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Fourth Judicial District, Ada County
Phil McGrane, Clerk of the Court
By: Deputy Clerk - Ellis, Janet

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF

THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

IDAHO STATE POLICE, by and through Colonel Kedrick R. Wills, Director,

Plaintiff,

vs.

ONE WHITE 2013 FREIGHTLINER COMMERCIAL VEHICLE, VIN # 1FUJGKDR4DSBU5154, WITH ALL APPURTENANCES, (OREGON REGISTRATION: YAIT108) ONE WHITE 2016 BOX VAN TRAILER (OREGON REGISTRATION: HV09598), AND SIX THOUSAND SEVEN HUNDRED AND ONE (6,701) POUNDS OF PLANT MATERIAL CONTROLLED SUBSTANCES,

Defendants.

Case No. CV01-19-2219

MEMORANDUM DECISION RE: MOTIONS FOR SUMMARY JUDGMENT

The Idaho State Police (ISP) initiated this action pursuant to Idaho Code Section 37-2744 that makes certain types of property under any circumstance, and all property under certain circumstances, subject to being forfeit to the government. In this action, ISP seeks to have forfeited to it a semi-tractor, a semi-trailer, and 6,701 pounds of plant material. Before the court presently are cross-motions for the summary entry of judgment on ISP's claim to that the plant material is subject to forfeit pursuant to Section 37-2744(d)(1).

The legal standards applicable to a motion for summary judgment are well known. Summary judgment is appropriate when the pleadings, affidavits, and discovery documents before the court indicate that no genuine issue of material fact exists and that the moving party is entitled to judgment as a matter of law. Idaho R. Civ. P. 56(c); *Baxter v. Craney*, 135 Idaho 166, 170, 16 P.3d 263, 267 (2000). The moving party carries the burden of proving the absence of a genuine issue of material fact. *Id.*

In construing the record on a motion for summary judgment, all reasonable inferences and conclusions must be drawn in favor of the party opposing summary judgment. *Student Loan Fund of Idaho, Inc. v. Duerner,* 131 Idaho 45, 49, 951 P.2d 1272, 1276 (1997). The nonmoving party, however, "may not rest upon the mere allegations or denials of that party's pleadings, but the party's response, by affidavits or ... otherwise ..., must set forth specific facts showing that there is a genuine issue for trial." Idaho R. Civ. P. 56(e); *Baxter*, 135 Idaho at 170, 16 P.3d at 267. "A mere scintilla of evidence is not enough to create a genuine issue of fact," but circumstantial evidence may suffice. *Tingley v. Harrison,* 125 Idaho 86, 89, 867 P.2d 960, 963 (1994); *Doe v. Durtschi,* 110 Idaho 466, 470, 716 P.2d 1238, 1242 (1986). Still, the evidence offered in support of or in opposition to a motion for summary judgment must be admissible. *Bromley v. Garey*, 132 Idaho 807, 811, 979 P.2d 1165, 1169 (1999).

When cross-motions have been filed and, as here, the action will be tried before the court without a jury, the court may, in ruling on the motions for summary judgment, draw probable inferences arising from the undisputed evidentiary facts. *Riverside Dev. Co. v. Ritchie,* 103 Idaho 515, 519, 650 P.2d 657, 661 (1982); *see also Drew v. Sorensen*, 133 Idaho 534, 537, 989 P.2d 276, 279 (1999). Drawing probable inferences under such circumstances is permissible since the court, as the trier of fact, would be responsible for resolving conflicting inferences at trial.

Ritchie, 103 Idaho at 519, 650 P.2d at 661. Conflicting evidentiary facts, however, must still be viewed in favor of the nonmoving party. *Argyle v. Slemaker*, 107 Idaho 668, 670, 691 P.2d 1283, 1285 (Ct.App.1984).

FINDINGS OF FACT

The court finds there is no genuine dispute regarding the truth of the following facts material to ISP's forfeiture claim.

In the growing season of the year 2018, Paul Snegirev grew and harvested plants on land he owns in Hubbard, Oregon. Decl. of E. Watkins, Ex. G, Decl. of P. Snegirev (Snegirev Declaration). As will be discussed in more detail below, the species of plant he grew is difficult to discern from the record. The lawyers and the witnesses have used the terms "marijuana" and "hemp" to refer to the plants grown. Those terms do not have a recognized botanical definition and those terms have imprecise and varying colloquial and legal definitions. The court infers that the plants Mr. Snegirev grew belong to the *genus* of plants called *Cannabis*, but the species is unclear. The court will refer to the plants as cannabis.

Mr. Snegirev harvested his cannabis crop in the fall of 2018. *Id.* He sold about 13,000 pounds of the harvest to Big Sky Scientific LLC. (Big Sky). *Id.* Big Sky is a Colorado limited liability company. Decl. of E. Watkins, Ex. H, Decl. of Ryan Shore (Shore Declaration). Big Sky purchased Mr. Snegirev's cannabis crop and arranged for it to be physically transported from his farm in Oregon to a facility in Colorado. *Id.* Big Sky arranged transportation through an unnamed third-party who hired VIP Transporter LLC to move the cannabis. *Id.*

The 6,701 pounds of cannabis at issue here was loaded into a semi-trailer. On January 24, 2019, Mr. Denis Palamarchuk drove a semi-tractor pulling that trailer into the eastbound Boise Port of Entry in Ada County, Idaho. Decl. of E. Watkins, Ex. E., Decl. of J.D.

Law (Law Declaration). An Idaho State Police trooper inspected the trailer and seized the cannabis plants. The plants contain tetrahydrocannabinols. *Id.,* Decl. of E. Watkins, Ex. F., Decl. of D. Roscheck, Ex. A. (The Fouser Analysis). Mr. Palamarchuck knew the trailer contained cannabis plants.

The court will make additional findings of fact as necessary during its discussion of the legal arguments.

LEGAL ANALYSIS

The Idaho legislature has determined that certain property is subject to forfeiture. That includes all "controlled substances which have been…possessed or held in violation of [The Uniform Controlled Substances Act]." I.C. § 37-2744(a)(1). Idaho's Uniform Controlled Substances Act contains various "schedules" or lists of substances that the legislature has decided to control. Some substances may never be lawfully possessed. Some may lawfully be possessed under certain circumstances.

All plants within the genus *Cannabis,* regardless of species, are a non-narcotic Schedule I controlled substance under Idaho law. I.C. § 37-2701(t). Under Idaho law, it is a crime to possess any plant within that genus under any circumstance, unless one possesses only the mature stalks of the plant. I.C. §§ 37-2701(t), -2732(c)(3), -2732(e). Evidence that a given mixture of plant material contains tetrahydrocannabinols creates a presumption that the mixture contains more than just the mature stalks. I.C. § 37-2701(t).

Thus, initially, this case is relatively straightforward. There is no genuine dispute that the Idaho State Trooper seized cannabis plants and plant parts from the semi-trailer and there is no genuine dispute that the plant material seized contains tetrahydrocannabinols; thus making it presumptively contraband subject to forfeiture under Section 37-2744(a)(1).

Big Sky does not dispute the conclusion that the cannabis plants are subject to seizure under Idaho Law. Big Sky argues, however, that Idaho law has been preempted by the federal laws as amended and enacted by Congress in the Agricultural Act of 2014 (2014 Farm Bill) and the Agricultural Act of 2018 (2018 Farm Bill). Big Sky argues such preemption precludes the entry of judgment in favor of ISP and mandates the entry of judgment dismissing the forfeiture action.

