UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

ONEIDA TRIBE OF INDIANS OF WISCONSIN,

Plaintiff,

v. Case File No. 10-CV-00137

VILLAGE OF HOBART, WISCONSIN,

Defendant.

PLAINTIFF'S BRIEF IN SUPPORT OF MOTION TO STRIKE AFFIRMATIVE DEFENSES AND MOTION TO DISMISS COUNTERCLAIMS

Respectfully submitted this 18th day of May, 2010.

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INTRODUCTION

In this action, the Oneida Tribe of Indians of Wisconsin ("Tribe") seeks declaratory and injunctive relief to protect its beneficial interest in lands owned by the United States and held in trust for the Tribe ("Trust Lands"). Under federal law, the Trust Lands are not taxable and are inalienable. Nonetheless, the Village of Hobart ("Village") seeks to impose charges against the Trust Lands under its storm water management ordinance, which provides for collection of the charges from the property owner in the same manner as property taxes, including foreclosure.

The Village interposes seven (7) affirmative defenses and two (2) counterclaims to the Tribe's Complaint. These defenses and counterclaims are largely duplicative of the conclusions of law asserted in denial of the Tribe's claims and insufficient as a matter law. For the reasons stated herein, the Tribe moves to strike the affirmative defenses (*see* Part I, below) and moves to dismiss the counterclaims (*see* Part II, below).

STATEMENT OF FACTS

The Tribe is a federally recognized Indian tribe organized under the Indian Reorganization Act ("IRA"), 25 U.S.C. § 462, *et seq*. Complaint, ¶ 4; Indian Entities Recognized and Eligible to Receive Services From the United States Bureau of Indian Affairs, 74 Fed. Reg., No. 153, August 11, 2009, at 40220. It occupies a reservation established by the 1838 Treaty with the Oneida, 7 Stat. 566. *Id.,* ¶ 6. The United States has continuously since 1838 held parcels of land located within the reservation in trust for the Tribe and the Secretary of the Interior has, from time to time since 1934, acquired additional parcels of land on the reservation in trust for the Tribe pursuant to the IRA. *Id.,* ¶ 8.

The Village is a municipality organized under the laws of Wisconsin located in Brown County. Complaint, ¶ 5. In 2007, the Village adopted an ordinance to regulate storm water runoff. *Village of Hobart, Code of Ordinances,* §§ 4.501 Findings, 4.508 Billing and Penalties. The Ordinance creates a Storm Water Management Utility which is authorized to impose an annual storm water charge on "each and every lot or parcel within the Village." *Id.,* § 4.505(1). "The property owner is held responsible for all storm water service charges on real property that he/she or it owns." *Id.,* § 4.508(2). Further, the Ordinance provides that "[u]npaid delinquent Storm Water Management Utility charges shall be a lien upon the property served…[t]he Village shall collect delinquent charges under Wis. Stat. §§ 66.0821(4) and 66.0809(3)." *Id.,* § 4.508(3). The referenced Wisconsin statutes provide that arrears "will be levied as a tax against the lot or parcel of real estate" and authorizes the use of the same proceedings "in relation to the collection of general property taxes" for failure to pay the charges. *Id;* Complaint, ¶¶s 9, 10, 11.

Beginning in July 2007, the Village purported to impose its storm water charges on the Trust Lands located within the Village. The Tribe repeatedly advised the Village that it objected to the imposition of the charges on the Trust Lands. Complaint, ¶¶s 12, 13. In addition, the Bureau of Indian Affairs objected to the imposition of these charges on the Trust Lands, advising the Tribe and the Village that the charges constituted a tax that may not be imposed on land held by the United States in trust for the Tribe. *Id.,* ¶ 17. Nonetheless, the Village continues to demand payment of its storm water charges on the Trust Lands. *Id.,* ¶ 18.

On March 25, 2009, the Tribe and Village executed an Escrow Agreement. The Oneida Golf Enterprise Corporation, a tribally chartered corporation wholly owned by the Tribe and charged with the management of the Thornberry Creek Golf Course, was also a signatory to the Escrow Agreement. Complaint, Exhibit C. The purpose of the Escrow Agreement was to obtain

approval of the Village of a liquor license application for the Thornberry Creek Golf Course, which approval was conditioned by the Village of the payment of the disputed storm water charges on the Trust Land. The Tribe agreed, and in fact did, deposit the disputed charges into an escrow account and the Village agreed, and in fact did, approve the requested liquor license. Complaint, ¶¶ 14, 15.

The Tribe filed this action on February 19, 2010, seeking a declaration that the Trust Lands, owned by the United States and held for the benefit of the Tribe, are not subject to the Village's storm water charges. The Tribe seeks declaratory and injunctive relief against the imposition of those charges. Complaint, ¶ 1, Prayer for Relief.

