

**UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF SOUTH DAKOTA**

FLANDREAU SANTEE SIOUX TRIBE, a federally
recognized Indian tribe,
PO Box 283
Flandreau, South Dakota, 57028

Plaintiff,

v.

UNITED STATES DEPARTMENT OF
AGRICULTURE,
1400 Independence Ave, S.W.
Washington, DC 20250

HON. SONNY PERDUE, in his official capacity,
SECRETARY OF AGRICULTURE
1400 Independence Ave, S.W.
Washington, DC 20250

Defendants.

Civil Action No.

**VERIFIED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF AND
EMERGENCY PETITION FOR WRIT OF MANDAMUS**

Plaintiff the Flandreau Santee Sioux Tribe (“Tribe”) brings this complaint seeking declaratory and injunctive relief.

INTRODUCTION

1. This is an action against the United States Department of Agriculture (“USDA”) and defendant Sonny Perdue, Secretary of Agriculture, in his official capacity (“Secretary”), seeking review of USDA’s unlawful extension of its regulatory reach beyond its limited statutory authority and its disregard of its congressionally mandated duties.

2. The Agriculture Improvement Act of 2018, Pub. L. 115-334, December 20, 2018, 132 Stat. 4490 (“2018 Farm Bill”) removed “hemp” from the Controlled Substances Act, 21 U.S.C.

§ 801 *et seq.* (“CSA”) and amended the Agricultural Marketing Act, 7 U.S.C. §§1639o-1639s (2018) (“AMA”) to provide for the production of hemp.

3. The AMA allows states and tribes to opt for primary regulatory jurisdiction over the production of hemp in their territory under AMA section 297B, 7 U.S.C. §1639p. Alternatively, it allows for states and tribes to opt for Secretarial jurisdiction over hemp production in their territory under AMA section 297C, 7 U.S.C. §1639q.

4. Tribes and states that opt for primary regulatory jurisdiction under section 297B submit a plan to the Secretary (“section 297B plan”). Tribal and state plans “shall only be required to include” seven discrete requirements set by Congress. AMA §297B(a)(2), 7 U.S.C. §1369p(a)(2). The words “shall only be required to include” were intentionally added by Congress to specifically limit the Secretary’s authority to impose additional requirements on states and tribes.

5. In meeting those requirements, the statute only calls for the state or tribe to encompass in their section 297B plan “a practice” or “a procedure” to meet all the seven criteria. AMA §297B(a)(2)(A)(i)-(vi), 7 U.S.C. §1369p(a)(2)(A)(i-vi). “A certification” of adequate resources and personnel is also required. AMA §297B(a)(2)(A)(vii); 7 U.S.C. §1369p(a)(2)(A)(vii).

6. 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.)

7. 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. §1369p(b)(1)(A) (the “Secretary shall . . . approve the State or Tribal plan if the State or Tribal plan complies with subsection (a).”)

8. Likewise, the Secretary is prohibited from disapproving plans that meet the above referenced requirements. AMA §297B(b)(1)(B), 7 U.S.C. §1369p(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).”)

9. 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.”).

10. Thus, 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 has “not later than 60 days after receipt” to approve or disapprove a plan.

11. For tribes and states that “forego developing and submitting” a section 297B plan or for which a section 297B plan is “denied or revoked,” the production of hemp within that state or tribal territory shall be subject to a plan established by the Secretary under section 297C, 7 U.S.C. §1639q. Conf. Rep. at 737-738.

12. 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).

13. Here, 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. The Tribe submitted its section 297B plan to the Secretary on March 8, 2019 to allow time for the Secretary to act within the 60 days mandated by the AMA and before the 2019 growing season started.

14. 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, 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

15. 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

¹ A true and correct copy of the Tribal Plan is attached to this Complaint as Exhibit 1.

² A true and correct copy of the Acknowledgment Letter is attached to this Complaint as Exhibit 2.

³ Prior to enactment of the AMA, the Tribe did not have 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

<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).

16. 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, § 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 upheld in the 2018 Farm Bill).

17. The Secretary’s failure to act on the Tribe’s Plan, or acknowledge that the Tribe can proceed under the authorities of the AMA, is today threatening the Tribe with a loss of jobs, income for irreplaceable tribal services like timely police protection, timely delivery of health care services, burial assistance, timely delivery of food and nutrition for families, and other essential governmental functions.

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 under the 2014 Farm Bill by a tribal member in Indian Country within the exterior boundaries of South Dakota.) It is thus unclear what 2014 Farm Bill authorities the Tribe may “continue” to operate under.

18. The Tribe therefore seeks a writ of mandamus directing the Secretary to approve the Tribe's plan as meeting the mandatory criteria set by statute and that this approval be issued immediately to allow the Tribe to engage in the 2019 growing season.

