

DEPARTMENT OF JUSTICE
Drug Enforcement Administration
MARIHUANA
Scheduling

This matter concerns the scheduling of marihuana under the Comprehensive Drug Abuse Prevention and Control Act of 1970, 21 U.S.C. 801 et seq. It involves a rulemaking proceeding conducted pursuant to the remand of the United States Court of Appeals for the District of Columbia Circuit in *The National Organization for the Reform of Marijuana Laws (NORML) et al., Petitioners v. John E. Ingersoll et al., Respondents*, 497 F. 2d 654.

The responsibility of the Acting Administrator of the Drug Enforcement Administration (DEA) is twofold. First, the record of the proceeding must be considered to determine if there has been compliance with the directions of the court. Second, if the terms of the remand have been met, the record must be considered to determine if the recommended decision of the administrative law judge shall be accepted or rejected in the light of all the evidence.

I. THE REMAND AND THE RECORD

PHASE I.

On January 15, 1974, the decision of the Court of Appeals was published. Since the opinion by Circuit Judge Leventhal sets forth the history of the proceedings to that date, it need not be detailed here. Suffice it to say that the court ordered the Bureau of Narcotics and Dangerous Drugs (a predecessor agency of the Drug Enforcement Administration) to hold an administrative hearing on the petition of NORML and other organizations to remove marihuana from control of the Act or, in the alternative, to transfer marihuana from Schedule I to Schedule V. The petition had previously been rejected by the Director, BNDD, on the ground that marihuana was included in an international treaty to which the United States was a signatory. That treaty—The Single Convention on Narcotic Drugs, 1961, 18 U.S.T. 1407 (1967)—imposed certain obligations on the United States concerning marihuana and thus, the Director contended, control of marihuana was governed by Section 201(d) of the Act, 21 U.S.C. 811(d), which provides that "if control is required by United States obligations under international treaties . . . the Attorney General shall issue an order controlling such drug under the schedule he deems most appropriate to carry out such obligations . . ." It should be noted that as to substances not covered by international treaty the Act sets forth certain criteria for placement in one of the five schedules of the Act and requires the Attorney General to request from the Secretary of Health, Education, and Welfare "a scientific and medical evaluation and his recommendations as to whether such drug or other substance should be so controlled . . ." (Sections 201 (a) and (b), 21 U.S.C. 811 (a) and (b))

The principal contrary position asserted by the petitioners, as seen by the court, was that "the Single Convention on Narcotic Drugs does not regulate marihuana as such, that it regulates 'cannabis' and 'cannibis resin' and these are carefully defined so as to be inapplicable to the *leaves* of the cannabis plant." (*Italics in opinion.*)

The court took no position on the merits. It called for a focused consideration of the issues and outlined the nature and extent of that consideration. Since the fulcrum of the contest was an international treaty the court called for "the views of sources in the State Department and the international organizations involved." Then the court said, "if it should develop as petitioners suggest, that there is latitude in treaty obligations depending on the country's assessment of the health aspects of the problem involved, a substantial question would arise whether the Department of Justice may insist on making these determinations without obtaining the appraisal of the Department of Health, Education, and Welfare."

The court proposed a rulemaking proceeding in phases:

In the first phase the Department of Justice could consider whether there is any latitude consistent with treaty obligations and herein receive expert testimony limited to this treaty issue.

The second phase would arise only if some latitude were found and would consider how the pertinent executive discretion should be exercised.

The following series of events occurred subsequent to the remand:

1. On June 26, 1974, the Administrator published a notice in the FEDERAL REGISTER announcing that DEA was "prepared to hold a hearing limited to the petitioners or any of them, for the purpose of receiving factual evidence and expert opinion on the issue and by the method described by the court as 'whether there is any latitude (on the scheduling of marihuana under the Controlled Substances Act) consistent with treaty obligations, and herein receive expert testimony limited to this treaty issue.'" The notice included a lengthy letter addressed to the Chief Counsel, DEA, by the Assistant Legal Adviser of the Department of State setting forth in detail that Department's position on the obligations imposed by the Single Convention on the United States in regard to marihuana. Certain United Nations documents on the subject were attached to the original letter and these were identified in the notice and subsequently made available to the petitioners. (39 FR 23072-75)

2. By letter dated July 19, 1974, two of the original three petitioners, NORML and the American Public Health Association, responded to the notice by requesting an administrative hearing. The letter observed that "the issue as framed in the notice will focus entirely on the treaty issue—whether the Administrator of DEA has any discretion, under the Single Convention, to remove marijuana from Schedule I." Petitioners saw "three specific subparts" to this issue:

(a) Whether there is any discretion to remove marihuana from Schedule I.

