UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

MENOMINEE INDIAN TRIBE OF WISCONSIN,

Plaintiff,

Civil Action No. 1:15-1378-WCG

v.

DRUG ENFORCEMENT ADMINISTRATION and UNITED STATES DEPARTMENT OF JUSTICE,

Defendants.

DEFENDANTS' MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

INTRODUCTION

Plaintiff, an Indian tribe within the State of Wisconsin, asks this Court to issue three declaratory judgments interpreting various aspects of a 2014 statute, 7 U.S.C. § 5940, which allows an "institution of higher education" to grow or cultivate industrial hemp for agricultural or academic research purposes, but only if "the growing or cultivating of industrial hemp is allowed under the laws of the State in which such institution of higher education . . . is located and such research occurs." 7 U.S.C. § 5940(a) ("Industrial Hemp Research Statute" or "the Statute"). The Statute provides a narrow exception to the general prohibitions on cannabis cultivation set forth in the Controlled Substances Act ("CSA"), 21 U.S.C. §§ 801 *et seq*., and Plaintiff asks the Court to weigh in on its eligibility for this exception on a prospective basis.

This Court should decline Plaintiff's invitation and should instead dismiss this action for lack of subject matter jurisdiction and failure to state a claim upon which relief can be granted. The Declaratory Judgment Act ("DJA"), 28 U.S.C. § 2201, is not an available vehicle for Plaintiff's claims. For one thing, the DJA does not provide a private right of action; instead, it merely provides an additional remedy where an independent right of action already exists. Here, Plaintiff has not identified a right of action that would allow it to raise its claims. In addition, the DJA is unavailable unless there is an "actual controversy" between the parties—in other words, unless Article III requirements are met. But Plaintiff has not alleged facts showing a real and immediate possibility of a federal enforcement action in the absence of the requested declaratory judgments. For similar reasons, even if the mandatory prerequisites to a DJA claim were satisfied, the Court should decline to exercise its jurisdiction in this case because there is no indication that resolution of the specific issues that Plaintiff identifies would resolve any controversy between the parties. Should the Court nevertheless proceed to the merits of

Plaintiff's claims, dismissal is still warranted because Plaintiff's assertions that the term "State" in the Industrial Hemp Research Statute includes Indian tribes, and that the State of Wisconsin has "allowed" hemp cultivation on the Menominee Reservation, are contradicted by the plain language of the Statute.

BACKGROUND

I. The Controlled Substances Act ("CSA"), 21 U.S.C. §§ 801 *et seq*.

The federal drug laws, and the penalties associated with their violation, are contained in the CSA, 21 U.S.C. §§ 801 *et seq*. Since the time of the CSA's enactment, marijuana (also known as cannabis) has been classified as a Schedule I drug. 21 U.S.C. § 812(c). That classification reflects express findings by Congress that marijuana "has a high potential for abuse," that it "has no currently accepted medical use in treatment in the United States," and that "[t]here is a lack of accepted safety for use of [marijuana] under medical supervision." *Id.* § 812(b). The CSA makes it unlawful for any person to "knowingly or intentionally . . . manufacture, distribute, or dispense, or possess" marijuana except as authorized by the CSA. *Id.* §§ 841(a), 844(a). "[M]anufacture" includes "production," *id.* § 802(15), which in turn includes the "planting, cultivation, growing, or harvesting of a controlled substance," *id.* § 802(22).

Because marijuana is a controlled substance, under the scheme of the CSA, only persons who have obtained a registration from the Drug Enforcement Administration ("DEA") may manufacture marijuana for any purpose, including industrial purposes. *Id.* §§ 822(a)(1), 823(a), 841(a)(1). It is well established that the CSA, including its registration requirement, applies to the cultivation of hemp for industrial use. *See id.* § 802(16) (Marijuana "means all parts of the plant Cannabis sativa L."); *see also Monson v. Drug Enforcement Admin.*, 589 F.3d 952, 962 (8th Cir. 2009) (concluding that industrial hemp "fell squarely within the definition of marijuana

set forth in the CSA") (citing *United States v. White Plume*, 447 F.3d 1067, 1072 (8th Cir. 2006)); *N.H. Hemp Council, Inc. v. Marshall*, 203 F.3d 1, 3 (1st Cir.2000) (recognizing that the "literal language" of the CSA's definition of marijuana includes "cannabis sativa plants . . . grown for industrial use").[1]

II. The Industrial Hemp Research Statute, 7 U.S.C. § 5940

In 2014, Congress enacted 7 U.S.C. § 5940, entitled "Legitimacy of Industrial Hemp Research" ("Industrial Hemp Research Statute"), as part of the Agricultural Act of 2014 ("2014 Farm Bill"), Pub. L. 113-79, § 7606, 128 Stat. 912 (2014). This provision establishes narrow exceptions to the CSA's ban on industrial hemp cultivation. In particular, the law provides that an "institution of higher education" or a "State department of agriculture" may grow or cultivate industrial hemp for agricultural or academic research purposes, but only if "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." 7 U.S.C. § 5940(a).