Federal law may preempt state law in one of two ways. *Boundary Backpackers v. Boundary County*, 128 Idaho 371, 376–77, 913 P.2d 1141, 1146–47 (1996)(*quoting Cal. Coastal Comm'n v. Granite Rock Co.,* 480 U.S. 572, 581, (1987). First, if Congress has shown the intent to occupy a given field, any state incursion into that field is preempted by federal law. *Id.* Second, even if the field is not preempted, if state law conflicts with federal law, it is preempted to the extent of the conflict. *Id.* In order to find that a state law has been preempted this court must determine that the law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Mundell*, 124 Idaho at 153, 857 P.2d at 632 (*quoting Maryland v. Louisiana*, 451 U.S. 725, 747 (1981)).

Thus, this court must first determine if Congress has shown the intent to occupy the field of cannabis husbandry to the exclusion of the states. Where Congress occupies an entire field even complementary state regulation is impermissible. Field preemption reflects a congressional decision to foreclose any state regulation in the area, even if it is parallel to federal standards. *See Silkwood v. Kerr–McGee Corp.,* 464 U.S. 238, 249 (1984). Both the 2014 and 2018 Farm Bills not only permit parallel regulation by the states of cannabis growers, but Congress expressly invites the States and Tribes to do so. Therefore, it is clear that when enacting the 2014 and 2018 Farm Bills Congress did not intend to occupy the field of cannabis husbandry to the exclusion of

the states. Thus, Idaho law has not been preempted by Congress under the "field preemption" doctrine.

The court must then determine if Idaho law conflicted with the federal law at the time of the seizure of this plant material. Big Sky argues that Idaho's prohibition on possessing cannabis plants had been at least partially preempted by the Agricultural Act of 2018 (the 2018 Farm Bill) and the Agricultural Act of 2014 (the 2014 Farm Bill), because, in Big Sky's view, the provisions of each conflict with the Idaho Controlled Substances Act. To address that argument the court must review the enactment of federal and Oregon statutes relating to cannabis plants starting with the 2014 Farm Bill.

I. The federal law pertaining to cannabis husbandry.

The 2014 Farm Bill was a wide-ranging bill that amended many existing federal statutes and enacted several new ones. One of the new statutes was 7 U.S.C.A. § 5940.

As originally enacted in 2014, 7 U.S.C.A. § 5940 stated:

> Notwithstanding the Controlled Substances Act (21 U.S.C. 801 et seq.), the Safe and Drug–Free Schools and Communities Act (20 U.S.C. 7101 et seq.), chapter 81 of title 41, United States Code, 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.
>
> (b) DEFINITIONS.—In this section:
>
> (1) AGRICULTURAL PILOT PROGRAM.—The term "agricultural pilot program" means a pilot program to study the growth, cultivation, or marketing of industrial hemp—
>
> (A) in States that permit the growth or cultivation of industrial hemp under the laws of the State; and
>
> (B) in a manner that—

> (i) ensures that only institutions of higher education and State departments of agriculture are used to grow or cultivate industrial hemp;
> (ii) requires that sites used for growing or cultivating industrial hemp in a State be certified by, and registered with, the State department of agriculture; and
> (iii) authorizes State departments of agriculture to promulgate regulations to carry out the pilot program in the States in accordance with the purposes of this section.

Congress defined "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. [1] 7 U.S.C.A § 1639p.

Notably, both the 2014 and 2018 Farm Bills are specific to one species of plant in the genus *Cannabis—sativa L.* Also importantly, Congress has still not removed other cannabis plants from the federal Controlled Substances Act. That Act still prohibits the manufacture and distribution of plant material containing tetrahydrocannabinols or any cannabinoid receptor type 1 agonist. 21 U.S.C.A. 812(c)(17), (d), 21 U.S.C.A. § 841(a). The 2014 Farm Bill created a limited exception to those prohibitions that allowed higher education institutions and state agriculture departments to cultivate[2] cannabis sativa L. plants if those plants contained less than

[1] While calling *C. sativa* plants with low THC concentrations "hemp" and all other *C. sativa* plants "marijuana" may have some obvious benefits for those marketing hemp products or lobbying for the relaxation of controlled substance laws, in legal prose the practice of referring to the same plant by different names only invites confusion. Therefore this court will refer to *C. sativa* plants with delta-9 THC concentrations low enough to fall within the definition of "hemp" in the 2014 and 2018 Farm Bills as "low THC *C. sativa"* and all other *C. sativa* plants as "high THC plants." This court is unable to find any argument by a botanist recognizing distinct subspecies of *C. sativa* based only on their delta-9 THC levels or recognizing distinct subspecies of *C. sativa* that have predictably low THC levels, the way sugar levels predictably vary in different subspecies of maize (although legal producers of *C. sativa* are certainly trying to get to that point). The terms "hemp" and "marijuana" are legal terms, not scientific ones. Historically they were used to refer to the same plant. Under Idaho law, they are the same. Under federal law, they refer to the same species of plant, but differ based on the chemical composition of each individual plant. Under current federal law, a farmer might grow two *C. sativa* plants from the same seed batch next to each other on the same plot of land and one ends up being "hemp" and the other "marihuana."

[2] The 2014 Farm Bill authorized higher education institutions and state agriculture departments to "grow or cultivate industrial hemp." The court normally presumes that if Congress uses multiple words, Congress intended each word to have a unique meaning. However, this court is unable to discern any significant distinction between "grow" and "cultivate" in the 2014 Farm Bill. To cultivate land is to prepare the land in order to grow a plant. To cultivate a crop

0.3 percent Δ-9 THC for the purpose of studying how the plant might be grown and marketed. The 2018 Farm Bill removed all low-THC *C. sativa* plants grown by anyone for any reason from the federal list of controlled substances, but subjected growers of those plants to regulations adopted by the Secretary of Agriculture or by the States and Tribes if the States' and Tribes' regulatory plans have been approved by the Secretary. High-THC *C. sativa* plants remain a controlled substance.

II. Oregon law related to cannabis husbandry

Prior to Congress' enactment of the 2014 Farm Bill, the Oregon legislature had begun cultivating its own statutory and regulatory structure for the cannabis industry, for those adventurous souls who were willing to risk federal prosecution. In 2009 the Oregon legislature declared that commerce in industrial hemp commodities and products were authorized in Oregon. 2009 Or. Session Laws. Ch. 897 (S.B. 676)(The Oregon Industrial Hemp Act).

Prior to 2009, Oregon had listed all plants in the genus *cannabis* as a controlled substance. O.R.S. 475.005(16). In 2009, the Oregon legislature removed "industrial hemp" from the list of controlled substances. *Id.* It defined "industrial hemp" as all parts of the Cannabis sativa plant, except certain seeds, so long as the crop-wide average tetrahydrocannabinol concentration was less than 0.3 percent by dry weight. Oregon required persons growing cannabis sativa (hoping their plants would fall below the THC threshold) to obtain a license from the state department of agriculture. In the 2009 Industrial Hemp Act, the Oregon legislature empowered the Oregon State Department of Agriculture to regulate the production of cannabis

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is to grow it or to help it grow. This court interprets "to cultivate industrial hemp" as including within it all of those activities that are included within what it means "to grow industrial hemp." Although, to "cultivate" might include additional activities as well, such as weeding a field. Thus, the court will simply use the broader term: to cultivate.

sativa plants, assuming the crop contains a crop-wide average THC concentration of less than 0.3 percent by weight.

Oregon's 2009 Industrial Hemp Act differed significantly from the subsequent 2014 Farm Bill. Oregon's Act was explicitly to permit commerce in low-THC cannabis sativa plants and products made from them. The 2014 Farm Bill authorized only the cultivation of low-THC *C. sativa* and then only for the purpose of studying its growth and how it might be marketed.

