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, HON. SONNY PERDUE, in his official capacity, SECRETARY OF AGRICULTURE, Defendants.	**FLANDREAU SANTEE SIOUX TRIBE'S MEMORANDUM IN SUPPORT OF EMERGENCY MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION** (Fed. R. Civ. P. 65(a)-(b))

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Plaintiff Flandreau Santee Sioux Tribe ("Tribe") hereby submits the following Memorandum of Points and Authorities in support of its motion for an emergency temporary restraining order and for a preliminary injunction.

INTRODUCTION

Completely ignoring the will of Congress *and the very statute it is here tasked with implementing*, the United State Department of Agriculture ("USDA") has violated its mandatory review deadline and attempts to assume power not delegated to it by Congress to the ongoing harm of the Tribe.

Under the guise of the Agricultural Marketing Act, 7 U.S.C. §§1639o-1639r ("AMA"), USDA attempts to preempt state and tribal law beyond the 60 day, statutory review requirement pending promulgation of agency regulations and state and tribal plan approval by the Secretary of Agricultural ("Secretary"). This is despite the fact that the AMA requires action by the Secretary within 60 days of receipt of a state and tribal plan pursuant to a clear and simple check list for mandatory approval and the fact that the AMA explicitly neither preempts state or tribal law nor requires Secretarial approval of state or tribal plans to operate under the AMA.

Throughout the AMA, Congress recognizes both that states and Indian tribes best understand their unique growing conditions and can best regulate the production of industrial hemp on their lands. It does this by guaranteeing local authority to states and Indian tribes and closely proscribing the authority of the Secretary by requiring his approval of plans which contain a mere seven requirements, and authorizing his disapproval of a plan only when one or more of those seven requirements are not addressed. It also allows the Secretary a limited timeframe in which to make his decision. USDA eviscerates this balance of powers and violates the will of Congress, the AMA, and federal law by attempting to exert powers going far beyond what the statute allows.

States and Indian tribes opting for local authority over hemp production must submit a regulatory plan to the Secretary. That plan is *only required to include* "a practice" or "a procedure" to meet six of the seven statutory requirements and a certification from the state or tribe that it has the resources and personnel to carry out those six state or tribally proposed practices and procedures. Upon receipt of such a plan, the Secretary has 60 days to either approve it if it satisfies those minimum requirements or disapprove it only if it does not meet the requirements. The Secretary has little to no discretion in whether to approve or disapprove a state or tribal plan.

Congress did not stop there. In further recognition of, and support for, local authority, Congress directs that nothing in the AMA shall preempt state or tribal laws regulating the production of hemp that go beyond the statutory requirements. It similarly directs that Secretarial approval of a state or tribal plan is not required so long as hemp production complies with either the Secretary's own plan or other federal laws and is not otherwise prohibited by the state or tribe.

Here, USDA failed to either approve the Tribe's plan as required under the AMA or take any action on it within the 60 days mandated by statute. USDA interprets the statute to require agency regulatory promulgation, followed by Secretarial approval of the Tribe's plan, prior to the Tribe operating pursuant to the AMA. Under this erroneous view, the statute would preempt the Tribe's hemp production ordinance.

USDA's interpretation fails on the level of basic statutory construction and analysis. Its interpretation of the AMA is inconsistent with the law's plain language, which on its face requires action no later than 60 days after receipt of a state or tribal plan, makes very clear that a state and tribal plan must only include seven things, and mandates Secretarial approval if it does.

Congress further prohibits use of the AMA to preempt local laws regulating hemp production and prohibits conditioning such production on approval of a state or tribal plan by the Secretary.

USDA would here allow for indefinite review and approval pending application of different or more rigorous requirements than those imposed by Congress. USDA further seeks to preempt the Tribe's laws related to the production of hemp on its territory pending that review and approval. For the Tribe, this means, at a minimum, that unless it is able to operate pursuant to its hemp production plan and Tribal law under the AMA immediately, it will be unable to participate in the 2019 growing season. This will in turn deny the Tribe valuable Tribal income to support essential governmental services including some non-replaceable services like timely food delivery to tribal members in need, timely medical assistance, burial funds for tribal members, and timely police protection.

For the reasons set forth herein, the Tribe respectfully requests that its emergency motion for temporary restraining order and preliminary injunction be granted pending a decision on the merits of its complaint.