The Industrial Hemp Research Statute does not define the term "State." However, it defines "State department of agriculture" to mean "the agency, commission, or department of a State government responsible for agriculture within the State." *Id.* § 5940(b)(3).

III. Procedural History

Plaintiff filed suit on November 18, 2015, seeking a declaratory judgment that (1) Plaintiff qualifies as a "State" for purposes of the Industrial Hemp Research Statute, Compl. ¶ 83; (2) the cultivation of industrial hemp on the Menominee Reservation is "allowed" under the

[1] Although the CSA's definition of marijuana excludes certain parts of the plant, such as the "mature stalks" and sterilized seeds, 21 U.S.C. § 802(16), the Act still prohibits the cultivation of cannabis for the production of such materials, unless the grower is registered with DEA. *See Monson*, 589 F.3d at 962.

laws of the State of Wisconsin, for purposes of the Industrial Hemp Research Statute, Compl. ¶ 91; and (3) the College of the Menominee Nation qualifies as an "institution of higher education" under the Industrial Hemp Research Statute, Compl. ¶ 98.

STANDARD OF REVIEW

A motion to dismiss under Rule 12(b)(1) challenges the court's subject matter jurisdiction. Fed. R. Civ. P. 12(b)(1). "Federal courts are courts of limited jurisdiction and can only hear 'cases' and 'controversies' as authorized by Article III of the Constitution." *Wis. Carry, Inc. v. City of Milwaukee*, 35 F. Supp. 3d 1031, 1035 (E.D. Wis. 2014) (quoting *Flast v. Cohen*, 392 U.S. 83, 94 (1968)). The plaintiff bears the burden of proving that subject matter jurisdiction exists. *Lee v. City of Chicago*, 330 F.3d 456, 468 (7th Cir. 2003) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992)).

To survive a motion to dismiss under Rule 12(b)(6), "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). When reviewing such a motion, the court "accept[s] as true all well-pled facts alleged, taking judicial notice of matters within the public record, and drawing all reasonable inferences in the plaintiff's favor." *Adkins v. VIM Recycling, Inc.*, 644 F.3d 483, 493 (7th Cir.2011). The court "need not accept as true legal conclusions, or threadbare recitals of the elements of a cause of action, supported by mere conclusory statements." *Brooks v. Ross*, 578 F.3d 574, 581 (7th Cir. 2009). "Factual allegations must be enough to raise a right to relief above the speculative level." *Bell Atl. Corp.*, 550 U.S. at 555.

ARGUMENT

I. PLAINTIFF'S DJA CLAIMS SHOULD BE DISMISSED BECAUSE PLAINTIFF FAILS TO IDENTIFY AN APPLICABLE PRIVATE RIGHT OF ACTION

Plaintiff seeks a declaratory judgment, pursuant to the DJA, 28 U.S.C. § 2201, concerning the application of the CSA and the Industrial Hemp Research Statute to Plaintiff. Compl. ¶ 4. The purpose of the DJA is "'to avoid accrual of avoidable damages to one not certain of his rights and to afford him an early adjudication, without waiting until his adversary should see fit to begin suit.'" *Bartucci v. Wells Fargo Bank N.A.*, No. 14-cv-5302, 2015 WL 6955482, at *3 (N.D. Ill. Nov. 10, 2015) (quoting *Nucor Corp. v. Aceros Y Maquilas de Occidente, S.A. de C.V.*, 28 F.3d 572, 577 (7th Cir. 1994)). However, the DJA "is not an independent source of federal subject matter jurisdiction." *GNB Battery Techs. v. Gould, Inc.*, 65 F.3d 615, 619 (7th Cir. 1995). Rather, the Supreme Court has recognized that the DJA is "procedural only," *Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667, 671 (1950) (quoting *Aetna Life Ins. Co. of Hartford, Conn. v. Haworth*, 300 U.S. 227, 240 (1937)), and that it "presupposes the existence of a judicially remediable right," *Schilling v. Rogers*, 363 U.S. 666, 677 (1960). In other words, in order to seek relief under the DJA, a plaintiff must identify an independent private right of action through which a "'judicially remediable right' already exists." *Seized Prop. Recovery, Corp. v. U.S. Customs & Border Prot.*, 502 F. Supp. 2d 50, 64 (D.D.C. 2007). Where such a private right of action is identified, the DJA may provide an additional remedy. *See GNB Battery Techs.*, 65 F.3d at 619 (plaintiff's DJA request was adequate when premised on a private right of action under CERCLA).