(b) Whether there is any discretion to remove the leaves or seeds of the plant from Schedule I.

(c) Whether there is any discretion to remove marihuana from the Act insofar as marihuana is privately possessed and used.

On the last point petitioners contended that if the Single Convention was construed to require a criminal sanction for private possession and use of marihuana such a treaty obligation would be void as "repugnant to the United States Constitution, especially the Right of Privacy." (The issue set forth in this last subpart had not been designated for consideration by the remand. Further, an administrative law judge or an agency head has no authority (even assuming the competency) to resolve constitutional issues).

3. Pursuant to an order of Administrative Law Judge Lewis F. Parker, counsel for petitioners and counsel for the government met in the absence of the judge on September 18, 1974. Prehearing conferences, presided over by Judge Parker, took place on September 23, 1974 and October 23, 1974. At the September 23, 1974 conference, petitioners sought to clarify the issues. It was their position that "the medical-pharmacological aspects of marihuana" should not be considered; that the hearing should be concerned only with "interpreting a treaty." Judge Parker and the government agreed with this position.

4. An administrative hearing was held before Judge Parker from January 28 through January 30, 1975. On April 18, 1975, the government submitted Government Exhibit 79 which was received without objection by the petitioners. Extended oral argument covering the entire record then followed.

5. The record of the administrative hearing and the findings of fact, conclusions of law, and reply briefs submitted by the parties have been reviewed to determine if they reached the issue of whether the Single Convention provided any latitude in U.S. control of marihuana.

Petitioners' two witnesses, Lawrence Hoover, a former State Department legal adviser, and Dr. Joel Fort, a former consultant to the World Health Organization, were qualified as experts to give their opinions on this question as was Donald E. Miller, Chief Counsel of DEA and a State Department consultant on narcotics and dangerous drugs, who testified for the government. Other government testimony was received from Philip P. Porto, Director of DEA's Northeastern Regional Laboratories, on the composition of marihuana in the illicit traffic in the United States and from Dr. Carlton E. Turner whose testimony was addressed to the component parts of the marihuana plant and the various preparations which can be derived from each part. Dr. Turner is Director of the National Institute on Drug Abuse Marihuana Project.

In addition the record, beginning with the Federal Register notice which set forth the views of the Department of State, is replete with documents on the Single Convention and the positions of international organizations and foreign governments. I conclude, therefore, that the administrative proceeding met the "first phase" direction of the court.

II. THE REMAND AND THE RECORD

PHASE 2

The question then becomes whether the administrative hearing did more than comply with the "first phase" direction. As noted above the court questioned whether, if it should develop there was latitude in treaty obligations, the Department of Justice could determine the scheduling of marihuana absent the appraisal of the Department of Health, Education, and Welfare. To that question the court suggested a "second phase" which would arise "only if some latitude were found and would consider how the pertinent executive discretion should be exercised."

On January 29, 1975, Dr. Joel Fort testified for the petitioners. As a former consultant to the World Health Organization and the United Nations Division on Narcotic Drugs, Dr. Fort was qualified to express opinions on the Single Convention and marihuana control and he did so. But Dr. Fort exceeded this "first phase" question. On direct examination he was permitted to testify on whether marihuana now has, or could have, a currently accepted medical use in treatment in the United States.

Attorney for the government, DEA's Deputy Chief Counsel Robert J. Rosthal, pointed out that such testimony was not strictly relevant to the first phase of the hearing as had been agreed by all parties during the prehearing conference of September 23, 1974. Judge Parker, however, allowed the witness to describe numerous illnesses and diseases for which, in the witness's opinion, marihuana could usefully be prescribed.

At this point the hearing had gone far beyond the "phase one" issue and had entered the "medical-pharmacological aspects of marihuana" which petitioners had earlier stated should not be the subject of that phase.

On April 18, 1975, there was received in evidence Government Exhibit 79. In introducing the exhibit Mr. Rosthal noted that it was intended to counter the testimony of Dr. Fort which had created "a medical issue that I was not prepared to discuss at the time of the hearing because NORML after asking for the stipulation violated it, and they were permitted to violate it."