19. The Tribe also seeks a judicial declaration holding that the Tribe may operate pursuant to the AMA, so long as its hemp production remains in accordance with other Federal laws (including regulations) and not otherwise prohibited by the Tribe, on the basis that (1) hemp production under the Tribe's qualifying Tribal law constitutes hemp production in accordance with federal law, pursuant to section 297B(f), or (2) the Tribe's qualifying section 297B plan must be deemed approved despite the Secretary's inaction, or both.

20. The Tribe also seeks a preliminary and permanent injunction prohibiting the USDA's interference with the Tribe's hemp regulation and production under the AMA.

THE PARTIES

21. The Flandreau Santee Sioux Tribe is an Indian tribe recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians. Indian Entities Recognized and Eligible to Receive Services from the United State Bureau of Indian Affairs, 83 Fed. Reg. 34863 (July 23, 2018). The Tribe is located on the Flandreau Santee Sioux Reservation and is headquartered at 603 West Broad Avenue, Flandreau, South Dakota, 57028.

22. Defendant United States Department of Agriculture is an executive agency within the United States government established to carry out acts of Congress concerning food, agriculture, natural resources, rural development, nutrition, and related issues. The USDA is subject to, and derives its authority to regulate hemp from, the AMA. The USDA is headquartered at 1400 Independence Ave., S.W., Washington, DC 20250.

23. Defendant Sonny Perdue is the Secretary of the USDA, with offices located at 1400 Independence Ave., S.W., Washington, DC 20250. In this capacity, the Secretary has the responsibility to administer the USDA, and carry out and enforce the acts of Congress applicable to the USDA. Secretary Perdue is sued in his official capacity. The defendants are sometimes collectively referred to herein as the “Secretary.”

JURISDICTION AND VENUE

24. This court has jurisdiction over this action pursuant to 28 U.S.C. §§ 1331, 1337, and 1362, because this is a civil action arising under the Constitution and laws of the United States, this is a civil action arising under one or more Acts of Congress regulating commerce, and this is a civil action brought by an Indian tribe with a governing body duly recognized by the Secretary of Interior wherein the matter in controversy arises under the Constitution, laws, and treaties of the United States.

25. This action arises under the Constitution, laws, and treaties of the United States, including, but not necessarily limited to the following: the Indian Commerce Clause, U.S. Const. art. I, § 8, cl. 3; the Administrative Procedure Act, 5 U.S.C. §§ 551-596 and §§ 701-706, and the accompanying regulations, the Declaratory Judgment Act, 28 U.S.C. §§ 2201-2202, the All Writs Act, 16 U.S.C. § 1651, and federal common law.

26. This court also has jurisdiction pursuant to 28 U.S.C. § 1346(a)(2), in that this is a civil action against the United States, not exceeding \$10,000 in amount, founded upon the Constitution, Acts of Congress, including but not necessarily limited to the provisions previously described.

27. This court also has jurisdiction pursuant to 28 U.S.C. § 1361, in that this is a civil action in the nature of mandamus seeking to compel an officer or employee of the United States

or an agency thereof to perform a duty owed to the Plaintiff, which duty arises under the Constitution and laws of the United States, including but not necessarily limited to the provisions previously described.

28. The sovereign immunity of the United States has been waived with respect to the subject matter of this action and the relief requested herein by the APA, 5 U.S.C. § 702.

29. Venue in this action lies in this Court pursuant to 28 U.S.C. § 1391(b)(1), § 1391(b)(2), § 1391(e)(1)(A), and § 1392(e)(1)(B), in that this is a civil action against an officer or employee of the United States or any agency thereof acting in his or her official capacity or under color of legal authority, or an agency of the United States or the United States, and a substantial part of the events or omissions giving rise to the claim occurred within this district, and one or more defendants resides within this district.

GENERAL ALLEGATIONS

I. The Tribe

30. The Flandreau Santee Sioux Tribe is comprised primarily of descendants of the Mdewakanton, Wahpekute and other bands of the Santee, or Dakota, division of the Great Sioux Nation. In 1869, pursuant to and in accordance with the provisions of the Fort Laramie Treaty of 1868, art. VI, 15 Stat. 635, twenty-five Santee Sioux families established a colony of homesteads along the Big Sioux River in the area that would become Flandreau, South Dakota.

31. The colony of Santee Sioux at Flandreau formed a Tribal Council in 1929. After Congress enacted the Indian Reorganization Act of 1934 (the “IRA” or the “Act”), the colony voted in 1935 to accept the Act pursuant to section 18 of the Act, 25 U.S.C. § 5125, and the Flandreau Santee Sioux Tribe organized under a Constitution and Bylaws, ratified by the Tribe and approved by the Secretary of the Interior in 1936 pursuant to section 16 of the Act, 25 U.S.C. §

5123. Later that year, the Secretary of the Interior issued the Tribe a Corporate Charter pursuant to section 17 of the Act, 25 U.S.C. § 5124.

