

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WISCONSIN

GREEN BAY DIVISION

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

This action arises from the Menominee Indian Tribe of Wisconsin's ("the Tribe") attempt to cultivate industrial hemp on the Menominee Indian Reservation under Tribal law and the Agricultural Act of 2014 ("the Farm Bill"). The Tribe's cultivation of industrial hemp on the Menominee Indian Reservation for agricultural and/or academic research purposes in conjunction with College of Menominee Nation complies with the Farm Bill's language that allows the cultivation of industrial hemp.

The Defendants Drug Enforcement Administration ("DEA") and the Department of Justice ("DOJ") disagree with the Tribe as to the legality of the Tribe's cultivation of

industrial hemp under the terms of the Farm Bill. In fact, on October 23, 2015, federal agents and their state counterparts entered the Menominee Indian Reservation – the sovereign lands of the Menominee Indian Tribe of Wisconsin – and destroyed the Tribe’s industrial hemp crop. These actions by the DEA and DOJ highlight the different positions taken by the Tribe and the federal agencies regarding the Tribe’s right to cultivate industrial hemp under the Farm Bill.

The Tribe seeks a declaration from this Court that its cultivation of industrial hemp for agricultural and academic research purposes in conjunction with College of the Menominee Nation is lawful under the Farm Bill’s language that allows for such cultivation. Specifically, the Tribe asks the Court to find: (a) in legalizing the cultivation of industrial hemp on the Menominee Indian Reservation, the Tribe acted as a “State” for purposes of § 7606 of the Farm Bill (7 U.S.C. § 5940) (“§ 7606”); (b) the cannabis laws of the State of Wisconsin have no application to industrial hemp cultivation by the Tribe within the exterior boundaries of the Menominee Indian Reservation and, therefore, cultivation of industrial hemp on the Menominee Indian Reservation is allowed under the laws of the State of Wisconsin for purposes of § 7606; and (c) the College of Menominee Nation is an “institution of higher education” under § 7606.

The Defendants have filed a Rule 12(b) Motion to Dismiss alleging several procedural defenses and arguing the legality of the Tribe’s cultivation of industrial hemp on the merits. The Tribe now responds in opposition to this Rule 12(b) Motion, and, because the declaratory judgments the Tribe seeks (and Defendants’ opposition to

them) present pure questions of law based on an undisputed set of facts, the Tribe cross-moves for summary judgment and requests that the Court take up at this time the legal issues on which this case turns.

## Statement of Facts

### The Agricultural Act of 2014

1. The Agricultural Act of 2014 contains in § 7606 a provision entitled “Legitimacy of Industrial Hemp Research.” Pub. L. No. 113-79, § 7606, 128 Stat. 649, 912-13 (2014) (Statement of Proposed Material Facts (“SPMF”) ¶ 1.)

2. The Farm Bill defines industrial hemp as “the plant *Cannabis sativa L.* and any part of such plant, whether growing or not, with a delta-9 tetrahydrocannabinol concentration of not more than 0.3 percent on a dry weight basis.” Agricultural Act of 2014, H.R. 2642; Pub. L. 113-79 (2014). (SPMF ¶ 2.)

3. Ultimately enacted as 7 U.S.C. § 5940 and signed into law on February 7, 2014, this section of the Farm Bill legalizes industrial hemp growth or cultivation under certain circumstances. 7 U.S.C. § 5940. (SPMF ¶ 3.)

4. Specifically, § 7606 provides:

Notwithstanding the Controlled Substances Act (21 U.S.C. 801 et seq.) . . . or any other Federal law, an institution of higher education (as defined in section 101 of the Higher Education Act of 1965 (20 U.S.C. 1001)) or a State department of agriculture may grow or cultivate industrial hemp if—

(1) the industrial hemp is grown or cultivated for purposes of research conducted under an agricultural pilot program or other agricultural or academic research; and

(2) the growing or cultivating of industrial hemp is allowed under the laws of the State in which such institution of higher education or State department of agriculture is located and such research occurs.

*Id.* (SPMF ¶ 4.)

5. Section 7606 does not define “State,” but the full text of the legislation in which it was included does, defining “State” as “(A) a State; (B) the District of Columbia; (C) the Commonwealth of Puerto Rico; and (D) any other territory or possession of the United States.” 7 U.S.C. § 9011 (20) (2015). (SPMF ¶ 5.)

6. Other agricultural provisions of the U.S. Code also define “State” to include “any other territory or possession of the United States.” *See* 7 U.S.C. § 2132(d) (2014); *id.* § 7202(14); *id.* § 8751(8). (SPMF ¶ 6.)

7. Further, § 7606 applies to all “institutions of higher education,” as defined by the Higher Education Act of 1965. *Id.* at § 7607(a). (SPMF ¶ 7.)

### **History of the Menominee Indian Tribe of Wisconsin**

8. The Menominee Indian Tribe of Wisconsin is a federally recognized Indian Tribe. (Delabreau Aff. ¶ 4.) (SPMF ¶ 8.)

9. The Tribe was granted a reservation in Wisconsin by the Treaty of Wolf River in 1854. 10 Stat. 1064 (1854). In this treaty the Menominee retroceded certain lands they had acquired under an earlier treaty in 1849. 9 Stat. 952 (1849). The United States granted to the tribe a tract of land along the Wolf River “for a home, to be held as Indian lands are held.” *Id.* at 1065. (Delabreau Aff. ¶ 5.) (SPMF ¶ 9.)