Government Exhibit 79, consists of a letter dated April 17, 1975, addressed to Peter H. Meyers, counsel for the petitioners, by Mr. Rosthal, enclosing a copy of a letter dated April 14, 1975 addressed to then DEA Acting Deputy Administrator Jerry N. Jenson by Dr. Theodore Cooper, then Acting Assistant Secretary for Health, Department of Health, Education, and Welfare. Mr. Rosthal's letter offered to join petition-

ers in a motion for postponement of oral argument to give petitioners additional time to consider Dr. Cooper's letter.

Dr. Cooper's letter reads as follows:

April 14, 1975.

JERRY N. JENSON,
Acting Deputy Administrator, Drug Enforcement Administration, Department of Justice, 1405 I Street NW., Washington, D.C. 20537.

DEAR Mr. JENSON: At your request, we have prepared the following statement giving our position on the medical uses of Cannabis sativa L. (marihuana).

There is currently no accepted medical use of marihuana in the United States. There is no approved New Drug Application for Cannabis sativa L. (marihuana) or tetrahydrocannabinol, the active principle in marihuana. There are Investigational New Drug Applications on file to determine possible therapeutic uses and potential toxic effects of the substance.

We have included for your information a copy of the most recent report on these studies and a copy of the FDA policy regarding clinical studies with marihuana.

Sincerely yours,

THEODORE COOPER, M.D.,
Acting Assistant Secretary
for Health.

This letter resolves the "substantial question" which the court found might exist if the Single Convention permitted latitude and the Attorney General acted to control marihuana "without obtaining the appraisal of the Department of Health, Education, and Welfare." It is unnecessary to decide whether Section 201(d) requires the Attorney General to seek the views of HEW on a substance included in an international treaty. In the instance of marihuana he has done so and he has received a reply.

Three federal statutes are noted at this point. Title 21 U.S.C. 812(b) defines the five schedules of controlled substances established by the Comprehensive Drug Abuse Prevention and Control Act of 1970. Only Schedule I is reserved for substances which have no currently accepted medical use in treatment in the United States. Title 21 U.S.C. 355(a) prohibits the introduction into interstate commerce of any new drug unless that drug has received an approved New Drug Application from HEW and Section 355(d) provides, in pertinent part, that to receive a New Drug Application a drug must be effective for a particular medical purpose and safe for use.

III. FINDINGS OF THE ADMINISTRATIVE LAW JUDGE

"Cannabis" (marihuana) is defined in the Single Convention as "the flowering or fruiting tops of the cannabis plant (excluding the seeds and leaves when not accompanied by the tops) from which the resin has not been extracted." "Cannabis resin" is defined as "the separated resin, whether crude or purified obtained from the cannabis plant."

As to these defined substances the Single Convention imposes certain obligations on the United States:

(a) To limit the use of cannabis and cannabis resin to medical and scientific

research or to medical and scientific purposes;

(b) To report estimates of cannabis and cannabis resin to be consumed in the next year and statistics on those drugs for the past year;

(c) To establish quotas for cannabis and cannabis resin;

(d) To establish a national cannabis agency;

(e) To license producers of cannabis and cannabis resin;

(f) To control domestic and international distribution of cannabis and cannabis resin; and

(g) To provide a penalty scheme for violation of the treaty and seize drugs used in such violations.

As noted, the seeds and leaves of the cannabis plant are included in the definition of "cannabis" when they accompany "the flowering or fruiting tops" of the plant. The leaves or seeds are excluded from the definition when they are entirely separated from the tops.

1. Judge Parker found that "when the leaves and seeds of cannabis accompany the tops, they come within the definition of cannabis adopted by the Single Convention, are subject to the same controls as the tops, and the United States has an obligation under the Convention to control them."

The Acting Administrator accepts this finding.

Seeds not accompanied by tops are not specifically controlled by the Single Convention.

2. Judge Parker found that "if the United States decided to decontrol cannabis seeds, that action would not violate any existing international obligations."

The Acting Administrator does not accept this finding since it is obvious that the seeds of a plant can be used to grow other plants. A finding that the Single Convention intended to ignore separated seeds capable of germination does not comport with the treaty's direction in Article 2, paragraph 8 which specifies "the parties shall use their best endeavors to apply to substances which do not fall under this Convention, but which may be used in the illicit manufacture of drugs, such measures of supervision as may be practicable." The Acting Administrator finds that the rigid controls imposed by the Single Convention on seeds when they accompany the tops do not apply to separated seeds which are capable of germination. He finds further that the Single Convention intended that such separated seeds be controlled.