STATUTORY BACKGROUND

Industrial hemp is an agricultural commodity used in a wide variety of products including cosmetics and personal care products, nutritional supplements, clothing and spun fiber, plastics and oil based products, paper, human and animal food, construction and insulation material, and other manufactured goods. Due in part to its versatility and superior performance, current industry estimates report that domestic sales of hemp products total around $700 million annually. Renée Johnson, Cong. Research, Serv., RL32725, Hemp as an Agricultural Commodity, R. Johnson, summary (2018).

I. The 2018 Farm Bill

In December 2018, Congress passed and the President signed into law The Agriculture Improvement Act of 2018, Pub. L. 115-334, December 20, 2018, 132 Stat. 4490 ("2018 Farm Bill"). Among other things, the 2018 Farm Bill amended the Agricultural Marketing Act of 1946, 7 U.S.C. 1621 *et seq*., to define "hemp" and to allow for hemp production. The 2018 Farm Bill also removed "hemp" from the Controlled Substances Act, 21 U.S.C. § 801 *et seq*., making it legal to grow and possess hemp and hemp seeds under federal law. *See* 2018 Farm Bill, §12619, (amending the Controlled Substances Act, 21 U.S.C. §802(16)). *See also United States v. Mallory*, No. CV 3:18-1289, 2019 WL 1061677, at *6 (S.D.W. Va. Mar. 6, 2019) ("The 2018 Farm Bill expressly allows hemp, its seeds, and hemp-derived products to be transported across State lines."); USDA Agricultural Marketing Service, Bulletin, Importation of Hemp Seeds (April 19, 2019) available at: https://content.govdelivery.com/accounts/USDAAMS/bulletins/23f8ef9 (regulating the importation of hemp seeds).

The 2018 Farm Bill also explicitly encompasses hemp in dormant Commerce Clause analysis, setting forth that nothing "in this title . . . prohibits the interstate commerce of hemp . . . . No State or Indian Tribe shall prohibit the transportation or shipment of hemp or hemp products produced in accordance with subtitle G of the [AMA] . . . through the State or the territory of the Indian Tribe, as applicable." 2018 Farm Bill, §10114; note following 7 U.S.C. § 1639o. It also contains a sunset provision for hemp production under 7 U.S.C. § 5940, as amended by section 7606 of the Agricultural Act of 2014, PL 113-79, February 7, 2014, 128 Stat 649 ("2014 Farm Bill"). This sunset provision allows states with industrial hemp research programs established under the 2014 Farm Bill to continue operating under such program until one year after the USDA establishes its 297C plan. 2018 Farm Bill, § 7605(b).

Unlike states, tribes could not establish hemp research programs under the 2014 Farm Bill and, in fact, risked criminal enforcement action for attempting to exercise authority under the 2014 Farm Bill. *See Menominee Indian Tribe of Wisconsin v. Drug Enf't Admin.,* 190 F. Supp. 3d 843, 852 (E.D. Wis. 2016) (denying "the Tribe's request for declaratory relief to the effect that 'State' as used in the [Agricultural Act of 2014] includes Indian tribes" in response to a Drug Enforcement Agency raid on a Tribal hemp operation conducted under tribal authority on tribal territory). *Cf. United States v. White Plume*, No. CIV. 02-5071-JLV, 2016 WL 1228585 (D.S.D. Mar. 28, 2016) (refusing to lift an injunction prohibiting the growing of industrial hemp by a tribal member in Indian Country within the exterior boundaries of South Dakota).

II. The Agricultural Marketing Act

The AMA, as amended by the 2018 Farm Bill, addresses "Hemp Production" in states and tribal territories and provides that states and tribes may opt for either "primary regulatory authority" or for USDA jurisdiction over hemp production on their lands. *See generally*, 7 U.S.C. 1639o-1639s (2019).

A. State and Tribal Plans

States and tribes desiring "primary regulatory authority" over hemp production are to submit to the Secretary a plan that must only include seven things pursuant to section 297B of the AMA, 7 U.S.C. §1639p(a)(2) (2019) ("section 297B plan").

Tribal and state section 297B plans "shall only be required to include" seven items prescribed by Congress. AMA §297B(a)(2), 7 U.S.C. §1639p(a)(2). The words "shall only be required to include" were added by Congress to specifically clarify its intent, which is that there is no "limit [to] what states and tribal governments include in their state or tribal plan, so long as it is consistent with this subtitle. For example, states and tribal governments are authorized to put

more restrictive parameters on the production of hemp, but are not authorized to alter the definition of hemp or put in place policies that are less restrictive than this title." H.R. Rep. No. 115-1072, at 737 ("Conf. Rep.").