10. In August 1953, the United States Congress enacted Public Law 280, 67 Stat. 588 (1953), which, as amended, became present 18 U.S.C. § 1162 (1976). Public Law 280 gave certain states, including Wisconsin, jurisdiction over crimes committed by or against Indians in Indian country within each state. This law, however, excluded the Menominee Indian Reservation from the grant of jurisdiction to Wisconsin. (Delabreau Aff. ¶ 6.) (SPMF ¶ 10.)

11. On June 17, 1954, Congress enacted the Menominee Termination Act, Pub. L. No. 399, 68 Stat. 250 (1954). Codified at 25 U.S.C. §§ 891-902 (repealed). The purpose of the Termination Act was “to provide for orderly termination of Federal supervision over the property and members of the Menominee Indian Tribe of Wisconsin.” 68 Stat. at 250. (Delabreau Aff. ¶ 7.) (SPMF ¶ 11.)

12. Additionally, on August 24, 1954, Congress amended 18 U.S.C. § 1162 to strike the Menominee exception, thereby subjecting the Menominee Indian Reservation to the state’s criminal jurisdiction as provided by 18 U.S.C. § 1162(a). As a result of these legislative and executive actions, the Tribe became subject to the state’s criminal and civil jurisdiction, and the area known as the Menominee Indian Reservation became Menominee County, Wisconsin’s 72nd County. (Delabreau Aff. ¶ 8.) (SPMF ¶ 12.)

13. On December 22, 1973, Congress repealed the Termination Act by enacting the Menominee Restoration Act, Pub. L. No. 93-197, 87 Stat. 770 (1973). This legislation restored federal recognition status for the Tribe and returned tribal property to federal trusteeship. (Delabreau Aff. ¶ 9.) (SPMF ¶ 13.)

14. Effective March 1, 1976, the State of Wisconsin retroceded state jurisdiction over the Menominee Indian Reservation by executive proclamation. Today, the boundaries of Menominee County are generally coterminous with the boundaries of the present day Menominee Indian Reservation. (Delabreau Aff. ¶10.) (SPMF ¶ 14.)

15. Because the Tribe is not subject to Public Law 280, the Menominee Indian Reservation is not subject to the jurisdiction or laws of the state of Wisconsin, including those that prohibit cannabis. (Delabreau Aff. ¶11.) (SPMF ¶ 15.)

### **The Tribe's Legalization of Industrial Hemp**

16. The 1973 Menominee Restoration Act provided for the election of a Menominee Restoration Committee, which was tasked with the responsibility of drafting the Menominee Tribal Constitution for adoption by tribal membership and approval by the United States of America. The Constitution and Bylaws of the Menominee Indian Tribe of Wisconsin was ratified on November 12, 1977. (Delabreau Aff. ¶ 12.) (SPMF ¶ 16.)

17. The Constitution and Bylaws of the Menominee Indian Tribe of Wisconsin give the Tribe the power to act through its duly elected governing body, the Menominee Tribal Legislature, and gives the Menominee Tribal Legislature the authority to make and enforce laws and govern itself under the laws and customs of the Tribe. (Delabreau Aff. ¶ 13.) (SPMF ¶ 17.)

18. Menominee County is the poorest county in Wisconsin and the lowest-ranked county in Wisconsin in regard to health outcomes. (Delabreau Aff. ¶ 14.) (SPMF

¶ 18.)

19. The United States Department of the Interior has recognized that the Tribe has unmet needs that include underfunded tribal government functions and programs, healthcare, community safety, and economic development. (Delabreau Aff. ¶ 15.) (SPMF ¶ 19.)

20. The Tribe is constantly seeking means of economic development to help pull its community out of poverty and provide needed health, education, and welfare services to its members. (Delabreau Aff. ¶ 16.) (SPMF ¶ 20.)

21. When the DOJ issued the Cole and Wilkinson Memoranda, the Tribe—aware of the successful history of hemp growth in Wisconsin—determined that the cultivation of hemp could be a viable economic development opportunity worthy of research by the College. Further the Tribe determined that because industrial hemp contains THC levels below 0.3 percent and has no psychoactive effect, cultivation of industrial hemp would be inherently in compliance with the Cole and Wilkinson Memoranda guidelines. (Delabreau Aff. ¶ 17.) (SPMF ¶ 21.)

22. Thus, in early 2015, the Tribal Legislature passed Tribal Ordinance 15-06, creating Chapter 307 that legalized the growing of low THC non-psychoactive industrial hemp by Tribal licensees on the Menominee Reservation. The chairman of the Tribe signed the Ordinance into law in May 2015, and the Tribe provided notice of this change in Tribal law to the United States Attorney's Office for the Eastern District of Wisconsin with the intent of complying with the relevant provisions of the Farm Bill.

(Delabreau Aff. ¶ 18.) (SPMF ¶ 22.)