With regard to leaves not accompanied by the tops the Single Convention directs that "the parties shall adopt such measures as may be necessary to prevent the misuse of, and illicit traffic in, the leaves of the cannabis plant."

3. Judge Parker found that "while the United States is obligated by the Single Convention to adopt specific controls over cannabis and cannabis resin . . . the Convention, in Article 28, paragraph 3, contains only a general admonition with respect to leaves." However, the article "does not give the parties the option of deciding not to control cannabis

leaves, and I find that it imposes an obligation on all parties to apply some measure of control, however slight, to prevent misuse of, and illicit traffic in, the leaves." (Word within quotation italicized by Judge Parker.)

The Acting Administrator accepts the substance of this finding but not the suggestion implicit in its language. The Acting Administrator construes Article 28, paragraph 3 as more than an "admonition." It intends that the United States make a full effort, in good faith, to prevent misuse of, or illicit traffic in, separated leaves. A "slight" effort or even a less than our best effort would denigrate the Single Convention.

4. Judge Parker found that the Single Convention does not apply to artificial cannabis.

The Acting Administrator finds that "artificial cannabis" does not exist and what the judge intended is synthetic tetrahydrocannabinol. This manufactured substance is not covered by the Single Convention and is not at issue in this proceeding.

The administrative hearing developed certain facts which were not included in Judge Parker's findings:

1. The plant material of what is commonly called marihuana in the United States consists of a mixture of crushed leaves, flowers and twigs of the Indian Hemp plant, an annual belonging to the single species of *Cannabis sativa*.

2. Resin is found in all parts of the cannabis plant including the leaves and the psychoactive element tetrahydrocannabinol (THC) is found in all parts of the plant. It is possible to extract THC from a separated cannabis leaf to make hash oil—a highly potent drug. THC is controlled in Schedule I of the Act.

3. It is the position of the Department of State, as set forth in the FEDERAL REGISTER notice of June 26, 1974, that "the Department of State is vitally interested in the effective enforcement of all the international obligations undertaken by the United States under the Single Convention on Narcotic Drugs, to which the United States became a party on June 24, 1967, and continues to be a party. The United States gave its consent to be bound by the Single Convention without any reservations or conditions and, accordingly, undertook to abide by all the obligations of that Convention."

4. It is the position of the Department of State, as set forth in the FEDERAL REGISTER notice of June 26, 1974, that the flowering or fruiting tops of the cannabis plant and cannabis resin must be included in Schedule I or Schedule II of the Act since these schedules are the only ones providing sufficient controls to meet the obligations which the Single Convention imposes as to those substances. The Department further considers that the Single Convention requires control of the leaves of the plant and that "the practice of mixing the flowering or fruiting tops, cannabis resin, (sometimes referred to as hashish), or a concentrated cannabis extract with the leaves, seems to present a serious problem of determining whether one level of control

can be applied to the leaves alone when other more potent substances are mixed with them which at the present time seems to be impossible except in a laboratory."

In discussing "the seriousness of the international situation with respect to illicit traffic in substances derived from the marihuana plant" the Department of State cites the statements made in the Report for 1973 of the International Narcotic Control Board (the control organ under the Single Convention) to the United Nations Economic and Social Council. This report, issued on February 22, 1974 states:

The Board notes in its report that cannabis continues to be the most prevalent drug in the illicit traffic. While there have been many seizures of substantial quantities of cannabis in 1973, the stream of the drug from countries where it is grown to countries where it is consumed has apparently not significantly diminished. The problem is exacerbated by the appearance of stronger concentrated forms which are easier to transport and are more potentially dangerous to the user. The Board is encouraged by the increase in basic research on cannabis, and calls for further studies on the effects of long-term consumption.

It is apparent that Judge Parker did not make these findings because of his understanding of the "first phase." He writes, "the only issue which must be decided is whether there is any latitude with respect to the scheduling of marihuana, consistent with treaty obligations. If there is, the extent to which such latitude permits descheduling or re-scheduling is an issue which would more properly be decided in the second phase proceeding after the views of the Secretary of Health, Education, and Welfare are considered by the Acting Administrator of DEA."