Oregon's 2009 Industrial Hemp Act created an opportunity to grow and to sell cannabis sativa L. However, doing so carried, at least theoretically, some significant risks. Distribution of cannabis sativa L. containing any quantity of THC remained criminal under the federal Controlled Substances Act. Also, the farmer who grew cannabis sativa and whose field, perhaps due to unpredictable seed genetics or perhaps due to the local terroir, exceeded the 0.3 percent average THC concentration was then guilty of manufacturing marijuana under Oregon law. O.R.S. 475.005(16)(2009).

Oregon's 2009 Industrial Hemp Act also differed from the 2014 Farm Bill in how it defined "industrial hemp." Under the 2014 Farm Bill, industrial hemp included only *C. sativa* plants and parts of those plants with a Δ-9 THC concentration of 0.3 percent or less. The definition is determined plant by plant and is specific to Δ-9 THC. As noted, Oregon's 2009 Industrial Hemp Act defined "industrial hemp" as any cannabis sativa L plant containing a "crop-wide" average THC concentration of 0.3 or less. In other words the Δ-9 THC concentration could be higher so long as the concentration of other less psychoactive tetrahydrocannabinols (such as Delta-8 and Delta-6 THC) was low enough to pull the average down. Also every plant grown in the same field was "hemp" even if that particular plant had a high Δ-9 THC concentration, so long as the average of the plants in the field fell below 0.3

percent by dry weight. Through the miracle of legal linguistics and basic math, *C. sativa* plants that would be 'marijuana' under Oregon law if grown individually, suddenly became 'hemp' if grown in the right field. Or. 2009 Session Laws Ch. 897, Sect. 1(2), (5). Those high THC *C. sativa* plants retained their "hemp" label even once harvested and separated from their low-THC field companions. The label was determined by the average across the entire field. Oregon law has subsequently moved closer to the federal laws, but remains distinct, as the court discusses below.

III. The taxonomy and biology of cannabis plants

Before discussing the various statutes further, the court will discuss its understanding of the history of some of the terms used by the parties. The court does so because the terms have different legal meanings in different jurisdictions and the legal meanings often conflict with the terms' historical meanings; a potential source of confusion the court wishes to avoid. The discussion of those terms' meanings will also shed light on the factual questions at issue in this case.

The term "sativa" (from the Latin "sativum" meaning "cultivated) was likely first used by the German botanist Leonhart Fuchs in his 1542 publication "De historia stirpium commentarii insignes" to refer to domesticated cannabis plants. According to one translation, "Hemp-seed," was a term used by Herodotus in 440 BC to describe plant flowers that the Scythians would throw upon red-hot stones to produce smoke in which they bathed with shouts of joy and delight. Herodotus describes the plant as being like flax, only taller and coarser. He says the Scythians also made garments from the plant that resembled linen. Herodotus, THE HISTORY, translated by David Gren. University of Chicago Press (1987). In 1548, the English naturalist William Turner stated in THE NAMES OF HERBES "Cannabis is called in Englische Hemp." Oxford English

Dictionary, 2nd Ed. V. 4, Oxford University Press (2009). "Marijuana" likely originated from the Mexican-Spanish slang term "mariguana" used by poor Mexicans uprooted by the Mexican Revolution who immigrated to the United States in the early 20th Century to describe their popular form of intoxication. In lobbying Congress to pass the 1937 Marihuana Tax Act, then Director of the Federal Bureau of Narcotics, Harry Anslinger, used the term "marihuana" to refer to cannabis plants. The point here is simply that the terms "cannabis," "hemp," and "marijuana[3]" have long and convoluted etymologies. Historically, the terms were interchangeably used as a general reference to plants in the genus *Cannabis.* The term "hemp" has also been used to refer to fibers from cannabis plants and to products made from such fibers, like rope and cloth.

However, botanists have disagreed for nearly 300 years about how many species of plant are in the genus *Cannabis.* The parties have provided the court with little or no evidence regarding the taxonomy of plants within the genus *Cannabis*. Thus, the court can make no factual findings in that area. However, to explain how this court interprets the various statutes at issue here, the court will simply articulate this court's limited understanding of the taxonomy and biology of cannabis plants.

As noted, there is some dispute about how many species of plant belong to the genus *Cannabis*. The most common, and the only widely accepted species, is *cannabis sativa L*. Carl Linnaeus, who named sativa L. in 1753, viewed the genus as containing only that species. https://www.ncbi.nlm.nih.gov/pmc/articles/PMC1336775/ , visited January 9, 2020. However, in 1785, Jean-Baptiste de Lamarck described what he believed to be a separate species he named *Cannabis indica Lam.* In 1924 Russian botantist D.E. Janichevsky proposed a third species:

[3] Federal law uses the spelling "marihuana." The spelling "marijuana" appears to be a mid-20th Century slang term that has now been formally adopted by many legislatures, including Idaho's. The terms are interchangeable.

Cannabis ruderalis Janisch. Small E., "American law and the species problem in Cannabis: science and semantics," BULLETIN ON NARCOTICS. 27 (3): 1–20 (1975). Plants in the genus *Cannabis* have been widely cultivated for use in making products such as rope and for recreational drug use. Cross-pollination between wild plants and the domestic production of plants has led to a wide number of variants. Some argue that all plants in the genus are merely subspecies of *C. sativa. See* Small, E. and Cronquist, A., "A Practical and Natural Taxonomy for Cannabis," TAXON 25(4); 405-435 (Aug. 1976). Research based on the variation in cannabinoid production supports recognizing *C. sativa* and *C. indica* as being separate species. Hillig KW, Mahlberg PG., "A chemotaxonomic analysis of cannabinoid variation in Cannabis (Cannabaceae)," AMERICAN JOURNAL OF BOTANY 91 (6): 966–75. (June 2004). Others continue to recognize *C. ruderalis* as a separate species. Hillig, Karl W., "Genetic evidence for speciation in Cannabis (Cannabaceae)," GENETIC RESOURCES AND CROP EVOLUTION. 52 (2): 161–80. (2005).

Whether one recognizes *C. indicia* as a separate species or as a sub-species, *C. indicia* plants are generally shorter with broader and darker leaves than *C. sativa*. Atakan, Z., "Cannabis, a complex plant: different compounds and different effects on individuals," Therapeutic Advances in Pyschopharmacology, 2012 Dec; 2(6): 241-254. All cannabis plants contain several hundred chemical compounds including over 60 cannabinoid compounds. Dewey, W., "Cannabinoid pharmacology." Pharmacology Review 38: 151-178 (2012). The plant naturally synthesizes and accumulates cannabinoids as cannabinoid acids. When the plant is dried or heated, those acids undergo a chemical process called decarboxylation, the reverse of a process used by the plant during photosynthesis. A number of compounds are produced; those include cannabidiol (CBD), cannabinol, Δ-9 tetrahydrocannabinol (Δ-9 THC), and Δ-8

tetrahydrocannabinol (Δ-8 THC). Pamplona F., Takahashi R., "Pyschopharmacology of the endocannabinoids: far beyond anandamide," Journal of Psychopharmacology 26: 7-22 (June 2012). Those compounds bind to one or both of two receptors on mammalian cells causing various changes in the way the brain and nervous system work. *Id.* There are two main receptors in the human brain to which cannabinoids bind themselves: CB1 and CB2. Δ-9 THC, Δ-8 THC, CBD, and other compounds in the plant all bind with those receptors in differing amounts with differing results. *See* Pertwee R.G., "The diverse CB1 and CB2 receptor pharmacology of three plant cannabinoids: Δ-9 tetrahydrocannabinol, cannabidiol, and Δ-9 tetrahydrocannabivarin," British Journal of Pharmacology, Jan. 2008, 153(2): 199-215. The most detrimental psychological effects are generally viewed to be the result of Δ-9 THC binding with the CB1 receptor.