On April 20, the Village filed its Answer to the Tribe's Complaint. The Village disputes legal conclusions drawn from the essential facts of the complaint but does not dispute the essential facts themselves. The Village admits that the United States holds land in trust for the benefit of the Tribe but disputes the propriety of the United States' acquisition of the Trust Lands. Answer, ¶ 7. The Village admits that it seeks to impose its storm water charges on the Trust Lands, that the Tribe has refused to pay such charges, and that the Bureau of Indian Affairs has denied that the Village has authority to impose the charges. Answer, ¶¶ 11, 12, 17. In addition, the Village alleges seven (7) affirmative defenses and two (2) counterclaims. This motion to strike the affirmative defenses and to dismiss counterclaims is timely.[1]

[1]By stipulation of the parties and as ordered by the court, the Tribe's time to move to dismiss or answer the counterclaims was extended until May 18, 2010.

ARGUMENT

I. THE TRIBE MOVES TO STRIKE ALL AFFIRMATIVE DEFENSES AS DUPLICATIVE AND INSUFFICIENT AS A MATTER OF LAW

As noted above, the Village pleads seven (7) denominated affirmative defenses: (1) the Trust Lands that are the subject of this litigation are not properly held in trust by the United States; (2) the Village was "mandated under applicable laws" to impose its storm water charges on the Trust Lands; (3) the Village's storm water charges are fees, not a tax; (4) the Tribe failed to name necessary and indispensable parties; (5) the Secretary of the Interior lacks authority to remove land from state jurisdiction; (6) the storm water charges are not pre-empted by federal law; and (7) the storm water charges do not violate the Tribe's inherent powers of self-government. Answer, Affirmative Defenses.

Federal Rules of Civil Procedure 12(f) provides that the "court may strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." While motions to strike are generally not favored, such motions are granted where the motion tends to expedite, not delay, the litigation. *Heller Financial, Inc. v. Midwhey Powder Co., Inc.,* 883 F.2d 1286, 1295 (7th Cir. 1989). Motions to strike expedite the litigation when the defenses subject to the motion are duplicative or redundant [*Williams v. Jader Fuel Co. Inc.,* 944 F.2d 1388, 1400 (7th Cir. 1991) (contributory negligence affirmative defense largely duplicated failure to mitigate affirmative defense)] or when the affirmative defense is not properly pleaded as an affirmative defense [*Voeks v. Wal-Mart Stores, Inc.,* 2008 WL 89434 (E.D. Wis.) at *5, quoting *Hydra-Stop, Inc. v. Severn Trent Environmental Services, Inc.,* 2003 WL 22872137 at *5 (N.D. Ill.)]. Motions to strike are particularly appropriate when the affirmative defense is legally insufficient on the face of the pleading [*Heller Financial, Inc.,* 833 F.2d at 1294], tends to

unnecessarily "clutter" the litigation [*Davis v. Elite Mortgage Services, Inc.,* 592 F. Supp.2d 1052, 1058 (N.D. Ill. 2009)], or contains "bare legal conclusions" [*id.*]. In *Davis,* the court summarized a three-part test for an affirmative defense to withstand a motion to strike: first, the matter must be properly pleaded as an affirmative defense; second, the matter must be adequately pleaded under F.R.C.P. 8 and 9; and third, the matter must be sufficient as a matter of law to defeat the complaint under a plausible state of facts. *Id.*

Each affirmative defense alleged by the Village is subject to one or more of these objections and, for the specific reasons set out below, should be stricken. The affirmative defense are addressed in the order in which the defenses are pleaded by the Village and addressed separately, except for the last two affirmative defenses which are addressed together.

A. The United States is an indispensable party to, and is immune from, the Village's first affirmative defense that the trust lands were not properly acquired.

In its Complaint, the Tribe seeks a declaration that the Village lacks authority to impose and collect its storm water charges on Trust Lands. In its Answer, the Village goes well beyond the issues presented by the Tribe's Complaint and alleges as an affirmative defense that the Trust Lands are not properly held in trust. However, this suit cannot be used by the Village as a springboard to challenge the United States' title to the Trust Lands. The United States is indispensable to this broadside challenge to the authority to acquire the Trust Lands in the first instance and is immune from suit on it. For this reason, the first affirmative defense should be stricken as insufficient on its face as a matter of law.

1. The United States is indispensable to challenges to title of restricted or trust land for Indians.

The Supreme Court has made plain that the United States is a necessary and indispensable party to claims challenging the United States' interest in restricted Indian lands. In *Minnesota v. United States,* 305 U.S. 382 (1939), the state had commenced condemnation proceedings in state court to take a right of way over allotted lands on the Grand Portage Indian Reservation. The Court determined that the United States was an "indispensable party," and that Minnesota could not maintain suit against the United States absent authorization from Congress. In the Court's words:

> The United States is an indispensable party defendant to the condemnation proceedings. A proceeding against property in which the United States has an interest is a suit against the United States. It is confessedly the owner of the fee of the Indian allotted lands and holds the same in trust for the allottees. As the United States owns the fee of these parcels, the right of way cannot be condemned without making it a party. The exemption of the United States from being sued without its consent extends to a suit by a state. Hence Minnesota cannot maintain this suit against the United States unless authorized by some act of Congress.

