivation to take place, under the carefully controlled conditions contemplated by these applications.

As to the fourth factor, our agency has confirmed, through both state and federal background checks, that neither of the applicant farmers has any prior conviction record for anything, let alone violations of controlled substances laws. Both of these applicants are known to me personally and are lifelong farmers and outstanding citizens of our state with a reputation for

adhering to the highest ethical standards. Rep. Monson, as you may know, currently serves the Majority (Republican) Assistant Leader of the North Dakota House of Representatives.

Finally, no U.S. farmer has any past experience in the cultivation of industrial hemp specifically; both of these applicants have, however, demonstrated the existence in their establishments, for the reasons explained above and in Rep. Monson's letter, of effective control against diversion.

Mr. Rannazzisi's letter also mentioned DEA's concern about ensuring "compliance with international drug control treaties," and the statute also requires that DEA ensure that any registration is consistent "with United States obligations under international treaties, conventions or protocols." 21 U.S.C. §823(a). As you are undoubtedly aware, Article 28, section 2 of the 1961 Single Convention on Narcotic Drugs, which the United States has ratified and constitutes the relevant strand of the network of Conventions implemented by the CSA, provides that, "This Convention shall not apply to the cultivation of the cannabis plant exclusively for industrial purposes (fiber and seed) or horticultural purposes..."

Consideration of the relevant factors should lead DEA to conclude that the issuance of these registrations is in the public interest and to grant these applications.

Given the history of other applications to DEA for registration to cultivate industrial hemp, for research and other purposes, I want to emphasize our strong belief that DEA is not free simply to ignore these applications. To the contrary, the agency has a legal obligation to review them carefully, to consider the relevant public interest factors set forth in the statute and to issue a reasoned decision based on such consideration. *See, e.g., State or Oregon v. Ashcroft*, 368 F.3d 1118, 1127-28 (9th Cir. 2004), *aff'd sub nom Gonzales v. Oregon*, 546 U.S. 243 (2006)(DEA must consider all factors listed in the statute in making a public interest determination on registration).

Further, while no specific time period for DEA's consideration is set forth in the law, we believe there is no reason why DEA cannot issue a decision in time for this year's planting season. In fact, to issue any decision after this year's planting season is to decide against the applicants since these applications are for the calendar year 2007. In order for these farmers to have adequate time to obtain seed and prepare the soil for planting, and to complete planting before the end of May, they need to have a decision from DEA by April 1. The facts are straightforward; our agency and the applicants themselves stand ready to respond promptly to any questions or requests for further information from DEA.

Again, I would like to thank your staff for taking the time to meet with me. I also appreciate your consideration of the applications which we have submitted on behalf of North Dakota farmers. If you have any questions or need any additional information concerning these applications or the State's industrial hemp program, please do not hesitate to contact me directly at 701-328-4754.

Sincerely,

Roger Johnson
Agriculture Commissioner

RJ:kj

CC: The Honorable Kent Conrad, U.S. Senator
The Honorable Byron Dorgan, U.S. Senator
The Honorable Earl Pomeroy, U.S. Congressman
The Honorable John Hoeven, North Dakota Governor
The Honorable Wayne Stenehjem, North Dakota Attorney General
The Honorable David Monson, North Dakota House of Representatives
National Association of State Departments of Agriculture

U. S. Department of Justice
Drug Enforcement Administration

Copied to Dept
Ken
Rep Hanson
Wayne Hauge

www.dea.gov Bismarck, North Dakota Washington, D.C. 20537

Roger Johnson, Commissioner
North Dakota Department of Agriculture
600 E. Boulevard Avenue, Dept. 602
Bismark, North Dakota 58505-0020

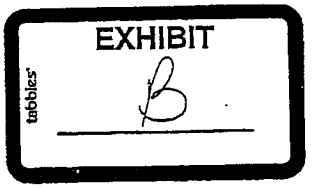
Dear Commissioner Johnson:

This responds to your March 5, 2007 letter to the Drug Enforcement Administration (DEA), in which you ask DEA to reconsider your prior request that DEA "waive individual DEA registration for North Dakota-licensed industrial hemp farmers and allow the State of North Dakota, with your guidance, to regulate industrial hemp farming within its borders." As you know, DEA denied this prior request by letter to you dated February 1, 2007.

In DEA's view, your latest letter does not raise any new issues or provide any additional information not previously considered by the agency. Accordingly, your request for reconsideration must be denied. However, we will address here the request in your latest letter that DEA issue by April 1, 2007, a final decision on the two applications to cultivate cannabis that you handed to the agency when we met with you on February 12, 2007.

Please understand that, as we explained during the February 12 meeting, any application by a person seeking to become registered with DEA to manufacture a controlled substance demands a careful and extensive review for DEA to meet its statutory and regulatory obligations. The process necessarily involves steps that take substantial time to complete. Among other things, DEA must first publish in the Federal Register a notice of application whenever a person seeks to manufacture in bulk a schedule I controlled substance. 21 CFR 1301.33(a). DEA must provide copies of the notice to all persons registered as a bulk manufacturer of that basic class of substance and allow such persons 60 days from the date of publication in the Federal Register to file comments or objections to the issuance of the proposed registration. *Id.* In addition, the agency must undertake a background investigation of the applicant and conduct an on-site investigation of the premises to evaluate the proposed manufacturing process and ensure that there are adequate safeguards against diversion. The general security requirements for all applicants and registrants are set forth in 21 CFR 1301.71 – 1301.76. Consistent with the overall framework of the Controlled Substances Act (CSA), the regulatory controls for schedule I controlled substances are the most stringent. Where, as here, the substance at issue is marijuana – the most widely abused controlled substance in the United States – the need for careful evaluation of the applicant's proposed security measures is of paramount concern.

Once DEA has completed the field investigation, the agency must evaluate all the relevant information to determine whether the application for registration can be granted in accordance with the statutory factors. With respect to the applications about which you inquire, the statutory factors are set forth in 21 U.S.C. 823(a), which governs applications by persons seeking to manufacture



Once DEA has completed the field investigation, the agency must evaluate all the relevant information to determine whether the application for registration can be granted in accordance with the statutory factors. With respect to the applications about which you inquire, the statutory factors are set forth in 21 U.S.C. 823(a), which governs applications by persons seeking to manufacture controlled substances in schedule I or II.

Given the foregoing considerations, it would be unrealistic (and unprecedented) to expect DEA to make a final decision on *any* application to manufacture any controlled substance within the timeframe you suggest – approximately seven weeks. That time frame is even more infeasible where the agency is being asked to evaluate two separate applications, both of which seek to grow marijuana on a larger scale than any DEA registrant has ever been authorized to undertake.

I trust that this information fully addresses your inquiry. We again thank you for continuing to seek DEA's input in addressing these important matters.

Sincerely,

Joseph T. Rannazzisi
Deputy Assistant Administrator
Office of Diversion Control