There is a significant amount of debate about how to predict the amount of CBD and THC that a plant will produce and whether that ratio can be affected by the growing conditions of the plant. Some argue that the ratio is pre-determined by the plant's genes. Russo E., Guy G., "A tale of two cannabinoids: the therapeutic rationale for combining tetrahydrocannabinol and cannabidiol." Medical Hypotheses, Vol. 6, Issue 2: 234-246 (2006). For obvious reasons, cannabis husbandry is not in the same position as apple, rose, or corn husbandry, where growers have cross-bred plants to produce certain physical characteristics for decades and there are many patented gene variations for each plant that will produce offspring with predictable genetics and predictable physical traits.

IV. Practical questions raised by how current legislation uses those taxonomical, biological, and colloquial terms.

The biology, husbandry, and taxonomy of cannabis plants are important to understand when looking at the various ways legislatures have dealt with cannabis. The taxonomical debate is an important one because various legislative bodies, like Congress in the 2014 Farm Bill and the Oregon legislature in its 2009 Industrial Hemp Act, continue to draw a legal distinction between all plants in the genus *Cannabis* and plants of the species *Cannabis sativa L.* Under federal law and under Oregon's 2009 Industrial Hemp Act, *C. indica* plants and *C. ruderalis* plants remain controlled substances, even if they have a low Δ-9 THC concentration. Indeed under Oregon law as of 2009, any *C. indica* or *C. ruderalis* plant was considered "marijuana" even if it had no detectible amount of THC. Under current federal law, *C. indica* and *C. ruderalis* plants are controlled substances if they contain tetrahydrocannabinols, even if the Δ-9 THC concentrations are below 0.3 percent. The definition of "industrial hemp" is species specific.

In those jurisdictions that define "hemp" as only including *C. sativa* plants an obvious question arises: How to tell one species from the other? That becomes even more difficult when the plant material in question consists of a chopped up mixture of stems, leaves, flower buds, and seeds. That question certainly cannot be answered from the factual record before this court in relation to whatever was in the semi-trailer Mr. Palumarchuck was pulling. Normally, that would preclude this court from granting Big Sky's motion. As the court discusses in more detail below, Big Sky's argument is premised upon the plant material seized by the ISP from Mr. Palamarchuk being entirely "industrial hemp" as defined under federal law.

The Agricultural Act of 2018 (2018 Farm Bill) amended 7 U.S.C.A. § 5940, but the definition of "industrial hemp" remained species specific:

> The term "industrial hemp" means 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.

7 U.S.C.A. § 5940. The court concludes that Congress recognized the existence of at least one other species of plant in the genus *Cannabis*, otherwise Congress would not have had to specify hemp as meaning *C. sativa L* plants. Congress could have simply said "plants within the genus *Cannabis.*" Congress clearly intended only to include plants of the specific species *C. sativa L.*

As discussed, the 2014 and 2018 Farm Bills do not purport to regulate the production of all *cannabis* plants. Indeed, they do not purport to govern production of all *C. sativa* plants, only those with low Δ-9 THC levels. Congress removed low-THC *C. sativa* plants from the federal list of controlled substances, but not high-THC *C. sativa* plants. 21 U.S.C. 802(16). However, by definition, one cannot tell the Δ-9 THC concentration of any given plant until after is has been grown, harvested, and dried. 7 U.S.C. § 1639o. That is certainly why Congress required the Secretary of Agriculture to establish regulations for the production of cannabis sativa plants that include a procedure for the "effective disposal of plants…that are produced in violation of this chapter." 7 U.S.C. § 1639q. Plants "produced in violation of this chapter" certainly include those cannabis plants the farmer grew that end up being marijuana; not hemp, as those terms are defined by federal law. That poses a risk for the farmer who could end up losing his entire harvest and facing theoretical federal criminal penalties if his plants end up having a higher THC concentration once dried than expected.[4]

The state of the federal law's treatment of *Cannabis* plants after the 2018 Farm Bill's enactment can fairly be analogized in this way. Imagine that it is a crime to grow, possess, or sell any of the 35 wild species of apples in the genus *Malus*, including the hundreds of varieties of the domesticated apple, *Malus domestica,* except those *Malus domestica* apples whose natural

[4] Mr. Snegirev avers that his personal religious beliefs also sanction the growing of marijuana and he'd never allow marijuana to be grown on his farm. (Snegirev Decl.) Given that he can't tell marijuana from hemp until after it is grown, harvested, and tested, Mr. Snegirev was presumably risking religious sanctions as well.

sugar content is below some established threshold. However, the only way to tell the sugar content of any given apple is to chemically analyze the apple's juice using either a gas chromatograph or High Performance Liquid Chromatography. *For ways to test THC levels see generally,* T. Ruppel, N. Kuffel, Cannabis Analysis: Potency Testing Identification and Quantification of THC and CBD by GC/GID and GC/MS, https://www.perkinelmer.com/lab-solutions/resources/docs/APP_Cannabis-Analysis-Potency-Testing-Identifification-and-Quantification-011841B_01.pdf, visited Jan. 2, 2020. Imagine as well that, because domesticated apples have not been legally grown until recently, there are not well recognized varietals of *M. domestica,* like granny smith or McIntosh, from which one might reliably predict eventual sugar content and which one may easily distinguish based on their appearance; imagine further that the only way to reliably tell *Malus domestica* from the other 34 species of wild apples once the apples are chopped up and stuck in bags in a semi-trailer is through DNA analysis. That analogy makes clear why some prosecutors describe the 2018 Farm Bill as being the *defacto* legalization of marijuana at the federal level. It is now simply impractical for law enforcement agencies to tell "hemp" from "marihuana" as those terms are defined in the federal statutes.

V. Factual issues for this case based on how Idaho and federal law define "hemp" and "marijuana."

Those definitions leave this court with a potential issue of fact to resolve. Because the 2018 Farm Bill and the 2014 Farm Bill are specific to plants of the species *C. sativa L*, Big Sky's argument about federal preemption fails as to plants, or parts thereof, from the species *C. indica* or *C. ruderalis*. All plants in the genus *Cannabis,* regardless of THC concentration, are controlled substances under Idaho law. I.C. § 37-2701(t). If the plant material seized by the ISP

consists entirely of *C. indica* or *C. ruderalis,* then the material is clearly contraband under Idaho law; there is no federal preemption issue, and ISP is entitled to the summary entry of judgment in its favor. Indeed, the same may also be true if the plant material consists of a mixture of *C. sativa* and *C. indicia* plants or a mixture of low-THC *C. sativa* and high-THC *C. sativa* plants and plant parts. High THC *C. sativa* plants are not covered by the 2018 Farm Bill and those plants remain a controlled substance both under federal and state law. Under both Idaho law and current federal law, whether a particular plant or part of a plant is or is not a controlled substance is a question that is specific to each plant or each part of a plant. *Examples include*, I.C. §s 37-2701(t), (w), (z); 37-2705(d)(19), (d)(22), 2707(b)(1), (b)(3), (b)(4), 3732B(a)(1), and 21 U.S.C. § 802(16).