32. The Tribe’s territory is generally known as the Flandreau Indian Reservation, and is comprised of lands held in trust by the United States government on behalf of the Tribe pursuant to and in accordance with the IRA and other applicable federal laws.

33. The Flandreau Indian Reservation includes, among other lands, 559 acres acquired by the United States under the provisions of section 5 of the IRA, 25 U.S.C. § 5108, for the use and benefit of the Tribe, which lands the Secretary of the Interior proclaimed, pursuant to section 7 of the IRA, 25 U.S.C. § 5110, “to be an Indian Reservation, to be known as the Flandreau Indian Reservation, South Dakota[.]” Proclamation, Flandreau Indian Reservation, South Dakota, 1 Fed. Reg. 1226 (Aug. 27, 1936).

34. In accordance with the Tribe’s federally approved Constitution, the Tribe exercises civil regulatory authority over the activities of all persons within the Flandreau Indian Reservation. This includes regulating and taxing commercial activities generally, and the activities provided in the Tribal Plan to monitor and regulate the production of hemp on its Reservation.

II. Hemp Production under the 2018 Farm Bill

A. In General

35. 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).

36. More than 30 nations grow industrial hemp as a commodity product. *Id* at 1. In the United States, most hemp products are grown abroad and imported. *Id*. This is due to the drug enforcement laws in the United States, which, until recently, did not distinguish between industrial hemp and marijuana, which are genetically distinct forms of the plant *Cannabis sativa*. *Id.* at 1-2.

37. In December 2018, Congress passed and the President signed into law the 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. *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 upholds protections to the interstate commerce of hemp and hemp products, 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 [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.

38. The AMA, as amended by the 2018 Farm Bill, addresses “Hemp Production” in States and Tribal territories. *See generally*, 7 U.S.C. 1639o-1639s (2019). States and tribes desiring “primary regulatory authority” over hemp production shall submit a plan to the Secretary pursuant

to the criteria outlined in section 297B of the AMA, 7 U.S.C. §1639p(a)(2) (2019) (“section 297B plan”).

39. A second option is to allow the Secretary to establish a plan for states and tribes for which a section 297B plan is not approved. 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).

40. The 2018 Farm Bill 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).

41. 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.).

B. Section 297B Plan Approval and Disapproval Requirements

42. After a state or a tribe submits a section 297B plan to the Secretary, the AMA requires that the Secretary either approve or disapprove the 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 (2018) (Conf. Rep.) (“Within 60 days of receiving a state or tribal plan, the Secretary must approve or deny the plan”).

43. 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.

44. The Secretary may “disapprove the State or Tribal plan *only if* the State or Tribal Plan does not comply with subsection (a).” AMA §297B(b)(1)(B), 7 U.S.C. §1639p(b)(1)(B) (emphasis supplied). Subsection (a) identifies the submission and minimum content requirements of a tribal or state section 297B plan. AMA §297B(a)(2), 7 U.S.C. §1639p(a)(2). Nothing in section 297B(a) “preempts or limits any law of a Sate or Indian tribe that . . . regulates the production of hemp . . . and . . . is more stringent than [the hemp production subtitle of the AMA].” AMA §297B(a)(3)(A), 7 U.S.C. §1639p(a)(3)(A) (2019).

45. If a plan is not approved, nothing in the AMA prohibits the production of hemp in the State or Indian tribal territory provided such production is either in accordance with the USDA's section 297C plan or with other Federal laws (including regulations) and is not otherwise prohibited by the State or Indian Tribe. AMA §297B(f), 7 U.S.C. §1639p(f).

III. The Tribal Plan

46. On March 8, 2019, the Tribe submitted to the Secretary its section 297B plan to monitor and regulate the production of hemp on its Reservation pursuant to section 297B, 7 U.S.C. §1639p.

47. The Tribal Plan is consistent with (and more stringent than) section 297B(a)(2), 7 U.S.C. §1639p(a)(2) as it contains the following:

- A practice to maintain relevant information regarding land on which hemp is produced in the territory of the Tribe, including a legal description of the land, for a period of not less than 3 calendar years (pursuant to Ch. 8, Title 30 of the Flandreau Santee Sioux Tribe Law and Order Code ("Industrial Hemp Ordinance")).
- A procedure for testing, using post-decarboxylation, delta-9 tetrahydrocannabinol concentration levels of hemp produced in the territory of the Tribe (Chapters 10-11 of the Industrial Hemp Ordinance).
- A procedure for the effective disposal of products that are produced in violation of the AMA (Chapter 12 of the Industrial Hemp Ordinance).
- A procedure to comply with the enforcement procedures under 7 U.S.C. §1639p(e) (Chapter 15 of the Industrial Hemp Ordinance).

