UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
SOUTHERN DIVISION

FLANDREAU SANTEE SIOUX TRIBE, a Federally-recognized Indian tribe, Plaintiff, v. UNITED STATES DEPARTMENT OF AGRICULTURE, and SONNY PERDUE, in his official capacity as Secretary of Agriculture, Defendants.	Case: 4:19-cv-04094-KES **DEFENDANTS' OPPOSITION TO PLAINTIFF'S MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION**

The 2018 Farm Bill directed the Secretary of Agriculture to promulgate regulations to implement a program for the commercial production of industrial hemp in the United States as part of the process of legalizing growth of a formerly controlled substance. Plaintiff seeks a temporary restraining order (TRO) and preliminary injunction that would allow it to regulate hemp production without a plan approved by the Secretary, in direct contravention of the statutory requirements. Plaintiff is entitled to no such relief. In fact, the order that Plaintiff now requests, seeks as much, if not more, relief than it would be entitled to after final judgment.

BACKGROUND

I. Statutory and Regulatory Background

The 2018 Farm Bill

The Agriculture Improvement Act of 2018 ("2018 Farm Bill") was signed into law on December 20, 2018. Pub. L. No. 115-334, 132 Stat. 4490. Notably, the 2018 Farm Bill addressed hemp production, defining hemp as follows:

> The term 'hemp' means the plant Cannabis sativa L. and any part of that plant, including the seeds thereof and all derivatives, extracts, cannabinoids, isomers, acids, salts, and salts of isomers, whether growing or not, with a delta-9 tetrahydrocannabinol concentration of not more than 0.3 percent on a dry weight basis.

Id. § 10113, 132 Stat. at 4908 (amending the Agricultural Marketing Act of 1946 (7 U.S.C. 1621 *et seq.*); *see* 7 U.S.C.A. § 1639*o*(1). The 2018 Farm Bill also removed hemp from Schedule I of the Controlled Substances Act, inserting the following language: "[t]he term 'marihuana' does not include—(i) hemp, as defined in . . . the Agricultural Marketing Act of 1946[.]" Pub. L. No. 115-334, § 12619, 132 Stat. 4490, 5018; *see also* 21 U.S.C.A. § 802(16)(B).

The 2018 Farm Bill requires that an "Indian tribe desiring to have primary regulatory authority over the production of hemp in the . . . territory of the Indian tribe" submit a plan to the Secretary of Agriculture. Pub. L. No. 115-334, § 10113, 132 Stat. 4490, 4909; *see* 7 U.S.C.A. § 1639p. Under the law, the Tribal plan is required to address seven categories, including:

(i) a practice for maintaining "information regarding land on which hemp is produced . . . including legal description[s]";

(ii) a reliable testing procedure to verify tetrahydrocannabinol (THC) levels;

(iii) a procedure for the "effective disposal" of plant or plant products "produced in violation" of the hemp production statutes;

(iv) "a procedure to comply with [applicable] enforcement procedures";

(v) "a procedure for conducting annual inspections";

(vi) a procedure for submitting information to the Secretary as required by 1639q; and

(vii) a certification that the Indian tribe has sufficient "resources and personnel to carry out the practices and procedures" outlined above.

7 U.S.C.A. § 1639p(a)(2)(A).

Regulations

To facilitate implementation of the hemp production statutes, the Secretary of Agriculture is charged with promulgating "regulations and guidelines to *implement* this subchapter as expeditiously as practicable." 7 U.S.C.A. § 1639r(a)(1)(A) (emphasis added). Further, the Secretary has explicit authority to set "regulations and guidelines that relate to the *implementation* of sections 1639p and 1639q". 7 U.S.C.A. § 1639r(b) (referencing §1639p, which covers the submission of State and Tribal Plans and §1639q, which covers growers over which USDA would have primary regulatory authority).