305 U.S. at 386-87 (citations omitted). Similarly, in *United States v. Hellard,* 322 U.S. 363 (1944), the Court determined that the United States was a necessary and indispensable party in a state court action to determine heirship in restricted Indian lands and to partition them. The Court found that Congress had granted the state courts of Oklahoma jurisdiction to hear such suits, and thereby waived the United States' sovereign immunity; however, this act had not affected the indispensability of the United States in any such state court proceeding:

> We must read the Act in light of the history of restricted lands. That history shows that the United States has long been considered a necessary party to such proceedings in view of the large governmental interests which are at stake. We will not infer from a mere grant of jurisdiction to a state or federal court to adjudicate claims to restricted lands and order their sale and distribution that Congress dispensed with that long-standing requirement.

322 U.S. at 368. The Court identified the interests of the United States as follows:

> Restricted Indian land is property in which the United States has an interest. This national interest is not to be expressed in terms of property, or to be limited to the assertion of rights incident to the ownership of a reversion or to the holding of a technical title in trust… The governmental interest is as clear as it would be if the fee were in the United States. The United States as guardian of the Indians is necessarily interested either in obtaining partition in kind where that course conforms to its policy of preserving restricted land, or in securing the best possible price…

322 U.S. at 367.

Since *Minnesota* and *Hellard,* lower federal courts have consistently held that the United States is a necessary and indispensable party in suits challenging the United States' title to restricted Indian land as well as individual and tribal trust lands. *See, e.g., Town of Okemah v. United States,* 140 F.2d 963, 964 (10th Cir. 1944) ("The United States is an indispensable party to any action wherein the relief sought would impair its governmental function to protect the allotted lands against alienation."); *Carlson v. Tulalip Tribes of Washington,* 510 F.2d 1337, 1339 (9th Cir. 1975) ("Because the United States has fee title to the unallotted Reservation lands, the dispute involves fixing of a boundary between lands of the United States and lands claimed by the plaintiffs…The United State is therefore a necessary party…Further, the United States is a necessary party to any action in which the relief sought might interfere with its obligation to protect Indian lands against alienation."); and *Imperial Granite Company v. Pala Band of Mission Indians,* 940 F.2d 1269, 1972, fn. 4 (9th Cir. 1991) ("there is another insuperable hurdle to Imperial's attempting to establish title to an easement in the road. The United States is an indispensable party to any suit brought to establish an interest in Indian trust land.").

2. The United States cannot be joined in this action.

The United States is immune from suit, absent a waiver of immunity by Congress. *United States v. Mitchell,* 463 U.S. 206 (1983); *California v. Arizona,* 440 U.S. 59 (1979); *United States v. Testan,* 424 U.S. 392 (1976); *United States v. Sherwood,* 312 U.S. 584 (1941). Any waiver of the United States' sovereign immunity must be unequivocally expressed and may contain conditions. *Sherwood,* 312 U.S. at 587; *Lehman v. Nakshian,* 453 U.S. 156 (1981). In the Quiet Title Act ("QTA"), 28 U.S.C. § 2409(a), Congress did waive the United States' immunity for claims challenging the United States' title to land but expressly excepted claims relating to Indian lands:

> The United States may be named as a party defendant in a civil action under this section to adjudicate a disputed title to real property in which the United States claims an interest, other than a security interest or water rights. *This section does not apply to trust or restricted Indian lands…*

Id. (emphasis supplied). The QTA is the "exclusive means" by which the United States' title to land can be challenged and cannot be avoided by naming an officer of the United States or by invocation of the Administrative Procedures Act, 5 U.S.C. §702. *Block v. North Dakota ex rel. Bd. Of Univ. and Sch. Lands,* 461 U.S. 273, 283, 286 fn.22 (1983) (the Indian lands exception was included in the statute because "a waiver of immunity in this area would not be consistent with the 'specific commitments' [the federal government] had made to the Indians in treaties and other agreements.").

The Supreme Court directly addressed the scope of the exception for Indian lands in the QTA in *United States v. Mottaz,* 476 U.S. 834 (1986). There, the Court determined that the exclusion for Indian lands "operates solely to retain the United States' immunity from suit by third parties challenging the United States' title to land held in trust for Indians…" *Id.* at 842.

