UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

GREEN BAY DIVISION

Menominee Indian Tribe of Wisconsin, Plaintiff, v. Drug Enforcement Administration and United States Department of Justice, Defendants.	**Civil Action No.: 1:15-cv-01378** **Plaintiff Menominee Indian Tribe of Wisconsin's Reply Brief in Support of Its Cross-Motion for Summary Judgment** **Oral Argument Requested**

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Introduction

This case presents an important question for the Menominee Indian Tribe of Wisconsin (the "Tribe") and Tribes throughout Indian Country: do the exceptions to the Controlled Substances Act allowing industrial hemp research laid out in the Agricultural Act of 2014 apply as equally to Tribes as they do to States? When consulting with the Tribe on its planned industrial hemp crop in 2015, Defendant United States Department of Justice ("DOJ") agreed with the tribe that, at worst, a good faith disagreement on this issue existed and that DOJ would work with the Tribe to get this question answered. Now, Defendants have reversed course, instead throwing up procedural barriers to keep the Court from addressing the substance of the Tribe's claims. The Tribe—and indeed, all of Indian Country—deserves better.

It is undisputed that the Agricultural Act of 2014 (the "Farm Bill") opened the door in § 7606 for Americans to grow industrial hemp under limited circumstances. It is also undisputed that the Tribe complied with each of § 7606's requirements and openly consulted with Defendants as it did so. Finally, it is undisputed that after months of consultation on the issue, Defendants abruptly reversed course, entered the Tribe's sovereign land, and destroyed its hemp crop. Rather than seeking money damages from the United States for its losses or suing to permanently enjoin Defendants from again raiding its fields, the Tribe instead seeks, under the Declaratory Judgment Act, a definitive interpretation of the Farm Bill by a federal court so that it can pursue the well-established and much-needed economic benefits of industrial hemp.

Argument

I. The Tribe is entitled to a declaration pursuant to the Farm Bill that it may cultivate industrial hemp on its sovereign land.

A. Farm Bill § 7606 applies to the Tribe.

The Tribe seeks a declaration that in legalizing the cultivation of industrial hemp on the Menominee Indian Reservation, it acted as a "State" for purposes of Farm Bill § 7606. Defendants argue that Congress did not define "State" to include Indian tribes, so the "plain meaning" of the word controls to prevent the Tribe from legally cultivating industrial hemp pursuant to § 7606's exceptions to the Controlled Substances Act ("CSA").

As discussed in the Tribe's opening brief, by citing "institutions of higher education"—which include tribal colleges—even before it mentions states when defining the context for the industrial hemp exceptions, Congress drafted § 7606 with more nuance than Defendants recognize. Defendants cannot dispute that § 7606 does not define the term "State," but they argue that the lack of explicit Congressional guidance leads to only one natural conclusion—that "State" does not include Indian tribes.

The Tribe has demonstrated that Defendants' interpretation is too limited. Section 7606's reference to institutions of higher education (which Defendants concede include the College of Menominee Nation), the broader context of the Farm Bill in which § 7606 is found, and case law precedent applying statutes addressing "States" to

Indian tribes all support the interpretation of § 7606 as equally applicable to the Tribe as it is to states. Defendants' opposition to this reading of § 7606 retreads old ground.

Unable to refute the inconsistency created by allowing the College of Menominee Nation (the "College") to participate in hemp research but subjecting it to the laws of Wisconsin, Defendants try to confuse the issue by implying that the Tribe seeks to cultivate industrial hemp at the College's off-reservation Green Bay campus. This intentional misdirection is beneath Defendants. As Defendants know from their raid of the Tribe's industrial hemp fields, the Tribe's industrial hemp facilities are located on sovereign tribal land within the boundaries of the Menominee Indian Reservation as established by the Treaty of Wolf River in 1854, and that is where they will stay. There is no threat of "inconsistency or incoherence" inherent in allowing the Tribe to engage in industrial hemp growth in conjunction with the College.

