

RED LAKE BAND of CHIPPEWA INDIANS

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**Testimony of the Honorable Darrell G. Seki, Sr.
Tribal Chairman
Red Lake Band of Chippewa Indians
Before the
U.S. Senate Committee on Agriculture, Nutrition, and Forestry
Hearing on "Hemp Production and the 2018 Farm Bill"
July 25, 2019**

Chairman Roberts, Ranking Member Stabenow, and members of the U.S. Senate Committee on Agriculture, Nutrition, and Forestry, my name is Darrell G. Seki, Sr. and I am Chairman of the Red Lake Band of Chippewa Indians in what is now, northern Minnesota.

Chi Miigwetch for the opportunity to provide testimony on the challenges and opportunities for Tribal governance and the production, processing, and marketing of industrial hemp in Indian Country.

Background on the Red Lake Nation and Reservation

Red Lake's 840,000 acre Reservation is held in trust by the United States and is home to over 12,000 Tribal members. While diminished in size over time, our Reservation was never broken apart or allotted. Thus our Tribal government is responsible for a large land area over which we exercise full governmental authority, jurisdiction and control, in conjunction with the United States.

There are far too few job opportunities available on our Reservation, due to our remote location, our lack of good roads, reliable communications systems, and other necessary infrastructure. These challenges make it difficult to provide public safety services, promote economic development, and create employment opportunities at Red Lake. While unemployment in Minnesota is below 3 percent, ours remains close to 40 percent.

TRIBAL COUNCIL Organized April 18, 1918 (Revised Constitution & By-Laws, January 6, 1959)

CHIEF COUNCIL OF 1889: May-dway-gwa-no-nind, Nah-guan-gwon-abe, Mays-co-co-caw-ay, Ahnah-me ay-ge-shig, Naw-ay-tah-wowb, Nah-wah-quay-ge-shg

Our Red Lake Nation has a rich tradition of agricultural production along with our fish, harvesting, wildlife and service economies. Red Lake Reservation has the only commercial fishery for walleye in the United States, annually catching, processing and marketing about a million pounds of fish. Red Lake is the only Tribe in the U.S. that grows and harvests our own wild rice on Tribal lands. Red Lake Nation Foods has expanded our natural foods line with unique hand harvested wild fruit jellies, jams & syrups, handcrafted gift items, all natural batter mixes, popcorn & herbal teas. We are pleased to export into the domestic American and international trade markets the bounty of our Reservation harvest produced by Native people. Red Lake Nation Foods is a proud and active member of the Intertribal Agriculture Council and the Native Farm Bill Coalition, and with pride we place the “Made/Produced by American Indians” trademark on our products.

Our Tribe has long operated the Red Lake Tribal Farms on the western side of our Reservation. We are using fish waste from our Walleye processing facility to fertilize our land and help our crops grow. Our interest in hemp production, processing and marketing stands well within our strong food production and processing traditions. When the 2018 Farm Bill provisions on hemp emerged, Red Lake began the process of developing the necessary legal and practical infrastructure. We adopted a Tribal law to guide our ongoing development of our regulatory plan for hemp production, processing and marketing. We are seeking significant levels of financial capital investment that are needed to turn our relatively vast land area into a competitively productive growing and processing center for industrial hemp in our region. There is great opportunity for Red Lake in this field, if we are given a *fair* opportunity to compete.

Tribal Perspective on the 2018 Farm Bill

The enactment of the 2018 Farm Bill, the Agriculture Act of 2018 (Pub. L. No. 115-334), represented an incredible paradigm shift in federal law, both in its acknowledgment of Tribal government sovereignty and its promotion of parity for Tribal producers. Because of the 2018 Farm Bill's recognition of Tribal sovereignty, Tribal producers across Indian Country will have improved access to the programs and authorities at the U.S. Department of Agriculture (USDA). These historic changes for Indian Country in the 2018 Farm Bill are owed in part to the work of the many Tribal leaders, Tribal organizations, Native youth, and allies who joined together to form the Native Farm Bill Coalition (NFBC) in October 2017. The NFBC today counts over 170 Tribal governments as members with 78 Tribes passing resolutions of support, 15 national and regional Tribal organizations/entities, and two national ally organizations. In addition to the dedication of the NFBC members, the support that Indian Country finds in the 2018 Farm Bill is also owed in large part to this Senate Committee, whose members and staff worked with NFBC members throughout the entire legislative process. In the end, our combined efforts cemented 63 new provisions across 11 of the 12 Farm Bill titles. These 63 provisions are aimed specifically at supporting Tribal self-governance, food, and agriculture, infrastructure, research, and education for Tribal governments and Tribal food producers, all of which will assist Tribes and Tribal producers in continuing to promote economic development, job creation, and healthy, sustainable food systems.