23. The ordinance also amended Chapter 306 on Drugs and Drug Paraphernalia to clarify that “possession, growing, extraction, formulation, testing, manufacture and sale of Industrial Hemp” is not a violation of the Chapter and that industrial hemp is “excluded from the categories of controlled substances.” § 306-4.

(Delabreau Aff. ¶ 19.) (SPMF ¶ 23.)

24. Chapter 307 defines industrial hemp as “all parts and varieties of the genera *Cannabis*, cultivated or possessed by a grower, whether growing or not, that contain a tetrahydrocannabinol concentration of 0.3 percent or less by weight.” § 307-4(D). (Delabreau Aff. ¶ 20.) (SPMF ¶ 24.)

25. The ordinance creates a licensing procedure, and all license applicants must demonstrate that they are “capable of growing industrial hemp and ha[ve] adopted methods to ensure its safe production.” § 307-6 (A)–(C). (Delabreau Aff. ¶21.) (SPMF ¶ 25.)

26. Only seeds likely to possess no more than 0.3 percent THC are approved for use under the ordinance, and licensed industrial hemp growers must submit to annual plant testing to ensure the plants contain 0.3 percent THC or less. §§ 307-8, 307-9(A). (Delabreau Aff. ¶22.) (SPMF ¶ 26.)

27. No industrial hemp products can be sold until the Menominee Tribal Department of Licenses and Permits approves them for sale, and all industrial hemp products must be tested for quality and include the percentage of THC the product

contains. § 307-9(D). (Delabreau Aff. ¶ 23.) (SPMF ¶ 27.)

28. It is a violation of the ordinance to sell any industrial hemp plant or product that will be produced for human consumption or absorption to any person under the age of eighteen. § 307-12(B). (Delabreau Aff. ¶ 24.) (SPMF ¶ 28.)

29. The ordinance's provisions are enforced by the Menominee Tribal Department of Licenses and Permits. § 307-5. (Delabreau Aff. ¶ 25.) (SPMF ¶ 29.)

### **The History of the College of Menominee Nation**

30. In September 1992, the Menominee Tribal Legislature began efforts to establish a college for the Menominee people and their neighbors pursuant to an initiative proposed by tribal membership. In March 1993, the Menominee Tribal Legislature adopted an ordinance, which officially chartered the College of Menominee Nation (the "College"), making it the second tribal college in Wisconsin. (Delabreau Aff. ¶ 26.) (SPMF ¶ 30.)

31. Congress authorized the College in 1996, as one of only three land grant colleges in Wisconsin, and it is also authorized by the State of Wisconsin to provide higher education. The College is accredited by the Higher Learning Commission, and the associate degree nursing program offered at the College is accredited by the Accreditation Commission for Education in Nursing (ACEN). (Delabreau Aff. ¶ 27.) (SPMF ¶ 31.)

32. The purpose of the College is "to provide quality higher education to the Menominee people such that each student enrolled at the College may pursue his or her

individual goals and may advance the interests of the Menominee Nation on its reservation and in the surrounding community.” CODE OF THE MENOMINEE INDIAN TRIBE OF WISCONSIN ch. 637, “College of Menominee Nation,” §637-2. (Delabreau Aff. ¶ 28.) (SPMF ¶ 32.)

33. Located on the Menominee Indian Reservation, the College’s main campus in Keshena, Wisconsin, provides a small-school environment in a rural reservation setting. With a satellite campus in Green Bay, the private, nonprofit institution serves tribal members residing on and off the reservation alike, as well as a significant number of Native students from other tribes and non-Native people. (Delabreau Aff. ¶ 29.) (SPMF ¶ 33.)

34. The College requires either a GED or a high school diploma to enroll, with the exception of high school students enrolled on a dual-enrollment basis, and it offers programs for four-year bachelor’s degrees, two-year associate’s degrees in arts, science, and applied science, certificate, and diploma programs in more than sixteen areas of study. (Delabreau Aff. ¶ 30.) (SPMF ¶ 34.)

### **The Tribe’s 2015 Industrial Hemp Program**

35. Following the enactment of the Farm Bill’s industrial hemp research provisions, the Tribe was interested in researching the potential economic benefits of industrial hemp cultivation, and the College was interested in agricultural and academic research regarding industrial hemp cultivation. (Delabreau Aff. ¶ 31.) (SPMF ¶ 35.)

36. Accordingly, the Tribe entered into an agreement with the College to cultivate industrial hemp for research purposes on the Menominee Indian Reservation and codified the terms of their agreement in a Memorandum of Agreement, signed by the Tribe's Chairman and the College's President. (Delabreau Aff. ¶ 32.) (SPMF ¶ 36.)

37. The Menominee Indian Tribe of Wisconsin issued an industrial hemp license under the Tribe's industrial hemp ordinance. (Delabreau Aff. ¶ 33.) (SPMF ¶ 37.)

38. The Tribe planted an industrial hemp crop on Tribal lands in 2015 for research purposes. (Delabreau Aff. ¶34.) (SPMF ¶ 38.)

39. The Tribe cooperated with the DEA and DOJ to secure testing of the industrial hemp to ensure that THC levels did not exceed 0.3 percent, including agreeing to destroy any industrial hemp that tested above this limit as such hemp would be in violation of the Tribal law. (Delabreau Aff. ¶ 36.) (SPMF ¶ 39.)