Additionally, Defendants offer no new arguments that would keep the Court from looking to the Farm Bill as a whole when interpreting the meaning of "State" in § 7606. Other Farm Bill provisions define "State" to encompass "any other territory or possession of the United States." *See* 7 U.S.C. § 23132(d); *id.* § 7202(14); *id.* § 8751(8). The Court may therefore rely on the various state and federal precedent interpreting similar uses of "State" and include the Tribe under § 7606's reach. Defendants once again cite the 1883 Arkansas district court case *Ex parte Morgan*, 20 F. 298 (W.D. Ark. 1883) to argue for a restricted definition of "State," but as the Tribe has previously explained, that case represents a minority view that runs counter to an earlier precedential Supreme Court case and its progeny. *See United States ex rel. Mackey v. Coxe*, 59 U.S. (18

How.) 100 (1855); *see also Tracey v. Superior Court*, 810 P.2d 1030, 1039-40 (Ariz. 1991) (collecting cases).

Even if the Court does not view § 7606 as explicitly including Indian tribes, it should recognize that Congress' failure to define "State" in this context created, at minimum, uncertainty about the term's meaning. When addressing this ambiguity and interpreting § 7606, the Court must view the statute through the lens of the Indian canons of construction, an approach to statutory interpretation with nearly 200-year-old roots in Justice McLean's *Worcester v. Georgia* concurring opinion that held "The language used in treaties with the Indians should never be construed to their prejudice." 31 U.S. (6 Pet.) 515, 528 (1832).

The Supreme Court explained these Indian canons in *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (1985), finding that "statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit" and noting that "the standard principles of statutory construction do not have their usual force in cases involving Indian law" because the "'canons of construction applicable to Indian law are rooted in the unique trust relationship between the United States and the Indians.'" *Id.* (quoting *Oneida County v. Oneida Indian Nation*, 470 U.S. 226, 247 (1985)). Courts in this Circuit have applied these "widely accepted" canons. *See Wisconsin v. Ho-Chunk Nation*, 784 F.3 1076, 1081 (7th Cir. 2015); *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Voigt*, 700 F. 2d 341, 351 (7th Cir. 1993) ("[T]hese canons mandate that we adopt a liberal interpretation in favor of the Indians.").

Under the Indian canons, Defendants—as representatives of the United States government—and this Court should interpret the statute in a way that benefits the Tribe. Instead, throughout their dealings with the Tribe on this issue and in their briefing here, Defendants have done just the opposite, bending over backward to keep § 7606 from applying to Indian country.

Nowhere is this more apparent than in Defendants' lengthy discussion of the Indian Gaming Regulatory Act ("IGRA") in support of their limited interpretation of "State." The IGRA is a wholly distinct statute that has no bearing on the instant action. It is an especially improper law to use for interpreting "State"—a term that Defendants argue was also "not defined" in the IGRA—because the IGRA *does* specifically define both "Indian lands" and "Indian tribe." *See* 25 U.S.C. § 2703 (4), (5). Further, the IGRA envisions and defines "Tribal-State compact[s]" as an integral part of the statutory framework. *See id.* § 2710. When the language of the statute specifically references a "Tribal-State compact entered into by the Indian tribe and the State," there can of course be no interpretation of "State" that would include Indian Tribes, which Defendants well know. Defendants' attempt to liken § 7606 to the IGRA merely because the laws share the phrase "the laws of the State," therefore, is misguided.

Defendants' use of the IGRA to assert that Wisconsin's drug laws are "applicable 'in Indian country' as federal law" is similarly wrong. (*See* Defs.' Opp'n at 10 n.6.) Given the IGRA's focus on distinct Tribal versus State relations, its definition of an exception "to otherwise-prohibited activity on tribal land" by "reference to State law" cannot

inform the Court's interpretation of § 7606's use of "State." Even if undefined, "State" in the IGRA could only mean one of the fifty States, while "State" in § 7606 is ambiguous.

B. The State of Wisconsin "allowed" industrial hemp cultivation by retroceding state jurisdiction over the Tribe in 1976.

The Tribe also seeks a declaration that its cultivation of industrial hemp is allowed by Wisconsin for the purposes of § 7606 because Wisconsin's drug laws do not apply on Tribal lands. Defendants object to this "new" argument and assert that retroceding jurisdiction does not fit within the "plain meaning" of "allow."