On February 27, 2019, USDA issued a "Notice to Trade" regarding its Hemp Production Program. *See* Declaration of Sonia N. Jimenez, Exhibit 1. The Notice announced that USDA had begun "to gather information for rulemaking" related to the "commercial production of industrial hemp in the United States" pursuant to the 2018 Farm Bill. *Id.* The Notice stated "USDA's intention to issue regulations [related to the commercial production of industrial hemp] in the Fall of 2019." *Id.*

The Notice further indicated USDA's commitment to reviewing plans submitted by States or Tribes seeking primary jurisdiction over the growth of hemp "within 60 days *once regulations are effective*." *See* Declaration of Sonia N. Jimenez, Exhibit 1 (emphasis added). The 60-day timeframe as expressed by USDA is consistent with the law, which requires USDA to approve or disapprove a State or Tribal Plan, "[n]ot later than 60 days after receipt of a State or Tribal plan[.]" 7 U.S.C.A. § 1639p(b).

On March 13, 2019, just two weeks following the initial Notice to Trade, USDA held a listening session to provide interested parties with an opportunity to provide input regarding the forthcoming Hemp Production Program and corresponding regulations. *See* Declaration of Sonia N. Jimenez ¶ 12. An additional hemp listening session was held at the conclusion of the Tribal Consultation regarding the 2018 Farm Bill on May 2. *Id.* ¶ 14. As of today's date, USDA is proceeding with its internal drafting process and anticipates issuing final regulations in the fall of 2019. *Id.* ¶¶ 8, 12.

II. Factual Background

USDA received the Flandreau Santee Sioux Tribe's "plan to monitor and regulate production of hemp" on March 8, 2019. *See* Declaration of Sonia N. Jimenez ¶ 10. The plan references "Title 30 of the Flandreau Santee Sioux Tribe Law and Order Code entitled 'Industrial Hemp'". Docket 1-1, p. 5. Section 30-1-6 of the FSST Code provides that the industrial hemp provisions are not effective until the Tribe's plan is approved by the Secretary of USDA or his designee. *Id.* p. 16. After submitting its plan to USDA, Plaintiff attended the March 13, 2019, listening session held by USDA and provided input by and through its attorney of

record, Ben Fenner. *See* Declaration of Sonia N. Jimenez ¶ 13. After the listening session, USDA met with representatives of the Flandreau Santee Sioux Tribe. *Id.*

On April 24, 2019, USDA's Secretary, Sonny Perdue, responded to Plaintiff's plan submission, noting USDA's "goal to issue regulations in the fall of 2019 to accommodate the 2020 planting season." Docket 1-2. The Secretary further noted that: "USDA is committed to completing its review of plans within 60 days, once regulations are effective." *Id.* Plaintiff participated in the May 2 hemp listening session by and through its attorney of record, Ben Fenner. *See* Declaration of Sonia N. Jimenez ¶ 14. On May 6, 2019, the Flandreau Santee Sioux Tribe submitted a letter to USDA requesting that it be issued a waiver such that it could begin planning hemp in the 2019 growing season. *Id.*, Exhibit 3. At the request of the Flandreau Santee Sioux Tribe, a meeting was held to discuss the waiver on May 13, 2019. *See* Declaration of Sonia N. Jimenez ¶ 16.

LEGAL ARGUMENT

Plaintiff's request for a TRO and preliminary injunction cannot issue because Plaintiff has failed to meet the requisite burden. "An injunction is an extraordinary remedy that is not routinely granted and generally reserved for when the right to relief is clear." *Crow Creek Sioux Tribal Farms, Inc. v. U.S. I.R.S.*, 684. F.Supp.2d 1152, 1156 (D.S.D. 2010) (citing *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312, 102 S.Ct. 1798 (1982) (additional citations omitted). Further, "[t]he burden of proving that a preliminary injunction should be issued rests entirely with the movant." *Tsuruta v. Augustana Univ.*, 2015 WL 5838602, at *1 (D.S.D. Oct. 7, 2015) (quoting *Goff v. Harper*, 60 F.3d 519, 520 (8th Cir. 1995)).