### **The Raid by Federal Agents**

40. On Friday, October 23, 2015, federal agents entered the sovereign land of the Menominee Indian Reservation and seized and destroyed the Tribe's industrial hemp crop. (Delabreau Aff. ¶ 37.) (SPMF ¶ 40.)

### **Argument**

#### **I. The Tribe's Declaratory Judgment Act claim is appropriate because the Court has federal question jurisdiction over the Tribe's claims.**

Defendants allege that the Tribe has not asserted a private right of action pursuant to the Declaratory Judgment Act ("DJA") such that the Court has jurisdiction

to hear this matter. Defendants' argument ignores the fact that the Tribe's claims for declaratory judgment present a federal question under 28 U.S.C. § 1331.

The DJA created "a new, noncoercive remedy (a declaratory judgment) in cases . . . in which a party who could sue for coercive relief has not yet done so." *B. Braun Med., Inc. v. Abbott Labs.*, 124 F.3d 1419, 1428 (Fed. Cir. 1997). To ensure that the Act does not extend the courts' jurisdiction, the Court must decide "whether a 'coercive action' brought by the declaratory judgment defendant . . . would necessarily present a federal question." *Medtronic, Inc. v. Mirowski Family Ventures, LLC*, 134 S. Ct. 843, 848 (2014) (quoting *Franchise Tax Bd. of Cal. v. Construction Laborers Vacation Trust for S. Cal.*, 463 U.S. 1, 19 (1983) (emphasis added)). If the declaratory-judgment defendant could have brought a coercive action that would have presented a federal question to enforce its rights, then the court has original jurisdiction over the declaratory-judgment suit.

Here, Defendants have a coercive action necessarily dependent on a federal question: they could sue for an injunction, preventing the Tribe from planting a hemp crop again, alleging that the crop would violate the federal Controlled Substances Act, 21 U.S.C. § 801 *et seq.* Indeed, their enforcement action that prompted the Tribe's lawsuit was premised on powers granted by the Controlled Substances Act. *See id.* § 871. The Department of Justice has, in the past, brought *exactly* this sort of a coercive, injunctive suit under the Controlled Substances Act in federal court to enjoin American Indian hemp farmers from planting industrial hemp. *See United States v. White Plume*, 447 F.3d 1067 (8th Cir. 2006) (affirming an injunction granted to the United States in federal court

against Oglala Sioux tribal member Alex White Plume enjoining him from planting industrial hemp.)

Defendants' argument that the Tribe requires a Controlled Substances Act- or Legitimacy of Industrial Hemp Research Act-based "private right of action" is misguided. Courts consider whether a private right of action exists under a federal statute if they have no other basis for jurisdiction. *Jones v. Hobbs*, 745 F. Supp. 2d 866, 892 (E.D. Ark. 2010) (citing *Schilling v. Rogers*, 336 U.S. 666, 677 (1960)). Because the Tribe's declaratory-judgment action here invokes federal question jurisdiction under 28 U.S.C. § 1331, no additional statutory basis for jurisdiction is necessary.

In *Jones*, the declaratory-judgment plaintiffs sought to challenge a state agency, claiming it was violating federal statutory law. *Jones*, 745 F. Supp. 2d at 888. The court noted that "when Congress has intended that there be no federal private right of action for violations of a federal standard an action under state law invoking the federal standard does not present a federal question so as to create jurisdiction under 28 U.S.C. 1331." *Id.* at 892. Defendants' use of *Jones* in the current context is improper because the Tribe's federal question jurisdiction is not premised on any state action. The Tribe has federal-question jurisdiction making a declaratory judgment an appropriate remedy because the potential coercive, injunctive cause of action possessed by Defendants necessarily presents a federal question. The Court should find that it has jurisdiction and that the Tribe's DJA claim is appropriate in this forum.<sup>1</sup>

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<sup>1</sup> This Court also has original jurisdiction over this matter pursuant to 28 U.S.C. § 1362, which grants to district courts "original jurisdiction of all civil actions, brought by any Indian tribe or band with a

## II. The Tribe adequately pleaded a live case or controversy.

Defendants argue that the Tribe has not pleaded a live case or controversy that satisfies the Article III standing requirement. Specifically, Defendants argue that the Complaint “contains no plausible allegation that Defendants will take enforcement action against Plaintiff in the immediate future.” (Defs.’ Br. 10, ECF No. 16) This argument ignores the fact that (1) the Tribe has passed a Tribal Ordinance allowing the farming of industrial hemp under the Farm Bill, (Delabreau Affidavit ¶¶ 18-25), (2) the Tribe, in cooperation with the College of Menominee Nation, planted an industrial hemp crop in 2015, (*id.* ¶ 34), (3) Defendants raided and destroyed the Tribes’ 2015 industrial hemp crop on October 23, 2015, (*id.* ¶ 37.), and (4) Defendants have now argued in their briefing that the Tribe cannot legally grow industrial hemp under the Farm Bill, (Defs.’ Br. 12-16, ECF No. 16). Given this undisputed factual background, additional enforcement actions by Defendants are assured if the Tribe continues to pursue its industrial hemp research projects.