As an initial matter, the Tribe has discussed Wisconsin's retrocession of jurisdiction since its very first pleading in this case—the Complaint—and there is nothing new or inconsistent in the way the Tribe has argued this point. (*See* Compl. ¶ 47, ECF No. 1.) More important, Wisconsin's retrocession of criminal jurisdiction over the Tribe--"a decision not to exercise one's authority to stop something from happening"—falls squarely in the very definition of "allow" that Defendants themselves provided but have now seemingly abandoned. When the State of Wisconsin retroceded jurisdiction in 1976, it knowingly gave up its right to stop the Tribe from growing industrial hemp on Tribal land—an act made a crime in Wisconsin's 1971 Controlled Substances Act. Wisconsin, therefore, "allowed" the Tribe to grow hemp on Tribal land free from criminal prosecution by its state authorities, and the State cannot now prevent the Tribe from otherwise complying with § 7606. Interpreting "allow" otherwise would again violate the Indian canons of statutory construction. *See Ho-Chunk Nation*, 784 F.3d at 1081.

As with the IGRA, Defendants again invoke a dissimilar federal law in to encourage a parallel that does not exist—this time, the Organized Crime Control Act, 18 U.S.C. § 1955 (the "OCCA"). The OCCA is an entirely different legislative animal than § 7606. Indeed, while it "is well established that Congress may incorporate by reference state criminal laws in federal criminal statutes," *United States v. Menominee Indian Tribe*, 694 F. Supp. 1373, 1375 (E.D. Wis. 1988), § 7606 is *not a criminal statute*—unlike all of the "federal laws that define federal offenses by reference to State law" that Defendants erroneously cite in support of their argument. Section 7606 is also not the law Defendants invoked when raiding the Tribe's industrial hemp crop; that was the Controlled Substances Act ("CSA"), which, as Defendants acknowledge, also does not incorporate state law as an element of an offense.

Without incorporating state law as a necessary element of an alleged violation of the federal CSA, a law like § 7606 that provides *exceptions* to the CSA cannot subject the Tribe to the otherwise inapplicable drug laws of Wisconsin. To read § 7606 as Defendants advocate—placing an additional state-law burden on the Tribe in the context of a federal law meant to *ease* enforcement of the CSA—makes no sense, flies in the face of the Indian cannons of statutory construction, and violates the undisputed intent of the Farm Bill to loosen restrictions on the growth and cultivation of industrial hemp for research purposes.

II. The Tribe has satisfied both jurisdictional and private right-of-action requirements of its action for declaratory relief.

The Tribe has met the jurisdictional requirements of the Declaratory Judgment Act ("DJA") and all other necessary requirements for pursing such relief. While true that the DJA is remedial in nature and that a party must still point to a judicially remediable right, courts look not to a plaintiff's underlying cause of action when assessing the propriety of a DJA action but to a defendant's. Thus, it is "the underlying cause of action of the defendant against the plaintiff that is actually litigated," and the Court asks whether the "party bringing a declaratory judgment action must have been a proper party had the defendant brought suit on the underlying cause of action." *Mylan Pharms., Inc. v. Thompson*, 268 F.3d 1323, 1330 (Fed. Cir. 2001) (quoting *Collin County, Tex. v. Homeowners Ass'n for Values Essential to Neighborhoods (HAVEN)*, 915 F.2d 167, 171 (5th Cir. 1990)). If a defendant—but-for the plaintiff's preemptive DJA complaint—has a coercive right of action under federal law, DJA relief is proper.

Here, Defendants could have brought a coercive right of action that would have presented a federal question to enforce their rights; specifically, Defendants could have sued for an injunction seeking to prevent the Tribe from planting a hemp crop under the theory that it would violate the federal Controlled Substances Act, 21 U.S.C. § 801 *et seq.* Such an action is not hypothetical—the Department of Justice brought exactly such a coercive, injunctive suit under the CSA in 2002 when it sought to enjoin Indian hemp farmers from planting industrial hemp on reservation land in South Dakota. *See United States v. White Plume*, 447 F.3d 1067 (8th Cir. 2006) (affirming an injunction granted to

the United States in federal court against Oglala Sioux tribal member Alex White Plume). Further, Defendants have already taken enforcement action against the Tribe—raiding sovereign Tribal land and seizing and destroying the Tribe's initial crop—that they premised on powers granted by the CSA. *See* 21 U.S.C. § 871; (Delabreau Aff. ¶ 37); (SPMF ¶ 40). Based on these affirmative courses of action for Defendants, therefore, the Tribe has demonstrated the propriety of its DJA action before this Court.