I. Plaintiff Improperly Seeks Ultimate Relief at the TRO and Preliminary Injunction Stage.

Plaintiff seeks to alter the status quo and immediately take primary jurisdiction over hemp production. *See* Docket 4, p. 1 (requesting "a declaration that the Tribe's hemp production . . . may lawfully proceed" and that this Court enjoin USDA from "interfere[ing] with such production"). The extremity of the requested relief is evidenced by that fact that this is *the same* relief (if not more) than Plaintiff could obtain after a full trial on the merits. Preliminary injunctive relief is not intended to provide a plaintiff with a means to bypass the litigation process and achieve rapid victory, and so a preliminary injunction should not give a party effectively the full relief it seeks on the merits. *See Univ. of Texas v. Camenisch*, 451 U.S. 390, 395 (1981) ("[I]t is generally inappropriate for a federal court at the preliminary-injunction stage to give a final judgment on the merits."). Accordingly, the "burden on a movant to demonstrate that a preliminary injunction is warranted is heavier when, as here, granting the preliminary injunction will in effect give the movant substantially the relief it would obtain after a trial on the merits." *Calvin Klein Cosmetics Corp. v. Lenox Labs., Inc.*, 815 F.2d 500, 503 (8th Cir. 1987).

At the preliminary stage, "the question is whether the balance of equities so favors the movant that justice requires the court to intervene to *preserve the status quo* until the merits are determined." *Dataphase Systems, Inc. v. C L Systems, Inc.*, 640 F.2d 109, 113 (8th Cir. 1981) (emphasis added); *see also Sprint Communications Co., L.P. v. Native American Telecom, LLC*, 2011 WL 2160478, *4 (D.S.D. May 31, 2011) (stating that "Courts typically grant preliminary injunctions

when the movant proves irreparable harm and the remedy is to maintain the status quo until the case's merits are resolved.") (citing *Owens v. Severin*, 293 Fed. Appx. 425, 425 (8th Cir. 2008)); *cf. Kroupa v. Nielson et al.*, 731 F.3d 813 (8th Cir. 2013) (affirming this Court's decision to enjoin officials from banning a minor from 4-H activities but only when minor had previously participated in such events and the injunction acted to restore the previous status of the parties).

The status quo is that Plaintiff does not have legal authority to take primary jurisdiction over the growth of hemp. The 2018 Farm Bill provides a mechanism for Tribes to request such authority only if the Tribe submits a plan to USDA and that plan is approved by the Secretary. Pub. L. No. 115-334, § 10113, 132 Stat. 4490, 4909; *see* 7 U.S.C.A. § 1639p. However, USDA cannot substantively review Plaintiff's plan until a proper regulatory framework has been established. *See* Declaration of Sonia N. Jimenez ¶ 17. Plaintiff essentially asks this Court for permission to "skip ahead" and begin planting hemp under its proposed plan—even though: (1) there is no regulatory framework for USDA to review the plan, (2) the process for creating such a regulatory framework is underway, and (3) the plan has not been substantively reviewed by USDA to ensure Congressional mandates have been satisfied. To undergo such a review without sufficient regulatory standards could lead to inconsistent agency decision-making. When a party seeks not to preserve the status quo, but instead "is asking the Court to order affirmative change," that is, to award Plaintiff primary jurisdiction over hemp production, "the Plaintiff bears a heavy burden." *Wigg v. Sioux Falls Sch. Dist. 49-5*, 259 F. Supp. 2d 967, 971 (D.S.D. 2003) (citing *Sanborn Mfg. Co., Inc. v. Campbell Hausfeld/Scott*

Fetzer Co., 997 F.2d 484, 486 (8th Cir. 1993)). This Court should refrain from granting the extreme remedy requested by Plaintiff.

II. The *Dataphase* factors weigh against preliminary injunctive relief.

In determining whether a TRO or preliminary injunction should issue, the Court considers the following factors set forth in *Dataphase Systems, Inc. v. C L Systems, Inc.*, 640 F.2d 109, 113 (8th Cir. 1981): "(1) the threat of irreparable harm to the movant; (2) the state of the balance between this harm and the injury that granting the injunction will inflict on other parties litigant; (3) the probability that movant will succeed on the merits; and (4) the public interest." *See Temple v. Cleve Her Many Horses*, 163 F.Supp.3d 602, 622 (D.S.D. 2016) (stating that the Court considers the *Dataphase* factors "[w]hen ruling on a motion for a temporary restraining order or preliminary injunction").