- A procedure for conducting annual inspections of, at a minimum, a random sample of hemp producers to verify that hemp is not produced in violation of this subchapter (Chapters 10-11 of the Industrial Hemp Ordinance).⁴
- A procedure for submitting to the Secretary of Agriculture the information described in section 297C (Chapter 8 of the Industrial Hemp Ordinance).
- A certification that the Tribe has the resources and personnel to carry out the practices and procedure described (Tribal Resolution 19-23 Approving the Industrial Hemp Ordinance, Chapters 1, 4, and 9 of Industrial Hemp Ordinance). *See also*, Letter from Anthony Reider, Tribal President, to Sonia Jimenez, Deputy Administrator, USDA Agricultural Marketing Service (May 6, 2019) (on file with the Tribe).

48. While it was finalizing and after it submitted the Tribal Plan, the Tribe participated in several meetings with the USDA to ensure a smooth transition to hemp production on the Tribe's lands.

49. The Tribe participated in a 2018 Farm Bill listening session on March 13, 2019. On that call, the Tribe highlighted and placed onto the record the harms it will face if USDA does not comply with the AMA and timely move the Tribal Plan forward.

50. The Tribe met with USDA on March 19, 2019. During that meeting, the Tribe and USDA discussed the Tribal Plan and the need of the Tribe to move forward pursuant to the AMA under its Tribal Plan.

⁴ The Tribal Plan is more stringent than the AMA as it requires a site inspection of all hemp producers upon the Tribal Hemp Control Officer's receipt of a harvest notification. Industrial Hemp Ordinance, §30-11-13.

51. On May 13, 2019, the Tribe again met with USDA to discuss state and tribal authority under the AMA and the pressing need of the Tribe to implement its plan on its territory. It has subsequently and on multiple occasions communicated with USDA regarding its pressing concerns over USDA's unlawful position and continued failure to act.

IV. USDA Violates the AMA

A. USDA Fails to Act on the Tribal Plan within 60 days of receipt

52. On May 6, 2019, the Tribe received a letter dated April 24, 2019 from the Secretary ("Acknowledgment Letter") stating that "it is [the USDA's] goal to issue regulations in the fall of 2019 to accommodate the 2020 planting season," and that, as "required by law, USDA is committed to completing its review of plans within 60 days once regulations are effective." *See also*, February 27, 2019 Notice to Trade (available at <https://www.ams.usda.gov/content/hemp-production-program>) (same). The AMA, however, requires the Secretary to review section 297B plans within 60 days of receipt. To remove any doubt, Congress instructed that consultation with the Attorney General in carrying out section 297B should not alter the "requirement to approve or deny a plan" within 60 days of receipt. Conf. Rep. at 737. Thus, USDA's interpretation that its consultation with the Attorney General to promulgate regulations (and review the Tribal Plan) extends its 60-day deadline is directly contrary to the plain language of the AMA and the clearly expressed intent of Congress.

53. The Secretary neither approved nor disapproved the Tribal Plan within 60 days of receiving the Tribal Plan.

54. To date, the Secretary has neither approved nor disapproved the Tribal Plan.

55. The stated reason for the Secretary's failure to approve or disapprove the Tribal Plan within 60 days of receipt was the Secretary's desire to issue regulations before making any such decisions on section 297B plans.

56. The Secretary’s interpretation that the AMA requires (or allows) regulations to be finalized and published in the Federal Register prior to the Secretary’s review and decision on a section 297B plan is inconsistent with the AMA and exceeds the limited powers delegated to the Secretary by Congress over hemp production on state or tribal land in accordance with the statute.

57. In requiring tribal or state plans to have “a practice” or “a procedure” under section 297B(a)(2)(A), 7 U.S.C. 1639p(a)(2)(A), in order to implement “primary regulatory authority” under the statute (AMA § 297B(a)(1), 7 U.S.C. §1639p(a)(1)), Congress intended for tribes and states to have the flexibility to develop their own unique plans implementing the statutory requirements that fit each location’s unique growing conditions and intended to limit the Secretary’s review authority to whether the state or tribal plan meets the minimum statutory requirements. *Id. See also* Conf. Rep., at 737 (“The Managers do not intend to limit what states and tribal governments include in their state or tribal plan, as long as it is consistent with this subtitle.”).

58. As a result, federal regulations to guide the Secretary’s review, approval and disapproval of section 297B plans are unnecessary, and cannot justify the Secretary’s delay and refusal to act on such plans within 60 days.