Because of the unique nature of issues like those facing the Tribe, courts have made an exception to the live case or controversy requirement where “in the case of government action, controversies may recur but, because of their nature may continue to defeat review.” *Alliance to End Repression v. City of Chicago*, Nos. 74-C-3268, 75-C-3295, 1991 U.S. Dist. LEXIS 14616, at \*16 (N.D. Ill. Oct. 2, 1991). That is exactly the case here.

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governing body duly recognized by the Secretary of the Interior, wherein the matter in controversy arises under the Constitution, laws, or treaties of the United States.” The Tribe did not plead this basis for jurisdiction in its Complaint because of the sufficiency of 28 U.S.C. § 1331, but it is prepared to amend its Complaint to assert this jurisdictional basis if necessary. See *Oneida Tribe of Indians v. Wisconsin*, 951 F.2d 757, 759-60 (7th Cir. 1991).

As long as the Tribe is growing industrial hemp, Defendants may continue to destroy the crop or pursue other enforcement actions against the Tribe that, because of the seasonal nature of agriculture, may evade review.

The burden is on Defendants to show that these actions are not likely to occur again in the future. “[T]o establish mootness based on voluntary cessation of unlawful activity, the [Government] has the burden of showing that there is no likelihood of recurrence.” *Id.* Here, the Tribe contends that Defendants’ destruction of the industrial hemp crop was unlawful because of the Farm Bill provisions allowing for industrial hemp research. The burden is on Defendants to show that there is no likelihood that future crops will be destroyed in the same manner. Defendants have not met this burden. Accordingly, this issue is appropriate for adjudication.

Defendants also base their argument on their assertion that “Plaintiff does not expressly allege that Plaintiff plans to cultivate industrial hemp in the immediate future.” (Defs.’ Br. 10, ECF No. 16.) The Tribe’s amendment to its tribal ordinance legalizing industrial hemp and the agreement between the Tribe and the tribal college regarding the industrial hemp research program, however, make clear the Tribe’s intent to continue with the industrial hemp research program. Additionally the Affidavit of Joan Delabreau, Chairwoman of the Tribe, expressly states that the Tribe desires to plant and cultivate industrial hemp in 2016.<sup>2</sup> (Delabreau Aff. ¶ 38.)

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<sup>2</sup> It is the Tribe’s position that it has met its burden of pleading that it intends to plant industrial hemp in the future. If this Court disagrees, however, the Tribe respectfully requests leave to amend the complaint to that effect.

Defendants rely on *Basic v. Fitzroy Eng'g Ltd.*, No.97-1052, 1997 WL 753336 (Dec. 4, 1997), to support their contention that the Tribe has not adequately pleaded the existence of a case or controversy. That case is inapposite. In *Basic*, the plaintiff asked the court to rule that a potential future judgment by a foreign court would not be enforceable against him. *Id.* The Tribe is not asking this Court to guess what claims the DOJ or DEA may bring against the Tribe or what the outcome of that hypothetical case might be. Rather, the Tribe is asking the Court – mindful of the enforcement actions the DEA and DOJ have *already* taken against the Tribe – to determine whether these actions are legally justified when the Tribe re-plants its hemp crop in the future

Standing to bring a declaratory-judgment action is not as narrow as Defendants suggest. “Declaratory judgments are appropriate when the judgment will serve a useful purpose in clarifying and settling the legal relations in issue and when it will terminate and afford relief from the uncertainty, insecurity, and controversy giving rise to the proceeding.” *Forest City Residential Mgmt. v. Beasley*, 71 F. Supp. 3d 715, 725 (E.D. Mich. 2014) (citing *Grand Trunk Western R. Co. v. Cons. Rail Corp.*, 746 F.2d 323, 326 (6th Cir. 1984)) (internal quotation marks omitted). Rather than requiring a plaintiff to wait until she is sued or other adverse action is taken against her, the Declaratory Judgment Act allows parties to “forestall the accrual of potential damages by suing for a declaratory judgment, once the adverse positions have crystallized and the conflict of interests is real and immediate.” *Societe de Conditionnement en Aluminium v. Hunter Engineering Co.*, 655 F.2d 938, 943 (9th Cir. 1981) (citing *Japan Gas Lighter Assoc. v. Ronson Corp.*, 257 F. Supp. 219, 237 (D.N.J. 1966)).

The conflict between Defendants and the Tribe is real and immediate – as evidenced both by Defendants’ previous enforcement actions and by the position Defendants take in their briefing on the instant motion. A declaratory judgment would clarify and settle the legal rights of the Tribe and resolve any uncertainty as to the Tribe’s fate when it plants an industrial hemp crop in 2016. This issue is appropriate for adjudication, and a declaratory judgment would resolve the controversy.

Finally, Defendants imply in their brief that there is no case or controversy because Defendants do not necessarily disagree that the Tribe is eligible to cultivate industrial hemp for research purposes under the Farm Bill. Defendants state that the Tribe has failed to allege that Defendants’ actions in destroying the Tribe’s hemp crop “resulted from a contrary interpretation of the Industrial Hemp Research Statute.” (Defs.’ Br. 10, ECF No. 16.) In a later section of the same document, however, Defendants contend that the Tribe is, in fact, *not* permitted to cultivate industrial hemp under the Farm Bill. (*Id.* at 12-16.) This inconsistent, hide-the-ball argument is perplexing. Suffice it to say that Defendants cannot have this argument both ways.