To meet the seven Congressionally-imposed items, the statute only requires the state or tribe to provide in their section 297B plan "a practice" or "a procedure" to meet each of the first six requirements. AMA §297B(a)(2)(A)(i)-(vi), 7 U.S.C. §1639p(a)(2)(A)(i-vi). To meet the seventh, Congress merely requires "a certification" of adequate "resources and personnel." AMA §297B(a)(2)(A)(vii); 7 U.S.C. §1639p(a)(2)(A)(vii).

To strengthen the respect for, and primacy of, state and tribal decision making under section 297B, Congress also provided that state and tribal plans may also include "any other practice or procedure established by a State or Indian tribe, as applicable, to the extent that the practice or procedure is consistent with this subtitle." AMA §297B(a)(2)(B), 7 U.S.C. §1639p(a)(2)(B). *See also* AMA §297B(a)(3), 7 U.S.C. §1639p(a)(3) (stating that no law of a state or Indian tribe regulating the production of hemp is preempted by this subsection if it is more stringent than Subtitle G of the AMA.)

The Secretary is mandated to approve a state and tribal plan that meets the above referenced requirements. AMA §297B(b)(1)(A), 7 U.S.C. §1639p(b)(1)(A) (the "Secretary shall . . . approve the State or Tribal plan if the State or Tribal plan complies with subsection (a).")

Likewise, the Secretary is prohibited from disapproving plans that meet the above referenced requirements. AMA §297B(b)(1)(B), 7 U.S.C. §1639p(b)(1)(B) (the "Secretary shall . . . disapprove the State or Tribal plan only if the State or Tribal plan does not comply with subsection (a).")

Finally, the Secretary must approve or disapprove a section 297B plan "no later than 60 days after receipt." AMA §297B(b)(1), 7 U.S.C. §1639p(b)(1). *See also* H.R. Rep. No. 115-1072, at 737 ("Conf. Rep.") ("Within 60 days of receiving a state or tribal plan, the Secretary must approve or deny the plan.").

The Secretary is required to consult with the Attorney General in carrying out its requirement to approve or deny a plan within 60 days of receipt (AMA §297B(b)(3), 7 U.S.C. §1639p(b)(3)), and in promulgating regulations and guidelines implementing the AMA provisions on hemp production. AMA §297D, 7 U.S.C. §1639r(a)(1)(B). As it relates to USDA's deadlines, however, Congress clearly instructs as follows: "**The consultation with the Attorney General should not alter the 60 day requirement to approve or deny a plan**." Conf. Rep. at 737.

Nothing in section 297B prohibits the production of hemp in a State or territory of an Indian tribe for which a section 297B plan is not approved, if such production "is in accordance with section 297C or other Federal laws (including regulations) . . . and . . . if the production of hemp is not otherwise prohibited by the State or Indian tribe." AMA §297B(f), 7 U.S.C. §1639p(f). This means that, so long as states and tribes: (1) do not alter the definition of hemp (and thus remain in compliance with the Controlled Substances Act, 21 U.S.C. §801 *et. seq.* ("CSA") (removing "hemp" as defined in the AMA from the definition of "marihuana") and, (2) have policies that meet the seven statutory requirements, they are operating pursuant to the AMA, 7 U.S.C. §1639p(f). Conf. Rep. at 737 ("The managers do not intend to limit what states and tribal government include in their state or tribal plan, as long as it is consistent with this subtitle. For example, states and tribal governments are authorized to put more restrictive parameters on the production of hemp, but are not authorized to alter the definition of hemp or put in place policies that are less restrictive than this title.")

B. Department of Agriculture Plan

The production of hemp in a state or tribal territory without an approved section 297B plan shall be subject to a plan established by the Secretary under the AMA §297C, 7 U.S.C. §1639q (2019) ("section 297C plan"). Operation in accordance with the USDA's section 297C plan is for "states and tribal territories that forego developing and submitting a state or tribal hemp production plan." Conf. Rep. at 738. Operation under section 297C is also intended in a state or tribal area for which a section 297B plan was denied or revoked. Conf. Rep. at 737 ("If a state or tribal plan is denied or revoked, the Managers intend for hemp production in that state or tribal area to fall under the Secretary's jurisdiction as authorized in section 297C.") *See also* AMA §297C(c)(1), 7 U.S.C. §1639q(c)(1) (stating that in the case of a state or tribe for which a section 297B plan is not approved, it shall be unlawful to produce hemp without a license issued by USDA pursuant to a section 297C plan).