Where, as here, a plaintiff has *not* invoked an available private right of action, a DJA claim is foreclosed because the DJA itself does not provide any such right. *See Schilling*, 363 U.S. at 677; *cf. Reiter v. Ill. Nat'l Cas. Co.*, 213 F.2d 946, 949 (7th Cir. 1954) (DJA "furnished a

procedural remedy which did not previously exist" but did not "create new causes of action"). Thus, in *Schilling*, the Supreme Court held that the plaintiff could not assert a DJA claim when no private right of action was available to the plaintiff under the Trading with the Enemy Act, which was the substantive law that the plaintiff asked the Court to interpret. *Schilling*, 363 U.S. at 677; *see also Quad/Med Claims, LLC v. Liberty Mut. Ins. Co.*, No. 12-CV-573-JPS, 2013 WL 5372331, at *6 (E.D. Wis. Sept. 24, 2013) (recognizing DJA claim must be dismissed where complaint "fail[ed] to state a cause of action"); *Johnson v. Milwaukee County*, No. 04-C-242, 2006 WL 272754, at *3, n.1 (E.D. Wis. Feb.1, 2006) ("Johnson's claim for declaratory judgment on his HIPAA claim cannot proceed [because] [t]here is no private right of action under HIPAA."); *Villasenor v. Am. Signature, Inc.*, No. 06 C 5493, 2007 WL 2025739, at *6 (N.D. Ill. July 9, 2007) (dismissing DJA claim because no private right of action was available under the Illinois Retail Sales Act); *see also Seized Prop. Recovery Corp.*, 502 F. Supp. 2d at 64 (rejecting plaintiff's DJA claim where the plaintiff failed to "specify any cause of action *through which* the Court may exercise subject matter jurisdiction and grant declaratory relief").

Here, as described above, Plaintiff asks the Court to issue declarations concerning substantive provisions of the CSA and the Industrial Hemp Research Statute. Compl. ¶¶ 4, 76-98. However, neither the CSA nor the Industrial Hemp Research Statute contains a private right of action that could allow Plaintiff to bring such claims. *Cf. Gonzaga Univ. v. Doe*, 536 U.S. 273, 283 (2002) (holding that where "a statute by its terms grants no private rights to any identifiable class," the question of whether Congress intended the statute to be privately enforceable must be "definitively answered in the negative").[2]

[2] In addition to the CSA and the Industrial Hemp Research Statute, Plaintiff also cites internal Department of Justice memoranda that provide enforcement guidance to U.S. Attorney's Offices. *See* Compl. ¶¶ 16-18. However, such internal guidance creates no rights enforceable by a private

The CSA is a comprehensive statutory scheme that "provides for enforcement through criminal, civil and administrative proceedings by the U.S. Attorney General." *Hatfield v. Arbor Springs Health & Rehab Ctr.*, No. 3:12CV528-MHT, 2012 WL 4476612, at *3 (M.D. Ala. Sept. 4, 2012), *rept. & rec. adopted*, No. 3:12CV528-MHT, 2012 WL 4471795 (M.D. Ala. Sept. 26, 2012). The Industrial Hemp Research Statute creates a narrow exception to the CSA for research activities involving the cultivation of industrial hemp in limited and expressly specified circumstances. *See* 7 U.S.C. § 5940. Nothing in the text or structure of either of these statutes suggests that Congress intended to allow a private entity to bring a civil suit under its provisions. *See Hatfield*, 2012 WL 4476612, at *3 (rejecting notion that CSA provides private right of action); *see also Durr v. Strickland*, 602 F.3d 788, 789 (6th Cir. 2010) (upholding district court's ruling that claim for declaratory relief was barred because CSA contained no private right of action); *Jones v. Hobbs*, 745 F. Supp. 2d 886, 893 (E.D. Ark. 2010) (concluding that the DJA "does not authorize actions to decide whether federal statutes have been or will be violated when no private right of action to enforce the statutes has been created by Congress"), *aff'd sub nom. Williams v. Hobbs*, 658 F.3d 842 (8th Cir. 2011); *McCallister v. Purdue Pharma L.P.*, 164 F. Supp. 2d 783, 793 (S.D.W. Va. 2001) ("a careful review of the [CSA] establishes no Congressional intent to create a private, civil right of action"). In rejecting a plaintiff's similar request for declaratory relief, the court in *Jones* observed that "[t]o entertain, under the auspices of the D[JA], a cause of action brought by private parties seeking a declaration that . . . the CSA has been violated would, in effect, evade the intent of Congress not to create [a] private right[] of action under th[at] statute[] and would circumvent the discretion entrusted to the executive branch in deciding how and when to enforce th[at] statute[]." *Jones*, 745 F. Supp. 2d at 893. This