For these reasons, *Smith v. Hickenlooper* and *Safe Streets Alliance v. Alternative Holistic Healing, LLC*—which Defendants cite as dispositive of the issue—are inapposite. The plaintiffs in both cases sought to challenge and defeat Colorado's recreational cannabis laws, in part by invoking the CSA. *See Smith*, No. 15-cv-462, 2016 U.S. Dist. LEXIS 23889 (D. Colo. Feb. 26, 2016); *Safe Streets*, No. 1:15-cv-349, 2016 U.S. Dist. LEXIS 5934 (D. Colo. Jan. 19, 2016). In dismissing each challenge, the district courts found that private parties could not *enforce* the CSA. *See Smith*, 2016 U.S. Dist. LEXIS 23889, at *7, and *Safe Streets*, 2016 U.S. Dist. LEXIS 5934, at *10-11. The Tribe, of course, is not seeking to privately enforce the CSA—just the opposite, in fact. Rather than frustrating the Tribe's position, *Smith* and *Safe Streets* further the Tribe's point that because Defendants have a coercive right of action under federal law, the Tribe's DJA action is properly before this Court.

Defendants' vehement procedural opposition to the Tribe's action is troubling not only because it is wrong but because it contradicts Defendants' position throughout its pre-raid interactions with the Tribe. Despite Defendants' inexplicable objection to the Affidavit of Chairwoman Delabreau, it is clear that the Tribe coordinated its actions

with Defendants to ensure compliance with THC level requirements of the Farm Bill, even agreeing to destroy any hemp that was found in violation of Tribal or federal law. 7 U.S.C. § 5940; (Delabreau Aff. ¶¶ 18, 36); (SPMF ¶¶ 22, 39). During this process, Defendants made clear that if any disagreements arose, the parties could seek relief in this forum under the Declaratory Judgment Act to determine if cultivation of industrial hemp for agricultural and academic purposes in conjunction with College was lawful under the Farm Bill.

Indeed, in the spirit of that understanding, the Tribe filed the cleanest, least-controversial action it could under the DJA to seek a determination of its rights—forgoing a lawsuit for money damages (for now) and/or a coercive permanent injunction in order to avoid distracting from the straightforward interpretation of § 7606 that is needed to resolve this dispute. That is, the Tribe could have brought, and is prepared to bring, a coercive claim for damages under *Bivens v. Six Unnamed Agents*, 403 U.S. 388 (1971), or the Federal Torts Claims Act or a claim for an injunction under Federal Rule of Civil Procedure 65 in order to resolve the very issues before the Court.

This Court should not endorse Defendants' attempts to delay the ultimate resolution of this important issue for Indian country by endorsing procedural maneuvering. Rather, the Tribe requests that the Court acknowledge the "shifting national focus on industrial hemp as a viable agricultural crop and the decision of the Attorney General of the United States to engage in a dialogue with the various tribes on the relationship between the CSA and the Agricultural Act of 2014" and extend § 7606's

reach to the Tribe. *United States v. White Plume*, No. 02-5071, 2016 U.S. Dist. LEXIS 40138, at *19-20 (D.S.D Mar. 28, 2016).

III. The Tribe has pleaded an actual case or controversy.

Contrary to Defendants' assertions, the Tribe has sufficiently pleaded a substantial controversy to warrant a declaratory judgment. Cases discussing this requirement "do not draw the brightest of lines between those declaratory-judgment actions that satisfy the case-or-controversy requirement and those that do not." *MedImmune, Inc. v. Genetech, Inc*., 549 U.S. 118, 127 (2007). The requirement is met, however, when the dispute is "definite and concrete, touching on the legal relations of parties having adverse legal interests," and where the dispute is resolved through "specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts." *Id.*

As the Tribe has alleged, a definite and concrete dispute between the Tribe and the Defendants exists regarding the legality of the Tribe's industrial hemp cultivation and Defendants' past and future enforcement actions against the Tribe. There is nothing hypothetical about the dispute between the parties. There was nothing hypothetical about the Defendants' October 23, 2015 raid on sovereign Tribal lands. The Tribe has legalized industrial hemp (Delabreau Aff. ¶ 18) and intends to plant an industrial hemp crop again as soon as this matter is resolved. Defendants have indicated that they will respond with enforcement actions, including destroying future Tribal hemp crops or initiating a criminal or civil lawsuit against the Tribe for its actions. Under these circumstances, a justiciable controversy exists because the Tribe faces the "real and

immediate possibility of . . . litigation." *GNB Battery Techs. v. Gould, Inc.*, 65 F.3d 615, 620 (7th Cir. 1995).