FACTUAL BACKGROUND

The Tribe opted for primary regulatory jurisdiction under section 297B and submitted its section 297B plan, which was received by the Secretary on March 8, 2019 ("Tribal Plan").[1] The Tribe has expressed and USDA is aware that the 2019 hemp growing season has already started on the Tribe's lands and that the window to plant will end soon. The Tribe has also told USDA in all of its meetings that it has already expended funds in reliance upon the plain language of the statute and that Tribal services will be harmed if the Tribe cannot secure private Tribal income from hemp production. The Tribe submitted its section 297B plan to the Secretary on March 8,

[1] A true and correct copy of the Tribal Plan is attached to the Verified Complaint filed contemporaneously herewith.

2019 to allow time for the Secretary to act within the 60 days mandated by the AMA and before the 2019 growing season started.

The Secretary did not approve or deny the Tribe's section 297B plan within 60 days of receipt and has still not acted on the plan. Instead, and contrary to the statutory language, the Secretary stated that, as "required by law, USDA is committed to completing its review of plans within 60 days . . . once regulations are effective." April 24, 2019 letter from the Secretary to the Tribe ("Acknowledgment Letter").[2]

Further, based to his failure to approve the Tribe's section 297B plan, the Secretary is denying the Tribe the ability to operate pursuant to the AMA, in contravention of section 297B(f), 7 U.S.C. §1639p(f). *See* Acknowledgment Letter (stating that the Secretary will hold the Tribe's plan and that, in the interim, the Tribe "may continue to operate under authorities of the 2014 Farm Bill.").[3] *See also* Questions and Answers, Question 7 (available at https://www.ams.usda.gov/publications/content/hemp-production-program-questions-and-answers) ("Questions and Answers") ("Question 7: When can growers begin planting hemp in compliance with the authorities of the 2018 Farm Bill? Until the USDA regulation is finalized and published in the Federal Register, research and development initiatives authorized in the 2014 Farm Bill remain in effect); USDA February 27, 2019 Notice to Trade (available at https://www.ams.usda.gov/content/hemp-production-program) ("Notice to Trade") (same).

This denial of authority under the AMA, in turn, denies the Tribe the protections to interstate commerce for hemp producers as carried forward in the statute. 2018 Farm Bill, §

[2] A true and correct copy of the Acknowledgment Letter is attached to the Verified Complaint filed contemporaneously herewith.

[3] As noted supra pg 5, prior to enactment of the AMA, the Tribe did not have authority under the 2014 Farm Bill. *See Menominee Indian Tribe of Wisconsin,* 190 F. Supp. 3d at 852.

10114(b); note following 7 U.S.C. § 1639o. *See also* Conf. Rep. at 736 ("nothing in this title authorizes interference with the interstate commerce of hemp."). *But see Big Sky Sci. LLC v. Idaho State Police*, No. 1:19-CV-00040-REB, 2019 WL 438336, at *6 (D. Idaho Feb. 2, 2019) (holding that hemp must be produced in accordance with the AMA to enjoy the interstate commerce protections set forth in the 2018 Farm Bill).

ARGUMENT

I. The standard for a temporary restraining order.

"Whether a preliminary injunction should issue involves consideration of (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." *Dataphase Sys., Inc. v. C L Sys., Inc.*, 640 F.2d 109, 113 (8th Cir. 1981).[4] *See also Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7, 20 (2008); *Sierra Club v. U.S. Army Corps of Engineers*, 645 F.3d 978, 993 (8th Cir. 2011); *First Premier Bank v. U.S. Consumer Financial Protection Bureau*, 819 F.Supp.2d 906, 912-13 (D.S.D. 2011). "If the chance of irreparable injury to the movant should relief be denied is outweighed by the likely injury to other parties litigant should the injunction be granted, the moving party faces a heavy burden of demonstrating that he is likely to prevail on the merits. Conversely, where the movant has raised a substantial question and the equities are otherwise strongly in his favor, the showing of success on the merits can be less." *Dataphase*, 640 F.2d at 113.

[4] The same standard applies to temporary restraining orders. *See, e.g., S.B. McLaughlin & Co. v. Tudor Oaks Condo. Project*, 877 F.2d 707, 708 (8th Cir. 1989)(affirming the district courts application of the *Dataphase* factors to a motion for temporary restraining order.)