It is an interesting legal question, assuming low-THC *C. sativa* plants are not subject to forfeiture as contraband in Idaho as Big Sky argues, whether a mixture of low THC *C. sativa* and high THC *C. sativa* plant parts would still be. Imagine the ISP seizes a bag of 1,000 dried flower buds; 100 of them come from a *C. indicia* plant; 300 of them come from *C. sativa* plants, but they have a Δ-9 THC concentration in excess of 0.3 percent by dry weight; and the remainders are low THC *C. sativa* flower buds. The bag certainly contains controlled substances under both state and federal law. Neither the *C. indicia* nor the high-THC *C. sativa* buds fall under the auspices of the 2018 Farm Bill. Are the entire contents of the bag then subject to seizure as contraband or does the ISP have to sort the low-THC parts and return them?[5]

[5] Under Idaho law, if a person possesses a bag containing a mixture of 25 pounds of sugar crystals and 1 gram of methamphetamine crystals, that person is guilty of a felony offense carrying a significant mandatory minimum prison sentence. *See* I.C. § 37-2732B(4). Because possession of the entire bag would be illegal, the entire bag is subject to forfeiture under I.C. § 37-2744(1). However, unlike mixtures of other solids, Idaho's Uniform Controlled Substances Act does not clearly discuss mixtures of parts from various species of plants such as cannabis or the cactus referred to as peyote. If one commingles one's peyote with one's prickly pear in a bag, it is not clear the entire contents of the bag are subject to forfeiture versus just the peyote and the bag itself. I.C. § 37-2744(3). That is because the definition of the substance that is controlled is specific to the plant. The government may have to return one's prickly pear.

The federal definition of "hemp" is likewise specific to each plant or part of a plant. As discussed above, Congress defined "hemp" as:

> The term "hemp" means the plant Cannabis sativa L. and any part of that plant, including the seeds thereof and all derivatives, extracts, cannabinoids, isomers, acids, salts, and salts of isomers, whether growing or not, with a delta-9 tetrahydrocannabinol concentration of not more than 0.3 percent on a dry weight basis.

7 U.S.C.A. § 1639o(1). The language of that definition is worthy of careful reading. Are the flower buds, once separated from the plant itself, still "hemp" if the entire plant when dried out, weighed, and tested contains a Δ-9 THC percentage less than 0.3 by weight, even if the flower buds when dried, weighed, and tested have a Δ-9 THC percentage much greater than that? In other words, is it the dry weight of the entire plant that is to be used to determine THC concentration? Or just the weight of the part at issue? What if you have the part and not the rest of the plant? Under a reasonable reading of 7 U.S.C. § 1639o, one could take a *C. sativa* plant that has a Δ-9 THC concentration of less than 0.3 percent by dry weight, cut it in half mid-stalk, and wind up with 2 plant parts—the top with the leaves and flowers and the bottom with the stalk and the roots. Theoretically once you cut it in half, if the Δ-9 THC is largely concentrated in the leaves and flower buds, you could end up with one part that is now marijuana (the top half) and one part that is still hemp (the bottom) under the federal definitions.

In other words, in order to grant Big Sky's motion under the legal theory it propounds, this court may have to find as a matter of fact that the 6,701 pounds of plant material seized by the ISP contains only plants and parts of plants from the species *C. sativa* and that all of those plants and plant parts individually contain less than 0.3 percent Δ-9 THC on a dry weight basis. Congress did not define "dry weight basis" in either the 2014 or 2018 Farm Bills. In his declaration, Mr. Shore says that the plant material seized by the ISP contains at least one volatile

oil (CBD) that is likely to dissipate over time. Thus, the plant material is subject to becoming more "dry" over time. Obviously, reducing the plant material's weight by evaporation of water or CBD oil could increase the percentage of THC in the plant by weight. Congress did not clarify in the 2014 or 2018 Farm bill when, in relation to harvesting, the plant should be weighed to determine its percentage of Δ-9 THC or what moisture content the plant should have when that measurement is taken. Congress left such pragmatic questions to be worked out by the federal Department of Agriculture and by those States and Tribes that chose to accept the responsibility of regulating *Cannabis sativa* cultivation.

On the record this court has, this court could not determine the species of each and every plant and plant part seized or the Δ-9 THC percentage in each and every plant and plant part seized. This court has little or no evidence as to what species of plants were even grown or tested. The testimony of the various chemists and Mr. Snegirev, who grew the plants, uses very generic or conclusory language. The reports from the various chemists who examined the material seized by the ISP all refer to it as "plant material" or "hemp biomass." Mr. Snegirev calls his crop "industrial hemp." But neither the chemists nor Mr. Snegirev explain what they mean by the word "hemp" or the phrase "industrial hemp" and, if by saying "hemp" they mean "plants of the species *C. sativa,"* they fail to explain how they reached the opinion that the plant material seized by ISP (or the crops Mr. Snegirev grew) were of that species and not another. In his declaration, Mr. Snegirev avers that he'd never grow marijuana, but he learned that hemp is not marijuana. Snegirev Decl. at 2. Is he suggesting that he believes marijuana and hemp are different plants? If so, he is either an extremely ignorant farmer or he is simply trying to appear sympathetic, at the risk of appearing non-credible. Perhaps he meant simply that hemp is not

marijuana in the way that a yellow rose is not a red rose; however, a rose, by any name, is still a rose.[6]

Should the court simply accept those opinions without foundation or explanation? Should the court simply take for granted that Mr. Snegirev can tell *C. sativa* from *C. indicia*, even in the face of his professed ignorance of cannabis husbandry? This court doubts most Americans can tell *Triticum aestivum* from *Triticum hybernum* by looking at the plants in the field, let alone chopped up in a bag; yet wheat, including bearded spring wheat (*T. aestivum*) and beardless winter wheat (*T. hybernum*), is an extremely common crop in America and the difference between those two species is relatively easy to discern in the field if one knows what to look for. At least one news agency has reported that even those selling *C. sativa* are poor at distinguishing between *C. sativa* and *C. indica*. THC levels in the same "brand" or "strain" of *C. sativa* are also reported to vary widely. *See* https://www.cbc.ca/news/thenational/ormiston-pot-marijuana-cannabis-weed-genetics-1.4489974. *visited Jan. 2, 2019.* Differentiation between low THC *C. sativa* and high THC *C. sativa* is further complicated by the reality that THCa and THC concentrations vary naturally in each plant over its growth cycle and the amount of Δ-9 THC in any given plant after it is dried will depend on when it was harvested, how completely it was dried, and whether it has been heated. *See* Moreno-Sanz, G., "Can You Pass the Acid Test? Critical Review and Novel Therapeutic Perspectives of Δ9-Tetrahydrocannabinolic Acid A." CANNABIS AND CANNABINOID RESEARCH. 1 (1): 124–130. (2016). Tetrahydrocannabinolic acid (THCa) is the precursor to tetrahydrocannabinol (THC). THCa decarboxylizes to THC. Conversion is limited in living C. sativa plants; however, THCa is progressively decarboxylated when cannabis plants are dried and especially when they are heated, as during smoking or

[6] Although perhaps in this analogy it would not in fact smell as sweet.

baking. *Id.* According to the evidence submitted, the plant material seized by the ISP was sampled and the samples contain a Δ-9 THC percentage under 0.3 percent by weight; however, the THCa percentage by weight exceeded that limit (approximately 0.4), assuming a complete conversion, if heated further, the material seized by ISP could theoretically turn from "hemp" into "marijuana" through more complete decarboxylation of the THCA within it.[7]

This court's point is simply that based on the pleadings, testimony, and exhibits in the record there is a genuine issue of fact about the identity of the species of plants and plant parts found in the semi-trailer Mr. Palamarchuck was hauling and the Δ-9 THC percentage by dry weight in each of those plants or plant parts that the court normally could not resolve. That issue of fact would normally preclude the summary entry of judgment in favor of Big Sky without even reaching the preemption issue.