A. Plaintiff has failed to make a sufficient showing of irreparable harm.

"To demonstrate irreparable harm, [Plaintiff] must show that the harm is 'certain great and of such imminence that there is a clear and present need for equitable relief.'" *Tsuruta*, 2015 WL 5838602, at *8 (citing *Packard Elevator v. Interstate Commerce Comm'n,* 782 F.2d 112, 115 (8th Cir. 1986)). "[F]ailure to show irreparable harm is an independently sufficient ground upon which to deny a preliminary injunction." *Id.* (quoting *Watkins Inc. v. Lewis*, 346 F.2d 841, 844 (8th Cir. 2003)); *see also Winter v. NRDC*, 555 U.S. 7, 22 (2008). "The key word in the irreparable harm factor is irreparable: 'The possibility that adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation, weighs heavily against a claim of irreparable harm.'" *Sprint*, 2011 WL 2160478 at *4 (quoting *Sampson v. Murray*, 415 U.S. 61, 88 (1974)).

To support its alleged harm, Plaintiff provides an estimate of potential *future* earnings related to hemp production. But a plaintiff "cannot meet its burden if it demonstrates only economic loss, unless 'the loss threatens the very existence of the [plaintiff's] business,' because 'economic loss does not, in and of itself, constitute irreparable harm.'" *Brady v. Nat'l Football League*, 640 F.3d 785, 794–95 (8th Cir. 2011) (quoting *Packard Elevator v. ICC*, 782 F.2d 112, 115 (8th Cir.1986)); *see also Wisc. Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985) (per curiam).

The harm Plaintiff alleges here, moreover, is not a disruption to an existing revenue stream. Plaintiff argues that its inability to pursue a hemp crop in the 2019 growing season will limit funds available for Tribal "functions, programs and services". Docket 5 at 15. All of the cases cited by Plaintiff in support of its showing of irreparable harm, however, deal with a reduction in *existing* revenue streams and therefore offer no support for the extraordinary remedy of a TRO or preliminary injunction in this context.[1] *See Winnebago Tribe of Nebraska v. Stovall*, 216 F. Supp. 2d 1226, 1233 (D. Kan. 2002) (emphasizing that the finding of irreparable harm "is not a matter of how much capital will be lost" but instead "concern [for] the scope of tribal sovereignty"); *Nebraska Health Care Ass'n v. Danning*, 578 F. Supp. 543, 545 (D. Ne. 1983) (stating that '[t]he threat of irreparable harm is genuine, because *the reduction in* [Medicaid] *payments*" will result in reduced services) (emphasis added); *Cedar-Riverside People's Center v.*

[1] The sole Eighth Circuit case Plaintiff cites for this proposition, *Marty Indian Sch. Bd. v. South Dakota*, 824 F.2d 684 (8th Cir. 1987), does not concern irreparable harm or injunctive relief at all.

Minnesota Dept. of Human Services, 2009 WL 1955440, at *2 (D. Minn. July 6, 2009) (finding that plaintiffs were "harmed due to defendants' failure to timely make complete supplemental payments"). Plaintiff's claim of future lost revenue is also speculative. Other than a rough estimate, it is unknown how much actual income Plaintiff would derive from its planned hemp production.

Further, Plaintiff was on notice of USDA's reading of the statute by *at least* March 13, 2019, when it attended the hemp listening session hosted by USDA. *See* Declaration of Sonia N. Jimenez ¶ 12. Any action taken in furtherance of its contemplated hemp production in the 2019 growing season after that date was therefore a known risk. Plaintiff's claimed irreparable harm is a result of its own investment and economic decisions taken despite this known risk and equity should not reward such risk taking. Plaintiff's failure to make a sufficient showing of irreparable harm on its own necessitates a denial of Plaintiff's request for equitable relief.