59. Congress did not authorize the Secretary, through inaction extending beyond the 60-day statutory deadline, to preclude hemp production under the AMA in a state or tribal territory when the state or tribe has a valid, qualifying section 297B plan.

B. USDA Purports to Withhold the Authority of the Tribe to Act in Compliance with the AMA Pending Regulations and Plan Approval

60. The Secretary takes the view that until the Secretary’s delayed review of the Tribal Plan is complete and the Tribal Plan is approved by the Secretary, hemp production is not allowed

in the Tribe's territory under the AMA, and that in the meantime, hemp production in the Tribe's territory is allowed only under the 2014 Farm Bill.

61. By purporting to withhold tribal and state authority under the AMA pending the Secretary's promulgation of regulations and plan approval, the Acknowledgment Letter and the Secretary's public guidance contravene the statutory provisions related to plan submission, approval requirements, and hemp production under the AMA and the interstate commerce protections in the 2018 Farm Bill.

62. In the case of a state or tribe which has submitted a valid, qualifying section 297B plan, and the Secretary has not acted on the plan within 60 days as required, the AMA nevertheless allows hemp production in the state or tribal territory, either under state or tribal law regulating hemp production that is more stringent than the hemp production subtitle of the AMA, or under the submitted 297B plan that is deemed approved upon the Secretary's failure to act within his deadline.

63. The AMA recognizes local authority in section 297B(a)(3), 7 U.S.C. §1639p(a)(3), which provides that "nothing in this subsection preempts or limits any law of a State or Indian tribe that . . . regulates the production of hemp . . . and . . . is more stringent than this subchapter."

64. In section 297B(f), the AMA authorizes hemp production under the local authority that section 297B(a)(3) acknowledges. Section 297B(f) provides that a state or tribe is not prohibited from producing hemp if their section 297B plan is not approved, provided such production is in compliance with section 297C or other Federal laws (including regulations) and not otherwise prohibited by the state or tribe. AMA §297B(f), 7 U.S.C. §1639p(f).

65. With the 2018 Farm Bill's amendment to the CSA, nothing in Federal law now prohibits the production of hemp on federal or tribal land. As contemplated by the AMA, the Tribe

has enacted Tribal law which regulates the production of hemp within the Tribe's territory and is more stringent than the hemp production subtitle of the AMA. As such, production of hemp in the Tribe's territory in accordance with such Tribal law is also in accordance with Federal law. Such hemp production is therefore authorized by section 297B(f), 7 U.S.C. §1639p(f).

66. Also, and alternatively, hemp production on the Tribe's territory is authorized under the AMA because the Tribal Plan must be deemed approved. The Tribal Plan satisfies the minimum requirements set forth in section 297B. The Tribal Plan would be approved but for the Secretary's failure to act as mandated by Congress. The AMA does not permit the Secretary to prohibit hemp production within the Tribe's territory in these circumstances. To the contrary, Congress intended and expected that any state or tribe submitting a qualifying plan would be able to have hemp production in accordance with the AMA within its territory within no more than 60 days.

67. Purporting to ameliorate the effects of the Secretary's inaction on the Tribal Plan, the Acknowledgment Letter states that tribes "can continue operating under authorities of the 2014 Farm Bill [for] . . . 12 months after USDA has established [its] plan"

68. The Questions and Answers, Question 7, similarly states as follows: "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."

69. The Secretary's interpretation advanced in the Acknowledgment Letter that tribes can "continue to operate under authorities of the 2014 Farm Bill" is unfounded, as tribes were not granted authority under the 2014 Farm Bill. *See Menominee Indian Tribe of Wisconsin*, 190 F. Supp. 3d at 843.

70. Because the Tribe's section 297B plan was not disapproved or revoked (and because the Secretary's representation that the Tribe can operate under the 2014 Farm Bill does nothing to mitigate the effects of the Secretary's inaction), the Tribe requested on May 10, 2019, that the Secretary issue an acknowledgment that the Tribe may operate in accordance with the AMA pursuant to section 297B(f), 7 U.S.C. §1639p(f). The USDA has not issued any such acknowledgment.

71. The Secretary's withholding of action on the Tribal Plan and purporting to withhold the Tribe's authority violates the AMA, and contradicts Congress's clear intent to require action within 60 days of receipt of the Tribe's section 297B plan. It also violates Congress's intent to delineate and promote tribal hemp production (whether its section 297B plan is approved or not) as separate and apart from continuing USDA jurisdiction under a section 297C plan.