---

party. *See West v. Holder*, 309 F.R.D. 54, 59 (D.D.C. 2015) (rejecting notion that plaintiff could enforce provisions of the Cole memorandum).

Court likewise should conclude that no claim under the DJA is available here and dismiss this action on that ground.

II. PLAINTIFF'S DJA CLAIMS ALSO FAIL BECAUSE PLAINTIFF HAS NOT ALLEGED FACTS THAT ESTABLISH AN ACTUAL CONTROVERSY

Plaintiff's DJA claims should also be dismissed for lack of subject matter jurisdiction because Plaintiff has failed to satisfy the Article III case or controversy requirements applicable to a declaratory judgment action. By its plain language, the DJA limits its availability to cases of "actual controversy" within a court's jurisdiction. 28 U.S.C. § 2201(a). The Seventh Circuit has held that this language establishes a "separate and distinct" prerequisite to a court's jurisdiction in a DJA case, independent of the question of whether a private right of action exists. *GNB Battery Techs., Inc.*, 65 F.3d at 620. In other words, even where a plaintiff seeks only declaratory relief, courts lack "the power to render advisory opinions," and Article III requirements must be satisfied. *Id.* (internal quotation omitted); *Quad/Med Claims, LLC*, 2013 WL 5372331, at *5 (DJA "explicitly incorporates the Article III case or controversy limitations" (quoting *In re Joint E. & S. Dist. Asbestos Litig.*, 14 F.3d 726, 731 (2d Cir.1993)).

In the context of a claim for declaratory relief, the "test to be applied to determine the existence of an actual controversy" is "whether . . . there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." *GNB Battery Techs., Inc.*, 65 F.3d at 620 (internal quotation omitted). "The controversy in question must not be contingent, speculative, or hypothetical," nor should the declaration that is sought be merely "'an opinion advising what the law would be upon a hypothetical [set] of facts.'" *Casual Dining Dev., Inc. v. QFA Royalties, LLC*, No. 07-CV-726, 2008 WL 4186692, at *2 (E.D. Wis. Sept. 5, 2008) (quoting *Sprague Farms, Inc. v. Providian Corp.*, 929 F. Supp. 1125, 1132 (C.D. Ill. 1996)) (recognizing that this test is

essentially a ripeness inquiry). In circumstances where a plaintiff has filed an action "in anticipation of a threatened action by the declaratory judgment defendant," a court must determine whether there is a "real and immediate possibility of such litigation." *Quad/Med Claims, LLC*, 2013 WL 5372331, at *5. At the motion to dismiss stage, a court must "[l]ook[] only to the complaint," evaluating "the complaint as a whole and assess[ing] the totality of the circumstances." *GNB Battery Techs., Inc.*, 65 F.3d at 620.

Applying this standard, the Seventh Circuit has held there was no "actual controversy" supporting a DJA claim when the plaintiff sought a declaration that a "possible future New Zealand judgment" would not be enforceable in the State of Illinois. *Basic v. Fitzroy Eng'g, Ltd.*, No. 97-1052, 1997 WL 753336, at *1, 4 (7th Cir. Dec. 4, 1997). Among other things, the court noted that even if the New Zealand court issued a judgment adverse to the plaintiff, "the court can only guess as to the particular claims on which the judgment would rest." *Id.* at *5. Thus, a declaration on the issues that the plaintiff had identified "would be useless." *Id.*; *see also Casual Dining Dev., Inc.*, 2008 WL 4186692, at *2 (holding that there was no actual controversy supporting the plaintiff's request for a declaration on the issue of indemnification when "there ha[d] been no finding of liability" against the plaintiff).