B. Plaintiff has failed to demonstrate a likelihood of success on the merits.

Although all factors must be evaluated before a court will grant such relief, likelihood of success on the merits is "the most important of the *Dataphase* factors . . . [.]" *Tsuruta,* 2015 WL 5838602, at *1 (citing *Shrink Mo. Gov't PAC v. Adams*, 151 F.3d 763, 764 (8th Cir. 1998). To succeed on this factor, Plaintiff must "demonstrate that it has a fair chance of success on the merits." *Id.* (citing *Planned Parenthood Minn., N.D., S.D. v. Rounds*, 530 F.2d 724, 731 (8th Cir. 2008)).

Plaintiff Cannot Regulate Hemp Production Until USDA Has Approved its Plan.

Plaintiff's plea for Court approval of its plan and entry of a declaratory judgment purportedly authorizing Plaintiff to regulate hemp is legally unavailable.

The 2018 Farm Bill is unambiguous on this point: a state or tribe "desiring to have primary regulatory authority" over hemp production may submit "to the Secretary" of Agriculture a plan. 7 U.S.C.A. § 1639p(a)(1). That plan is subject to "approval" or "disapproval" by the Secretary. *Id.* § 1639p(b). And if a plan "is not approved"—either because it was disapproved or because none was submitted—hemp production "shall be subject to" the USDA plan. *Id.* § 1639q(a)(1). Hemp production must proceed under a plan either developed by or approved by the Secretary because to be considered "hemp" the plant must meet the requisite THC level. For the first time, regulation of hemp is being transitioned to the Secretary of Agriculture and away from the Drug Enforcement Agency; close supervision of regulatory plans, including testing and disposal procedures, is necessary to maintain the line between legal hemp and illegal marijuana. There is simply no authorization for regulation of hemp production under an unapproved plan, and no court is authorized to approve a plan itself. *See Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 64 (2004) (holding that § 706(1) "empowers a court only to compel an agency 'to perform a ministerial or non-discretionary act,' or 'to take action upon a matter, without directing how it shall act'").

USDA is Acting in Accordance with Congressional Directives.

Plaintiff claims that USDA is acting in "disregard of its congressionally mandated duties." Docket 1 at 1. Yet USDA is doing precisely what Congress has ordered it to do by expeditiously working to "promulgate regulations and guidelines" related to hemp production. 7 U.S.C.A. § 1639r(a)(1)(A). Plaintiff seeks to read 7 U.S.C.A. § 1639p(b), which requires the Secretary to approve or disapprove a plan "[n]ot later than 60 days after receipt of a State or Tribal plan" in

a vacuum, as requiring approval of a plan even in the absence of regulations "to implement" the statute. But the statute's plain text and legislative history do not dictate such an absurd result, and Plaintiff's arguments to the contrary ignore the statute's structure and its key provisions that make clear section 10113 of the 2018 Farm Bill is not self-executing. *See* Pub. L. No. 115-334, § 10113, 132 Stat. 4490, 4909; *see* 7 U.S.C.A. § 1639p.

In determining whether a statute is self-executing, courts look to the text, context, and legislative history of the statute. *See Gholston v. Hous. Auth. of City of Montgomery*, 818 F.2d 776 (11th Cir. 1987). In *Gholston*, for example, the Eleventh Circuit held that a provision of the Housing Act was not self-executing given the requirement that the agency promulgate implementing regulations, the lack of legislative history indicating that Congress intended the statute to be self-executing, and the agency's "large degree of discretion to administer" the Housing Act's programs. *Id.* at 786. Here, the 2018 Farm Bill likewise gives USDA regulatory authority to implement a hemp regulatory program.

Plaintiff contends that the Secretary must approve their plan within 60 days even without implementing regulations because Congress has set out all of the required elements of a plan in 7 U.S.C. § 1639p(a)(2). *See* Docket 5 at 23-24. But as the Eighth Circuit has emphasized, "[t]he 'long established plain language rule of statutory interpretation' requires 'examining the text of the statute as a whole by considering its context, object, and policy.'" *American Growers Ins. Co. v. Federal Crop Ins. Corp.*, 532 F.2d 797, 803 (8th Cir. 2008) (quoting *Harmon Indus., Inc. v. Browner*, 191 F.3d 894, 899 (8th Cir. 1999). Here, the 2018 Farm Bill directs the Secretary to promulgate regulations and guidelines to "***implement***" the hemp