Hemp's Growing Potential for Tribes

Of the 63 significant Tribal provisions in the 2018 Farm Bill, one of the clearest illustrations of its many acknowledgments of Tribal sovereignty appears in the Horticulture Title, where Congress legalized the production of industrial hemp and expressly included Tribes alongside states as regulators of hemp production. While the 2014 Farm Bill only offered Tribes the opportunity to grow industrial hemp through an agreement with a state institution of higher education, the 2018 Farm Bill specifically recognizes that Tribes have separate and independent legal authority to regulate industrial hemp production in the same manner as states. This provision represents remarkable respect for Tribal government sovereignty and parity. It also offers Tribes federal protection for an incredible economic development opportunity.

The Tribal regulation and production of industrial hemp holds great promise to build strong, sustainable agricultural economic development through Indian Country, creating jobs and building strong Tribal economies in some of our nation's most rural and remote areas where local economies have stagnated, and unemployment remains high. Tribes and Tribal producers are ready to enter this new market as soon as possible. Many Tribes, like the Red Lake Nation, have access to the land and water necessary to be leaders not only in the cultivation of industrial hemp, but to engage in lucrative value-added agriculture for hemp products as well.

The 2017 Census of Agriculture data indicates that 58.7 million acres of land throughout Indian Country are already supporting some type of food or agriculture production, at a total value of \$3.5 billion. Today's robust Tribal agriculture sector reflects only the beginning of what is the burgeoning potential of Indian Country to feed itself and provide food, fiber, and jobs throughout America. Expanding Tribal agriculture production to include industrial hemp cultivation will certainly help grow Tribal economies and create Tribal jobs, but only if the 2018 Farm Bill hemp provisions are implemented in a way that truly allows for Tribal self-governance. Tribal producers must be free to pursue these new market opportunities without unnecessary administrative burdens from USDA, or our producers will continue to struggle to access a market that the 2018 Farm Bill made clear was open to them. Tribes insist on a fair opportunity, on par with states in ways that make up for the many years Tribes have lost due to legal disadvantage and neglect.

Support for Tribal Authority to Regulate Hemp in the 2018 Farm Bill

In the 2018 Farm Bill, Congress unequivocally recognized the ability of Tribal governments to exercise our sovereignty and regulate industrial hemp produced within our jurisdictions, on par with state governments.

Tribes and states who want to regulate industrial hemp are authorized to submit a regulatory plan to USDA who has 60 days to review and approve it. The 2018 Farm Bill provides relatively few criteria that a Tribal (or state) plan must meet in order to regulate industrial hemp, and the Red Lake Nation thanks this Committee for that parity of treatment in the statute, and especially the fact that the law you authored applies exactly the same criteria for both Tribal and state governments. We are grateful that the law now makes no distinction between Tribes and states for regulatory management of industrial hemp.

Because the Farm Bill put Tribes on equal footing with states, it is all the more disappointing that USDA's current regulatory process leaves Tribal governments and Tribal producers lagging behind the states. Despite significant progress in the Farm Bill itself for Tribal sovereignty, USDA decisions to delay regulations are threatening to cripple Tribal industrial hemp projects before they can even begin.