### **III. Declaratory Judgment is appropriate because it would settle the controversy.**

Defendants further argue that this Court should decline to resolve the controversy “for prudential reasons.” (Defs.’ Br. 11, ECF No. 16.) Specifically, Defendants argue that the Tribe “fails to establish that any future action by federal agents would result from a particular interpretation of the Industrial Hemp Research Statute” and that there is no basis to conclude that “resolution of the interpretative issues identified in the Complaint would settle any controversy between Plaintiff and

the Government regarding Plaintiff's cultivation of cannabis plants." (*Id.*) As described above, the issue in this case is one that is capable of repetition yet evading review. Defendants are likely to destroy the Tribe's hemp crop in future planting seasons. Without the protection of a declaratory judgment, the Tribe will have no avenue to challenge Defendants' enforcement actions. For these reasons, a declaratory judgment would settle the controversy by clarifying the relative rights of the parties and addressing potential future repetition of Defendants' actions.

**IV. The Tribe has stated viable Declaratory Judgment Act claims and is entitled to summary judgment on the declarations it seeks.**

**A. Legal Standard**

A motion to dismiss under Rule 12(b)(6) challenges the sufficiency of the complaint to state a claim upon which relief may be granted. *See* Fed. R. Civ. P. 12(b)(6). Rule 12(b)(6) requires a plaintiff to clear two hurdles. *EEOC v. Concentra Health Servs., Inc.*, 496 F.3d 773, 776 (7th Cir. 2007). First, the complaint must describe the claim in sufficient detail to give a defendant fair notice of the claim and the grounds on which it rests. *Id.* Although specific facts are not necessary, "at some point the factual detail in a complaint may be so sketchy that the complaint does not provide the type of notice of the claim to which the defendant is entitled under [Fed. R. Civ. P.] 8." *Airborne Beepers & Video, Inc. v. AT&T Mobility LLC*, 499 F.3d 663, 667 (7th Cir. 2007). Second, the complaint must set forth a claim that is plausible on its face. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007); *St. John's United Church of Christ v. City of Chicago*, 502 F.3d 616, 625 (7th Cir. 2007). The "allegations must plausibly suggest that the plaintiff has a right to relief,

raising that possibility above a ‘speculative level’; if they do not, the plaintiff pleads itself out of court.” *EEOC*, 496 F.3d at 776 (citing *Twombly*, 550 U.S. at 555–56, 569 n.14). When considering a Rule 12(b)(6) motion, a court must construe the complaint in the light most favorable to the plaintiff, accepting as true all well-pleaded facts and drawing all possible inferences in the plaintiff’s favor. *Tamayo v. Blagojevich*, 526 F.3d 1074, 1081 (7th Cir. 2008).

The Tribe has satisfied its burden to both give defendants fair notice of the claims at issue and grounds underlying them and to state plausible claims. Accordingly, the Court should deny defendants’ motion to dismiss and allow the Tribe’s claims to proceed. Further, because the declaratory judgments the Tribe seeks (and Defendants’ opposition to them) present pure questions of law (interpretation of specific language in the Farm Bill) based on an undisputed set of facts (passage of the Tribe’s industrial hemp ordinance), the Tribe cross-moves for summary judgment and requests that the Court take up the legal issues on which this case turns now so that the Tribe may, if it prevails in this litigation, sow a new hemp crop during the 2016 spring planting season.

Summary judgment is proper “if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56; see *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986); *McNeal v. Macht*, 763 F. Supp. 1458, 1460-61 (E.D. Wis. 1991). “Material facts” are those under the applicable substantive law that “might affect the outcome of the suit.” See *Anderson*, 477 U.S. at 248. A dispute over “material fact” is “genuine” if “the evidence is such that a reasonable jury could return

a verdict for the nonmoving party.” *Id.* In deciding a motion for summary judgment, a court views the facts in the light most favorable to the non-moving party. *Crull v. Sunderman*, 384 F.3d 453, 460 (7th Cir. 2004).

**B. The Tribe acted within the Farm Bill in legalizing the cultivation of industrial hemp on the Menominee Indian Reservation.**

Defendants argue that the Controlled Substances Act exception set forth in § 7606 of the Farm Bill for institutions of higher education or State departments of agriculture to grow industrial hemp does not apply to the Tribe. Defendants maintain that §7606’s reference to “State” cannot include the Tribe because such an interpretation is contrary to the statute’s plain language. While true that “when the plain language of a statute is clear, courts need look no farther than those words in interpreting the statute,” *Estate of Cowser v. Comm’r of Internal Revenue*, 736 F.2d 1168, (7th Cir. 1984), § 7606 is not the model of clarity Defendants suggest. Section 7606’s first substantive reference is not to a “State” but rather to an “institution of higher education.” By including such institutions, § 7606 includes tribal colleges and universities, which in turn creates ambiguity as to the meaning of the term “State.”