Federal appellate courts have since applied the QTA to bar third party challenges to the United States' title to trust land, regardless of whether the challenge is styled as a quiet title action or otherwise, where the relief requested would impact the United States' title. *Governor v. Kempthorne,* 516 F.3d 833 (10th Cir. 2008); *Shivwits Band of Paiute Indians v. Utah,* 428 F.3d 966 (10th Cir. 2005); *Neighbors for Rational Development, Inc. v. Norton,* 379 F.3d 956 (10th Cir. 2004); *Metropolitan Water District of Southern California v. United States,* 830 F.2d 139 (9th Cir. 1987); *Florida v. United States Dept. of Interior,* 768 F.2d 1248 (1985).

As a result, even though the Village does not assert a title interest in the Trust Lands in itself, its first affirmative defense that the United States' did not properly acquire trust land for the Tribe is barred by the QTA. "Congress chose to preclude an adverse claimant from divesting the United States' title to Indian lands held in trust. It would be anomalous to allow others, whose interest might be less than that of an adverse claimant, to divest the sovereign of title to Indian trust lands." *Florida,* 768 F.2d at 1254-55. *See also Metropolitan Water District,* 830 F.2d at 144 ("To allow this suit would permit third parties to interfere with the Government's discharge of its responsibilities to Indian tribes in respect to lands it holds in trust for them."); *Neighbors,* 379 F.3d at 962 ("If Congress was unwilling to allow a plaintiff claiming title to land to challenge the United States' title, we think it highly unlikely Congress intended to allow a plaintiff with no claimed property rights to challenge the United States' title to trust land."); and *Shivwits Band,* 428 F.23d at 975 (It is "clear that Congress' intent in excluding Indian trust lands from the [QTA's] waiver of immunity was to prevent adverse claimants from interfering with the United States' obligations to the Indians.") (quotation marks and citations omitted.)

Finally, it should be noted that the Village has another forum and opportunity in which to litigate its defense relating to the United States' authority to acquire trust land for the Tribe. As

the Village itself notes, this very same issue, among others, is the subject of an appeal by the Village currently pending before the Interior Board of Indian Appeals. Answer, Affirmative Defense 1. That forum is the appropriate place and time for the Village to asserts its first affirmative defense – in a proceeding against the United States on a proposed acquisition, rather than in this case where the United States is absent and the subject land is already held in trust. The Court should strike the first affirmative defense as insufficient as a matter of law due to the absence of the United States.

B. In its second affirmative defense, the Village fails to identify any state or federal law that "mandates" the application of its storm water charge.

The Village claims a "mandate" that it impose charges against the Trust Land for regulating storm water runoff but does not cite any basis for this "mandate." Interestingly, the Village's own Ordinance makes no reference to any "mandate" for its storm water charges; rather, the Ordinance refers to Wisconsin statutes governing general powers of municipalities. Storm Water Runoff Ordinance, § 4.201(A) (ordinance is adopted "by the Village Board under the authority granted by Sec. 61.35, Wis. Stats."). Nothing in these Wisconsin statutes mandates any particular ordinance at all, including one regulating storm water runoff.[2] Neither does federal or any other state law mandate that the Village adopt its storm water runoff ordinances or impose the storm water charges upon the Trust Lands. The Village's second affirmative defense claiming otherwise should be stricken as legally insufficient.

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[2] Wis. Stat. 61.35 provides, "Section 62.23 applies to villages, and the powers and duties conferred and imposed by s. 62.23 upon mayors, councils and specified city officials are hereby conferred upon presidents, village boards, and village officials performing duties similar to the duties of such specified city officials, respectively. Any ordinance or resolution passed prior to May 30, 1925, by any village board under s. 61.35, 1923 stats., shall remain in effect until repealed or amended by such village board."

1. Federal law regulating storm water runoff contains no "mandate."

The Clean Water Act ("CWA"), 33 U.S.C. § 1251, *et seq.,* and its implementing regulations establish a comprehensive regulatory scheme to prevent pollution of the waters of the United States, including that occurring from storm water discharge. The CWA requires the Environmental Protection Agency ("EPA") to promulgate regulations governing storm water discharges [33 U.S.C. § 1342] and the EPA has done so. 40 C.F.R. § 122. Among other things, these regulations require owners and operators of small municipal separate storm sewer systems ("MS4") to obtain a permit from EPA for the operation of the MS4. 40 C.F.R. § 122.33. These permits require operators to "develop, implement, and enforce a storm water management program designed to reduce the discharge of pollutants…*to the maximum extent practicable."* 40 C.F.R. § 122.34(a) (emphasis supplied). These permits further require operators to "*the extent allowable under State, Tribal or local law,* effectively prohibit, through ordinance, or other regulatory mechanism, non-storm water discharges into your storm sewer and implement appropriate enforcement procedures and actions." 40 C.F.R. § 122.34(b)(3)(iii)(B) (emphasis supplied). In all other respects regarding regulation of particular sources of runoff, the regulation is specifically imposed "to the extent allowable under State, Tribal or local law." *See* 40 C.F.R. § 122.34(b)(4)(ii)(A) [erosion and sediment control]; 40 C.F.R. § 122.34(b)(5)(ii)(A) [post-construction runoff]. Far from mandating any particular regulation or charge, federal law and regulations on storm water runoff specifically defer to other laws that set the boundaries of the regulated entities' jurisdictional authority.