If Tribes had always been on the same footing with states in terms of growing and regulating industrial hemp, this regulatory delay would merely be a source of frustration. Instead it poses a serious threat to competitive Tribal agribusiness. Unfortunately, the 2014 Farm Bill authority only allowed hemp production as part of a research pilot program authorized under state law in partnership with a higher education state institution or state department of agriculture. Our 1994 Land Grant Tribal colleges and Tribal universities and Tribal departments of agriculture and Tribal regulatory authorities were excluded from the hemp research authority in the 2014 Farm Bill unless we were able to persuade a state competitor to partner with us. This was simply not an option for many Tribes. Even for Tribes who maintain good relationships with their state universities or departments of agriculture, the 2014 law was still essentially asking Tribes to subordinate our sovereignty to states just to do research. This legal background is unfortunately still relevant to Tribes and Tribal producers today: the USDA's regulatory delay on its implementation of 2018 Farm Bill hemp authorities means that state governments today continue to be able to take competitive advantage of the unfair 2014 Farm Bill authorities on hemp research while Tribes are left to wait on USDA to implement the 2018 parity provisions.

Earlier this year, the USDA Agricultural Marketing Service (USDA-AMS) announced that AMS was developing hemp regulations which it expected would be released in early Fall 2019 to accommodate the 2020 growing season. As the months have passed, AMS has continued to push back this expected date. The more the AMS delays, the less time Tribal producers are given to prepare, plan, finance, and plant for the new crop year. Because there are no regulations, USDA takes the position that it cannot review and approve any proposed regulatory plans, whether from a Tribe or a state. However, states are still able to continue growing hemp under the 2014 law—and Tribes are not. Right now, the only way for Tribes to begin hemp production is to use the extremely limited 2014 Farm Bill industrial hemp authority, which as I have stated does not acknowledge Tribal sovereignty and requires a state competitor to become a willing partner. While USDA-AMS has sought to clarify its interpretation of the 2014 Farm Bill authority and how it will apply to Tribes in the 2019 growing season, it *still* limits and requires Tribal sovereignty to take a backseat to state authority. This is *not* what this Committee intended to be the outcome of the 2018 Farm Bill. I find it deeply frustrating that although the 2018 Farm Bill unlocked the door to Tribal parity in this area, USDA has blocked Tribes from opening that door through delayed implementation that places Tribes at a distinct competitive disadvantage.

Under federal law, the allocation of state and Tribal jurisdiction varies widely throughout Indian Country. At Red Lake Nation, our Reservation is solely under Tribal and federal jurisdiction. The State of Minnesota has no jurisdiction, civil or criminal. So for the Red Lake Nation, there is no legal framework that would permit us to enter into an agreement subjugating us to the State of Minnesota under 2014 Farm Bill authorities, even if we were to want to – which we do not. For many Tribes, the negative impacts and effects of a Tribe or Tribal producer starting production of hemp under a state law in 2019 not only exposes deep wounds from historically

competitive battles with states, but it also creates new concerns. Despite the bedrock federal Indian law cases of the Marshall Trilogy of the early 19th century, states have continually, consistently and wrongly attempted to assert jurisdiction over Tribal lands, especially policing powers. Given that the 2018 Farm Bill hemp provision hinges on a Tribe's ability to regulate and enforce its own laws, the USDA-AMS is shoving Tribes backwards by saying Tribes should simply start hemp production under state authority as an interim measure under the 2014 Farm Bill. Heeding that message would be a dangerous step back. It would not only set a wrong standard but also provide states an unwelcome foot in the door to exercise state jurisdiction and competitive control over Tribal lands. As we have seen countless times in Indian Country, once the federal government opens that door for states, it is extremely difficult, if not impossible, to walk the state back out the door and shut it again.

Tribes see this new market opportunity for hemp as one that has the potential to provide badly needed jobs and spur economic development in many of our remote and rural Tribal lands, but Tribes' unequal footing while the USDA-AMS delays implementation of the 2018 Farm Bill provisions will leave that potential wholly unrealized.

Need for Improved Consultation with Tribal leaders

Although USDA has held two Tribal consultations on the 2018 Farm Bill as a whole, this issue of hemp is so new, and so complicated, that we should have meaningful Tribal consultation focused on hemp alone. AMS has had a few "listening sessions" on hemp, but there is a significant difference between a consultation, where there is government-to-government dialogue between decision-making government representatives, and a listening session, where Tribal leaders raise concern after concern and the federal government is not really able to respond beyond a series of prepared talking points. Tribal governments need better engagement and communication from USDA on the development of industrial hemp regulations, especially as those regulations look to address Tribal regulatory jurisdiction over hemp.