However, in its response to Big Sky's motion for summary judgment and memorandum in support of its own cross-motion, and despite contrary factual assertions in its complaint, the ISP has implicitly conceded that the plant and plant parts it seized were entirely low-THC *C. sativa.* The ISP lists facts it concedes are undisputed, including that Mr. Snegirev planted and grew "industrial hemp." Resp. to Mtn. for Summ. Jgmnt. And Mem. in Supp. of Cross-Mtn. for Summ. Jgmnt. At 6. The court infers that the ISP is using the term "industrial hemp" as it is defined in the 2014 and 2018 Farm Bills, not as it is defined under Oregon law. A fair reading of the ISP's listing of "undisputed facts" also requires the conclusion that ISP concedes there is no genuine issue regarding whether the semi-trailer pulled by Mr. Palumarchuck contained the

[7] The court does not mean to imply that the court believes either Mr. Snegirev or Big Sky actually intended to use this plant material for illicit sales to recreational drug users. In the parlance of cannabis smokers, the plant material seized by the ISP would be some bad weed. Cannabis abusers can certainly find plants with much higher THCA and Δ-9 THC levels elsewhere. The court is simply highlighting the practical realities given how Congress has defined "hemp."

plants grown and harvested by Mr. Snegirev. The ISP concedes that it did. Therefore, the ISP has conceded that the plant material it seized consists entirely of low-THC *C. sativa* plants and plant parts. Thus, the court will continue to analyze Big Sky's preemption argument.

VI. The 2018 Farm Bill does not preclude States and Tribes from restricting the interstate transportation of low THC research *C. sativa* grown by the pilot programs established pursuant to the 2014 Farm Bill.

On December 20, 2018 President Trump signed into law the Agriculture Improvement Act of 2018 (the 2018 Farm Bill). As noted previously, the 2018 Farm Bill retained the definition of "industrial hemp" Congress had adopted in the 2014 Farm Bill—plants of the species *C. sativa* provided the delta-9 tetrahydrocannabinol concentration of the plant or plant part is less than 0.3 percent on a dry weight basis. 7 U.S.C.A. § 5940, 1639**o.**

Notably, Congress also removed those *C. sativa* plants that qualify as "hemp" from the list of federal controlled substances. 21 U.S.C.A. § 802(16). Oddly, the 2018 Farm Bill still authorizes only the growing or cultivating of low THC *C. Sativa* (not its sale or distribution) and then only by institutions of higher learning and state departments of agriculture. 7 U.S.C.A § 5940. However, where those *C. sativa* plants with Δ-9 THC concentrations low enough to meet the definition of "hemp" are no longer controlled substances, this court is unclear what federal law, if any, would prohibit anyone from not only growing and cultivating them, but also selling or distributing them.

Whatever the reasons for the language of 7 U.S.C.A. § 5940, Congress chose to regulate the production of *C. sativa*,[8] unless a State or Indian tribe submitted a plan under which the state

[8] The 2018 Farm Bill technically only regulates the production of low-THC *C. sativa* (what congress calls Hemp). Production of high-THC *C. sativa* is still a crime under federal law. However, given that one can't predict with 100% accuracy the THC content of a given *C. sativa* plant when one plants it, the regulations adopted by the Secretary will effectively apply to all *C. sativa* grown by licensed growers. Presumably those plants that wind up becoming "marihuana" instead of "hemp" will simply be destroyed.

or tribe would assume primary regulation of such production to the Secretary of Agriculture and the Secretary approved such regulatory plan. 7 U.S.C.A. § 1639p; 1639q. Congress also commanded the Secretary of Agriculture to develop regulations for the production of low THC *Cannabis sativa* for those states that choose not to accept primary regulatory responsibility. 7 U.S.C.A § 1639q. The Secretary finally promulgated such regulations in October of 2019.

Big Sky concedes that Mr. Snegirev's plants were grown prior to the enactment of the 2018 Farm Bill. Certainly Mr. Snegirev's *cannabis* crop was not grown subject to the regulations passed by the Secretary of Agriculture in October of 2019 or under any plan submitted by the state of Oregon to the Secretary after the December 20, 2018 passage of the 2018 Farm Bill. Mr. Snegirev's crops had been harvested by then. However, Mr. Palamarchuk was driving them through Idaho after that bill had passed. Big Sky argues the 2018 Farm Bill contains a provision that prevents states from restricting such transportation.

Section 10114 of the 2018 Farm Bill, a portion of the Bill not enacted into statute, reads:

> (a) RULE OF CONSTRUCTION.—Nothing in this title or an amendment made by this title prohibits the interstate commerce of hemp (as defined in section 297A of the Agricultural Marketing Act of 1946 (as added by section 10113)) or hemp products.
> (b) TRANSPORTATION OF HEMP AND HEMP PRODUCTS.—No State or Indian Tribe shall prohibit the transportation or shipment of hemp or hemp products produced in accordance with subtitle G of the Agricultural Marketing Act of 1946 (as added by section 10113) through the State or the territory of the Indian Tribe, as applicable.

After the December 20, 2018, Farm Bill's amendment to the Agricultural Marketing Act of 1946, Section 1639p of Title 7 of the United States Code reads, in part, as follows:

> (f) Effect
> Nothing in this section prohibits the production of hemp in a State or the territory of an Indian tribe--

> (1) for which a State or Tribal plan is not approved under this section, if the production of hemp is in accordance with section 1639q of this title or other Federal laws (including regulations); and
> (2) if the production of hemp is not otherwise prohibited by the State or Indian tribe.

7 U.S.C. § 1639p(f).

Big Sky reads these provisions together to rewrite Section 10114 of the 2018 Farm Bill to read as follows:

> b) TRANSPORTATION OF HEMP AND HEMP PRODUCTS.—No State or Indian Tribe shall prohibit the transportation or shipment of hemp or hemp products produced in accordance with any Federal Laws (including regulations) through the State.

Big Sky argues that the plant material at issue here was produced by Mr. Snegirev in accordance with the 2014 Farm Bill and, therefore, Idaho, as of December 20, 2018, could not prohibit its transportation through this state. Resolving that argument involves answering two questions: whether Big Sky's statutory interpretation is correct and, if so, whether Mr. Snegirev's plants were in fact produced in accordance with federal law. The ISP argues the answer to both questions is—no.

Idaho courts exercise free review over the application and construction of statutes. *State v. Reyes*, 139 Idaho 502, 505, 80 P.3d 1103, 1106 (Ct. App. 2003). Where the language of a statute is plain and unambiguous, a court must give effect to the statute as written, without engaging in statutory construction. *State v. Burnight*, 132 Idaho 654, 659, 978 P.2d 214, 219 (1999); *State v. Escobar*, 134 Idaho 387, 389, 3 P.3d 65, 67 (Ct. App. 2000). The language of the statute is to be given its plain, obvious, and rational meaning. *Burnight*, 132 Idaho at 659, 978 P.2d at 219. If the language is clear and unambiguous, there is no occasion for the court to resort to legislative history or rules of statutory interpretation. *Escobar,* 134 Idaho at 389, 3 P.3d at 67.

When a court must engage in statutory construction because an ambiguity exists, it has the duty to ascertain the legislative intent and give effect to that intent. *State v. Beard*, 135 Idaho 641, 646, 22 P.3d 116, 121 (Ct. App. 2001). To ascertain such intent, not only must the literal words of the statute be examined, but also the context of those words, the public policy behind the statute and its legislative history. *Id.* It is incumbent upon a court to give an ambiguous statute an interpretation which will not render it a nullity. *Id.* Constructions of an ambiguous statute that would lead to an absurd result are disfavored. *State v. Doe*, 140 Idaho 271, 275, 92 P.3d 521, 525 (2004).