V. The Tribe Has Been Harmed And Will Continue To Be Harmed By The USDA's Failure to Act

72. The Secretary's withholding of action mandated under the AMA and unlawfully interpreting the statute by purporting to withhold the Tribe's authority under the AMA has harmed and will continue to irreparably harm the Tribe. Based on the Tribe's reliance on the plain language of the AMA's hemp production provisions, the Tribe 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. These are properties which, but for the actions and inaction of the Secretary, would today be producing grazing and other agriculture crop income to fund tribal law enforcement, health and food services to its people. The Tribe has expended extremely limited private tribal funds on consultants, due diligence, and other expenses related to hemp regulation and production under the Tribal Plan. It was also led to seek out contracts with potential seed providers, purchasers, and transportation

services, and in so doing, has represented that the actual language of section 297B, 7 U.S.C. §1369p, means what it says and that the Tribe would be lawfully producing hemp in 2019. Thus, the Secretary's arbitrary and illegal actions have damaged the Tribe's business relationships with companies it hopes to (and may in fact need to) do business with in the future. Each of these actions was taken at the expense of the tribe's ability to engage in commercial transactions, and at the expense of its much needed law enforcement, health and other services, because the Tribe genuinely believed that it was making a sound investment which would enhance the monies available for these necessary services in a little over six months.

73. Much of the Tribe's land is held in trust by the United States government or has been diminished through allotment, leaving the Tribe unable to fund its governmental programs through property tax revenue. In addition, the Tribal Casino, which accounts for approximately 40% of tribal governmental revenue, has been under renovation for months. This will result in a 42% budget shortfall in 2020 alone and a decrease in tribal government funding available to finance basic governmental services. Without a significant tax base, combined with the ongoing casino renovations and federal government funding shortfalls, hemp cultivation is necessary to help the Tribe generate the income required to better fund tribal programs and services. Tribal programs that benefit the community living both on and off the Flandreau Santee Sioux Tribal Reservation include health services, law enforcement, social services, Tribal courts, and education.

74. Services and programs operated primarily with Tribal funds include an elderly meals program, a childcare program, streetlight maintenance and replacement (both on and off reservation), burial assistance, food delivery, and a sex offender registry. Tribal funds also support a free community and recreation center, on-going roads maintenance, a fitness center, and information technology services including wireless internet services. All of these services benefit

and are open to the entire community regardless of tribal membership. Tribal funds also support a sizable percentage of the funding going to the tribal court, law enforcement and unsupported prescriptions and family medical and emergency assistance, and provide support to non-tribal local governments.

75. A delay in approval of the Tribal Plan and unlawfully withholding Tribal authority curtails receipt of the Tribal revenue from hemp production at grave cost to Tribal members, putting Tribal members' health, safety, and welfare at risk.

76. The Secretary's position that the Tribe may not now regulate and produce hemp in accordance with the AMA prohibits the Tribe from obtaining financing and engaging partners in its hemp production program.

77. The Secretary's failure to act and its failure to acknowledge the Tribe's hemp production authority under the AMA restricts inherent Tribal regulatory authority within its own territory, contrary to applicable federal law, including section 297B, 7 U.S.C. §1639p. It also violates the federal government's trust responsibility to Tribes and well-established federal policy of promoting tribal self-sufficiency, self-determination, and economic development.

78. The Secretary's denial of the Tribe's authority to operate under the AMA, in violation of section 297B and Congressional intent, while still recognizing non-Indian cultivation authority under the 2014 Farm Bill, singles out tribes and tribal business partners as hemp producers, and prohibits the Tribe and other economically deprived tribes from entering the hemp market during the 2019 growing season. This puts them at a distinct economic disadvantage to the non-Indian growers in approximately 41 states who are today cultivating and preparing to market their hemp products. As a result of the Secretary's interpretation of the AMA and its delay and inaction, state producers under the 2014 Farm Bill are able to access financing, enter production

and market hemp under the AMA, whereas tribal producers are not able to access financing or able to produce or market hemp under the statute. The Secretary thereby denies the Tribe, its Tribal citizens, and its potential partners the equal protection of the laws, in violation of the Equal Protection Clause of the Fifth Amendment

79. The Secretary's failure to act and denial of the Tribe's authority under the AMA violates the Tribe's rights under the First Amendment of the U.S. Constitution by interfering with its right to advertise a legal product. The Tribe's inability to advertise available hemp from the 2019 growing season right now leaves it to volatile market condition in the fall, even if the USDA approves its plan in the next few weeks.

80. Because of the timing of the 2019 growing season, other than review in this Court, no avenue for redress exists for the Tribe to undo the harm that has been done to date and will be done in the future. Unless the Secretary's failure to act and purported withholding of authority under the AMA is reviewed and remedied, the Secretary will continue to assert unauthorized power over the Tribe, will continue to deprive the Tribe of monies to support its police, health care, food and other essential tribal services, and will continue to brand the Tribe's hemp industry as unlawful.