Plaintiff's request for declaratory relief fails to identify an "actual controversy" for similar reasons. Plaintiff asserts three Counts seeking declarations regarding three specific interpretative issues under the Industrial Hemp Research Statute. Specifically, Plaintiff seeks declarations regarding (1) whether the term "State" in the Industrial Hemp Research Statute includes Indian tribes, (2) whether the State of Wisconsin allows hemp cultivation on the Menominee Reservation, and (3) whether the College of Menominee Nation is a "institution of higher education" for purposes of the Industrial Hemp Research Statute. Compl. ¶¶ 83, 91, 98.

Plaintiff's allegations as to each of these issues are inadequate to demonstrate a real and immediate possibility of an enforcement action resulting from the Government's allegedly contrary interpretations.

Plaintiff alleges in its Complaint that it "planted an industrial hemp crop on Tribal lands for research purposes." Compl. ¶ 73. It also alleges that it "cooperated with DEA and DOJ" in order to ensure that the THC levels in the hemp plants did not exceed .3% and that any plants with higher THC levels would be destroyed. *Id.* ¶ 74. Yet allegedly "[o]n Friday, October 23, 2015, federal agents entered the Menominee Reservation and seized and destroyed the Tribe's industrial hemp crop." *Id.* ¶ 75. Nowhere in Plaintiff's Complaint, however, is there any allegation that those alleged actions of federal agents resulted from a contrary interpretation of the Industrial Hemp Research Statute; nor does the Complaint set forth any plausible factual support for such an allegation. Specifically, the Complaint contains no allegations that suggest that the Government has ever taken the position that the College of the Menominee Nation is not an "institution of higher education," or that an institution of higher education is prohibited as a matter of law from undertaking hemp cultivation on the Menominee Reservation for research purposes under any circumstances.

Plaintiff's Complaint, moreover, contains no plausible allegation that Defendants will take enforcement action against Plaintiff in the immediate future. Indeed, Plaintiff does not expressly allege that Plaintiff plans to cultivate industrial hemp in the immediate future. And again, even if there were such enforcement action, this Court could "only guess" that such action might rest on the interpretative issues that Plaintiff asks the Court to resolve. *See Basic*, 1997 WL 753336, at *5. Accordingly, a declaration by this Court on any of the issues that Plaintiff has identified would be "useless." *See id.* Plaintiff therefore fails to satisfy the "actual controversy"

requirement regarding the interpretation of the Industrial Hemp Research Statute, and its claims should be dismissed for lack of subject matter jurisdiction.

III. EVEN IF PLAINTIFF SATISFIED THE MANDATORY REQUIREMENTS FOR A DJA ACTION, THE COURT IN ITS DISCRETION SHOULD DECLINE TO CONSIDER PLAINTIFF'S CLAIMS

Dismissal of Plaintiff's DJA claims is also warranted on prudential grounds. Even where a plaintiff seeking a declaratory judgment sets forth a cognizable claim under an applicable cause of action and identifies an actual controversy, a court nevertheless may "refuse to grant declaratory relief for prudential reasons." *Alcan Aluminum Ltd. v. Dep't of Rev.*, 724 F.2d 1294, 1298 (7th Cir.1984). The Seventh Circuit has identified five factors applicable to the court's exercise of its discretion:

> (1) whether the judgment would settle the controversy; (2) whether the declaratory judgment action would serve a useful purpose in clarifying the legal relations at issue; (3) whether the declaratory remedy is being used merely for the purpose of 'procedural fencing' or 'to provide an arena for a race for *res judicata';* (4) whether the use of a declaratory action would increase friction between our federal and state courts and improperly encroach on state jurisdiction; and (5) whether there is an alternative remedy that is better or more effective.

Nucor Corp., 28 F.3d at 579.

Here, again, Plaintiff's Complaint fails to establish that any future action by federal agents would result from a particular interpretation of the Industrial Hemp Research Statute. Thus, 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, or would clarify any legal issues relevant to any such controversy. Plaintiff also has alternative remedies, in that it could "place the same contentions within the four corners of a pleading in response to an anticipated enforcement action," *Basic*, 1997 WL 753336, at *9, or it could apply for a registration from DEA for its proposed hemp

cultivation, pursuant to 21 U.S.C. §§ 822(a)(1) and 823(a).[3] While Plaintiff's purpose in filing this action is unclear and there is no indication that the issues raised implicate state court jurisdiction, the factors on balance weigh decidedly against considering Plaintiff's requests for declaratory relief. Accordingly, the Court should decline to issue a declaratory judgment in connection with any of Plaintiff's three claims.

* * * * *

Should the Court nevertheless conclude that Plaintiff's request for declaratory relief is not barred on the grounds identified above, Plaintiff's claims should be dismissed for failure to state a claim on which relief can be granted.

