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

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

BRIEF OF AMICUS CURIAE
NORTH DAKOTA STATE UNIVERSITY
IN SUPPORT OF PLAINTIFFS' CROSS-MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

North Dakota State University ("NDSU") hereby submits this brief amicus curiae in support of Plaintiff David Monson's and Wayne Hauge's cross-motion for summary judgment and in opposition to Defendants' motion to dismiss. A motion for leave to file this brief is being filed herewith.

INTEREST OF AMICUS CURIAE

Based in Fargo, NDSU is North Dakota's land grant university, with more than 12,000 students. NDSU is nationally known for its College of Agriculture, Food Systems and Natural Resources. Located on NDSU's campus is the main research center of the North Dakota Agricultural Experiment Station ("NDAES"), which also includes eight research extension centers throughout the state and in which researchers from NDSU engage in basic and advanced research in all aspects of agricultural economics and technology. By state law, the research conducted by the NDAES center "must have, as a purpose, the development and dissemination of technology important to the production and utilization of food, feed, fiber and fuel from crop and livestock enterprises." N.D.C.C. §4-05.1-05.

In 1997, the state legislature ordered NDAES to conduct a study of the feasibility of industrial hemp production in the North Dakota. S.L. 1997, ch. 56, §13. As explained in the Affidavit of Burton L. Johnson, Ph.D. ("Johnson Aff."), filed by Plaintiffs with their cross-motion for summary judgment, this study, completed in 1998, concluded that industrial hemp is a viable alternative rotation crop and that its cultivation would create significant economic and business opportunities for the state's farmers. Johnson Aff. ¶4. In 1999, the state enacted a law authorizing the NDAES center to "conduct baseline research, including production and processing in conjunction with the research and extension centers of the state, regarding industrial hemp and other alternative use crops." S.L. 1999, ch. 53, codified at N.D.C.C. § 4-05.1-05.

In order to carry out this mandate, in September 1999, NDSU applied to Defendant Drug Enforcement Administration ("DEA") for a registration (*i.e.*, a license) to cultivate industrial hemp for research purposes. Johnson Aff. ¶6. To date, in the eight years since it was filed, DEA has never ruled on that application. Id. ¶ 7.

In 2005, the state law was amended to authorize the NDAES center to

> collect feral hemp seed stock and develop appropriate strains of industrial hemp which contain less than three-tenths of one percent tetrahydrocannabinol in the dried flowering tops. The Agriculture Commissioner shall monitor the collection of feral hemp seed stock and industrial hemp strain development and shall certify appropriate stocks for licensed commercial cultivation.

S.L. 2005, ch. 58, §1, codified at N.D.C.C. 4-05.1-05. In that same year, the state law was amended to authorize the Agriculture Commissioner to license farmers to cultivate industrial hemp within the state subject to certain conditions and to regulation by the Commissioner. N.D.C.C. §§4-41-01 & 4-41-02.

NDSU has a strong interest in being able to fulfill its statutory mandates to conduct research regarding the cultivation of industrial hemp; to develop appropriate strains of industrial hemp for commercial cultivation; and to support the state's farmers in their efforts to undertake commercial cultivation of this crop which has the potential toproduce significant economic, environmental and other benefits for North Dakota agriculture. As Dr. Johnson explained, if the Plaintiff farmers, Rep. David Monson and Wayne Hauge, are able to cultivate industrial hemp pursuant to state license as authorized by state law, without fear of prosecution for violating the federal Controlled Substances Act, their plants "will be available for study and analysis by NDSU, enabling NDSU to carry out its statutorily mandated function of conducting research on industrial hemp."

Johnson Aff. ¶10. For these reasons, NDSU supports Plaintiff's cross-motion for summary judgment in this case.

DISCUSSION

NDSU can provide the Court with additional insight with respect to the issue of ripeness for adjudication, an issue that has been raised in this case by DEA. NDSU's own experience clearly indicates that it is futile for Plaintiffs to pursue applications for registration by the DEA and, therefore, Plaintiffs' claims should be considered ripe for adjudication.