81. The Secretary's unreasonable delay in withholding action on the Tribal Plan past the 60 days required and its attempt to withhold the Tribe's authority under the AMA pending approval of the Tribal Plan violates the plenary authority of Congress to regulate commerce with Indian Tribes. U.S. Const. art. I, § 8, cl. 3. the Secretary here unlawfully seeks to expand the role and powers Congress delegated to the agency under the AMA over the Tribe's authority over hemp production on its territory.

82. In the AMA, Congress intended to allow Indian tribes to exercise primary regulatory authority over hemp production in tribal territory. AMA §297B, 7 U.S.C. §1639p. This upholds unbroken federal common law stretching from the earliest Indian law decisions through today recognizing exclusive tribal jurisdiction in tribal territory. *Compare Worcester v. Georgia*, 31 U.S. 515 (1832) (interpreting the Indian Commerce Clause as supporting the fact that Indian nations are “distinct political communities, having territorial boundaries, within which their authority is exclusive”), *with Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 137 (1982) (upholding the Indian Commerce Clause as “a shield protecting Indian tribes from state and local interference” and recognizing that tribal self-government and territorial management has been “a shared assumption of all three branches of federal government.”)

83. The Secretary’s interpretation that section 297B requires that regulations be finalized and published in the Federal Register and a section 297B plan approved prior to operating in compliance with the AMA violates the 2018 Farm Bill, §10114, and leaves legally cultivated or purchased tribal hemp plants and hemp products subject to interference by agents of state government when those items are moving in interstate commerce to cultivation sites, product manufacturers, and final sale.

FIRST CAUSE OF ACTION

(Violation of the Agricultural Marketing Act)

84. The Tribe incorporates by reference and re-alleges the allegations contained in the preceding paragraphs of this Complaint.

85. The AMA embodies Congress’s careful balancing of issues of local authority, public health and safety, and the substantial economic interests associated with hemp production.

86. For tribes and states opting for primary regulatory authority under section 297B, the AMA closely circumscribes the minimum requirements of section 297B plans and the review, approval, and disapproval authority of the Secretary, and requires the Secretary to exercise that limited authority and act on a section 297B plan not “later than 60 days after receipt.” AMA §297B(b)(1), 7 U.S.C. §1639p(b)(1).

87. The Secretary’s failure to approve or disapprove the Tribal Plan within 60 days of receipt violates the AMA and otherwise exceeds the authority delegated to the Secretary.

SECOND CAUSE OF ACTION

(Violation of the Agricultural Marketing Act)

88. The Tribe incorporates by reference and re-alleges the allegations contained in the preceding paragraphs of this Complaint.

89. The AMA does not preclude hemp production if a section 297B plan is not approved if production accords with section 297C or other Federal laws (including regulations) and is not otherwise prohibited by the state or tribe. AMA §297B(f), 7 U.S.C. §1639p(f).

90. Congress did not delegate to the Secretary the power to deny state or tribal hemp production authority, particularly if the state or tribal section 297B plan is not disapproved (within 60 days) or revoked.

91. Here, the Tribe’s section 297B plan was not disapproved or revoked. The Secretary, however, through the combination of his inaction and erroneous construction of the AMA, purports to deny the Tribe the authority recognized in the AMA to produce hemp in its territory.

92. The Secretary’s attempt to withhold the Tribe’s authority recognized in the AMA is contrary to the AMA and otherwise unlawful.

93. The Court is requested to declare that the Tribe now possesses authority to engage in the production of hemp in its territory pursuant to the AMA.

THIRD CAUSE OF ACTION

(Violation of the Administrative Procedures Act)

94. The Tribe incorporates by reference and re-alleges the allegations contained in the preceding paragraphs of this Complaint.

95. The APA requires a court to “compel agency action unlawfully withheld or unreasonably delayed” 5 U.S.C. §706(1) (2019). It also requires a court to “hold unlawful and set aside agency action, findings, and conclusions found to be arbitrary and capricious, and abuse of discretion, or otherwise not in accordance with the law; contrary to constitutional right, power, privilege, or immunity; in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; [or] without observance of procedure required by law.” *Id.* at §706(2)(A)-(D).

96. The Secretary has unlawfully withheld and unreasonably delayed action and has acted not in accordance with the law, and without observance of procedure required by law in taking no action on the Tribal Plan within 60 days of receipt pursuant to 7 U.S.C. §1639p(b)(1).

97. The Secretary’s decision to hold the Tribal Plan past 60 days after receipt and until regulations are in place is arbitrary and capricious, not in accordance with the law, in excess of the Secretary’s statutory jurisdiction, and short of statutory right. This action or failure to act violates the 60-day deadline set by Congress.

98. The Secretary’s violation of the mandatory deadline is not reasonably justified. The Secretary’s violation of the 60-day deadline does not arise from a shortage of funds or resources in the Department, or from a “first-in, first-out” policy in which the Tribal Plan is behind other plans under the Secretary’s review.