IV. PLAINTIFF'S CLAIMS SHOULD BE DISMISSED UNDER RULE 12(b)(6) BECAUSE THE INDUSTRIAL HEMP RESEARCH STATUTE DOES NOT ALLOW PLAINTIFF TO CULTIVATE INDUSTRIAL HEMP

In addition to the threshold deficiencies identified above, Plaintiff's claims also fail on the merits. As indicated above, Plaintiff asserts that its cultivation of industrial hemp in cooperation with the College of the Menominee Nation would be eligible for the exception set forth in the Industrial Hemp Research Statute. In an effort to establish various aspects of that asserted eligibility, Plaintiff asks this Court to issue a series of declarations regarding the interpretation of specific terms in the Industrial Hemp Research Statute, including a declaration that Plaintiff, an Indian tribe, qualifies as a "State" for purposes of the Industrial Hemp Research Statute, and that the cultivation of industrial hemp on the Menominee Reservation is "allowed" under the laws of the State of Wisconsin. Compl. ¶¶ 83, 91. However, as set forth below,

[3] Judicial review of an adverse decision regarding such a registration application would be available in the Courts of Appeals pursuant to 21 U.S.C. § 877.

Plaintiff's proposed interpretations on those points are not in accord with the plain language of the Industrial Hemp Research Statute and therefore fail as a matter of law.[4]

A. The Term "State" as Used in the Industrial Hemp Research Statute Does Not Include Indian Tribes

The CSA exception set forth in the Industrial Hemp Research Statute applies only if an institution of higher education or a State department of agriculture is growing or cultivating industrial hemp in a State where "the growing or cultivating of industrial hemp is allowed under the laws of th[at] State." 7 U.S.C. § 5940(a)(2). Plaintiff's request in Count I for a declaration that Plaintiff, as an Indian tribe, has "acted as a 'State'" purportedly by allowing hemp cultivation on its Reservation rests on the untenable notion that the term "State" in the Statute includes Indian tribes. However, such an interpretation is contrary to the Statute's plain language. *See Barma v. Holder*, 640 F.3d 749, 751 (7th Cir. 2011) ("In ascertaining the meaning of a statute, we begin with the plain language."); *see also Abraham Lincoln Mem'l Hosp. v. Sebelius*, 698 F.3d 536, 547 (7th Cir. 2012) ("Where Congress' intent is clear [from the statutory text], [the court] must give effect to Congress' unambiguously expressed intent." (citing *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984)).

The Industrial Hemp Research Statute does not contain a definition of the term "State." *See* 7 U.S.C. § 5940. Nor is the Statute part of a unified statutory scheme, such that definitions of "State" that appear elsewhere might have some application to the Statute. The absence of an applicable definition, however, does not render the term "State" ambiguous. To the contrary, the

[4] For purposes of this motion to dismiss, Defendants do not address the merits of Plaintiff's third Count, which asks the Court to declare that the College of the Menominee Nation qualifies as an "institution of higher education." However, should the Court agree with Defendants regarding the first two Counts, it should decline to address the third under the discretionary factors identified above because the status of the College would have no bearing on the ultimate question of whether industrial hemp can be cultivated for research purposes on the Menominee Reservation.

term "State," standing alone, "has a definite, fixed, certain, legal meaning in this country and under our form of government," deriving from the Constitution's allocation of powers between the Federal Government, on the one hand, and those other "commonwealths or political bodies" known as States, on the other. *See Ex parte Morgan*, 20 F. 298, 303-06 (W.D. Ark. 1883). In other words, the plain meaning of "State" is simply one of the 50 States that together comprise the United States. Congress's intent that this plain meaning apply is bolstered by the fact that the Statute does define "State department of agriculture" to mean "the agency, commission, or department of a State government responsible for agriculture within the State." 7 U.S.C. § 5940(b)(3). If Congress had intended the term "State" to have other than its plain meaning, it could have specified as much in that definition.

Equally plain is the fact that, as the Supreme Court has recognized, tribes have an "anomalous" status that is fundamentally different from States. *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 142-43 (1980) ("Tribal reservations are not States."); *see also Sturdevant v. Menominee Indian Tribe of Wisconsin*, No. 09-C-0884, 2010 WL 2571966, at *2 (E.D. Wis. June 22, 2010) ("'Indian tribes are not states of the union within the meaning of the Constitution.'" (quoting *Nevada v. Hicks*, 533 U.S. 353, 383–84 (2001) (Souter, J., concurring))). Together, these principles foreclose interpreting the term "State" in the Industrial Hemp Research Statute as including Indian tribes.