2. State law regulating storm water runoff contains no "mandate."

Similar to the requirements of federal law, Wisconsin law requires certain owners and operators of an MS4 to obtain a permit for storm water discharge. Wis. Stat. § 283.33(1)(c). An

operator may be issued a general permit for the operation of an MS4, or it may be issued individual permits for individual discharges from the system. Wis. Stat. § 283.33(3). The Wisconsin Department of Natural Resources issues the permits and has promulgated regulations to implement Wis. Stat. § 283.33. *See* Wis. Admin. Code NR § 216. These regulations set the requirements for permit applications and the issuance of permits. Again like the federal regulations, the Wisconsin regulations specifically provide that the permit requirements are imposed *"[t]o the extent authorized by law…"* NR § 216.07(4)(a) (emphasis supplied). *See also* NR § 151.11 and 151.23 [enforcement prescribed *"to the extent authorized by law"*]; NR § 151.12 and 151.24 [imposing sanctions *"to the extent authorized by law"*] (emphasis supplied.).

In the end, neither federal nor state law mandates that the Village impose its storm water charges on the Trust Lands. To the contrary, both federal and state law expressly subject the regulation of storm water runoff to limitations of other applicable laws. Here, the Tribe claims that federal law prohibits the application of the Village's storm water charges to the Trust Land. The Tribe expects to prevail upon its claims and, when it does, there is plainly nothing in federal or state environmental laws that mandate the application of the charge nonetheless. The Village's affirmative defense claiming otherwise should be stricken as legally insufficient.

C. The Village's third affirmative defense that the storm water charges are fees, not a tax, is not properly pleaded as an affirmative defense and runs against the absent property owner - the United States.

In its Complaint, the Tribe alleges that the storm water charges constitute a tax, not a fee, and cannot be imposed on the Trust Lands. Complaint ¶¶s 10, 28. In addition, the Tribe alleges that even if the charges are deemed to constitute fees for services, the charges are nonetheless pre-empted by federal law and by the Tribe's inherent powers of self-government. *Id.,* ¶¶s 32, 38. The Villages denies all of these allegations in its Answer. The Village simply restates these

denials in its third affirmative defense (as well as in its sixth and seventh affirmative defenses, addressed below at II, F).

This matter is plainly not one in avoidance and is not properly pleaded as an affirmative defense. F.R.C.P. 8(c). It merely restates allegations that deny the Tribe's claims and tends to clutter the litigation. It should be stricken on that basis alone. *Voeks v. Wal-Mart Stores, Inc., supra; Davis v. Elite Mortgage Services, Inc.,* 592 F.Supp.2d at 1058.

Further, this affirmative defense is legally insufficient on its face. The storm water charges, whether they constitute a tax or a fee for services, run against the title owner under the literal terms of the Ordinance. *Code of Ordinances,* § 4.508(2). The United States is the owner of the Trust Lands, which it holds for the benefit of the Tribe. As established above, the United States cannot be joined in this litigation. While the Village may deny the Tribe's allegations, it cannot assert those allegations as an affirmative claim for relief against the Tribe, when the Tribe is not the party responsible for the charges under the Ordinance. The Village has not and cannot join the party that is purportedly obligated under the Ordinance to pay the charges, i.e., the United States, whether the charges constitute a tax or a fee. Consequently, this so-called third affirmative defense must be stricken for the additional reason that it is legally insufficient.

D. The United States is not a necessary party to the Tribe's claim of immunity from the Village's storm water charges.

In its fourth affirmative defense, the Village alleges that the Tribe failed to name all necessary and indispensable parties to the Tribe's claims for relief. The Village does not identify these necessary parties. But the United States is the only other party with any interest in the Trust Lands, so presumably the Village means the United States in this affirmative defense.

On that assumption, the affirmative defense is legally insufficient since it is clear that the Tribe can sue to protect its beneficial interest in the Trust Lands without the United States.

Courts have ruled time and again that Indians can sue on their own behalf to protect their rights in real property without the participation of the United States as plaintiff. *See Poafpybitty v. Skelly Oil Co.,* 390 U.S. 365, 372 (1968) (involving individual Indian); *Creek Nation v. United States,* 318 U.S. 629, 620 (1943) (tribes possess "the power to bring actions on their own behalf. That the United States also had a right to sue did not necessarily preclude the tribes from bringing their own actions."); *Lane v. Pueblo of Santa Rosa,* 249 U.S. 110, 113 (1919); *Choctaw & Chickasaw Nations v. Seitz,* 193 F.2d 456, 461 (10th Cir. 1951), *cert denied* 343 U.S. 919 (1952); *Narragansett Tribe of Indians v. So. R.I. Land Develop.,* 418 F. Supp. 798 (D. R. I. 1976). "[I]n a suit by an Indian tribe to protect its interest in tribal lands, regardless of whether the United States is a necessary party under Rule 19(a), it [the United States] is *not* an indispensable party in whose absence litigation cannot proceed under Rule 19(b)." (emphasis in original). *Puyallup Indian Tribe v. Port of Tacoma,* 717 F.2d 1251, 1254 (9th Cir. 1983) (citing *Fort Mojave Tribe v. LaFollette,* 478 F.2d 1016, 1017-18 (9th Cir. 1973)).