II. The Tribe will suffer irreparable harm in the absence of emergency temporary and preliminary relief.

A. Irreparable harm will result from the loss of essential governmental services.

Allowing the USDA to unlawfully withhold Tribal authority here excludes the Tribe from the 2019 planting season (which effectively ends June 15, 2019), costing the Tribe a projected $17 million in income. (*Exhibit 2, Decl. of Richard Tall Bear Westerman,* ¶¶ 9, 12). This limits the funds available to the Tribe to operate its tribal government functions, programs and services by approximately that amount. As the Eighth Circuit has explained, this is necessarily an infringement on the right of the Tribe to make its own laws and be ruled by them, and its right to self-determination and self-sufficiency. *Cf. Marty Indian School Bd. v. South Dakota*, 824 F.2d 684, 687-88 (8th Cir. 1987) ("Depleting the funds available for the operation of the school. . . . [removes] from the Tribe and the Board the choice of how to spend the finite dollars provided by the federal government for school operations also necessarily affects the Tribe's ability to make its own rules and be governed by them…") (internal citation omitted). *See also, Winnebago Tribe of Nebraska v. Stovall*, 216 F.Supp.2d 1226, 1232 (D.Kan. 2002) (holding the loss of revenues necessary to provide tribal government services constitutes irreparable harm)

If the Tribe's hemp production program proceeds in the 2019 growing season, it is estimated that $17 million would be generated in net revenue to the Tribe. *Exhibit 2,* ¶12. Every dollar in net revenue realized through the Tribe's hemp production program would be used to support Tribal governmental programs, services, and functions. *Exhibit 1, Decl. of Ryan Kills A Hundred*, at ¶11. Tribal hemp production revenue would help provide timely health care services, law enforcement services, and an elderly meals program, services and programs that the

Tribe cannot adequately fund with federal dollars without access to additional revenues. *See Exhibit 1* at ¶¶ 12, 17.

This is a particularly difficult time for the Tribal treasury, making the revenues from hemp production under the Tribe's section 287B plan more urgent than ever. The single largest source of non-federal funds to the tribal government is revenue from the Tribe's Casino business, accounting for approximately 40% of the tribal government budget. *Exhibit 1* at ¶ 8. The Casino is ongoing complete renovation to ensure that it meets environmental, public health, and safety standards in accordance with the Indian Gaming Regulatory Act (25 U.S.C §2710(b)(2)(E) (2019)), and to remain competitive in its local market. *Exhibit 1* at ¶ 9. The Tribe's projected $17 million from its hemp production in 2019 would make up for a sizable percentage of those lost revenues. *See Id.* at ¶17.

In *Nebraska Health Care Ass'n. v. Danning*, 578 F.Supp. 543, 545 (D. Ne. 1983), the Court granted a preliminary injunction on the implementation of new health care regulations, finding that "[t]he threat of irreparable harm is genuine, because the reduction in payments, according to the evidence, is likely to result in a reduction of the quality of services to patients or an inability of the health care providers to continue to furnish the nature of services contemplated by the federal program." *See also Cedar-Riverside People's Center v. Minnesota Dept. of Human Services*, Civ No. 09-768, 2009 WL 1955440 (D. Minn. July 6, 2009) (granting preliminary injunction on regulations on the basis of irreparable harm from loss in funding to health facility). This is precisely the type of irreparable harm the Tribe is suffering in this case.

B. There is no adequate post-deprivation remedy at law.

The remedy of directing the USDA to approve or immediately review the Tribe's section 297B plan if the Court holds that USDA has unlawfully withheld or delayed agency action after

a prolonged briefing schedule or trial on the merits is insufficient to remedy the loss of programs and services occurring. This is based on the climate and June 15, 2019 deadline for planting hemp on the Tribe's reservation. *Exhibit 2*, ¶ 9. The damages caused by this continuing unlawfully withheld agency action are immediate and compounding. Courts have found irreparable harm where there is no adequate remedy at law. *See Baker Elec. Co-op, Inc. v. Chaske*, 28 F.3d 1466, 1472-73 (8th Cir. 1994).