The Acting Administrator does not interpret the "first phase" as limited to a sterile reading of the treaty's words and phrases. To discuss "flowering or fruiting tops," "seeds and leaves," "resin" without knowing what they are and how they are used is to ignore why they appear in the Single Convention at all. Also, the court called for "the views of sources in the State Department and the international organizations involved" and since those views appeared in detail in the FEDERAL REGISTER notice of June 26, 1974, they require the closest attention. Accordingly, while the four findings immediately above were not "found" by the administrative law judge, they are "found" by the Acting Administrator.

Finally, the Acting Administrator finds that it is the position of the Secretary of Health, Education, and Welfare that "there is no currently accepted medical use of marihuana in the United States. There is no approved New Drug Application for *Cannabis sativa* L. (marihuana). There are Investigational New Drug Applications on file to determine possible therapeutic uses and potential toxic effects of the substance." The "substance" referred to by Dr. Cooper in his letter of April 14, 1975, to Mr. Jenson is the substance defined in Section 102

(15) of the Act, 21 U.S.C. 802(15). Here marihuana is described as "all parts of the plant *Cannabis sativa* L., whether growing or not; the seeds thereof; the resin extracted from any part of such plant; and every compound, manufacture, salt, derivative, mixture, or preparation of such plant, its seeds or resin." Excluded from the definition are seeds incapable of germination and certain other parts of the plant and products which may be derived from the plant. These parts and products are not pertinent to this discussion.

Congress placed all parts of marihuana as defined in the Act under Schedule I of the Act.

Comparing the description of "marihuana" in the Act with the description of "cannabis" in the Single Convention it is noted that the Act applies complete and equal coverage to flowering or fruiting tops, to seeds capable of germination and leaves whether or not accompanied by the tops, and to resin, while the Convention applies specific controls to the tops and to the seeds and leaves when they accompany the tops and to resin. The Convention assigns nonspecific controls to leaves and to seeds capable of germination when separated from the tops.

IV. THE RECOMMENDED DECISION OF THE ADMINISTRATIVE LAW JUDGE

Judge Parker's recommended decision reads as follows:

The United States is not required by any treaty, convention, or protocol to control cannabis seeds or artificial cannabis (Findings 22, 25 and 26(b) (1), (2)). Therefore, I recommend that the Administrator, pursuant to § 201(b) of the Controlled Substances Act, 21 U.S.C. 811(b), request from the Secretary of Health, Education, and Welfare a scientific and medical evaluation and the Secretary's recommendation as to the appropriate schedule in which cannabis seeds and artificial cannabis should be placed or whether these drugs should be removed from the schedules as controlled substances. After receiving these recommendations, the Administrator should hold hearings pursuant to § 201(a).

The United States is required by the Single Convention to control cannabis, cannabis resin, and cannabis leaves (Findings 21, 23, 24 and 26(a) (1) and (2)). However, its obligations thereunder can be satisfied if cannabis and cannabis resin are placed in Schedule II of the Controlled Substances Act and if cannabis leaves are placed in Schedule V of the Act. Therefore, I recommend that the Administrator, pursuant to § 201(b), 21 U.S.C. 811(b), of the Controlled Substances Act, request from the Secretary of Health, Education, and Welfare a scientific and medical evaluation and the Secretary's recommendation as to the appropriate schedule (within the limits of the United States' treaty obligations)* in which cannabis, cannabis resin and cannabis leaves should be placed. After receiving these recommendations,

*This phrase is included to make it clear that the Secretary, while he might recommend it, could not bind the Attorney General to place cannabis and cannabis resin in Schedules III-V or decontrol cannabis leaves since such action would violate the United States' treaty obligations.

ommendations, the Administrator should hold hearings pursuant to § 201(a).

V. ACTING ADMINISTRATOR'S DISCUSSION OF THE RECOMMENDED DECISION

The Acting Administrator agrees that "artificial cannabis" (actually synthetic tetrahydrocannabinol) is not controlled by any treaty to which the United States is a signatory. Therefore, U.S. control of synthetic tetrahydrocannabinol is not an issue in this proceeding.

The recommendation concerning "cannabis seeds" is confusing since it does not differentiate between seeds capable of germination and those which are not. As to those capable of germination, the Acting Administrator, as noted above, considers them covered by the treaty. Seeds incapable of germination are not controlled by either the Convention or the Act and are not an issue in this proceeding.