The ISP argues that based on the plain language of the Farm Bill, the command to the States in 7 U.S.C. § 1639p(f) that they may not impede inter-state transportation of low-THC *C. sativa* applies only to low-THC *C. sativa* grown after the enactment of the 2018 Farm Bill and after the various regulations which will hopefully answer some of the practical questions the court alluded to above—what seeds can be trusted to produce low-THC plants? How to tell if a farmer is growing *C. sativa* versus *C. indicia* or has interspersed the two in a given field? How to test the THC concentration of a given crop? Every plant? A random sampling? How to determine a sampling procedure will be representative of the entire crop? How dry is dry enough for the "dry weight"? What exactly will be weighed to determine "dry weight?" When post-harvest will dry weight be measured? Etc.—have been promulgated. The court agrees.

As to that issue, the court finds the ISP's arguments persuasive and adopts them, including its arguments regarding why the authorities to which Big Sky cites this court are not persuasive. The court also finds persuasive and adopts the reasoning of federal Judge Ronald Bush in *Big Sky Scientific, LLC., v. Idaho State Police,* 2019 WL 438336 (D. Idaho 2019). The court will not reiterate that reasoning here. The court will simply additionally note that, in the

court's view, the 2014 Farm Bill clearly authorized the cultivation of low-THC *C. sativa* by higher education institutions or by state departments of agriculture to research the husbandry of *C. sativa*. It is clear to this court that Congress wanted educational institutions and the states to begin researching answers to such important questions before permitting a wholescale cannabis farming industry. Additional questions the research might answer include: Can we produce a varietal of *C. sativa* that has predictably low-THC levels but still has commercially useful levels of CBD? Will that translate to the next generation by seed? If not, can that be accomplished some other way (grafting, cloning, gene splicing,[9] etc.)? Where is the THC concentrated in the plant? Even if overall THC levels are low, can a part of the plant nevertheless be abused? Etc.

With the possible exception of shipping seeds from one university to another, those educational institutions and states that chose to enact pilot programs under the 2014 Farm Bill to conduct such research would have no need to transport *C. sativa* across state borders. Not surprisingly given that reality, the 2014 Farm Bill is silent as to the States' continued ability to restrict the inter-state transportation of low-THC *C. sativa* plants. The court suspects there is a lot of research into the growing of corn conducted annually across this country that does not involve shipping semi-trailers full of corn cobs from one research institution to another.

The language of Section 10114 of the 2018 Farm Bill is plain. Congress is expressing its view of the effect of the 2018 Farm Bill on the ability to transport low-THC *C. sativa* across state and tribal territories: The Bill does not prohibit such transportation and the States and Tribes may no longer do so as to low-THC cannabis produced in accordance with the provisions of the Bill. If it had suddenly dawned on Congress that states have been restricting the inter-state

[9] The court will be interested to see the demographic to which the researchers believe they can best market genetically modified CBD oil.

transportation of low-THC research *C. sativa* produced in the pilot programs created by the 2014 Farm Bill and, after 4 years of apparently not being concerned about the states doing so, Congress finally decided to make clear to the states that the states cannot restrict transportation of low-THC *C. sativa* plants that have been grown and harvested in those pilot programs, Congress would have done so more explicitly than via the linguistic gymnastics Big Sky espouses.

The language of sub-section 1639p(f) on which Big Sky relies clearly applies only to Section 1639p of Title 7 of the United States Code. Section 1639p is directed at those States and Indian tribes who desire to permit cannabis production and who wish to assume primary regulatory authority over how that will be done in their territory. In Section 1639p Congress tells the States and Tribes what each must do if it decides to permit cannabis production (subsections (a) and (b)), Congress establishes civil penalties for cannabis growers who violate the State or Tribe's regulations (subsection (e)), and Congress limits the categories of persons whom the States and Tribes may permit to cultivate cannabis (subsection (e)(3)). Subsection (f) then clarifies that "nothing in this section" (meaning Section 1639p of Title 7) prohibits persons who live in states that have decided not to assume primary regulatory authority of cannabis cultivation from growing low-THC *C. sativa*, so long as they do so in accordance with the federal laws and regulations, including those Congress is now telling the Secretary of Agriculture to enact, and so long as their state law does not preclude them from doing so. Subsection 1639p(f) simply tells people who live in states where the state government is fine with people growing cannabis, but the state government is happy to let the Secretary of Agriculture handle the regulations, that those people can still grow cannabis—i.e. they don't need a license from their state, as their state won't be issuing any. Congress is simply telling those people that all the restrictions about

licensing and applications they just read in section 1639p don't apply to them. So long as their state has not prohibited low-THC *C. sativa* production, they are still free to grow it; they just have to follow the federal rules. In making that clear to those unfamiliar with legal prose, Congress said nothing about the inter-state transportation of anything, including low-THC *C. sativa* plants. Subsection 1639p(f) of Title 7 of the United States Code and subsection 10114(b) of the 2018 Farm Bill are talking about completely different subjects. The former tells people who live in states that permit cannabis husbandry, but don't want to regulate it, that they may still grow it if they follow the federal laws and regulations; the latter tells the States and tribes that they may *no longer* restrict the inter-state transportation of low-THC *C. sativa* that has been grown in states who, after the 2018 Farm Bill, submit a regulatory plan to the Secretary of Agriculture and have it approved, or that has been grown in accordance with the regulatory plan adopted by the Secretary of Agriculture.

The court agrees with the ISP that the prohibition on states interfering with the inter-state transportation of low-THC *C. sativa* plants in Section 10114(b) of the 2018 Farm Bill applies only to low-THC *C. sativa* plants grown after the 2018 Farm Bill was enacted and grown pursuant to either an approved state regulatory plan or pursuant to those regulations promulgated by the Secretary of Agriculture to govern cannabis production. There is no genuine dispute that the plant material seized by the ISP from Mr. Palamarchuck was not. Thus, those provisions in the 2018 Farm Bill do not conflict with the Idaho Controlled Substances Act's provisions regarding forfeiture of these plants. With no conflict between the federal law and Idaho's law, there can be no conflict based preemption of Idaho's laws. Therefore, the ISP is entitled to the summary entry of judgment in its favor.

VII. The crops grown by Mr. Snegirev were not grown "in accordance with" the provisions of the 2014 Farm Bill.

There is, however, an independent basis upon which this court reaches the same conclusion. Accepting Big Sky's argument that Idaho may not restrict the inter-state transportation of low-THC *C. sativa* produced in accordance with the 2014 Farm Bill (as opposed to the 2018 Farm Bill and its subsequent regulatory structure), the ISP is still entitled to the summary entry of judgment in its favor. The court finds as a matter of fact that Mr. Snegirev's crop of low-THC *C. sativa* was not produced "in accordance with" the provisions of the 2014 Farm Bill.

The most obvious basis upon which to reach that conclusion involves a factual determination: Mr. Snegirev was growing his plants in order to sell them. (Snegirev Decl.). There is no genuine dispute about the truth of that fact. At the time Mr. Snegirev grew his plants even low-THC *C. sativa* plants were a controlled substance under federal law. The 2014 Farm Bill created a limited authorization, notwithstanding the prohibitions in the federal Controlled Substances Act, for institutions of higher education and state departments of agriculture to cultivate low-THC *C. sativa* for the purpose of conducting research. Big Sky suggested at oral argument that Mr. Snegirev's sale of his crop may be considered research into the marketing of low-THC *C. sativa*. That argument is absurd on its face, but it is also refuted by Mr. Snegirev's testimony. The only reasonable inference to draw from his declaration is that he wasn't growing the crop to help the Oregon Department of Agriculture do research, he was trying to make money. That factual finding alone is sufficient to conclude his crop was not grown in accordance with the 2014 Farm Bill. However, there is another reasons to reach the same conclusion—the

difference between Oregon's statutory structure for growing cannabis during the 2018 growing season and the provisions of the 2014 Farm bill in effect at the time.