As established above, the United States *is* an indispensable party where the validity of title to restricted or trust land is challenged by a third party. *See* Part I, A, above. However, those cases do not prevent a tribe from suing to assert or protect its restricted or trust lands, as the Tribe does in its Complaint here. In such cases, the United States' interest is not impaired in its absence since the United States is not a party to the suit and is not bound by the judgment. *Seitz,* 193 F.2d at 450; *United States v. Candelaria,* 271 U.S. 432, 442 (1926); *see also Poafpybitty,* 390 U.S. at 371. And a tribe's interest in the possession of its lands clearly supports an independent right to sue without the United States. *Id.* Thus, a tribe can sue without the

United States to protect its interest in trust lands but third parties cannot challenge the United States' title to trust lands in the absence of the United States.

In *Seitz,* the court of appeals considered the equities under these circumstances as required by F.R.C.P. 19 and found this to be an equitable result. In the court's words:

> If we hold that the United States is an indispensable party, the Nations will be unable to assert their longstanding claim to the land; and if we hold that the United States is not an indispensable party, the defendants will run the risk of the burden and expense of defending two lawsuits, even though they succeed in obtaining a judgment in their favor in the instant action.
>
> We are of the opinion that the equities presented by the situation and the inconveniences that will result to the Nations, if they are denied the right to prosecute an action, and to the defendant, if the Nations are permitted to prosecute the action without the joinder of the United States, weigh heavily in favor of the Nations.
>
> We conclude that a final decree determining the title and right to possession as between the Nations and the defendants would not leave the controversy in a situation inconsistent with equity and good conscience.

Id., at 461. *See also Sokaogon Chippewa Community v. State of Wis.,* 879 F.2d 300, 305 (7th Cir. 1989) (United States was not indispensable party to tribal action for mineral rights). Courts have consistently followed the lead of *Seitz* and refused to find the United States indispensable where the Indians sue to enforce federally protected rights. This is particularly equitable here since the Village has another forum in which it has squarely made this challenge against the United States. The Village's attempt to insert this issue into this litigation as an affirmative defense is barred by the absence of the United States and should be stricken.

E. There is no conceivable basis in law for the Village's fifth affirmative defense that the Secretary of the Interior lacks authority to remove trust land from state jurisdiction.

The Village claims that the Secretary lacks authority to place land into trust and, thereby, remove land from state jurisdiction. But the Village fails to identify the legal basis for this

defense. And, of course, the defense overlaps significantly with the Village's denial that the trust land was properly placed into trust for the Tribe as well as the Village's first counterclaim. *See* Answer, ¶ 7; II, A, below. A motion for a more definitive statement would serve no purpose, though, since there is no legal principle that supports the Village's claimed fifth affirmative defense. State and local governments have routinely made similar such arguments in other contexts and courts have consistently rejected them all.

It is important to first set the legal backdrop against which all such defenses have been judged. This backdrop features most prominently Congress' broad and plenary authority to manage Indian affairs. This authority is most commonly stated to reside in the Indian Commerce clause and the treaty clause of the United States Constitution. U.S. Const., art. I, § 8, clauses 3 & 8. *See generally, Cohen's Handbook of Federal Indian Law,* § 5.01. This pervasive and broadly pre-emptive federal authority correspondingly limits state authority in Indian affairs by operation of the Supremacy Clause. In the words of the *Handbook:*

> The pervasive federal presence in the field has led courts to reject challenges to Indian legislation as invading state sovereignty...Congress may constitutionally enact legislation, execute provisions of a treaty, or ratify agreements with a tribe, even if so doing affects state interests, such as barring the operation of state hunting and fishing laws, regulatory or tax laws, and laws governing such traditional state areas of concern as child welfare.

Id., §§ 5.01[1], 5.02[2]; *United States v. Lara,* 541 U.S. 193, 202 (2004); *Cotton Petroleum Corp. v. New Mexico,* 490 U.S. 163 (1989). Judged against this backdrop, every argument similar to the Village's fifth affirmative defense has been rejected, just as should the Village's affirmative defense.