The Acting Administrator agrees that the Single Convention requires the United States to control cannabis, cannabis resin, and cannabis leaves. He agrees that the control mechanisms of the Act relating to Schedule I or Schedule II are sufficient to meet the requirements of the Single Convention as to cannabis and cannabis resin. (These requirements are listed above as (a) through (g) in the second paragraph under "Findings of the Administrative Law Judge")

So that there be no confusion, the term "cannabis" includes the seeds and leaves when they accompany the tops and Judge Parker's reference to "cannabis leaves" is taken to mean leaves which do not accompany, and are entirely separated from the tops. As to such separated leaves, the judge believes the control mechanisms of Schedule V to be sufficient. If the Acting Administrator were faced with this question in the framework of an academic discussion, he might agree that Schedule V controls could technically so limit separated leaves (and seeds capable of germination) as to meet the bare bones language of the treaty.

However, marihuana in the illicit traffic is a mixture of crushed leaves, flowers, and twigs, and THC can be extracted from the leaves to make hash oil. Thus, the misuse to which the leaves can be put and the form in which marihuana appears illicitly, make it obvious that Schedule V controls, which permit over-the-counter sales for a "medical purpose" would fall far short of the contemplated restrictions and purposes of the Single Convention and the intent of the Comprehensive Drug Abuse Prevention and Control Act of 1970.

Having found that the Single Convention obligates the United States to control cannabis, and cannabis resin and that this obligation could be met by placement in Schedule II, Judge Parker appears to recommend that, under Section 201(b) of the Act, the Acting Administrator request a scientific and medical evaluation from the Secretary, HEW, and then hold a hearing under Section

201(a). The identical procedural recommendation appears to be made as to leaves entirely separated from the tops.

The Acting Administrator uses the phrase "appears to recommend" because under Judge Parker's total recommendation the Secretary of HEW is not really to be permitted to make the medical and scientific evaluation contemplated by Section 201(b). As the footnote to the recommendation shows, the Secretary is to make an evaluation limited by legal interpretations of an international treaty. This situation demonstrates the problem which faced the Congress on the subject of drugs which are controlled by domestic law and international agreement.

The solution, as Congress resolved it, was to place in the Attorney General the ability to resolve the mixed questions of law and science and medicine. What the Court of Appeals feared was that this official conceivably might act without due regard for the views of other officials with an interest in the subject matter and in a special position to offer him advice. The court did not repeal Section 201(d). It referred to it as "establishing a basis for control under the Act if required by treaty obligations" and it strongly suggests that the Attorney General employ the appropriate talents available in the federal government in reaching a decision. In short, as the court projected Phase II, there would be a "pertinent executive discretion" when latitude exists as to a drug controlled by treaty. Judge Parker sees this executive discretion as a Section 201(a) hearing surrounded by a thicket of international legal inhibitions. If the court intended this result it might well have written, "the second phase would arise only if some latitude were found and would consist of a hearing under Section 201(a)."

Judge Parker's refusal to weigh the impact of Dr. Cooper's letter, or even to recognize that it exists in the record, is not explained. He may consider as mandatory the court's suggestion that the rulemaking proceed in two phases even where, as here, the second phase has been permitted to invade the first. The Acting Administrator does not regard the remand as an exercise in form. The court ordered the resolution of issues.

Whether Judge Parker has followed the logical extension of his recommendations does not appear, but in any hearing pursuant to Section 201(a), Dr. Cooper's letter would permeate the proceedings. First, under Section 201(b) it would represent the position of the Secretary of HEW on a medical-scientific matter. From that position would flow the statutory domestic prohibitions on marihuana as a drug without a New Drug Application. Second, since the Attorney General would be bound by the Secretary's position he could issue no order at the conclusion of a hearing inconsistent with it (unless of course, as Judge Parker footnotes, the Secretary's position is inconsistent with the Single Convention). Thus, no matter the weight of the scientific or medical evidence which petition-

ers might adduce, the Attorney General could not remove marihuana from Schedule I. That schedule is the only schedule reserved for drugs without a currently accepted medical use in treatment in the United States. Dr. Cooper's letter states that marihuana, as defined in the Act, has no currently accepted medical use in treatment in the United States.

Conceivably, Judge Parker foresaw the Section 201(a) hearing as a forum for resolving conflicting medical and scientific views in which petitioners' experts would so overwhelm the government's that the Secretary of HEW would change his mind on marihuana. Such a forum exists but not within the Drug Enforcement Administration.

