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Cannabis Industry E-lert

Federal Appellate Court to Review Idaho Seizure of Industrial Hemp

The U.S. Court of Appeals for the Ninth Circuit is reviewing the case of a Colorado CBD company seeking the release of hemp seized in Idaho as it was being trucked through the state on its way from Oregon to Colorado. The legal case, believed to be the first of its kind since new federal farming legislation made industrial hemp legal, pits the federal law allowing production and transport of hemp against an Idaho statute that defines hemp as an illegal substance.

Continuing Friction Between Federal and State Cannabis Laws

Big Sky Scientific, LLC claims that Idaho state police seized nearly 7,000 pounds of industrial hemp in contravention of the Agricultural Improvement Act of 2018 (commonly referred to as the Farm Bill). Within Section 10114 (“Interstate Commerce”) of the 2018 Farm Bill, two provisions directly address the interplay between federal and state laws impacting the legality of hemp and CBD products:

- Subsection (a) states as a “RULE OF CONSTRUCTION” that “[n]othing in this title or an amendment made by this title prohibits the interstate commerce of hemp (as defined in section 297A of the Agricultural Marketing Act of 1946 (as added by section 10113)) or hemp products.”
- Subsection (b), titled “TRANSPORTATION OF HEMP AND HEMP PRODUCTS” provides that “[n]o State or Indian Tribe shall prohibit the transportation or shipment of hemp or hemp products produced in accordance with subtitle G of the Agricultural Marketing Act of 1946 (as added by section 10113) through the State or the territory of the Indian Tribe, as applicable.”

The meaning of “in accordance with” played a major role in a [Memorandum, Decision and Order](#) by Ronald E. Bush, Chief U.S. Magistrate Judge of the District of Idaho. That order denied a request by Big Sky Scientific for return of its seized hemp.

Idaho is one of the few state in America where hemp is banned; the product has been legalized via state legislation by all of Idaho’s surrounding neighbor states, including Oregon and Colorado. In *Big Sky Scientific LLC v. Idaho State Police*, the Idaho state police seized several tons of what all parties now acknowledge was industrial hemp. They did so because hemp remains

a controlled substance under Idaho law. The contraband hemp was produced in Oregon and was in route to Colorado, thus crossing state lines and invoking federal jurisdiction.

The Unintended Consequences of USDA's Delays

Idaho officials prosecuting the criminal action took the position that the Farm Bill's section 10114(b) protection against a state prohibiting the transport of hemp within its borders did not apply because subtitle G contains provisions setting forth how the Secretary of the U.S. Department of Agriculture can "approve" or disapprove" a state or tribal "plan," or establish his own "plan." However, on February 27, 2019, the USDA confirmed it will not review state or tribal plans until after federal rulemaking is complete; a [statement](#) on USDA's Agricultural Marketing Service Website said it is working on federal guidelines and plans to issue final guidelines prior to the 2020 growing season. Based on these circumstances, Idaho contends that until such a plan is approved or established by the USDA, no hemp can be produced "in accordance with subtitle G."

Big Sky Scientific filed a [Complaint for Declaratory Judgment](#) with the U.S. District Court for the District of Idaho, seeking confirmation that its hemp was legal, that Idaho's seizure was illegal, and that the seized hemp should be returned to its rightful owner. In response to an emergency motion by Big Sky Scientific demanding immediate return of the seized hemp, the District Court agreed with the State of Idaho:

[T]he cargo that was seized on January 24, 2019 was not hemp that has been "produced in accordance with subtitle G." It could not have been produced in accordance with subtitle G because Oregon does not have a federally approved plan and the Secretary of the United States Department of Agriculture has yet to establish its own plan as Subtitle G requires be done. This is undisputed. It matters not whether the cargo might meet the requirements of subtitle G if such a plan (or something similar) had existed when the crop was grown and harvested, or whether the implementation of the production plan by the Department of Agriculture was delayed somehow because of the recent shutdown of certain operations of the federal government. There simply is no such plan in place and therefore the cargo, whether described as hemp or marijuana, could not have been produced in accordance with subtitle G and therefore could not be subject to the protection of interstate commerce as provided by the 2018 Farm Bill.

The District Court made clear that its decision to deny return of the seized hemp was not a final determination on the merits. In fact, the federal magistrate noted in his opinion that "there is no evidence in the record that the seized load [of industrial hemp] does not meet the definition of industrial hemp in the 2018 Farm Bill." However, Chief Magistrate Bush also observed in his opinion that: "*Though the 2018 Farm Bill removes industrial hemp as a controlled substance under federal law, states and Indian tribes still may declare it to be a controlled substance under state or tribal law. Idaho does not distinguish industrial hemp from marijuana; both are controlled substances under Idaho law.*"

Once the lower court declined the release of the shipment to Big Sky Scientific because Oregon's hemp regulations have not yet been approved by USDA, the plaintiff sought immediate review by the Ninth Circuit Court of Appeals. That petition for review was granted on February 20th, and

the appellate court agreed to hear oral arguments in the case, which could come as early as this month.

In an amicus curiae brief filed in the case, the U.S. Hemp Roundtable Inc. said that if the appellate court were to determine that the 2018 Farm Bill does not protect hemp grown or cultivated, it would “eschew clear congressional intent and cause unnecessary market uncertainty and trepidation in an industry on the cusp of economic boon.” In contrast, the State of Idaho argues that if Big Sky prevails in its lawsuit it would “significantly hamper law enforcement’s ability to enforce Idaho state law” and protect its citizens. No surprisingly, the pending confusion produced by the litigation has caused the American Trucking Associations to caution truckers about transporting hemp across state lines.

Which Way Forward?

Concerned stakeholders on all sides of the issue acknowledge that the situation needs a fix. The Idaho litigation has received the most attention because of the unique legal argument raised by the Idaho State Police. However, it is not the only challenge facing the industrial hemp industry.

For example, law enforcement officials in Wyoming and Kentucky also have seized multiple loads of cannabis – often because state police have no way of readily determining at roadside whether what is in a truck is lawful hemp or illegal marijuana. In Idaho and a number of other states, the laws in effect dictate that if hemp has any THC level, even below the federal limit of 0.03, it is considered marijuana.

The Farm Bill of 2018 represents a major step forward in the development of a legalized commercial hemp industry in the United States. However, there is still far to go before the industry comes into its own. The Ninth Circuit’s decision in the *Big Sky Scientific* case will be a strong indicator of how quickly America’s legalization of commercial hemp can progress.

For more information regarding the *Big Sky Scientific* case or the status of cannabis laws generally, please contact GrayRobinson’s [Cannabis Industry Law Group](#).

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