

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN**

<p>ST. CROIX CHIPPEWA INDIANS OF WISCONSIN,</p> <p style="text-align: center;">Plaintiff,</p> <p style="text-align: center;">vs.</p> <p>BRAD SCHIMEL, Wisconsin Attorney General,</p> <p style="text-align: center;">Defendant.</p>	<p>)</p>	<p>COMPLAINT</p> <p>Civil Action No. 18-CV-88</p>
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INTRODUCTION

1. Plaintiff, the St. Croix Chippewa Indians of Wisconsin, a Federally recognized American Indian Tribe (hereinafter, “St. Croix” or “Tribe”), files this Complaint seeking relief against Defendant, Wisconsin Attorney General Brad Schimel, the State of Wisconsin’s chief law enforcement officer (hereinafter, “Defendant” or “Wisconsin Attorney General”), in order that St. Croix may carry out and implement the Tribe’s regulatory program for hemp and non-psychoactive hemp oils (including, but not limited to, Cannabidiol (or “CBD”)) derived from industrial hemp (*a.k.a.* the plant *Cannabis Sativa L.*) on tribal land without the threat of State interference and criminal prosecution pursuant to Public Law 83-280 (1953) (codified as amended at 18 U.S.C. § 1162) (hereinafter “P.L. 280”).

2. Specifically, St. Croix seeks declaratory judgment in the form of a finding from the Court that the State of Wisconsin’s industrial hemp and CBD laws are “civil/regulatory” in nature, and thus have no applicability on St. Croix tribal lands under P.L. 280.

3. Following adoption of the Tribe’s St. Croix Hemp Cultivation & Processing Ordinance (hereinafter, “Hemp Ordinance”) in September 2017, St. Croix seeks to move forward with the cultivation of industrial hemp and production and distribution of hemp and hemp oils on tribal lands, including the incorporation of a modern, tribally owned and operated business.

4. St. Croix brings the present challenge for the limited purpose of resolving a dispute with the Wisconsin Attorney General regarding the well-settled limitations of state civil and criminal authority over American Indian Tribes pursuant to P.L. 280.

5. Under P.L. 280, “the criminal laws of [the State of Wisconsin] shall have the same force and effect within [] Indian country as they have elsewhere within the State...” 18 U.S.C. § 1162.

6. P.L. 280 does not grant to states the authority to regulate activities in Indian country that are civil and/or regulatory in nature and that do not implicate a state's criminal code.

7. Here, and because the State of Wisconsin has chosen to regulate rather than prohibit industrial hemp and CBD under State law, Wisconsin's industrial hemp and CBD laws are civil-regulatory in nature, and are therefore not enforceable by the Wisconsin Attorney General in Indian Country, and on St. Croix tribal lands in particular, under P.L. 280.

8. Beginning in 2014, Wisconsin initiated an expansion of the State's regulatory framework with regard to CBD and industrial hemp.

9. In 2014, Wisconsin legalized dispensing, possession, and use of CBD within the State as an exception to the State's general prohibition on psychoactive tetrahydrocannabinol (or "THC"), which is also derived from the plant *Cannabis Sativa L* and is classified as a Schedule I controlled substance. Wis. Stat. § 961.14(4)(t).

10. Under Wisconsin's CBD law, individuals may possess CBD with "certification" from a doctor stating that "the individual possesses cannabidiol to treat a medical condition if the cannabidiol is in a form without a psychoactive effect." Wis. Stat. §§ 961.32 (2m), 961.38(1n).

11. In 2017, Wisconsin passed, a bill legalizing and regulating industrial hemp, and allowing persons to "plant, grow, cultivate, harvest, sample, test, process, transport, transfer, take possession of, sell, import, and export industrial hemp in this state" subject to State regulation. Wis. Stat. §§ 94.55, 961.32 (3).

12. While the State was expanding its cannabis regulatory framework, St. Croix was beginning the work of creating its own ordinance governing hemp and CBD.

13. In 2016, St. Croix drafted the Hemp Ordinance, formerly titled the Cannabidiol Control Ordinance, proposing comprehensive regulations for the cultivation of industrial hemp

on tribal lands, the processing and distribution of hemp oils (including CBD), and the possession and consumption of non-psychoactive CBD.