The effects of not entering the market now under the authorities allowed the Tribe under the AMA are immediate and compounding and are unable to be remedied at law. First, based on the tribal hemp provisions in the AMA authorizing tribal primary regulatory authority after submission of a section 297B plan, the Tribe invested its limited capital in its hemp production program. The Tribe also removed two parcels from its normal agricultural leasing program, dedicated them to the production of hemp in the 2019 growing season, and dedicated an existing indoor growing facility to the operation. *Exhibit 1* at ¶18. Additionally, third parties are unwilling to contract with the Tribe given the USDA's unlawful interpretation of the law purporting to withhold tribal authority under section 297B. This compounds the hesitancy to contract and engage in business with tribes that already exists in the marketplace due to overregulation and regulatory uncertainty. All of this Tribal investment and good will is at risk and these opportunities will be lost if USDA continues to unlawfully exclude the Tribe from the 2019 growing season pending action on its 297B plan outside the 60 days mandated by statute. For these reasons, irreparable harm will result if this Court does not issue an emergency temporary restraining order and preliminary injunction.

III. The balance of harms favors the Tribe.

If the temporary restraining order and preliminary injunction are issued, the harm faced by USDA is negligible compared to the harm caused to the Tribe if relief is denied. Without an emergency temporary restraining order and preliminary injunction, the Tribe faces the prospect of significant interference with its self-government and continuing inability to fund vital governmental services. *See* Section II, *supra*. It will be unable to engage in hemp production for at least the 2019 growing season due to USDA's failure to take action on the Tribe's section 297B plan as required by statute and its unlawful application of the statute to purport to withhold the tribal authorities under the AMA. Under the temporary relief proposed here, the Tribe will operate under its plan, which contains, and is more stringent than, the AMA minimum requirements, as envisioned by Congress.

USDA, on the other hand, has no significant interest in continuing to unlawfully delay review and deny the Tribal authorities recognized in the AMA during the pendency of this litigation. The USDA's role in the ongoing operations of hemp production under the Tribe's primary regulatory authority is limited and not effected by allowing the Tribe to operate under its section 297B plan immediately. USDA will also be allowed to promulgate regulations implementing the statute "as expeditiously as practicable" and report to Congress annually on such implementation as required by law without continuing to deny market participation to the Tribe in violation of the AMA. 7 U.S.C. §1639r(a). Further, any possible harm to USDA is not irreparable. If this Court ultimately finds that USDA is not subject a review deadline measured 60-days from receipt or that USDA may deny the Tribe's hemp production authority recognized in the statute, 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.

IV. An injunction is in the public interest.

Issuance of a temporary restraining order and preliminary injunction here would serve the public interest. The Tribe's cultivation of hemp in 2019 will create jobs, decrease dependence on taxpayer-funded programs, improve the health and welfare of American citizens, and add to the local economy. Continuing denial of the Tribe's authorities under the AMA will also constitute an infringement on the Tribe's right of self-government, on the functioning of the Tribe's government and economy, and on the rights of the Tribe to engage in economic transactions free from unlawful intrusion by USDA. It would also result in the continuing loss of governmental services to the community members utilizing those services, both tribal members and non-members. *See Sac and Fox Nation of Missouri v. LaFaver,* 905 F.Supp. 904, 907-908 (D. Kan. 1995) ("[T]he public interest in assuring the continued presence of social services, public safety and education programs and benefits to the Tribes on Indian lands is significant. The public also has a genuine interest in helping to assure Tribal self-government, self-sufficiency, and self-determination."). *Cf. Wyandotte Nation v. Sebelius*, 443 F.3d 1247, 1255 (10th Cir. 2006)(finding that unwarranted diminution of sovereign immunity constitutes irreparable injury).

Finally, the Tribe is seeking the enforcement of its rights as recognized by Congress, and not subjected by Congress to diminution by Defendants, and the enforcement of its right to make its own laws and be governed by them. The maintenance of the balance of powers reserved in states and tribes and those delegated to the federal executive branch is in the public interest. *See Poarch Band of Creek Indians v. Hildreth,* 656 Fed.Appx. 934, 944 (11th Cir. 2016)

("[E]nforcing the existing federal statutory and regulatory structure applicable to Indian tribes would serve the public interest."). A temporary restraining order and preliminary injunction would serve these interests while this Court considers the important questions raised by this litigation.

V. The Tribe has a strong likelihood of success on the merits

The AMA requires nondiscretionary action within 60 days of receiving a state or tribal plan and links the Secretary's mandatory approval to clear and concise requirements. It also directs that non-approval neither prohibits hemp production under the statute nor preempts state or tribal laws related to hemp production. Because the Secretary violates each of these commands, the Tribe has a strong likelihood of success on the merits and its motion for a temporary restraining order should be granted.