The Supreme Court has recognized that "where threatened action by government is concerned, [courts] do not require a plaintiff to expose himself to liability before bringing suit to challenge the basis for the threat." *MedImmune,* 549 U.S. at 128–29. Thus, the Tribe need not plant industrial hemp again and risk an imminent enforcement action in order to challenge Defendants' position.

Defendants cite *MedImmune* to support their position that the Tribe failed to plead a live case or controversy. (Defs.' Opp'n at 6.) In that case, however, the court held that there *was* a live case or controversy even though the plaintiff had not yet breached the agreement that was the subject of the controversy. *MedImmune,* 549 U.S. at 137. Here, even though the Tribe has not yet replanted its hemp crop, a justiciable controversy nonetheless exists because of the real and immediate threat of legal or enforcement action by the government.

Defendants also argue that the Tribe has not shown that Defendants' future enforcement action would be *because of* the parties' dispute over the three legal issues raised in the Complaint. (Defs.' Opp'n at 7–8.) But whether future hemp cultivation is legal, and in turn, whether future enforcement action is legal, turns entirely on the resolution of these three questions. The parties' dispute over the meaning of § 7606 is the *sole* reason the Tribe faces a threat of future enforcement action when it plants future hemp crops. If the parties agreed on the interpretation of this statute, there would be no reason for Defendants to pursue enforcement action against the Tribe.

Defendants further argue that by referencing Defendants' arguments in support of dismissal in their briefing, the Tribe is attempting to "manufacture an actual controversy," citing *Pollack v. United States Dep't of Justice*, 577 F.3d 736 (7th Cir. 2009), and *Perry v. Village of Arlington Heights*, 186 F.3d 826 (7th Cir. 1999). Defendants' reliance on these cases is misplaced, as both are factually distinguishable.

In *Pollack*, the plaintiff alleged that bullets from a military gun range were escaping into Lake Michigan and Foss Park in violation of several environmental laws. *Pollack*, 577 F.3d at 737. The plaintiff, however, did not visit Foss Park until after he commenced his lawsuit. *Id.* at 742 n.2. Similarly, in *Perry*, the plaintiff sought to challenge state and municipal code provisions governing the seizure and disposal of abandoned vehicles despite not living in the municipality at issue or even owning a car until after he filed his complaint. 186 F.3d at 827–28, 830. When pressed in his deposition, the plaintiff even admitted that he purchased a car and rented an apartment to establish standing. *Id.* The Tribe is in an obviously different situation from these plaintiffs.

Unlike in *Pollack* and *Perry*, the Tribe did not initiate this lawsuit and then later plant its first industrial hemp crop merely to create standing. This is not just an academic exercise—it is a matter of economic survival. As the 8th Circuit has recognized, many in Indian country face "challenges . . . engag[ing] in sustainable farming on federal trust lands. It may be that the growing of hemp for industrial uses is the most viable agricultural commodity for that region . . . [and that] there are a countless number of beneficial products which utilize hemp in some fashion." *White*

Plume, 447 F.3d at 1976. To explore the promise of this crop, the Tribe carefully followed each of § 7606's requirements and worked transparently with Defendants to do so lawfully—only to be raided on its sovereign tribal land.

To avoid adjudicating the Tribe's legal claims, as Defendants advocate, because the Tribe seeks an interpretation of § 7606 instead of money damages for the raid or a permanent injunction against future raids is to miss an opportunity to settle a dispute of great importance. The Tribe has established standing by already planting an industrial hemp crop, enduring an enforcement raid by Defendants, and preparing to plant industrial hemp again in the future. The dispute is not hypothetical but very real. Unlike the Defendants, the Tribe simply seeks resolution in the most respectful, least aggressive way possible.

Conclusion

For the reasons stated here and in its earlier briefing, the Menominee Indian Tribe of Wisconsin requests that the Court deny Defendants' motion to dismiss and grant the Tribe's cross-motion for summary judgment.

April 18, 2016

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