To be sure, Congress sometimes expressly defines the term "State" in statutes to include entities other than the 50 States. And there are many instances where Congress has chosen to indicate expressly that a statute applies to Indian tribes, either by defining the term "State" to include Indian tribes or by including Indian tribes together with States or other entities to which the statute applies. *E.g.*, 7 U.S.C. § 1632c(a) (grants to promote domestic maple syrup industry

may be made "to States, tribal governments, and research institutions"); 18 U.S.C. § 2265(a) (2000) (applying full faith and credit requirements to the courts of any "State, Indian tribe, or territory"); 28 U.S.C. § 1738(B) (defining "state" as "a state of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the territories and possessions of the United States, and Indian country (as defined in section 1151 of title 18)"). These examples show that Congress can and will indicate its intent to apply a statutory provision to tribes, and thus provide further support that here, in the absence of such an indication, tribes are not included. *Cf. Garcia v. Gutierrez*, 217 P.3d 591, 605 (N.M. 2009) ("The explicit inclusion of tribes in these statutes strongly suggests that Congress not only considers it necessary to specify when legislation is meant to apply to tribes, but also that Congress is capable of doing so when it desires.").

Tellingly, Plaintiff appears to agree that the term "State," standing alone, cannot be read to include Indian tribes. Instead, Plaintiff sets forth a legal argument in its Complaint that "the full text of the legislation in which" the Industrial Hemp Research Statute "was included" does contain a definition of "State," and that that definition, by referring to "any other territory or possession of the United States," includes Indian tribes. *See* Compl. ¶¶ 25-27. Plaintiff's argument fails, however, most notably because the definition that Plaintiff references has no application to the Industrial Hemp Research Statute.

Specifically, the provision Plaintiff cites, 7 U.S.C. § 9011, is entirely independent of the Industrial Hemp Research Statute, so the definitions contained in § 9011 do not inform the meaning of terms in the Industrial Hemp Research Statute. Section 9011 appears in Title I, Part II of the 2014 Farm Bill, addressing "commodity policy." *See* Pub. L. 113-79, § 1111. In contrast, the Industrial Hemp Research Statute was a "miscellaneous provision" included in Title VII of the Bill, which addressed "research, extension, and related matters." *See* Pub. L. 113-19,

§ 7606. Indeed, the plain language of § 9011 indicates that the definitions set forth in that provision apply only to "this subchapter" (Subchapter I – Commodity Policy) and "subchapter II" (Marketing Loans) of Title 7, Chapter 115 of the United States Code. *See* 7 U.S.C. § 9011. Those definitions thus clearly do not apply to the Industrial Hemp Research Statute, which is located in Chapter 88 of U.S. Code Title 7, in a subchapter called "miscellaneous provisions." *See* 7 U.S.C. § 5940. Other provisions of Title 7 that Plaintiff cites in its Complaint, *see* Compl. ¶ 26, are also inapplicable to the Industrial Hemp Research Statute. *See* 7 U.S.C. § 2132 (setting forth definitions applicable to "this chapter," Chapter 54); § 7202 (same, for Chapter 100), § 8751 (setting forth definitions applicable to subchapter III of Chapter 113).[5] Indeed, as a "miscellaneous provision," the Industrial Hemp Research Statute effectively stands alone; there is no structural or other basis to import definitions from other provisions in U.S. Code Title 7 that, by their plain language, do not apply. Thus, the provisions that Plaintiff cites in its Complaint provide no support for its request that this Court declare that the term "State" in the Industrial Hemp Research Statute includes the Menominee Indian Tribe. The Court should accordingly reject Plaintiff's request in Count I.

B. The State of Wisconsin Does Not Allow the Growing or Cultivating of Industrial Hemp on the Menominee Reservation

The interpretation of the Industrial Hemp Research Statute proposed in Count II of Plaintiff's Complaint should also be rejected. In Count II, Plaintiff essentially sets forth an

[5] Even if the definition set forth in § 9011 were applicable, Plaintiff is also wrong in asserting that references to "territories" or "possessions" of the United States include tribes. *See Ex parte Morgan*, 20 F. at 304 (explaining that "territories" has a fixed meaning and refers to lands that have not yet been admitted as a state but are "organized under the laws of congress, with a separate legislature, under a territorial governor"); *see also MacArthur v. San Juan Cty.*, 309 F.3d 1216, 1225 (10th Cir. 2002) (recognizing some disagreement on the issue but citing later cases as holding that tribes are not "territories"); *Garcia*, 217 P.3d at 605-06 ("most courts have concluded that Indian tribes are not 'territories or possessions' of the United States" for purposes of Full Faith and Credit statutes).

alternative basis for its assertion that it is eligible to cultivate hemp for research purposes under the Industrial Hemp Research Statute. Specifically, Plaintiff suggests that even if the Tribe is not a "State" within the meaning of the Statute, the Court should declare that hemp cultivation on the Menominee Reservation "is allowed under the laws of the State of Wisconsin." Compl. ¶ 91.