14. In August 2016, in an effort to ensure that its actions would neither implicate State criminal code nor run afoul of federal guidance, St. Croix sought comment on the Tribe's draft Hemp Ordinance from various federal and state agencies, including the Wisconsin Attorney General.

15. In a letter dated August 29, 2016, the Wisconsin Attorney General "objected" to the Tribe's draft Hemp Ordinance and took the position that the "cultivation and manufacture for any purpose" of industrial hemp is a violation of Wisconsin law "irrespective of any State law related to CBD oil" and that "[i]n light of your tribe's status as a Public Law 280 tribe, enforcement of the state's criminal code falls under the jurisdiction of the Wisconsin Department of Justice . . ."

16. Based on feedback received from the Wisconsin Attorney General and the U.S. Attorney for the Western District of Wisconsin, St. Croix revised its Hemp Ordinance.

17. In September of 2017, St. Croix sought comment on the Tribe's final, revised Hemp Ordinance from various federal and state agencies, including the Wisconsin Attorney General.

18. In a letter dated December 27, 2017, the Wisconsin Attorney General again objected to the Tribe's final Hemp Ordinance stating that the Attorney General is "not in a position to make any promises or assurance with respect to potential law enforcement activity under state or federal law as it pertains to your tribe's intentions with CBD oil."

19. THC is the regulated compound in *Cannabis Sativa L.* that generates psychoactive effect and is classified under State law as a Schedule I controlled substance. Wis. Stat. § 961.14(4)(t).

20. The State's criminal laws exempt CBD "in a form without a psychoactive effect". Wis. Stat. § 961.14(4)(t)(1). Additionally, "[t]etrahydrocannabinols contained in fiber produced from the stalks, oil or cake made from the seeds of a Cannabis plant, any other compound, manufacture, salt, derivative, mixture or preparation of the mature stalks (except the resin extracted therefrom), fiber, oil or cake or the sterilized seed of a Cannabis plant which is incapable of germination" are exempted from the State's criminal laws. *Id.*

21. CBD is one of more than 100 non-psychoactive compounds, or cannabinoids, identified in and derived from industrial hemp.

22. The U.S. Department of Health and Human Services, on behalf the United States, holds a patent regarding cannabinoids as antioxidants and neuroprotectants. *See* U.S. Government Patent Office # 6630507 (Oct. 2003).

23. St. Croix seeks declaratory relief in the form of a finding from the Court that the State of Wisconsin's industrial hemp and CBD laws are "civil/regulatory" in nature, and thus have no applicability on St. Croix tribal lands under P.L. 280.

24. Further, St. Croix seeks declaratory relief in the form of a finding from the Court that any "potential law enforcement activity" by the State that would interfere with the Tribe's Hemp Ordinance and civil regulatory jurisdiction over industrial hemp and CBD on tribal land is beyond the Wisconsin Attorney General's statutory jurisdiction under P.L. 280.

25. The Tribe's legal rights are genuinely and actively contested in this matter. Unless so ordered by this Court, the Wisconsin Attorney General's unwillingness to rule out "potential law enforcement activity" against the Tribe under P.L. 280, and concurrent failure to recognize and respect the Tribe's inherent civil-regulatory jurisdiction over industrial hemp and CBD on tribal

land, will have a substantial detrimental impact on the Tribe's governmental and economic sovereignty.

JURISDICTION AND VENUE

26. The Tribe repeats and incorporates by reference the allegations in the above paragraphs and all paragraphs of this Complaint.

27. This court has jurisdiction over this matter under 28 U.S.C. § 1331, because this case presents a federal question under the laws of the United States.

28. Specifically, the Tribe's action for declaratory relief concerns P.L. 280 and determining the scope of P.L. 280 is a question of federal law. *See Burgess v. Watters*, 467 F.3d 676, 683 (7th Cir. 2006).

29. This Court has jurisdiction over claims brought by American Indian Tribes under 28 U.S.C. § 1362.

30. The Declaratory Judgment Act provides this Court with the authority to declare the rights of a party in a case of actual controversy, 28 U.S.C. § 2201. Further, if a party's legal rights are genuinely and actively contested, the case or controversy requirement of Article III does not require a party to take the action in question, at the risk of severe consequences for guessing wrong, in order to obtain a declaratory ruling on those rights. *MedImmune, Inc. v Genentech, Inc.*, 549 U.S. 118, 133-34 (2007).

31. The doctrine of sovereign immunity does not bar an action for declaratory relief brought against state officials, in this case the Wisconsin Attorney General, acting beyond their constitutional or jurisdictional authority. *Ex Parte Young*, 209 U.S. 123 (1908); *Forest Cty. Potawatomi Cmty. of Wis. v. Norquist*, 45 F.3d 1079 (1995); *Weis v. Bd. of Regents of the Univ. of Wis. Sys.*, 837 F. Supp. 2d 971, 980 (E.D. Wis. 2011).

32. At present an actual controversy exists as to the limits of the Wisconsin Attorney General's assertion of broad jurisdiction and enforcement of the State's criminal code on St. Croix tribal lands based on P.L. 280.

33. A substantial part of the events or omissions giving rise to the claims have occurred, or a substantial part of property that is subject to this action is situated in this judicial district. Venue in this Court is therefore proper under 28 U.S.C. § 1391(b)(2).

PARTIES

34. Plaintiff THE ST. CROIX CHIPPEWA INDIANS OF WISCONSIN are a federally recognized American Indian tribe possessed of full sovereign powers of government, including a tribal law enforcement system comprised of eight full-time officers with two K-9 units, and a tribal court system that hears a variety of cases invoking tribal and some federal law.

35. Approval of the Tribe's Hemp Ordinance and creation of a modern tribally owned and operated industrial hemp and hemp oil business is vital to the Tribe's continued economic growth, development, and sovereignty as a tribal nation. The business will generate substantial funds for essential tribal services and provide much needed employment opportunities in a county with one of the highest unemployment rates in the State.

36. The Tribe adopted the St. Croix Constitution in 1942 under Section 16 of the Indian Reorganization Act of 1934 (48 Stat. 984, 25 U.S.C. § 5124). St. Croix is in northwest Wisconsin and has approximately 1,100 enrolled tribal members living in four reservation communities, Danbury, Sand Lake, Maple Plain and Round Lake.

37. St. Croix owns a 149,725 square foot facility in Danbury, Wisconsin that was initially developed to operate as an aquacultural farming site. Over the last three years the Tribe has

invested heavily in repurposing the facility to accommodate hemp cultivation and hemp oil processing. There is currently no other viable alternative purpose for the facility.

38. Defendant WISCONSIN ATTORNEY GENERAL BRAD SCHIMEL serves as the State of Wisconsin's chief law enforcement officer and the head of the Wisconsin Department of Justice. Schimel was elected Wisconsin Attorney General on November 4, 2014, and took office on January 5, 2015.

39. Under P.L. 280, the Wisconsin Attorney General is responsible for overseeing enforcement of the State's criminal code, including the Wisconsin Uniform Controlled Substances Act, in areas of Indian country within the state.

40. St. Croix notified the Wisconsin Attorney General and the Wisconsin State Governor of the Tribe's Hemp Ordinance in both draft and final form. St. Croix provided the Wisconsin Attorney General with two separate 30-day periods to submit comments on the Tribe's Hemp Ordinance.

41. On two separate occasions, the Tribe provided the Wisconsin Attorney General the opportunity to consult with the Tribe formally on a "government-to-government" basis to discuss the Tribe's Hemp Ordinance. The Wisconsin Attorney General did not avail himself of such opportunity.

42. The office of the Wisconsin Attorney General provided the Tribe four letters related to the Tribe's Hemp Ordinance on February 2, 2016, August 29, 2016, November 9, 2017 and December 2017.

43. The Wisconsin Attorney General has expressed opposition to the Tribe's Hemp Ordinance. For example, in his letter dated December 27, 2017, the Wisconsin Attorney General stated the "[Wisconsin] DOJ does not agree with some of the statements set forth in your letter.

Furthermore, we are not in a position to make any promises or assurances with respect to potential law enforcement activity under state or federal law as it pertains to your tribe's intentions with CBD oil.”

44. The Wisconsin Attorney General fails to recognize and/or provide assurance that St. Croix may regulate hemp activity on its reservation, including the operation of tribal hemp and hemp oil businesses, free from criminal enforcement and interference by local and state law enforcement. For example, in his response letter dated August 29, 2016, the Wisconsin Attorney General opined that the Tribe’s Hemp Ordinance “directly conflict[ed] with state and federal law,” irrespective of the Farm Bill, before stating, “[i]n light of your tribe's status as a Public Law 280 tribe, enforcement of the state's criminal code falls under the jurisdiction of the Wisconsin Department of Justice as well as the St. Croix County Sheriff and the local police.”

45. The Wisconsin Attorney General has threatened criminal prosecution under state and federal law if the Tribe proceeds with this project. For example, in his response letter dated February 2, 2016, the Wisconsin Attorney General referenced another Wisconsin tribe’s attempt to cultivate cannabis that was “met with a substantial federal and state law enforcement response” before stating “I cannot imagine that the result would be any different should you move forward with your plans, and I assure you that the Division of Criminal Investigation will take a lead role in any such operation.”

STATEMENT OF FACTS AND LAW

Legal Background

Federal Law

46. In 2014, Congress passed the Agricultural Act of 2014 (P.L. 113-79) (hereinafter the “Farm Bill”), which authorized hemp cultivation under certain circumstances and, importantly,

distinguished between hemp and marijuana based on threshold levels of THC present in the plant capable of producing psychoactive effects. 7 U.S.C. § 5940.

47. The Farm Bill defines industrial hemp as distinct from marijuana based on a threshold Delta-9 Tetrahydrocannabinol (“THC”) concentration of .3 percent on a dry weight basis, exempts industrial hemp from the Controlled Substances Act, and provides that certain research institutions and state departments of agriculture may grow industrial hemp, as part of an agricultural pilot program, if allowed under state law where the institution or state department of agriculture is located. 7 U.S.C. § 5940(b).

48. The plant *Cannabis sativa L.*, which includes hemp and marijuana, contains more than 100 chemical compounds, called cannabinoids, including THC and CBD.

49. CBD is a cannabinoid possessing no psychoactive effect, and it is sought after for its ability to prevent or reduce convulsions, making it an effective treatment for seizure disorders.

50. Congress passed protections for hemp, most recently in the *Consolidated Appropriations Act, 2017* (P.L. 115-31), which bars the U.S. Department of Justice (“DOJ”) and its sub-agency the Drug Enforcement Agency (“DEA”) from using funds to interfere with the Farm Bill, including to prohibit the transportation, processing, sale, and use of industrial hemp within and outside the state in which the industrial hemp was cultivated.

State Law

51. The Wisconsin Uniform Controlled Substances Act (“Wisconsin UCSA”) tracks the federal Controlled Substances Act, defining marijuana as “all parts of the plants of the genus *Cannabis*, whether growing or not; the seeds thereof; the resin extracted from any part of the plant; and every compound, manufacture, salt, derivative, mixture or preparation of the plant, its seeds or resin, including tetrahydrocannabinols. ‘Marijuana’ does include the mature stalks if

mixed with other parts of the plant, but does not include fiber produced from the stalks, oil or cake made from the seeds of the plant, any other compound, manufacture, salt, derivative, mixture or preparation of the mature stalks (except the resin extracted therefrom), fiber, oil or cake or the sterilized seed of the plant which is incapable of germination.” Wis. Stat. § 961.01(14).

52. In 2014, the State of Wisconsin passed legislation allowing for the possession of CBD for the purpose of treating epileptic seizures and other maladies. Wis. Stat. § 961.38(1n).

53. In April 2017, the Wisconsin Legislature expanded the list of “Legitimate Medical Conditions” for which CBD could be used, as well as expanded access to obtaining CBD from physicians and pharmacies. Wis. Stat. § 961.38(1n).

54. In November 2017, Governor Scott Walker signed a bill legalizing hemp cultivation in the State of Wisconsin under certain circumstances. Wis. Stat. § 94.55.

55. The November 2017 Wisconsin hemp bill is silent on, and does not address, American Indian tribes participation in the State’s pilot hemp project.

Consultation

56. In 2016, in response to the Wisconsin Legislature legalizing CBD under certain circumstances, the St. Croix Chippewa Indians of Wisconsin drafted the *St. Croix Hemp Cultivation & Processing Ordinance* (“Hemp Ordinance”), which proposed comprehensive regulation of industrial hemp and medical CBD operations on tribal lands.

57. The Tribe made its draft Hemp Ordinance available for comment to the Office of Brad D. Schimel, Attorney General of the State of Wisconsin, as well as for Wisconsin Governor Scott Walker.

58. In a letter dated August 29, 2016, Brad Schimel, Attorney General of the State of Wisconsin, responded by saying the draft Hemp Ordinance “appears to directly conflict with state and federal law irrespective of any state law related to CBD oil, subject to certain exceptions under the [federal] Controlled Substances Act and the Agricultural Act of 2014 (‘Farm Bill,’ P.L. 113-79).”

59. In a letter dated August 30, 2016, Governor Scott Walker notified the Tribe that its draft Hemp Ordinance “cannot be considered under current law” and referred the Tribe to the office of the Attorney General.

60. Based on comments received, the Tribe revised its Hemp Ordinance in an effort to ensure compliance and consistency with the laws of the State of Wisconsin.

61. The Tribe’s revised Hemp Ordinance contains the same preconditions to dispensing CBD as are required by state law.

62. The revised Hemp Ordinance requires any plants developed from genetic material and used for cultivation to have no more than .3 percent THC, which is the threshold for psychoactive effect.

63. In September 2017, the Tribe adopted its revised Hemp Ordinance, and sent notice of adoption letters (“Notice Letters”) to the offices of Governor Scott Walker and Attorney General Brad Schimel.

64. The Tribe’s September 2017 letter requested a written response from both offices no later than October 27, 2017, and stated that if the Tribe did not receive a response, it would assume there was no objection to the Hemp Ordinance.

65. In January 2018, over two months after the date of requested response, the Tribe received a letter from Deputy Attorney General Paul Connell, dated December 27, 2017, which

stated the Wisconsin Department of Justice “does not agree with some of the statements set forth in your letter. Furthermore, we are not in a position to make any promises or assurances with respect to potential law enforcement activity under state or federal law as it pertains to your tribe’s intentions with CBD oil.”

66. To date, the Tribe has not received a response to its Notice Letter from the Office of Governor Scott Walker.

CLAIM FOR RELIEF

Violation of P.L. 280: Because the State’s industrial hemp and CBD laws are not prohibitory under state criminal law, but instead are civil regulatory in nature, the Wisconsin Attorney General lacks jurisdiction under P.L. 280 to regulate, or otherwise interfere with, the Tribe’s conduct on tribal lands as it relates to industrial hemp and hemp oil (including CBD).

67. The Tribe repeats and incorporates by reference the allegations in the above paragraphs and all paragraphs of this Complaint.

68. Because Wisconsin has chosen to regulate rather than prohibit industrial hemp and CBD as exceptions to the State’s general criminal prohibition on THC under the Wisconsin Uniform Controlled Substances Act, Wisconsin’s industrial hemp and CBD laws are civil-regulatory and not enforceable by the State under P.L. 280 in Indian country.

69. States cannot assert civil regulatory authority over tribal reservations and members. *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 142-43 (1980).

70. Reservation Indians have the right to make, enforce, and be ruled by their own laws and state law is generally inapplicable. *Williams v. Lee*, 358 U.S. 217, 223 (1959).

71. P.L. 280 provides Wisconsin criminal jurisdiction over areas of Indian country within the State. 18 U.S.C. § 1162. The State’s criminal jurisdiction is bounded by the Act’s express language mandating equivalency in enforcement vis-à-vis the State and Indian country. *Id.*

72. Wisconsin’s civil jurisdiction under P.L. 280 is limited to “private civil litigation involving reservation Indians in state court, but is not a grant of general civil regulatory authority.” *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 208 (1987) (hereinafter “*Cabazon*”) (citing *Bryan v. Itasca Cty., Minn.*, 426 U.S. 373, 385 (1976)); *see also* 18 U.S.C. § 1163.

73. When a state threatens or seeks to enforce a law within Indian country under P.L. 280, it must first be determined whether the law in question falls within the scope of the state’s P.L. 280 authority. *Id.* Specifically, if a state law is classified as “criminal/prohibitory” it falls within P.L. 280’s grant of criminal jurisdiction, but if the state law is “civil/regulatory,” it falls outside the scope of a state’s P.L. 280 enforcement authority. *Id.*

74. “Congress did not intend to allow states to use licensing requirements in an attempt to create jurisdiction to enforce otherwise civil regulations on Indian reservations.” *Oneida Tribe of Indians of Wisconsin v. State of Wisconsin*, 518 F.Supp. 712, 720 (W.D. Wisc. 1981).

75. When value is generated through on-reservation activities the tribal interests are strongly established, and the state will be prevented from exercising on-reservation jurisdiction even over non-Indians. *See New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 334-36 (1983).

76. Wisconsin law provides civil regulatory carve outs to the Wisconsin Uniform Controlled Substances Act, Wis. Stat. §§ 961 *et seq.*, for industrial hemp and CBD.

77. Wisconsin law generally permits persons to “plant, grow, cultivate, harvest, sample, test, process, transport, transfer, take possession of, sell, import, and export industrial hemp in this state” subject to State regulation and licensing requirements. Wis. Stat. § 94.55.

78. The Tribe plans to plant, grow, harvest, sample, test, process, transport, transfer, take possession of, sell, import, and export hemp and hemp oils derived from hemp (including CBD).

79. Under the *Cabazon* test, Wisconsin's hemp law is "civil/regulatory," and has no applicability within areas of Indian Country in the state. 480 U.S. at 209.

80. Wisconsin law generally permits CBD possession and use, subject to State regulation and licensing requirements as to who may dispense CBD and the circumstances under which one can obtain and use CBD. Wis. Stat. § 961.38(n).

81. The Tribe plans to dispense CBD on tribal land to persons with "certification" from a doctor stating that "the individual possesses cannabidiol to treat a medical condition if the cannabidiol is in a form without a psychoactive effect."

82. Under the *Cabazon* test, Wisconsin's CBD law is "civil/regulatory," and has no applicability within areas of Indian Country in the state. 480 U.S. at 209.

83. The Tribe's Hemp Ordinance provides for cradle-to-grave civil regulation of industrial hemp and CBD on St. Croix tribal lands.

84. In sum, and because Wisconsin has chosen to regulate rather than prohibit industrial hemp and CBD and as an exception to the State's general criminal prohibition on THC under the Wisconsin Uniform Controlled Substances Act, the Wisconsin Attorney General lacks jurisdiction under P.L. 280 to enforce the State's industrial hemp and CBD laws and regulations on St. Croix lands.

VII. PRAYER FOR RELIEF

WHEREFORE, the Tribe respectfully requests that this Court enter judgment providing the following relief:

1. Declare that St. Croix has inherent governmental and sovereign power—not as a grant, but as a retained power to regulate the affairs of tribal and non-tribal members including civil regulatory jurisdiction over industrial hemp and hemp oil (including CBD);

2. Declare that the State of Wisconsin’s industrial hemp and CBD laws, which regulate rather than prohibit industrial hemp and CBD and as an exception to the State’s general criminal prohibition on THC under the Wisconsin Uniform Controlled Substances Act, are “civil/regulatory” in nature and not applicable on St. Croix tribal lands under P.L. 280;

3. Declare that any “potential law enforcement activity” by the State that would interfere with the Tribe’s Hemp Ordinance and civil regulatory jurisdiction over industrial hemp and CBD on tribal land is beyond the state of Wisconsin’s statutory jurisdiction under P.L. 280; and,

4. Grant the Tribe such additional and further relief as the Court may deem just and proper.

RESPECTFULLY SUBMITTED on February 8, 2018.

s/ Jeffrey A. Cornell

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