Dr. Cooper's letter refers to "Investigational New Drug Applications on file to determine possible therapeutic uses and potential toxic effects of the substance." Clearly then there are ongoing studies aimed at demonstrating that all or part of the plant *Cannabis sativa* L. may be effective for a particular medical purpose and safe for use. Should these studies result in the granting of a New Drug Application by HEW, the Acting Administrator could move promptly to determine the proper schedule for the drug, consistent with federal law and the Single Convention.

VI. SUMMARY OF THE ACTING ADMINISTRATOR'S FINDINGS

Based on the record,¹ the Acting Administrator concludes as follows:

1. There is currently no accepted medical use of any part of the cannabis plant or of marihuana in the United States; there are studies in progress, authorized by HEW, to determine the possible therapeutic uses and potential toxic effect of the substance.

2. Under the Comprehensive Drug Abuse Prevention and Control Act of 1970, five schedules for controlled substances are established. Of these, only Schedule I is reserved for substances having no accepted medical use in the United States. Congress placed marihuana, as described in the Act, in Schedule I.

3. The Single Convention obligates the United States to control the flowering or fruiting tops of the plant from which the resin has not been extracted, the separated resin (whether crude or purified), the seeds capable of germination and the leaves. Therefore, none of these materials may be decontrolled.

4. The control mechanisms of the Act for Schedule I or Schedule II are sufficient to meet the obligations of the

¹ By a written communication dated June 13, 1975, counsel for petitioners asked the Acting Administrator to overrule the Administrative Law Judge's ruling admitting certain government exhibits into evidence. These exhibits consisted of cannabis materials and photographs and slides of various cannabis materials. The Acting Administrator has not found it necessary to consider these exhibits.

Single Convention as to the flowering or fruiting tops, seeds, and leaves when they accompany such tops, and resin.

5. The control mechanisms of the Act for Schedule III or Schedule IV are sufficient to meet the obligations of the Single Convention as to leaves which are capable of germination.

6. The United States Department of State interprets the Single Convention to require U.S. control of the flowering or fruiting tops of the cannabis plant and cannabis resin in Schedule I or Schedule II of the Act. The Department further interprets the Single Convention to require U.S. control of the leaves of the plant and it questions whether it is practical to apply one level of control to the leaves alone and another level of control when other parts of the cannabis plant are mixed with the leaves.

7. The International Narcotics Control Board report to the United Nations Economic and Social Council issued February 22, 1974, finds that cannabis is the most prevalent drug in the illicit traffic. It has appeared recently in stronger concentrated forms which are easier to transport and are potentially more dangerous to the user.

8. Seeds capable of germination are controlled by the Single Convention and the Act.

9. Synthetic tetrahydrocannabinol and seeds incapable of germination are not controlled by the Single Convention and therefore are not issues to be considered by the Acting Administrator.

VII. EXERCISE OF THE PERTINENT EXECUTIVE DISCRETION

This second phase would arise only if some latitude were found and would consider how the pertinent executive discretion should be exercised.

Congress enacted the Comprehensive Drug Abuse Prevention and Control Act of 1970 with the Single Convention on Narcotic Drugs, 1961, firmly in mind. (See the following sections of Title 21, United States Code in which the treaty is considered: Section 801(7), Section 811(d), Section 812(b), Section 823(a), Section 953(a) C, Section 953(b), Section 958(a)).

The Act then is the cutting edge of federal law which enforces the treaty as Congress sees the treaty. Whenever the federal law meets an obligation imposed by the treaty, the federal law has been designed to meet that obligation. In short, Congress intended (and must have believed) that the Act and the treaty would be *consistent*.

This is not to say that the Act is merely a restatement of the treaty in statutory language. Domestic considerations of public health and safety and criminal conduct intrude. The consistency sought by Congress was consistency within the framework of our own national problems, interests, and policies. Therefore the pertinent executive discretion cannot be exercised in the light of the Single Convention alone. It is required that the treaty and the Act be considered always together.

To find that the control mechanisms of Schedule I or II are sufficient to meet the obligations imposed on the United States by the treaty as to flowering or fruiting tops, seeds and leaves when they accompany the tops, and resin, is not to find that Schedule I and II are equally acceptable under the Act. Similarly, to find that the control mechanisms of Schedule III, Schedule IV, or even Schedule V are sufficient to meet the obligations imposed on the United States by the treaty as to leaves entirely detached from the tops and separated seeds capable of germination is not to find each of these three schedules equally acceptable (or acceptable at all) under the Act. The available discretion does not permit violation of the treaty or violation of the Act.