First, the proposition that state regulatory authority over Indian lands cannot be limited without the state's consent or participation has been rejected by the Supreme Court. In *Antoine*

v. Washington, 420 U.S. 194 (1975), the State of Washington denied that a federal Indian treaty could limit state authority to prosecute Indians for violation of state hunting and fishing laws because the state was not a party to the treaty. The Supreme Court rejected the state's argument, reasoning that it failed in the face of Supremacy Clause. *Id.,* at 199. In *United States v. McGowan,* 302 U.S. 535 (1938), the Supreme Court reversed a lower court ruling that the Congress could not limit a state's authority to regulate the introduction of liquor onto Indian lands without the consent of the state. The Court ruled that the federal liquor law was constitutional and, as such, operated to pre-empt the operation of inconsistent state laws. 302 U.S. at 537.

Second, a set of related arguments that, for one reason or another, state authority has been unconstitutionally infringed by placing land into trust for tribes has been rejected by lower courts. In each case, a state or local government challenged federal authority to place Indian land beyond the regulatory or other authority of the affected state and in every case the argument was rejected. The catalogue of failed arguments, all similar to the Village's affirmative defense, includes:

• trust lands create a federal enclave within the meaning of the Enclave Clause article I, section 8, clause 17, of the Constitution, thereby requiring state consent -- rejected because trust land status does not create an federal enclave that removes the land from state jurisdiction altogether; *State of New York v. Salazar, 2009 WL 3165591* (NDNY 2009); *Carcieri v. Kempthorne,* 497 F.3d 15, 40 (1st Cir. 2007), rev'd on other grounds 555 U.S. ___, 129 S. Ct. 1058 (2009); *Nevada v. United States,* 221 F.Supp.2d 1241, 1251 (D. Nev. 2002); and *City of Roseville v. Norton,* 219 F. Supp.2d 130, 150 (D.D.C. 2002);

• trust lands restrict state authority in violation of the Tenth Amendment -- rejected inasmuch as regulation of Indian affairs is expressly delegated to Congress and, thus, not reserved by the literal terms of the Tenth Amendment; *State of New York v. Salazar, supra; Carcieri v. Kempthorne,* 497 F.3d at 39; *City of Roseville,* 219 F.Supp.2d at 154; *see also New York v. United States,* 505 U.S. 114, 156 (1992) ("If a power is delegated to Congress in the Constitution, the Tenth Amendment expressly disclaims any reservation of that power to the States; if a power is an attribute of state sovereignty reserved by the Tenth Amendment, it is necessarily a power the Constitution has not conferred on Congress.");

• trust lands are held under an unconstitutional delegation of legislative authority to the Secretary of the Interior and thereby illegally infringe upon state jurisdiction over such lands -- rejected in *State of New York v. Salazar, supra; Nevada v. United States,* 221 F.Supp2d at 1250 (as to special legislation mandating trust acquisition); *South Dakota v. United States Department of the Interior,* 69 F.3d 878 (8th Cir. 1995), vacated and remanded, 519 U.S. 919 (1996), rev'd, 423 F.3d 790 (8th Cir. 1995); *United States v. Roberts,* 185 F.3d 1125 (10th Cir. 1999);

• trust lands violate the Statehood clause of article IV, section 3, clause 1, of the United States Constitution by creating a new state within the borders of an existing state without the consent of the existing state - rejected on reasoning similar to the Enclave clause discussed above; *City of Roseville,* 219 F.Supp2d at 152;

• trust lands violate the Equal Footing doctrine by limiting sovereignty of affected state as compared to other states -- rejected on authority that trust lands do not oust state jurisdiction altogether; *City of Roseville,* 219 F.Supp.2d at 153. *See Nevada v. Hicks,* 533 U.S. 353, 361 (2001) ("Our cases make clear that the Indians' right to make their own laws and be governed by

them does not exclude all state regulatory authority on the reservation. State sovereignty does not end at a reservation's border.")

In the face of this overwhelming authority, there is no possible legal basis for the Village's bald assertion that the "Secretary of the Interior has no authority under any statute to remove lands from state jurisdiction." The affirmative defense must be stricken as legally insufficient and as bare legal conclusions.

F. In its so-called affirmative defenses numbered six (6) and seven (7), the Village makes nothing more than bare legal conclusions that deny two of the Tribe's claims.

The last two of the Village's designated affirmative defenses literally do no more than repeat the Village's denials of the Tribe's claims for relief. Affirmative defense number six states, "The fees and charges asserted by the Village relating to its Storm water Ordinances are not preempted by federal law." *Compare,* ¶¶s 31, 32 of Answer, where the Village denies the Tribe's allegations that the storm water charges are pre-empted by pervasive federal regulation of trust lands. Affirmative defense number seven states, "The fees and charges asserted by the Village related to its Storm water Ordinances do not violate the Tribe's inherent powers of self-government." *Compare,* ¶¶s 37, 38 of Answer, where the Village denies the Tribe's allegations that the storm water charges infringe upon the Tribe's inherent powers of self-government. These affirmative defenses are plainly not matters in avoidance or in defense of claims, as provided for in F.R.C.P. 8(c) and, thus, are not properly pleaded as affirmative defenses. *Voeks, supra.* They are nothing more than bare legal conclusions that are merely mirror images of the Tribe's claims for relief and should be stricken as affirmative defenses. *Davis,* 592 F.Supp.2d at 1058.