production statutes. *See* 7 U.S.C.A. § 1639r(a)(1)(A) (emphasis added). Further, the Secretary has explicit authority to set "regulations and guidelines that relate to the ***implementation*** of [7 U.S.C. § 1639p]." 7 U.S.C.A. § 1639r(b) (emphasis added) (referencing Section 297B, codified at 7 U.S.C. § 1639p, which covers the required elements of State and Tribal Plans). Plaintiff asks this Court to read both the 60-day provision and the plan requirement provisions as self-executing. Because this ignores Congress's direction to USDA that it create regulations to implement the hemp production provisions in 2018 Farm Bill—including regulations for "implementation" of the provisions governing Tribal plans—such a reading cannot stand. Reading the 2018 Farm Bill as a whole indicates that the 60-day timeline has not begun to run and *will not* begin to run until there is a sufficient regulatory framework in place.

Indeed, regulations are not only intended but also plainly necessary to effectuate the provisions in § 1639p. For example, Congress has dictated that a State or Tribal plan must include "a practice to maintain relevant information regarding land on which hemp is produced." 7 U.S.C. § 1639p(a)(2)(A)(i). But nowhere has Congress defined what information is "relevant." Until that ambiguous statutory language is given meaning through implementing regulations, USDA has no metric by which to gauge whether a State or Tribal plan complies with the statutory requirements. The same problem arises with the requirement of "a procedure for testing, using post-decarboxylation *or other similarly reliable methods*," the hemp product. *Id.* § 1639p(a)(2)(A)(ii) (emphasis added). USDA must first determine what other methods are "similarly reliable" before it can assess whether plans proposing alternative methods are adequate.

And so, too, USDA must give substance to the requirement that plans provide a procedure for "effective disposal" of plants grown in violation of the statute. *Id.* § 1639p(a)(2)(A)(iii). Effective disposal procedures are especially important because plants that do not meet the definition of hemp are classified as a Schedule I controlled substance, that is, marijuana, and thus subject to extensive federal regulation far beyond the provisions of the 2018 Farm Bill or the authority of the USDA. Simply put, the language and structure of the statute belie Plaintiff's contention that the statute is self-executing.[2] The statute uses vague and undefined terms, and then gives to USDA the responsibility to adopt implementing regulations.

Even if the Statute Were Self-Executing, the Appropriate Remedy Would Not Be to Order the Plan Approved Prior to USDA Review.

In addition to arguing that the hemp provisions of the 2018 Farm Bill are self-executing, Plaintiff goes a step further, asserting that this Court should simply deem the plan approved because USDA has not yet acted on it. That is not the remedy permitted by the APA nor the one intended by Congress in the 2018 Farm Bill. Plaintiff seeks relief under 5 U.S.C. § 706(1), which authorizes a court to "compel agency action unlawfully withheld or unreasonably delayed." As the Eighth Circuit has explained, relief under § 706(1) is akin to mandamus under the

[2] Plaintiff misconstrues the legislative history on which they rely. *See* Docket 5 at 19-21. The conference report does indicate that the Secretary's consultation with the Attorney General should not delay approval of a plan. But that reference is plainly to the Secretary's duty to consult with the Attorney General when deciding whether to approve or disapprove a plan, 7 U.S.C. § 1639p(b)(3), not to his separate obligation to consult the Attorney General in promulgating regulations, *id.* § 1639r(a)(1)(B). *See* H.R. Rep. 115-1072 at 737 (discussing provisions of 7 U.S.C. § 1639p) (available at https://www.congress.gov/115/crpt/hrpt1072/CRPT-115hrpt1072.pdf).

All Writs Act. *See Org. for Competitive Markets v. U.S. Dep't of Agric.*, 912 F.3d 455, 462 (8th Cir. 2018) (citing *Norton v. Southern Utah Wilderness Alliance*, 542 U.S. 55, 63 (2004)). Thus, the Eighth Circuit further explained, relief under § 706(1) is, like mandamus, "an extraordinary remedy reserved for extraordinary situations." *Id.* (quoting *In re MidAmerican Energy Co.*, 286 F.3d 483, 486 (8th Cir. 2002)). "To qualify for mandamus, a litigant must satisfy three requirements that courts have characterized as jurisdictional: '(1) a clear and indisputable right to relief, (2) that the government agency and official is violating a clear duty to and, (3) that no adequate alternative remedy exists.'" Wright & Miller, Federal Practice & Procedure § 8312 (2d ed.).