One key issue that requires consultation is the growing concern among Tribal leaders about the definition of our jurisdiction in these developing regulations. We are unsure what the boundaries of that jurisdiction are because of the way it is defined in the Farm Bill. The new law defines a Tribe's jurisdiction to be the "territory of an Indian Tribe." Now for the Red Lake Indian Reservation, that should be quite clear. Our Reservation is intact. It was never allotted. Virtually all of the land within our Reservation boundaries are held in trust by the United States for the Red Lake Band of Chippewa Indians. Our Reservation was excluded from Public Law 83-280, preventing all state jurisdiction. I am concerned, however, that USDA-AMS is not openly addressing the wide variety of jurisdictional differences throughout Indian Country.

Unlike Red Lake and some other Tribes, many Tribes¹ have many different types of land within their jurisdictional boundaries: fee land, restricted fee land, individual trust land, or Tribal trust land. All of those legal categories can have different jurisdictional rules, yet hemp could

¹ Public Law 83-280 imposed varying state laws on many lands within Indian reservations and Tribal communities in Alaska, California, Minnesota (except for Red Lake Nation), Nebraska, Oregon, Wisconsin, as well as Florida, Idaho, and Washington. Other federal laws have imposed state law on other Tribal reservation lands (e.g., Oklahoma).

reasonably be grown on any of those lands within the “territory of an Indian Tribe.” Given USDA’s limited legal expertise in Tribal lands, this Committee should insist that Tribal leaders be welcomed by USDA, along with their technical advisors, to partner with USDA in guiding the regulation-writing process that will shape the federal regulations regarding our Tribal jurisdiction over our Tribal territory, and how the term “Tribal territory” is best defined in the regulation of hemp. If USDA does not take steps to define “territory of an Indian Tribe” in the regulations in meaningful and direct consultation with Tribes, I and other Tribal leaders are concerned that we will end up in a space where everyone involved in growing hemp on Tribal lands has to work out whether or not they can grow hemp on a parcel-by-parcel basis. That would be a huge barrier to Tribal regulation of hemp and to the Tribal producers trying to grow hemp. It would also be a paralyzing challenge to Tribal governments seeking to regulate consistent and uniform hemp production structures. To ensure this is not an additional barrier to Tribal economic development, USDA must work with Tribes on developing more precise definitions, or we need clarity in subsequent legislation. Here’s the bottom line – Indian Tribes will *not* go backwards. Given that federal recognition of our jurisdiction has suffered calamitous erosion for more than two centuries, many Tribes will join the Red Lake Nation in insisting that Tribal authority to produce and process hemp within the “territory of an Indian Tribe” means that Tribes have the authority to regulate, produce and process hemp within “Indian country” as defined in Section 1151 of Title 18, United States Code.² While there may be additional views on how to define the statutory phrase – “territory of an Indian Tribe” – my point here today is that USDA should develop its views only in negotiation with Tribal leadership.

If USDA is going to give us that clarity in the regulations, however, then USDA needs to communicate better with Tribal leaders on this issue through a meaningful, government-to-government consultation on hemp alone. Tribal leaders understand the jurisdictional complications of the phrase, “territory of an Indian Tribe,” because we deal with those complications every day. That is why I recommend that phrase be defined based on the territorial bounds of our Tribal reservations and jurisdictional service areas, which would keep us from having all parties involved considering their land status on a parcel-by-parcel basis. This definition is clear and recognizes Tribal sovereignty in a manner that is consistent with the inherent authority we have exercised since time immemorial. For these reasons, Congress must insist that the USDA deal with Tribal leaders as its technical and political advisors on this and many other issues regarding industrial hemp. The Committee should demand that the USDA invite Tribal leaders to sit at the regulatory-writing table as governmental partners not special interest groups or “stakeholders.” The appropriate vehicle for that is through agency-specific, government-to-government negotiation consultations not listening sessions.