A. Standard of Review

Both the text of the statute and Congressional intent direct that the Secretary must review section 297B plans no later than 60 days after receipt.

When interpreting a statute, the court starts with the plain language. *United States v. I.L.*, 614 F.3d 817, 820 (8th Cir. 2010). "The Supreme Court has 'stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there. When the words of a statute are unambiguous, then, this first canon is also the last: judicial inquiry is complete.'" *Id.* (quoting *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992)) (internal citations and quotations omitted).

Additionally, as the Supreme Court recognizes, "shall" means shall—when Congress intends to direct some action, it uses the mandatory command "shall." *See United States v. Monsanto*, 491 U.S. 600, 607 (1989) (by using "shall" in civil forfeiture statute, "Congress could

not have chosen stronger words to express its intent that forfeiture be mandatory in cases where the statute applied"); *Pierce v. Underwood*, 487 U.S. 552, 569-70, (1988) (Congress' use of "shall" in a housing subsidy statute constitutes "mandatory language"); *Stanfield v. Swenson*, 381 F.2d 755, 757 (8th Cir. 1967) ("When used in statutes the word 'shall' is generally regarded as an imperative or mandatory and therefore one which must be given a compulsory meaning.")

The primacy of unambiguous statutory text in judicial interpretation of laws holds true when reviewing failure of an agency to act pursuant to a clear statutory mandate under the APA. *Forest Guardians v. Babbitt,* 164 F.3d 1261, 1272 (10th Cir. 1998), *opinion amended on denial of reh'g,* 174 F.3d 1178 (10th Cir. 1999).

Forest Guardians examined the distinction between agency action "unlawfully withheld" and "unreasonably delayed," noting that the analysis turns on "whether Congress imposed a date-certain deadline on agency action." *Id.* When "Congress by organic statute sets a specific deadline for agency action," the court held, "neither the agency nor any court has discretion. The agency must act by the deadline. If it withholds such timely action, a reviewing court must compel the action unlawfully withheld. To hold otherwise would be an affront to our tradition of legislative supremacy and constitutionally separated powers." *Id.*

Where an agency is required by law to take some discrete action and fails to take that action, federal courts may compel such agency action unlawfully withheld. *E.g. Meina Xie v. Kerry*, 780 F.3d 405, 407 (D.C. Cir. 2015) (*citing Norton v. Southern Utah Wilderness Alliance*, 542 U.S. 55 (2004)).

Finally, the unique trust responsibility owed by USDA as trustee to the Tribe weighs in the Courts' analysis. It weighs both in defining (and compelling) the action USDA is required to take vis-à-vis the Tribe (*Cobell v. Norton*, 392 F.3d 461, 473 (D.C. Cir. 2004) (finding that "the

availability of common law trust precepts . . . flesh out the statutory mandates)) and in interpreting any ambiguities in the statute in favor of the Tribe. *Cheyenne River Sioux Tribe v. Jewell*, 205 F. Supp. 3d 1052, 1062 (D.S.D. 2016) (citing *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 767 (1985)).

B. The Text of the AMA Mandates that the Secretary Review Plans Within Sixty Days of Receipt

Here, the statute is unambiguous. The AMA directs as follows:

> Not later than 60 days after receipt of a State or Tribal plan under subsection (a), the Secretary shall . . . approve the State or Tribal plan if the State or Tribal plan complies with subsection (a) . . . or . . . disapprove the State or Tribal plan only if the State or Tribal plan does not comply with subsection (a).

7 U.S.C. §1639p(b)(1).

This mandatory statutory command leaves no discretion: the Secretary must approve a section 297B plan meeting the minimum conditions set by Congress not later than 60 days after receipt and only deny a plan that fails to meet those minimum conditions. The Tribe submitted its section 297B plan so that it was received by the Secretary on March 8, 2019. The Secretary has still not approved or disapproved the Tribe's plan. In fact, in the acknowledgment letter (curiously received by the Tribe on May 6, 2018—almost 60 days to the date after receipt) the Secretary states that he will as "required by law . . . [review the Tribe's plan] within 60 days, once regulations are effective." Acknowledgment Letter. This violates the clear command of Congress to the Secretary to review plans "no later than 60 days after receipt." For this reason alone, the Secretary must be directed to adhere to the clear statutory command and the Tribe is likely to prevail on the merits.