Plaintiff's request for such a declaration should be denied. Wisconsin law prohibits growing or cultivating marijuana, and its definition of "marijuana" parallels that set forth in the CSA. *See* Wis. Stat. § 961.01(13) (defining "manufacture" to include production), (14) (defining "marijuana"), § 961.01(20) (defining "production" to include "planting, cultivating, growing, or harvesting"); § 961.14(4)(t) (listing marijuana in Schedule I of Wisconsin's list of controlled substances); § 961.41(1)(h) (prohibiting manufacture of marijuana).[6] Thus, Wisconsin law clearly does not "allow" the growing or cultivating of industrial hemp; to the contrary, such cultivation is expressly prohibited.

Plaintiff apparently relies on the notion that the State of Wisconsin has no authority to prohibit hemp cultivation on the Menominee Reservation and therefore effectively "allows" such cultivation for purposes of the Industrial Hemp Research Statute's requirement. *See* Compl. ¶¶ 85-86, 91. That proffered interpretation, however, tortures the plain meaning of "allow." The word "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.[7] To the extent Plaintiff is correct that the State of Wisconsin has no authority to regulate hemp cultivation on the

[6] Wisconsin has adopted in part the Uniform Controlled Substances Act ("Uniform CSA"). *See* Wis. Stat. §§ 961.001 - .67. The purpose of the Uniform CSA was to "achieve uniformity between the laws of the several States and those of the Federal government." *State v. Hecht*, 342 N.W.2d 721, 727 (Wis. 1984) (quoting Uniform CSA, 9 U.L.A., Commissioners' Prefatory Note, p. 188 (1979)).

[7] *See, e.g.*, Merriam-Webster Online (defining "allow," in relevant part, as "permit" or "to forbear or neglect to restrain or prevent"), *available at* http://www.merriam-webster.com/dictionary/allow.

Menominee Reservation, the State cannot decide to permit hemp cultivation, nor can it can refrain from exercising an authority (the authority to prohibit hemp cultivation) that, under Plaintiff's theory, the State does not possess. Plaintiff's theory therefore cannot lead to a conclusion that the State of Wisconsin "allows" hemp cultivation on the Menominee Reservation.

By referencing "the laws of the State" in the Industrial Hemp Research Statute without including a definition of "State" that includes tribes, Congress made State (not Tribal) law the relevant reference point for purposes of whether an institution of higher education or a State department of agriculture might be allowed to engage in industrial hemp cultivation under the Statute. *See* 7 U.S.C. § 5940. There is no question that the *Federal Government* can regulate hemp cultivation on Tribal land by reference to State law. *See Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2033 & n.5 (2014) (recognizing that another federal statute, 18 U.S.C. § 1166, "ma[de] a State's gambling laws applicable 'in Indian country' as federal law"). That is exactly what the Industrial Hemp Research Statute does. Like the provision considered in *Bay Mills*, the Statute does not attempt to subject tribes to State enforcement authority; rather, it simply defines federal authorization by reference to State law. In other words, the Industrial Hemp Research Statute provides a narrow exception to the CSA for hemp cultivation by an institution of higher education or a State department of agriculture on any land within a State—whether Tribal land or not—but makes the availability of this federal law exception dependent on the relevant State law regarding hemp cultivation.

In sum, nothing in Plaintiff's Complaint supports Plaintiff's request for a declaratory judgment on this issue. The Court should accordingly dismiss Plaintiff's request in Count II.

CONCLUSION

For the reasons set forth above, the Court should dismiss this action in its entirety.

January 19, 2016

Respectfully submitted,

BENJAMIN C. MIZER
Principal Deputy Assistant Attorney General
GREGORY J. HAANSTAD
Acting United States Attorney
JACQUELINE COLEMAN SNEAD
Assistant Director, Federal Programs Branch

/s/ Kathryn L. Wyer
KATHRYN L. WYER
U.S. Department of Justice, Civil Division
20 Massachusetts Avenue, N.W.
Washington, DC 20530
Tel. (202) 616-8475 / Fax (202) 616-8470
kathryn.wyer@usdoj.gov
Attorneys for Defendant