Big Sky has given the court no information about how Oregon was regulating *Cannabis* growers during the 2018 growing season. Big Sky has given the court little evidence that Mr. Snegirev complied with that regulatory structure when he grew his low-THC *C. sativa* crop. It appears that he did have a license and at least one of his fields (the South) underwent some pre-harvest testing for THC levels. Assuming he complied with Oregon's regulatory structure, his crop was still not produced "in accordance" with the 2014 Farm Bill because in the growing season of 2018 Oregon's statutory structure regarding *Cannabis* production differed significantly from the authorizations in the 2014 Farm Bill.

As indicated earlier, Oregon waded into the field of *Cannabis* husbandry before Congress when the Oregon legislature passed the 2009 Industrial Hemp Act. The Oregon legislature has been amending its laws regarding *Cannabis* production and sales ever since. On April 13, 2018, Oregon redefined "industrial hemp" to include any plant in the genus *Cannabis* with a low-THC concentration; not just *C. sativa* plants. O.R.S. § 571.300(5). Oregon's definition of "hemp" also included the seeds of any *Cannabis* plant, regardless of the mother plant's THC concentration or that of the seed,[10] under certain circumstances. *Id.* Oregon's definition of "hemp" was not specific to Δ-9 THC levels like the 2014 Farm Bill was. Oregon's definition of "hemp" included

[10] Some researchers conclude that the level of Δ-9 THC in the seeds of plants, where the plants meet the definition of "hemp," can exceed the legal limit by as much as 1250%. The exact measurement appears to vary based on the extraction method used. Yang, Y., Lewis, M., Bello, A., Wasilewski, E., Clarke, H., and Kotra, L., "*Cannabis sativa* (Hemp) seeds, Δ-9- Tetrahydrocannabinol, and potential overdose," CANNABIS AND CANNABINOID RESEARCH, published on-line, 2017. https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5665515/, visited Jan. 10, 2020.

averaging all of the Tetrahydrocannabinols in the plant.[11] *Id.* Even today, Oregon law precludes its Department of Agriculture from seizing those crops found to contain a THC concentration in excess of federal law if the average THC concentration is below Oregon's threshold. O.R.S. § 571.305(7).

In that growing season, Oregon's definitions of "hemp" and "marijuana" differed from the federal definitions in another way. Oregon defined both "hemp" and "marijuana" as being "the plant Cannabis family Cannabaceae." O.R.S. § 475B.015(17) and O.R.S. § 571.300(5). It appears the Oregon legislature may no longer recognize separate species of plants within the genus *Cannabis*, like Congress did in both Farm Bills, and like Oregon originally did in its 2009 Industrial Hemp Act. Certainly Oregon's current definition of "industrial hemp" includes plants—*C. indica* and *C. ruderalis*—that remain controlled substances under federal law. Oregon appears to have concluded that the genus *Cannabis* does not exist because it contains only one species of plant. Anyone growing hops in Oregon certainly hopes the Oregon legislature wasn't intending to include within its definition of "marijuana" all 11 genera of plants in the family *Cannabaceae* (i.e., the plant Cannabis' family—Cannabaceae). The court suspects most hop growers are not complying with the regulations applicable to cannabis farmers.

This court concludes that Oregon's legislation permitting the cultivation of low-THC *C. sativa* during the growing season of 2018 exceeded the limited exception to the federal Controlled Substances Act found in the 2014 Farm Bill. Therefore evidence that Mr. Snegirev grew his *C. sativa* in accordance with Oregon's statutory and regulatory scheme does not necessitate a conclusion that he grew that crop "in accordance with" the 2014 Farm Bill. As

[11] The Oregon Department of Agriculture appears to have corrected this discrepancy sometime in 2018 by redefining "THC." *See* Or. Admin. R. 603-048-2310(38). Legislation currently pending in the Oregon legislature would make Oregon's statutory definition of "hemp" more closely resemble the federal definition.

discussed above, the court concludes he did not. Therefore, even if the 2014 and 2018 Farm Bills conflict with Idaho's controlled substance laws for low-THC *C. sativa* grown "in accordance with" either Bill, because the plant material seized by the ISP was not, that material is still subject to forfeiture under Idaho law.

Having determined that the plant material seized is a controlled substance under Idaho law and that the federal law in existence at the time of the seizure does not preclude forfeiture of any interests in that material under Idaho Code Section 37-2744(a)(1), the court must still determine if the plant material at issue here is subject to forfeiture under that section. Section 37-2744 provides that property interests (including any possessory interests) in certain objects are subject to being forfeit.[12] That includes any property interest in:

> All controlled substances which have been manufactured, distributed, dispensed, acquired, possessed, or held in violation of [the Uniform Controlled Substances Act] or with respect to which there has been any act by any person in violation of this act.

I.C. § 37-2744(a)(1).

All plants in the genus Cannabis, regardless of species and irrespective of the presence or absence of THC, are controlled substances under Idaho law. I.C. § 37-2705(d)(19); 2701(t). Therefore, the court must determine if the plant material here was possessed by Mr. Palamarchuck in violation of Idaho's Controlled Substances Act. In Idaho, one may lawfully possess some controlled substances pursuant to a valid prescription. Plants in the genus *Cannabis* are not one of those. There are no circumstances under which a person may lawfully possess such plants under Idaho law. There is no genuine dispute that Mr. Palamarchuck possessed such

[12] Upon such interests being forfeit by the holder (generally involuntarily through an action such as this), right of possession vests in a law enforcement agency. For certain objects and land that are not controlled substances, all property interests (possession included) similarly vest in the law enforcement agency. I.C. § 37-2744, 2745.

plants. However, mere possession of a controlled substance does not amount to a violation of Idaho's Controlled Substances Act. The Act criminalizes knowing possession. If one is genuinely ignorant of the physical nature of the substance one possesses, one does not violate the Act. The court finds there is no genuine dispute that Mr. Palamarchuck knew he was possessing plants of the genus *Cannabis*. In his testimony, he admits knowing the plant material was "hemp." While he fails to define what he means by that term, whatever specific species of plant he is referring to, he was clearly referring to a plant in the genus *Cannabis*. Therefore, the court concludes Mr. Palamarchuck possessed the plant material at issue here in violation of Idaho's Controlled Substances Act. Therefore, any possessory or other interests in that property held by anyone are forfeit by operation of Section 37-2744(a)(1).

CONCLUSION

For the reasons stated herein, Big Sky's motion for summary judgment is denied. The ISP's motion for summary judgment is granted. The ISP has previously dismissed its claims as to the remaining property at issue in this action. Therefore, the court will enter a judgment dismissing those claims and ordering the 6,701 pounds of plant material at issue in this claim be forfeit.

IT IS SO ORDERED.

Signed: 1/17/2020 03:38 PM
JONATHAN MEDEMA
District Judge

CERTIFICATE OF MAILING

I hereby certify that on this 21 day of January 2020, I mailed (served) a true and correct copy of the within instrument to:

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PHIL McGRANE
Clerk of the District Court
Signed: 1/21/2020 07:42 AM

By: _____
Deputy Court Clerk

CLERK OF THE DISTRICT COURT FOURTH JUDICIAL DISTRICT ADA COUNTY, IDAHO