99. Congress set the criteria the Tribe's Plan must meet and restricted the role of the Secretary in approving or disapproving the Tribal Plan. Because Congress left the Secretary with little discretion, if any, in making the decision to approve or reject section 297B plans, and because federal standards already exist for agricultural activities on tribal lands, it is unlawful, unreasonable and contrary to congressional intent for the Secretary to delay such decisions beyond the congressional 60-day deadline in order to develop regulations to guide the Secretary's limited review.

100. Because Congress did not delegate to the Secretary the authority to withhold tribal or state hemp production authority while the Secretary implements the AMA and approves section 297B plans, the Secretary's attempt to withhold the Tribe's authority under the AMA pending regulations and plan approval is unlawful, unreasonable and contrary to congressional intent.

101. Although the 2018 Farm Bill sunsets the 2014 Farm Bill hemp production authorities twelve months after promulgation of the section 297C plan, nothing in the 2018 Farm Bill suggests any basis for the Secretary to delay his review of section 297B plans. To the contrary, the intention of the 2018 Farm Bill was to acknowledge the primary regulatory authority of tribes and states within 60 days after their submission of a plan that meets the statutory criteria, or allow them to operate without approval provided they do so in accordance with either section 297C or other Federal laws – including operating pursuant to Tribal laws regulating hemp production which are more stringent than the hemp production subtitle of the AMA. The Secretary contravenes that intent and deprives tribes of such authority by failing to timely review submitted plans and failing to approve plans that satisfy the statutory criteria (as the Tribal Plan does), and by purporting to withhold the Tribe's hemp production authority under the AMA pending promulgation of regulations and approval of the Tribal Plan.

102. The Secretary acted arbitrarily and capriciously in failing to apply the standards set out by Congress in section 297B(a)(2)(A), 7 U.S.C. §1639p(a)(2)(A), to the Tribal Plan. Congress spelled out specific criteria by which tribal plans must be evaluated, which the Tribe adhered to in drafting its Tribal Plan. The Secretary arbitrarily and capriciously failed to measure the Tribal Plan against the statutory criteria as required by law, a task which requires no agency preparation other than a copy of the Congressionally mandated requirements, a copy of the Tribal Plan, and a check list where the USDA staff can mark included or not included when reporting his or her findings to the Secretary.

103. The Secretary's failure to act on the Tribe's plan, and purporting to withhold the Tribe's authority under the AMA, is causing and will continue to cause irreparable harm to the Tribe as it deprives the Tribe of the ability to adequately fund government functions and enhance the Tribal programs and services necessary for the health, safety and welfare of Tribal citizens, and infringes upon rights guaranteed by the Constitution and federal law, as alleged herein.

104. The Secretary should be ordered to issue a decision on the Tribal Plan as consistent with the AMA, section 297B, 7 U.S.C. §1639p(a)(2)(A).

PRAYER FOR RELIEF

WHEREFORE, and based on the foregoing, Plaintiff respectfully requests that the Court grant the following relief:

- a. Declare that the Secretary's failure to act on the Tribal Plan within 60 days of receipt violates controlling federal law, including the Agricultural Marketing Act and the Administrative Procedure Act;
- b. Declare that the Secretary's withholding of authority of the Tribe under the AMA

pending regulatory promulgation and approval of the Tribal Plan violates controlling federal law, including the Agricultural Marketing Act and the Administrative Procedure Act;

- c. Temporarily and permanently enjoin the Secretary from interfering with the Tribe's primary regulatory authority in its territory by requiring the Secretary to withdraw his statements that such authority is contingent on regulatory promulgation and plan approval;
- d. Enter a writ of mandamus directing the Secretary, within 7 days from the date of the Court's order, to approve the Tribe's plan as meeting the minimum statutory requirements;
- e. Any other relief that the Court deems just and proper.

Respectfully submitted this 23rd day of May, 2019,

By: /s/Seth Pearman

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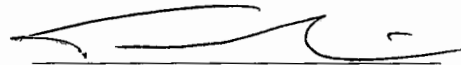
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VERIFICATION

I, Anthony Reider, President of the Flandreau Santee Sioux Tribe Executive Committee, the elected governing body of the plaintiff Flandreau Santee Sioux Tribe, hereby verify and declare under penalty of perjury under the laws of the United States that I have read the foregoing Verified Complaint for Declaratory and Injunctive Relief and know the contents thereof, and that the matters contained in the Verified Complaint are true to my knowledge.

I hereby verify and declare under penalty of perjury that the foregoing is true and correct. Executed on May 21st, 2019, at Flandreau, South Dakota.



Anthony Reider
Tribal President