Defendants refute that agency action has been improperly delayed or withheld. Nevertheless, Plaintiff relies on a Tenth Circuit case, *Forest Guardians v. Babbit*, 164 F.3d 1261 (10th Cir. 1998), to support their argument that the 60-day approval window deprives the agency of discretion to act beyond that window and deprives the court of discretion to withhold relief. *See* Docket No. 5 at 21. But the Eighth Circuit has explicitly rejected the Tenth Circuit's analysis in *Forest Guardians*, and so this Court should pay it no heed. *See Org. for Competitive Markets*, 912 F.3d at 462 & n.5. Rather, the Eighth Circuit has cautioned that courts must be "wary of becoming the ultimate monitor of Congressionally set deadlines" because Congress itself "can take appropriate action" to enforce its directives. *Id.* at 463.

In *Organization for Competitive Markets*, the plaintiff challenged USDA's failure to enact certain regulations. Congress had directed, in 2008, that USDA "shall promulgate" regulations "[a]s soon as practicable, but not later than 2 years

after the date of the enactment of this Act." 912 F.3d at 461 (quoting PL 110-246 § 11006). The deadline for promulgating regulations ran in June 2010, but USDA still had not adopted final regulations when the Eighth Circuit reviewed the case in 2018. *Id.* Plaintiff argued that USDA's failure to comply with this statutory deadline warranted judicial intervention to "compel agency action unlawfully withheld or unreasonably delayed," 5 U.S.C. § 706(1), but the Eighth Circuit rejected the suggestion that such an extraordinary remedy was warranted. 912 F.3d at 463. Rather, the court recognized that "[t]his was not a case where an agency has failed to take action in the face of multiple unambiguous commands"; the agency had proceeded with rulemaking in an orderly fashion, inviting public participation and responding to stakeholder interests as it endeavored to comply with Congress's "ambiguous directive." *Id.*

Just so here. At the same time Congress set a 60-day window for USDA to approve State and Tribal plans, it set several ambiguous standards by which USDA must evaluate those plans. Until USDA can craft appropriate regulations—as Congress has also directed it to do—it simply cannot meaningfully evaluate whether the plan Plaintiff or any other entity has submitted complies with Congressional mandates. *See* 7 U.S.C.A. §§ 1639r(a)(1)(A), 1639r(b). USDA is developing regulations so that it can approve State and Tribal plans that comply with the statutory requirements. It has announced its intention to promulgate rules in the fall of 2019, in time for hemp producers to plan for the 2020 growing season. It has held public listening sessions and solicited public input. In the face of Congress's "ambiguous directive" to approve plans that meet undefined requirements, the extraordinary remedy of mandamus is plainly unwarranted. *See*

Org. for Competitive Markets, 912 F.3d at 463; *see also Al-Rifahe v. Mayorkas*, 776 F. Supp. 2d 927, 936 (D. Minn. 2011) (setting out the factors relevant to whether agency action has been "unreasonably delayed").

In any event, the most Plaintiff would be entitled to under § 706(1) is an order compelling the Secretary to review their plan; § 706(1) does not authorize the Court to "direct how [the agency] shall act." *Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 64 (2004) (holding that § 706(1) "empowers a court only to compel an agency 'to perform a ministerial or non-discretionary act,' or 'to take action upon a matter, without directing how it shall act.'").

C. The balance of harms and public interest weigh in favor of USDA and Secretary Perdue.

Finally, Plaintiff has not met the burden of "establish[ing] . . . that the balance of equities tips in [their] favor, and that an injunction is in the public interest." *Winter*, 555 U.S. at 20 (citations omitted). Where the Federal Government is the defendant, these factors "merge" into one. *Nken v. Holder*, 556 U.S. 418, 435 (2009) ("These factors merge when the Government is the opposing party."). As such, Defendants' discussion of the final two *Dataphase* factors, the balance of harms and the public interest, are jointly addressed below. 640 F.2d at 113.