Another issue that requires Tribal consultation is the interstate commerce protections provision and issues with the testing certification process. Section 10114 of the 2018 Farm Bill safeguards the transportation and shipment of legally produced hemp under an approved Tribal or state plan

² “[T]he term ‘Indian country’ ... means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.” Title 18 U.S.C. § 1151.

when a crop leaves Tribal jurisdiction and enters another jurisdiction where hemp production might be illegal as a matter of state or Tribal law. There currently exists no efficient manner by which law enforcement in the field can scientifically determine whether a hemp crop is below the prescribed THC level of 0.3 percent on a dry weight basis without laboratory testing (which by definition now requires delay and impoundment). To complicate the matter more, the currently available tests yield different results, and hemp THC percentage levels can vary in the harvest, packing, and shipping processes. Therefore, you can have legally produced Tribal hemp that tests at the proscribed limit when harvested, but then tests above 0.3 THC when, inevitably, the truck carrying it is stopped in a state where the hemp production is illegal. This can create extensive inefficiencies, logistical shipping delays, and product loss, and can lead to personally burdensome arrests and bonds while a crop undergoes testing. It can also be exploited by states as a competitive means to thwart Tribal hemp production and it could deter third parties from doing business with Tribal producers and processors, thereby negatively compounding the economic disparities already faced by Tribes.

Tribal leaders have requested a formal consultation with USDA-AMS to discuss the hemp industry's unique regulatory issues in the context of Indian country. This request was made to the USDA-Office of Tribal Relations (OTR) at the most recent 2018 Farm Bill Tribal Consultation, which took place in Reno, Nevada, at the end of June 2019. So far, notice of a scheduled consultation has not reached Tribal leaders. I would like to underscore the need for this consultation before this Committee. We simply must have a meaningful consultation with USDA-AMS on these hemp issues that I have brought before the Committee today, or Tribes will continue to be left out of this process and regulatory decisions will be made that make it more difficult for Tribes to access this new market opportunity.

The fear of Tribes being left behind by USDA is not unsubstantiated. On many separate instances in meetings and listening session, high-ranking officials within USDA-AMS have frequently mischaracterized the sovereignty of Indian Tribes in the context of industrial hemp regulation under the 2018 Farm Bill, often not understanding that Tribal authority to regulate hemp production on our lands is not predicated on any state action and exists on-par with states in every aspect and that Tribes have their own policing powers and authorities. I believe effective consultation could provide clarity to all parties, but especially to USDA-AMS officials who are charged with crafting regulations that will affect Tribes for years to come.

Such a consultation would mark the first standalone government-to-government consultation concerning industrial hemp since the passage of the Farm Bill last December. This consultation would serve as a platform to clarify these recurring misunderstandings of Tribal authority and offer Tribal leaders an opportunity to provide USDA-AMS with technical advice on Indian country jurisdiction that will prove invaluable to the Department in crafting regulations that make sense and promote, rather than stifle, Tribal hemp production and processing. It is deeply concerning that regulations implementing these provisions will be released in a matter of months when meaningful consultation has not occurred as is required by USDA Departmental Regulation 1350-002. While I do not wish to delay the release of regulations further, I also know that regulation crafted without the necessary Tribal input could have negative impacts that last even longer than the problems arising from USDA's delay. A standalone consultation on hemp with Tribal leaders should be scheduled immediately.

Need for Technical Assistance and Risk Management Tools for Hemp Production

The 2018 Farm Bill also authorizes USDA-AMS to provide technical assistance to Tribal governments as we begin developing our regulatory plans. A form of technical assistance that would most benefit Tribes like the Red Lake Nation would be for USDA-AMS to issue a “model plan” for us to modify and adapt for our own governmental needs. This would lessen the amount of Tribal resources expended to enter this market and potentially expedite the review process for USDA when we submit plans. I know the Tribal members of the Native Farm Bill Coalition stand ready to provide their technical experts to help USDA-AMS draft such a “model plan.”

The 2018 Farm Bill also assures Tribes that industrial hemp producers in our Tribal communities are eligible to receive the benefits of federal crop insurance administered by the USDA-Risk Management Agency (USDA-RMA). Despite that assurance in the law, we had no clear pathway to receiving this coverage until Congress passed the Additional Supplemental Appropriations for Disaster Relief Act of 2019 (H.R. 2157). That law finally made it clear that industrial hemp producers may purchase coverage for their crop through a Whole Farm Revenue Protection policy beginning in the 2020 reinsurance year. We appreciate that assurance from Congress, but now we look to USDA to implement it. USDA-AMS and USDA-RMA must work together in implementing this provision as Congress intended so that our Tribal producers, and investors from outside Indian country, can enjoy a necessary degree of security in their investments and reap the full benefits of this growing market.