As explained in the Tribe’s complaint, the College of the Menominee Nation qualifies as an “institution of higher education” pursuant to the Higher Education Act of 1965 (“HEA”). 20 U.S.C. § 1059c(b)(4). HEA § 316, codified at 20 U.S.C. § 1059c, is entitled “American Indian Tribally Controlled Colleges and Universities” and modifies the definition of “institution of higher education” as applicable to tribal colleges and universities by removing the requirement that the institution “is legally authorized

within such State to provide a program of education beyond secondary education.” *See id.* (referencing 20 U.S.C. § 1001(a)(2)). Thus tribal colleges and universities may fall within the HEA’s “institution of higher education” if satisfying the other requirements. The College of Menominee Nation does so and is properly categorized as an institution of higher education. Tellingly, Defendants do not dispute that the College of Menominee Nation is “institution of higher education” pursuant to the HEA.<sup>3</sup>

Under § 7606, therefore, the College of Menominee Nation “may grow or cultivate industrial hemp” if (1) doing so for agricultural or academic research and (2) that growth or cultivation is “allowed under the laws of the State in which such institution of higher education . . . is located and such research occurs.” § 7606(a)(1)-(2). Defendants would argue that “State” here refers to Wisconsin, which has not legalized industrial hemp growth. That reading is inconsistent with the HEA, which enables a tribal college to qualify as an institution of higher education while exempting it from being “legally authorized” by one of the 50 states. 20 U.S.C. § 1059(c). The more coherent reading of § 7606, in light of the HEA, is that a tribal college or university may grow or cultivate industrial hemp if doing so is allowed under the laws of the tribal nation in which it is located. Here, Tribal Ordinance 15-06 legalized the growing of low THC non-psychoactive industrial hemp, (Compl. ¶ 56; Delabreau Aff. ¶¶ 18-20), giving the College of Menominee Nation the legal authorization necessary to comply with § 7606.

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<sup>3</sup> Therefore, the Tribe seeks summary judgment as to Count III as well.

Such interpretation of this industrial hemp provision in the Farm Bill is consistent with the wider context in which the Farm Bill defines “State” and with legal precedent. Though Defendants dismiss the broader definition of “State” contained within the Farm Bill, courts have held that “[S]tatutory language . . . ‘cannot be construed in a vacuum. It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.’” *Roberts v. Sea-Land Servs.*, 132 S. Ct 1350, 1357 (quoting *Davis v. Mich. Dep’t of Treasury*, 489 U.S. 803, 809 (1989)). Here, Defendants admit that “State” is not defined within the Controlled Substances Act or within § 7606. And they offer no precedent restricting the Court from looking to the wider Farm Bill to assess the meaning of the term. It is proper, therefore, to turn to the broader statutory context of the Farm Bill to interpret § 7606, including the multiple definitions in the Farm Bill of “State” as encompassing “any other territory or possession of the United States.” *See* 7 U.S.C. § 2132(d); *id.* § 7202(14); *id.* § 8751(8).

Courts routinely include Indian tribes within this broader reading of “State” and have done so for generations. In 1872, the Supreme Court in *Holden v. Joy* recognized that while not States “within the meaning of the second section of the third article of the Constitution . . . in a certain domestic sense, and for certain municipal purposes, [Indian tribes] are States, and have been uniformly so treated since the settlement of our country and throughout its history.” 84 U.S. 211, 242 (1872). Not long after, the Eighth Circuit analogized tribes to states when considering issues of sovereignty and jurisdiction. *Raymond v. Raymond*, 83 F. 721, 724 (8th Cir. 1897).

Courts have continued this approach in more recent years, reading statutes that only address “States” to include Indian tribes. *See In re Larch*, 872 F.2d 66, 68 (4th Cir. 1989) (determining that the Cherokee tribe is a “state” for purposes of the Parental Kidnapping Protection Act, in part due to “United States territories” being included in the definition of “states”); *see also Martinez v. Superior Court*, 731 P.2d 1244 (Ariz. Ct. App. 1987) (Indian reservations are territories or possessions of the United States within the meaning of Arizona's Uniform Child Custody Jurisdiction Act, A.R.S. §§ 8-401 through 8-424); *Red Lake Band of Chippewa Indians v. Minnesota*, 248 N.W.2d 722 (Minn. 1976) (Red Lake tribe was a state or territory for purposes of a Minnesota motor vehicle statute that was premised on policy to recognize the validity of automobile registration licenses issued by other jurisdictions). Further, Defendants’ primary authority for denying that statutory reference to “States” or “territories” can include tribes – *Ex parte Morgan*, an 1883 Federal district court case from Arkansas – is the minority view, and its position is contrary to the Supreme Court’s decision in *United States ex rel. Mackey v. Coxe*, 59 U.S. (18 How.) 100 (1855) (finding the Cherokee Nation to be a territory for purposes of a federal statute), and its progeny. *See Tracy v. Superior Court*, 810 P.2d 1030, 1039–40 (Ariz. 1991) (collecting cases).

Such an inclusive approach is not the novelty Defendants suggest. Rather, it is consistent with the Supreme Court’s directive in *FPC v. Tuscarora Indian Nation* that “a general statute in terms applying to all persons includes Indians and their property interests.” 362 U.S. 99, 116 (1960). Section 7606, therefore, applies to the Tribe and the College of Menominee Nation, and they should be free to grow and cultivate industrial

hemp for purposes consistent with that law. The Tribe requests that the Court grant summary judgment in its favor and make that finding.