To determine whether Plaintiff's request for relief is appropriate, the Court must balance the alleged harm faced by Plaintiff versus the hardship injunctive relief would place on USDA and the public. *Tsuruta*, 2015 WL 5838602, at *9 (indicating that the balance of harms analysis "requires the court to evaluate the severity of the impact on the defendant should the injunction be granted and the

hardship to the plaintiff should the injunction be denied") (citing *PCTV Gold, Inc. v. SpeedNet, LLC.*, 508 F.2d 1137, 1145 (8th Cir. 2007)); *see also Winter*, 555 U.S. at 24 (stating that "courts of equity should pay particular regard for the public consequences in employing the extraordinary remedy of injunction").

The public interest is best served by allowing governmental agencies sufficient time to promulgate rules to ensure consistent implementation of agency programs. Congress expressly authorized USDA to promulgate regulations related to the domestic production of hemp and the submission of tribal and state plans. Defendants are focused on promulgating rules as required. Asking USDA to "stop in its tracks" and focus on Plaintiff's submitted plan is an unwise use of agency resources. Furthermore, any review of a plan today would certainly be different than a future review when USDA can utilize its established regulations to evaluate State and Tribal plans. *See* Declaration of Sonia N. Jimenez ¶ 17. Approval of Plaintiff's plan is further complicated by the jurisdictional intricacies that occur when, as here, a tribe that seeks to regulate hemp production is located within a state that criminalizes its production. SDCL §§ 22-42-1(7) and 34-20B-1(12); *see also* 7 U.S.C.A. § 1639p(f)(2). Allowing the regulations to be published to establish consistent standards, prior to USDA action on Plaintiff's plan, serves the public interest.

Plaintiff contends that if this Court grants injunctive relief now but later determines USDA properly waited to act on the plan or reject the plan altogether, "then the Tribe will, if necessary, dispose of its hemp and any hemp products pursuant to the Tribe's Industrial Hemp Ordinance, Chapter 12, Title 30 of the Flandreau Santee Sioux Tribe Law and Order Code." Docket 5 at 18-19. This

proposed result creates a host of potential legal and regulatory issues, especially because the output of a "failed" hemp crop is a Schedule I drug subject to the restrictions and requirements of the Controlled Substances Act. *See* 21 U.S.C.A. §§ 801 *et seq.*; *see also* 7 U.S.C.A. § 1639*o*(1) (defining hemp as containing THC levels "of not more than 0.3 percent"). If any hemp produced under a later-invalidated plan is sold or transferred out of Plaintiff's control, it will be too late for Plaintiff to "dispose" of it. The public interest is best served by ensuring that the plans submitted to USDA are sufficiently robust to accommodate the requirements set forth by Congress. The public interest is not served by court-authorized production of hemp that might inadequately guard against the production of controlled substances.

The Tribal Ordinance itself indicates that it is only effective once Plaintiff's hemp plan is approved by USDA. *See* Docket 1-1 at 16. If Plaintiff's hemp production plan is later deemed lacking there will be no established process to dispose of its illegal hemp. The 2018 Farm Bill specifically provides that hemp production is unlawful unless grown under an approved State plan, Tribal plan, or USDA license. *See* 7 U.S.C.A § 1639q(c)(1). Further, the 2018 Farm Bill allows only hemp grown legally under the amended provisions of the Agricultural Marketing Act of 1946 to be transported via interstate commerce. Pub. L. No. 115-334, § 10114, 132 Stat. 4490, 4914; *see also* 21 U.S.C.A. § 1639o(a). If this Court deems the plan approved on its own accord, it calls into question the legal status of the hemp grown by Plaintiff if the plan is later found to be deficient or lacking.

CONCLUSION

Defendants submit that all four *Dataphase* factors weigh in their favor. Accordingly, the United States respectfully requests the Court deny Plaintiff's request for a TRO and preliminary injunction.

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