Need for Access to Credit for Hemp Production

While Congress has identified a clear pathway to accessing federal crop insurance for hemp, questions remain about how Tribal producers can access credit assistance. It is unclear right now if industrial hemp producers will be able to access capital through additional USDA programs and farm loans like those many Native producers receive from Farm Service Agency (FSA), since the 2014 Farm Bill authority does not allow for it. For example, FSA State Directors are in the position to have to tell local farmers that they cannot provide FSA loans for the 2019 growing season because they are producing hemp under the 2014 Farm Bill which is just supposed to be a stop gap while we await new regulations. This FSA position is delaying the access to credit products that hemp producers need and will create a huge problem in Indian Country where access to credit is typically scarce. Credit deserts exist throughout Indian country and as a result, Tribal producers rely on FSA as a lender because there either are no commercial banks in our remote communities, or because the commercial banks refuse to adequately lend to our producers. FSA must honor the changes that the 2018 Farm Bill made and not further burden Tribal producers who are looking to expand into hemp production in this growing cycle and beyond.

Additionally, the regulatory delay is inevitably limiting other agriculture lenders from releasing guidance for lending to industrial hemp producers, leaving us with more questions than answers about credit access for Indian country. Further hesitation to lend to hemp growers will only make it even harder for Tribal producers to access credit, something that is such a challenge overall that the 2018 Farm Bill requested a special study from the GAO on the topic. Clear

guidance from policymakers is needed so that these items do not further compound the economic obstacles plaguing our communities.

Regulatory Issues Impacting Marketability of Hemp Products

I would like to raise one final regulatory issue which has the potential to have a serious negative impact on the marketability of hemp products, specifically hemp-based food products. Shortly after the 2018 Farm Bill was signed into law, the Commissioner of the U.S. Food & Drug Administration (FDA) released a statement that the agency would still retain the authority to regulate THC- and CBD-based food and drug products as FDA interprets these types of products to still be illegal under federal law. FDA's statement has created much confusion among our Tribal producers who want to grow hemp and also develop and process value-added hemp food products.

There are clearly many questions surrounding the new hemp provisions, and this incongruent regulatory interpretation between the USDA hemp cultivation side and FDA hemp-based food and drug products side is adding great uncertainty to the legal landscape. We need clarity as to when each federal agency is properly exercising jurisdiction and what is permissible under the law. Thus, we ask the Committee to instruct the federal agencies to work closely together in developing a federal regulatory framework to avoid a patchwork of conflicting state and Tribal regulations in this area and simplify the marketplace for cultivators, producers, processors and purchasers alike.

Conclusion

The industrial hemp provisions of the 2018 Farm Bill hold vast potential for sustainable economic development throughout Indian country. These remarkable provisions recognize the inherent sovereignty of Indian Tribes, and our proper governmental role in developing this new agricultural market as partners on par with the federal and state governments. In its implementation of the 2018 Farm Bill, however USDA is not reflecting the spirit and letter of this new law. The Committee should aggressively exercise its oversight responsibility to ensure that the USDA consistently and actively engage with Tribal governments throughout the implementation process.

The legalization of industrial hemp production marks a potential landmark economic opportunity for Tribes and Tribal producers through value-added agriculture. Because of this, it is vital that federal policymakers and agency officials negotiate with Tribal leaders, in robust government-to-government consultation, in shaping the federal regulatory structure implementing the industrial hemp provisions of the 2018 Farm Bill. This commitment must be made real from top to bottom at USDA. Otherwise, there is a high risk of this turning into yet another missed opportunity for Indian Country.

I would like to thank the Committee – Chi Miigwetch -- for holding this hearing and offering me an opportunity to focus on these issues and urge that Indian Country be restored to an equal footing and competitive opportunity in hemp cultivation, production, processing and purchasing, just as this Committee envisioned it in the 2018 Farm Bill.