**C. The State of Wisconsin’s cannabis laws have no applicability over the Tribe.**

Defendants are equally preoccupied with form over substance in their objection to Count II, which seeks a declaration that the laws of the State of Wisconsin have no application to the Tribe’s industrial hemp cultivation within the exterior boundaries of the Menominee Reservation. (Compl. ¶ 91.) Instead of acknowledging the undisputed fact that a combination of the Menominee Restoration Act and a 1976 Wisconsin executive retrocession proclamation worked to end state law applicability on or jurisdiction over the actions of the Tribe on the Menominee Reservation, (*see* Compl. ¶¶ 43-48; *Delabreau Aff.* ¶¶ 9-10), Defendants focus on how to read the term “allow.”

Defendants argue that the Tribe tortures the term’s plain meaning by arguing that the State of Wisconsin “allows” the Tribe to cultivate industrial hemp. (*See* Defs.’ Br. 17, ECF No. 16.) As explored more fully below, applying the term “allow” as the Tribe does is more in keeping with general precepts of Indian law than Defendants’ narrow interpretation. Specifically, Defendants read the term for the purpose of limiting the authority and rights of the Menominee Indian Tribe, contrary to their duty to make “federal law bear as lightly on Indian tribal prerogatives as the leeways of statutory interpretation allow.” *Reich v. Great Lakes Indian Fish & Wildlife Comm’n*, 4 F.3d 490, 496 (7th Cir. 1993).

Nevertheless, even accepting Defendants' interpretation of the "plain meaning" of the term, the State of Wisconsin *does allow* the cultivation of industrial hemp on the Menominee Indian Reservation by the Tribe. Defendants argue that "allow" suggests "an intentional decision to permit something to happen, or at least a decision not to exercise one's ability to stop something from happening." (Defs.' Br. 17, ECF No. 16.) This is precisely what the State of Wisconsin did when it retroceded criminal jurisdiction over the Menominee Indian Reservation in 1976. It consciously gave up any right or ability to exercise its ability to stop something from happening. Specifically, the State gave up its right to stop the Tribe from acting contrary to Wisconsin criminal laws on the Menominee Indian Reservation. The Wisconsin Controlled Substances Act, Wis. Stat. § 961.006 *et seq.*, which prohibited the cultivation of Industrial Hemp, was passed in 1971. Therefore, the State was aware in 1976 that by giving up its right to enforce state criminal laws by retroceding jurisdiction, it was giving up its right to prohibit the Tribe from cultivating industrial hemp on the Menominee Indian Reservation.

Indeed, because Wisconsin law does not apply to the Tribe on the Menominee Indian Reservation, Wisconsin's state law prohibition of industrial hemp growth cannot prevent the Tribe from otherwise complying with § 7606. The reading of the law that Defendants favor not only contradicts the inclusion of tribal colleges and universities in the definition of institutions of higher education and the applicability of the Farm Bill's industrial hemp provisions to tribes, as explained above, but it smacks of the paternalism that has for too long defined federal treatment of tribes. Defendants would have § 7606's Controlled Substances Act exemption dependent strictly on the relevant

state law in which the Tribal land was located. (Defs.' Br. 18, ECF No. 16.) That interpretation ignores years of federal Indian law establishing that actions on their own reservations by tribes with a legal history like the Menominee Indian Tribe of Wisconsin are not subject to state law. And worse, it implies that tribal governments are not to be trusted to determine on their own whether industrial hemp growth is permitted within the bounds of their land. This is simply wrong.

Defendants' reference to *Michigan v. Bay Mills Indian Community*, 134 S. Ct. 2024 (2014), and the Indian Gaming Regulatory Act ("IGRA") does not change this analysis. Defendants argue that § 7606 does "exactly what" IGRA did in making "a State's gambling laws applicable 'in Indian country' as federal law." (Defs.' Br. 18, ECF No. 16 (citing *Bay Mills*, 134 S. Ct. at 2033 n.5).) But the laws in question are far from "exactly" the same. While the IGRA specifically provided that "all State laws pertaining to . . . gambling . . . shall apply in Indian country," 18 U.S.C. § 1166, the Legitimacy of Industrial Hemp Research Act contains no such sweeping grant of authority. *See* 7 U.S.C. § 5940. Reading a wholesale allocation of power to Wisconsin over the Tribe into § 7606 despite its lack of any IGRA-like explicit language misreads the law and runs roughshod over traditional notions of tribal sovereignty and hundreds of years of federal Indian law.

Wisconsin law does not apply to the actions of Tribe on the Menominee Indian Reservation, and it should not therefore prevent the Tribe from growing and cultivating industrial hemp pursuant to § 7606. Accordingly, the Tribe requests that the Court grant

summary judgment in its favor as to the declaration it seeks in Count II of its Complaint.

### **Conclusion**

For the foregoing reasons, the Menominee Indian Tribe of Wisconsin requests that the Court deny Defendants' motion to dismiss and grant the Tribe's cross-motion for summary judgment.

February 19, 2016

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