Looking first at the treaty, there is no latitude to decontrol any part of the cannabis plant, except seeds incapable of germination. Turning to the Act, Schedule II, Schedule III, Schedule IV and Schedule V are confined to drugs having a currently accepted medical use in treatment in the United States. Seeking now the appraisal of the Secretary of Health, Education, and Welfare, we are instructed that there is no part of the cannabis plant which has such use. Placement of marijuana in Schedule I is therefore less discretionary than mandatory. Considering the Single Convention and the Act together there is in fact no discretion unless the appraisal of the Secretary, HEW, can be ignored. The Court of Appeals indicates that it should not be ignored and we have not done so here.

The conclusion now reached may be altered by time. Congress may amend the Drug Abuse Prevention and Control Act of 1970. Certainly petitioners and others have the right to seek a hearing from HEW under the Federal Food, Drug, and Cosmetic Act to demonstrate that all or part of the cannabis plant has a particular medical usefulness and that it is safe for that use.

ORDER

Under the authority vested in the Attorney General by Section 201(d), of the Comprehensive Drug Abuse Prevention and Control Act of 1970, 21 USC 811(d), and redelegated to the Acting Administrator of the Drug Enforcement Administration by Section 0.100, as amended, Title 28, Code of Federal Regulations, and having been duly designated as Acting Administrator by Order No. 607-75 of the Attorney General dated May 30, 1975, in accordance with the authority stated therein and pursuant to the authority delegated to the Acting Administrator by Section 0.132(d) of Title 28, Code of Federal Regulations, *and*

Having considered the recommended decision of the Administrative Law Judge, the Single Convention on Narcotic Drugs, 1961, the applicable statutes, the findings of fact and conclusions of law, and the record of the hearing which includes the views of the Secretary of Health, Education, and Welfare, the Department of State, and international or-

ganizations, it is *Ordered* that the petition of the National Organization for the Reform of Marijuana Laws (NORML) and the American Public Health Association dated May 18, 1972 is, in all respects, denied.

Dated: September 22, 1975.

HENRY S. DOGHT,
Acting Administrator,
Drug Enforcement Administration.

[FR Doc.75-25677 Filed 9-24-75;8:45 am]

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[Power Project 2405]

ALASKA

Opening of Lands

SEPTEMBER 17, 1975.

1. In order issued September 3, 1975, the Federal Power Commission partially vacated the power withdrawal created by the filing of an application by the City of Anchorage for a preliminary permit for Project No. 2405 (proposed Eagle River Project). The withdrawal was vacated as to the following described lands:

T. 14 N., R. 2 W., Seward Meridian, Alaska.
Section 13: Those portions of the NW $\frac{1}{4}$ NE $\frac{1}{4}$ and N $\frac{1}{2}$ NW $\frac{1}{4}$ included in highway right-of-way application AA-9101 (Bureau of Land Management serial number).

Containing approximately 6.67 acres.

2. The State of Alaska, Department of Highways has filed an application with the Bureau of Land Management (serial No. AA-9101) for a highway right-of-way pursuant to the act of August 27, 1958 (72 Stat. 885), that includes the above-described lands. Pursuant to section 11(a)(1) of the Alaska Native Claims Settlement Act (85 Stat. 688), the lands described in paragraph 1 are withdrawn for selection by the village of Ekiutna and the Cook Inlet Region, Inc.

In accordance with section 22(d) of the Alaska Native Claims Settlement Act, the Secretary has interim administration of the lands described in paragraph 1, including the authority to grant rights-of-way. After December 18, 1975, any of the lands described in paragraph 1 not selected by the village or regional corporation shall be withdrawn by Public Land Order No. 5418 of March 29, 1974, as modified or amended, for classification and protection of the public interest.

CURTIS V. McVEE,
State Director.

[FR Doc.75-25649 Filed 9-24-75;8:45 am]

[Serial No. A-8918]

ARIZONA

Designation of Paiute Primitive Area

Pursuant to the authority in 43 CFR, Subpart 2070, and authorization from the Director dated August 18, 1975, I hereby designate the National Resource Lands in the following described area as the Paiute Primitive Area: