IN THE UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH DAKOTA

WESTERN DIVISION

UNITED STATES OF AMERICA, Plaintiff, vs. ALEXANDER "ALEX" WHITE PLUME, PERCY WHITE PLUME, their Agents, servants, assigns, And all others acting In concert with the named Defendant, Defendants.	)	CIV 02-5071
TIERRA MADRE, LLC AND MADISON HEMP & FLAX COMPANY 1806, INC. Applicants for Intervention.	)	

MEMORANDUM IN SUPPORT OF MOTION TO INTERVENE BY TIERRA MADRE, LLC AND MADISON HEMP & FLAX COMPANY 1806, INC.

Pursuant to Federal Rule of Civil Procedure 24, Tierra Madre, LLC, a Delaware limited liability company ("Tierra Madre"), and Madison Hemp & Flax Company 1806, Inc., a Kentucky corporation ("Madison Hemp"), hereby move to intervene in this action as of right. Fed. R. Civ. P. 24 (a) (2). Alternatively, Tierra Madre and Madison Hemp request this Court grant them permissive intervention. Fed. R. Civ. P. 24 (b). Defendants White Plume support this motion. Defendant-intervenors' counsel contacted US

Attorney Mark Vargo by telephone on August 30, 2002 to notify Plaintiff of this Motion; Mr. Vargo did not state any objection at that time.

I. INTRODUCTION

On or about August 9, 2002, Plaintiff, United States of America filed a Summons, Complaint for Declaratory Relief, Temporary Preliminary and Permanent Injunctive Relief against Defendants above-named based on the Government's interpretation that the industrial hemp crops grown by Defendants White Plume and contracted for purchase and resale by Intervenors is restricted as "marihuana"[1] under Section 102(16) of the Controlled Substances Act, 21 U.S.C. Sec. 801, et seq., and the regulations thereunder at 21 C.F.R. _1300 et seq. (collectively, the "CSA"); 21 U.S.C. Sec. 802(16).

On August 13, 2002, the Honorable Richard H. Battey signed a Temporary Restraining Order (the "Order"), enjoining Defendants or any other person "from violating Title 21 of the United States Code, including possessing, manufacturing, or distributing marijuana, further including "industrial hemp."" The Order at 4.

The slang term "marijuana" is often used interchangeably with the proper legal term "marihuana," to refer to drug Cannabis. The legal term "marihuana" includes both drug Cannabis, non-drug Cannabis plants and such term expressly excludes (a) mature whole hemp stalks (as opposed to growing plants), (b) hemp

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[1] All parts of the plant Cannabis sativa L., whether growing or not; the seeds thereof; the resin extracted from any part of such plant; and every compound, manufacture, salt, derivative, mixture, or preparation of such plant, its seeds or resin. **Such term does not include the mature stalks of such plant, fiber produced from such stalks, oil or cake made from the seeds of such plant, any other compound, manufacture, salt, derivative, mixture, or preparation of such mature stalks (except the resin extracted therefrom), fiber, oil, or cake, or the sterilized seed of such plant which is incapable of germination**." 21 U.S.C.802(c)(16) (emphasis added.)

fiber produced from such stalks, (c) oil or cake made from the seeds thereof, (d) any other derivative of such mature stalks, (e) hemp fiber, hemp oil, hemp seedcake and dehulled hempseeds (also known as "hempnut"), and (f) non-germinating seeds thereof (hereinafter, such excluded items are referred to as "Industrial Hemp Products"). As such, Industrial Hemp Products are not controlled substances and are a lawful commodity, which may be bought and sold and freely contracted for without restriction. Nonetheless, the Order expressly restricts the possession and/or distribution of "marijuana, further including 'industrial hemp'" by Tierra Madre and/or Madison Hemp. Industrial Hemp Products are also allowed under the 1961 Single Convention on Narcotic Drugs, and the North American Free Trade Act ("NAFTA"), to which the US is a signatory.

In 1998, the Oglala Sioux Tribe ("OST") enacted Ordinance No. 98-27 which acknowledged that under the various treaties signed between tribes and the United States government, the OST retained the right to grow food, and fiber crops from the soil. The OST recognized that industrial hemp is a commodity grown worldwide in more than thirty countries. Moreover, the OST reaffirmed their current policy of prohibiting the use and proliferation of marijuana on the reservation.

An OST member, Alex White Plume, then initiated dialog with various companies, which purchase, sell and otherwise trade in Industrial Hemp Products. In June 2000, Intervenor Tierra Madre contracted with Defendants White Plume to purchase Industrial Hemp Products from this his crop. In September 2000,

Plaintiff raided Defendants White Plume, harvested the White Plume hemp crop and with this Court's permission, US Drug Enforcement Administration ("DEA") seized and destroyed the Industrial Hemp Products resulting therefrom. Thereafter, Tierra Madre extended its purchase contract to buy any and all future Industrial Hemp Products made available by Defendants White Plume. In 2001, Defendants White Plume consented to the harvest of that year's hemp crop by the DEA and, accordingly, no Industrial Hemp Products were available from the 2001 crop. Intervenor Madison Hemp contracted with Defendants White Plume to purchase Industrial Hemp Products from the 2002 hemp crop and such contract was the basis for the urgency supporting Plaintiff's Motion for the Temporary Restraining Order.

II. ARGUMENT

A. APPLICANT- INTERVENORS HAVE ARTICLE III STANDING

1. REQUIREMENTS FOR STANDING

The Eighth Circuit has held that the "Constitution requires that prospective intervenors have Article III standing to litigate their claims in federal court." Mausolf v. Babbit, 85 F.3d 1295, 1300 (8th Cir. 1995). To establish standing, the would-be litigant must: 1) have suffered an "injury in fact"; 2) have a causal connection between the alleged injury and the challenged action; and, 3) establish that the injury is likely to be redressed through a favorable decision. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992). An injury-in-fact in an "invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical." Id. at 560 (internal citations omitted). Environmental or economic harms

are a sufficient basis for standing. Sierra Club v. Morton, 405 U.S. 727, 738 (1972) (injuries to aesthetic, conservational, recreational, economic interests are legally protectable).

2. THE PROPOSED INTERVENORS

The proposed intervenors are two separate companies that purchase, market, sell, and otherwise trade in Industrial Hemp Products for various reasons, including profit, promotion of environmental sustainability and rural economic development, research, and development.

Intervenor Tierra Madre is a limited liability company organized under the laws of the State of Delaware.

In April 2000, Tierra Madre received a press release from Defendant Alex White Plume and the Oglala Sioux Tribe that Alex White Plume was authorized to grow industrial hemp under a 1998 tribal ordinance enacted under the Treaty of 1868 between the Oglala Sioux Tribe and the United States (the "Oglala Hemp Ordinance").

On June 16, 2000, Tierra Madre representatives field tested samples from the 2000 White Plume hemp crop and found no detectable amounts of tetrahydrocannabinol (THC), the psychoactive compound in drug Cannabis. On June 22, 2000, Tierra Madre representatives further inspected that certain one acre plot at Wounded Knee Creek, which is, located approximately .4 miles west of the junction of BIA Road 33 and BIA Road 24 (the "White Plume Field.") Immediately after inspecting the industrial hemp growing at the White Plume Field, Tierra Madre entered into a contract to purchase certain industrial hemp raw materials and products from White Plume, which was later, confirmed in

writing (the 'Tierra Madre Purchase Contract'). A copy of the Tierra Madre Purchase Contract is attached hereto as Exhibit A.

Pursuant to the Tierra Madre Purchase Contract, subject to certain conditions, Tierra Madre purchased from Alex White Plume certain Industrial Hemp Products, namely:

> the following products from the hemp crop located on that certain one acre plot along the banks of Wounded Knee Creek for a purchase price equal to the market prices quoted to farmers by Kenex, Ltd. in Ontario, Canada for the same products, namely: cleaned, bundled whole stalks, and value added products such as clean, field retted hemp fiber, tow, sliver, hurds, oil, non-germinating seeds and hempnut but NOT INCLUDING any: (i) germinating seed; (ii) resins; (iii) any flowers or (iv) any psychoactive substance.

Under the Tierra Madre Purchase Contract, Alex White Plume agreed to harvest the whole hemp stalks and properly ret the hemp stalks by letting them lie in the White Plume Field to undergo microbiotic processing which serves to weaken the fibers and make them accessible for further processing. Field retting of hemp is the traditional way for primary processing of hemp fiber. Without such field retting, the value of the hemp fiber is greatly reduced.

On August 24, 2000, the DEA harvested and seized the entire hemp crop at the White Plume Field on the grounds that such crop was "marihuana" under federal law. On the same date, Alex White Plume notified Tierra Madre that the crop had been harvested and seized by the DEA.

On August 25, 2000, Assistant US Attorney, Mark Vargo, moved this Court for an order authorizing the destruction of all of the seized material, including the part thereof in which Tierra Madre has a property interest under the Purchase Contract.

On or about August 27, 2000, Alex White Plume cleaned and bundled certain whole hemp stalks that remained after the DEA raid and notified Tierra Madre that it was prepared to deliver several bundles of such Industrial Hemp Products to Tierra Madre against payment of the purchase price. At that time, Alex White Plume informed Tierra Madre that he would be unable to further perform the Purchase Contract because the remainder of the Industrial Hemp Products were in the DEA's custody.

On or about September 5, 2000, Tierra Madre delivered to White Plume a check for purchase consideration under the Purchase Contract as payment for the several bundles of hemp stalks delivered and, on that date, Tierra Madre transferred such bundles of the Industrial Hemp Products to the Pine Ridge hemp house construction project in which an environmentally sustainable home was being constructed for a Lakota elder.

On October 5, 2000, pursuant to an Order signed by the Honorable Richard H. Battey, law enforcement destroyed the remaining Industrial Hemp Products. Thereafter, Tierra Madre and Defendants White Plume extended the Purchase Contract to cover subsequent years hemp crops.

Madison Hemp & Flax Company 1806, Inc. is incorporated under the laws of Kentucky. Madison Hemp was due to take delivery of Industrial Hemp Products from Defendants White Plume on August 14, 2002, which delivery was prevented by the Order.

A. TIERRA MADRE AND MADISON HEMP SATISFY THE REQUIREMENTS FOR INTERVENTION AS OF RIGHT

To intervene as of right, the proposed intervenor must show that: 1) the intervention is timely; 2) the proposed intervenor has legally protectable interest in the

subject of the action; 3) the disposition of the action may impair or impede the proposed intervenor's ability to protect that interest; and 4) the existing parties do not adequately represent the proposed intervenor's interest. Fed. R. Civ. P. 24 (a) (2).

1. PROPOSED INTERVENOR'S REQUEST IS TIMELY

The factors used to determine whether an application to intervene is timely include: (1) the reason for any delay; (2) how for the litigation has progressed; and (3) how much prejudice, if any, the delay will cause to other parties. Mille Lacs Band of Chippewa Indians v. Minnesota, 989 F.2d 994, 998 (8th Cir. 1993). Courts evaluate timeliness by considering all the circumstances of the case. Id.

Tierra Madre and Madison Hemp acted immediately upon learning of this lawsuit. As quickly as Intervenors were able to marshal necessary resources, they proceeded to obtain counsel, prepare their Motion to Intervene, and prepare their Answer and Counterclaim. Tierra Madre and Madison Hemp are seeking to intervene and file their Answer and Counterclaim by the filing due date for Defendants White Plume's Answer.

Tierra Madre and Madison Hemp applied to intervene before the filing of any substantive briefs. Intervention is timely as long as there have not been any legally significant proceedings, even after the completion of discovery. Diaz v. Southern Drilling Corp., 427 F.2d 1118, 1125-26 (5th Cir. 1970) (intervention timely although filed more than a year after the action commenced). To date, discovery has not yet commenced and only the complaint has been filed and the Order issued.

Intervention at this time will not prejudice any of the parties. When considering prejudice, courts assess whether a delay in seeking intervention prejudiced any of the parties, not "whether intervention itself will cause the nature, duration, or disposition of

the lawsuit to change." United States v. Union Electric Co., 64 F.3d 1152, 1159 (8th Cir. 1995). Intervention in this lawsuit will not delay the expeditious resolution of this case or prejudice the rights of the parties in any way. In addition, Tierra Madre and Madison Hemp are prepared to abide by any existing scheduling orders.

2. TIERRA MADRE AND MADISON HEMP HAVE LEGALLY PROTECTABLE INTERESTS IN THE ISSUES RAISED BY THE PLEADINGS

To satisfy this prong of the intervention as of right test, the proposed intervenor must have a direct, substantial and legally protectable interest in the subject matter of the action. Union Electric Co., 64 f.3d at 1161. This interest is especially pronounced when the lawsuit is the direct or indirect result of the proposed intervenor's efforts. Yniguez v. Arizona, 939 F.2d 727, 735 (9th Cir. 1991).

In 2000 Tierra Madre contracted with Defendants White Plume to purchase Industrial Hemp Products from the 2000 hemp crop. Once the DEA seized the 2000 hemp crop, Tierra Madre filed a Complaint for Declaratory Judgment naming , *inter alia,* defendants, the United States Department of Justice and DEA. Tierra Madre eventually dismissed that action without prejudice. Thereafter, Tierra Madre and Defendants White Plume extended the Tierra Madre Purchase Contract to cover subsequent years hemp crops. Accordingly, the Tierra Madre Purchase Contract covers any Industrial Hemp Products available from the 2001 or 2002 hemp crops.

In 2001 and 2002, Madison Hemp contracted with Defendants White Plume to purchase Industrial Hemp Products from the hemp crops. Such business transactions could not proceed due to the consented to DEA harvest of the 2001 hemp crop and due to the Order, respectively.

3. THE DISPOSITION OF THIS LAWSUIT WILL AS A PRACTICAL MATTER IMPAIR OR IMPEDE PROPOSED INTERVENORS' ABILITY TO PROTECT THEIR INTERESTS

In addition to having an interest relating to the subject of the action, an applicant for intervention must be "so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect [their] interest" Fed. R. Civ. P. 24(a)(2). The applicant only needs to show that, without intervention, their interest "may be" impaired. Kansas Publ. Employees Retirement Sys. V. Reimer & Koger Assocs., Inc., 60 F.3d 1304, 1308 (8th Cir. 1995).

The disposition of this action in favor of the Government would impair or impede proposed intervenors's interests in promotion of environmental sustainability and rural economic development, market research and development and trade of Industrial Hemp Products. Without intervention, the legitimate business interests of intervenors will be thwarted and irreparably harmed. This Court has already taken judicial notice concerning the definition of "marijuana" in the Order and has acted to restrain Tierra Madre, Madison Hemp and persons similarly situated from possession and distribution of Industrial Hemp Products.

4. THE PARITES WILL NOT ADEQUATELY REPRESENT PROPOSED INTERVENORS' INTERESTS IN THIS ACTION

An applicant for intervention typically carries only a minimal burden of showing that existing parties do not adequately represent their interests. Mille Lacs, 989 F.2d at 999. However, a proposed intervenor has a heavier burden when a party already in the suit has an obligation to represent that interest. Id. At 999-1000. For example, when the

government is a party to a suit involving a matter of sovereign interest, the government is presumed to represent the interests of all its citizens. Id. At 1000.

However, the presumption of adequate representation may be rebutted on proof that the government has an interest or bias that is antithetical to that of the proposed intervenor. Mausolf, 85 F.3d at 1303 (court permitted applicant to intervene as of right where government had history of failure to enforce regulations in which applicant had an interest).

For three years in a row, the government has interfered with intervenors' rights to purchase Industrial Hemp Products, a commodity specifically **excluded** from the CSA.

C. IF THE COURT DENIES THIS APPLICATION FOR INTERVENTION AS OF RIGHT, THE COURT SHOULD ALLOW TIERRA MADRE AND MADISON HEMP TO INTERVENE PERMISSIVELY

The Federal Rules of Civil Procedure allow permissive intervention when the applicant's claim or defense is timely and has a question of fact or law in common with the main action. Fed. R. Civ. P. Sec. 24(b). In exercising its discretion to grant permissive intervention, courts consider whether the intervention will unduly delay or prejudice the adjudication of the existing parties' rights. Id. As set out above, this application shares substantial questions of law and fact with the main action, is timely, and will not prejudice the rights of existing parties.

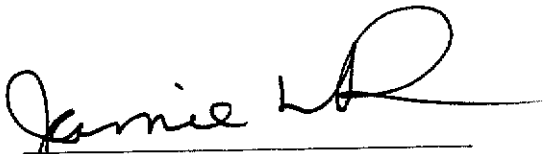
Accordingly, if this Court finds that intervention as of right is not warranted, it is proper to permit Tierra Madre and Madison Hemp to intervene permissively.

III. CONCLUSION

For the reasons state above, Tierra Madre and Madison Hemp respectfully request that this Court grant them leave to intervene in this case as a matter of right, pursuant to the provisions of Fed. R. Civ. P. 24(a)(2), or, in the alternative, under the permissive intervention provisions of Fed. R. Civ. P. 24(b).

Respectfully submitted this 30th day of August, 2002.

DAMON LAW OFFICE



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