In support of its motion to dismiss, DEA argues that Rep. Monson and Mr. Hauge should wait for the DEA to act upon their registration applications and that, until DEA does so, this Court should withhold its consideration of the case. Defendants' Brief in Support of Their Motion to Dismiss ("DEA Brief") at 13-14. According to DEA, "Plaintiffs cannot demonstrate any hardship justifying judicial review prior to the DEA's resolution of their registration application." *Id.* at 13. In effect, DEA is contending that Plaintiffs should exhaust their administrative remedies before seeking relief from this Court.

One of the circumstances in which exhaustion of administrative remedies is not required, however, is when "requiring resort to the administrative remedy may occasion undue prejudice to subsequent assertion of a court action. Such prejudice may result, for example, from an unreasonable or indefinite timeframe for administrative action." *McCarthy v. Madigan*, 503 U.S. 140, 146-47 (1992). Exhaustion may be unnecessary where there is no time frame set by statute or rule in which the agency is required to act,

e.g., Coit Independence Joint Venture v. Federal Savings and Loan Ins. Corp., 489 U.S. 561, 587 (1989); or because agency action routinely requires an unduly long time. *E.g., Walker v. Southern Railway Co.*, 385 U.S. 196 (1966)(10 years).

NDSU's experience demonstrates that applying to DEA for a registration to cultivate industrial hemp clearly involves an "unreasonable or indefinite timeframe for administrative action." The CSA provision authorizing DEA to grant registrations, 21 U.S.C. §822, does not provide any timeframe in which DEA is required to act on registrations. And the time consumed by DEA to consider NDSU's application must be considered unreasonable, by any measure.

NDSU submitted a complete application in September 1999. About three years later, Dr. Johnson heard from DEA and had a series of discussions with DEA officials in which, among other things, they requested him to submit detailed designs for the fencing and security measures to be taken to ensure that there would be no unauthorized access to the hemp plants. Dr. Johnson did submit such designs and, in 2003, NDSU obtained a commitment from the North Dakota Agricultural Products Utilization Commission for funding of those fencing and security systems. DEA officials then indicated to Dr. Johnson, in telephone conversations, that DEA would require NDSU actually to expend these funds, construct the fence and put the security measures in place, and to then allow DEA to inspect the fence and security devices—all without any assurance that a registration would ever be granted.

In February 2006—seven years after the application had been filed—DEA requested NDSU to answer a series of 15 detailed questions, including "all of the security measures that you plan to utilize to prevent theft or other diversion of cannabis plant

material" and NDSU's "proposed method for destruction of the marijuana parts of the cannabis plant that you will produce." Letter from Joseph T. Rannazzisi, Deputy Assistant Administrator, Office of Diversion control, to Dr. Burton Johnson, Feb. 17, 2006, attached hereto as Exhibit A. On April 5, 2006, Dr. Johnson responded to all of these questions, including a detailed description of the security measures proposed to be taken. Letter from Dr. Johnson to DEA, April 5, 2006, attached hereto as Exhibit B. Dr. Johnson indicated that the "field area will have a chain link fence surrounding the research area that will be in compliance with DEA specifications" and that the fence "will also be equipped with appropriate motion detection and automated systems...." DEA did not respond further to these answers and as of now, *eight years* after the application was filed, DEA has failed to make *any* decision on the application.

Further, there is little doubt about the outcome of the applications for registration that have been filed by Rep. Monson and Mr. Hauge. DEA has already decided to treat the applications as being for registration to "manufacture[] marijuana—which is the most widely abused controlled substance in the United States....." Letter from Joseph T. Rannazzisi, Deputy Assistant Administrator, Office of Diversion Control, DEA, to Agriculture Commissioner Roger Johnson, Feb. 1, 2007, attached to DEA Brief as Exhibit B. DEA's decision is thus a foregone conclusion.

> [W]hen an administrative appeal would be futile and little more than a formality, exhaustion will not be required..... The futility exception to the exhaustion requirement applies when there is nothing to be gained other than an agency decision adverse to the plaintiff.

Sioux Valley Hospital v. Bowen, 792 F.2d 715,724 (8th Cir. 1986). Clearly that is the situation here.

For these reasons, Plaintiffs' claims should be considered ripe for adjudication.

CONCLUSION

For the reasons set forth above, Plaintiffs' claims should be considered ripe for adjudication. For the reasons set forth in Plaintiffs' response to the Defendants' motion to dismiss and cross-motion for summary judgment, Defendants' motion should be denied and Plaintiffs' cross –motion should be granted.

Respectfully submitted,

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