C. The Congressional Intent and Legislative Record Support the Plain Text of the Statute

This 60 day review requirement is not only mandated by the plain language of the statute, it carries forward the intent and structure of the law as enacted by Congress.

As detailed above in section II.A, the Secretary's statutory duty and statutory limitations are expressed in the following mandatory commands: (1) that plans "shall only be required to include" certain requirements, (2) that the Secretary "shall . . .approve" a plan that complies and "shall disapprove . . . only" if a plan does not comply with setting out those requirements, and (3) that the Secretary must "not later than 60 days after receipt" approve or disapprove a plan within these confines. When read against the tightly proscribed Secretarial review of requirements set by Congress and delegated to states and tribes, the 60-day mandatory review deadline of section 297B plans is understandable and completely reasonable.

The mandatory 60-day review of statutorily established requirements that are left to primary local authority is not only required by section 1639p(b)(1) and a holistic reading the statute, it also allows, as Congress intended, for state and tribal jurisdictions to opt to regulate according to their unique growing conditions pursuant to the AMA for the 2019 growing season. This is evidenced by the fact that nothing in section 297B of the AMA preempts "any law of a State or Indian tribe that . . . regulates the production of hemp . . . and is more stringent that this subtitle." 7 U.S.C. §1639p(a)(3). It is also evidenced by the fact that nothing in the AMA prohibits states and tribes from hemp production in their territory so long as compliant with section 297C "or other federal laws (including regulations)" and not prohibited by that local jurisdiction. 7 U.S.C. §1639p(f). Congress clarified these provisions in the legislative record, stating as follows:

> The managers do not intend to limit what states and tribal government include in their state or tribal plan, as long as it is consistent with this subtitle. For example, states and tribal governments are authorized to put more restrictive parameters on the production of hemp, but are not authorized to alter the definition of hemp or put in place policies that are less restrictive than this title.

Conf. Rep. at 737.

Thus, so long as states and tribes do not "alter the definition of hemp" (and thus remain in compliance with the CSA) and have policies that meet the minimum requirements in section 297B, they are operating pursuant to the AMA, 7 U.S.C. §1639p(f).

The Secretary, however, purports to exclude state and tribes from operating pursuant to the AMA well past 60 days from receipt of a section 297B plan and for at least the 2019 growing season. Acknowledgment Letter. This violates the mandate to review plans no later than 60 days from receipt pursuant to 7 U.S.C. §1639p(b)(1). It also withholds local authority beyond 60 days in violation of the limited authority delegated to the Secretary by Congress. For these reasons, the Tribe is likely to prevail on the merits and the Tribe's motion should be granted.

Finally, the Secretary states that he is withholding review of the Tribe's section 297B plan until 60 days "after regulations are effective." Acknowledgment Letter. Initially, this violates the unambiguous statutory command that the Secretary review the Tribe's section 297B plan "no later than 60 days after receipt" (7 U.S.C.§1639p(b)(1)), and "approve the plan if it complies with subsection (a) (297B (a), 7 U.S.C. §1639b(a)), which only requires that the plan address seven separate items. 297B (a)(2)(A)(i)-(vii), 7 U.S.C. §1639p(a)(2)(A)(i)-(vii). Congress could have, but did not, link review of section 297B plans to promulgation of regulations, which it addressed in the AMA section 297D, 7 U.S.C. §1639r. For the reasons described above, Congress plainly mandates the Secretary to review plans to implement local primary authority pursuant to preset statutory conditions not later than 60 days after receipt.

Aside from statutorily foreclosing the Secretary's position that review of the Tribe's section 297B plan may commence once regulations are effective, Congress appears to have foreseen and explicitly foreclosed the Secretary's position that review commences upon promulgation of regulations. In promulgating regulations implementing the statute (including implementing the Secretary's carrying out review of state and tribal section 297B plans), Congress requires that the Secretary consult with the Attorney General. 7 U.S.C. §§1639p(b)(3), 1639r(a)(1)(B). This consultation, however, "**should not alter the 60 day requirement to approve or deny a plan**." Conf. Rep. at 737. Thus, Congress foresaw the Secretary's position taken here and explicitly foreclosed it in the record. For this additional reason, the Tribe is likely to succeed on the merits and the Tribe's motion should be granted.

CONCLUSION

For the reasons stated herein, the Tribe's motion for temporary restraining order and preliminary injunction should be granted pending resolution of the merits of its claims.

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Respectfully submitted,

FLANDREAU SANTEE SIOUX TRIBE

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