Because these two affirmative defenses merely duplicate denials in the Answer, the Village loses nothing by having the same allegations stricken as affirmative defenses. The matters contained in the two so-called affirmative defenses are clearly contested between the parties and will be fully adjudicated, even if the affirmative defenses are stricken. On the other hand, having the same issues remain in the litigation as affirmative defenses may unduly complicate and delay this litigation. Surely it would make no sense to litigate the same issues separately as part of the Tribe's initial claims and then again as affirmative defenses. And if these issues are addressed at the same time, which party would bear the burden of proof – the Tribe, since it alleges these matters as part of its claims for relief, or the Village, since it alleges these matters as affirmative defenses? This is precisely the "unnecessary clutter" that is appropriately stricken upon motion. *Heller Financial, Inc.,* 883 F.2d at 1295.

In all respects, the Tribe's motion to strike the affirmative defenses proposes to streamline this litigation. It eliminates duplicative allegations -- allegations that also appear as denials and will of necessity be addressed in the context of the Tribe's claims. The motion also disposes of affirmative defenses that are insufficient as a matter of law. As such, the Tribe's motion will expedite rather than protract this litigation and should be granted.

II. THE TRIBE MOVES TO DISMISS THE COUNTERCLAIMS FOR FAILURE TO JOIN THE UNITED STATES, AS BARRED BY THE TRIBE'S SOVEREIGN IMMUNITY, AND FOR FAILURE TO STATE A CLAIM FOR RELIEF.

As noted above, the Village makes two (2) counterclaims. The first counterclaim challenges the validity of the United States' action to place the subject land into trust, denies the Secretary's authority to remove the Trust Lands from state jurisdiction (assuming the land was properly placed into trust), and alleges that the storm water charges are due in any event since they constitute fees for services and not a tax. This counterclaim is described as one for

declaratory judgment. The second counterclaim claims the storm water charges are due and demands payment of the charges by the Tribe. The second counterclaim is described as one for money damages.

F.R.C.P. 12(b)(1), (6), and (7) provide that claims, including counterclaims, are subject to dismissal for lack of subject matter jurisdiction, failure to state a claim for relief, and failure to join a party under F.R.C.P. 19. Motions to dismiss for lack of subject matter are expressly provided for in the rule [*Arbaugh v. Y&H Corp.,* 546 U.S. 500 (2006)] and such motions can test the facts alleged in the pleading as the basis for jurisdiction [*Apex Digital, Inc., v. Sears, Roebuck & Co.,* 572 F.3d 440, 443-44 (7th Cir. 2009)]. Motions to dismiss for failure to state a claim are also expressly provided for in the rule under a standard recently reformulated by the Supreme Court. The claim must contain sufficient factual matter, accepted as true, to "state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal,* 556 U.S. 500 (2009), quoting *Bell Atlantic Corporation v. Twombly,* 550 U.S. 544 (2007). Finally, the rule provides for pre-answer dismissal of a claim (or counterclaim, in this case) due to the absence of a required party who cannot be joined. F.R.C.P. 12(b)(7). The two counterclaims made by the Village must be dismissed on these grounds.

A. The Village's first counterclaim should be dismissed principally due to the indispensability of the United States.

The main thrust of the Village's first counterclaim is to challenge the validity of the United States' acquisition of the Trust Lands. The counterclaim consists of nothing but affirmative defenses, which are addressed above, cobbled together as a counterclaim for declaratory relief. As such, the counterclaim suffers the same defects as the affirmative defenses, specifically:

• the Trust Lands were not validly taken into trust by the United States -- repeats the first affirmative defense, which is barred by the indispensability and sovereign immunity of the United States as a direct challenge to the United States' title; *see* Part I, A, above;

• the storm water charges are fees for services, not a tax - repeats the second affirmative defense, which simply restates the Village's denials, fails to state a claim against the Tribe under the Ordinance, and which fails due to the indispensability and sovereign immunity of the United States, the property owner; *see* Part I, B, above;

• the Village's interests in its storm water charges outweigh the Tribe's interests -- repeats the denials in paragraphs 31 and 32, as well as the thrust of the sixth affirmative defense, which should be stricken as improperly pleaded as an affirmative defense and as a counterclaim; *see* Part I, 6, above;

• the federal government has no authority to remove the Trust Lands from state jurisdiction -- repeats the fifth affirmative defense, which fails as legally insufficient and should be dismissed as a counterclaim for failure to state a claim; *see* Part I, 5, above.

For the same reasons stated above regarding these same allegations as affirmative defenses, these allegations should be dismissed when restated as a counterclaim. To the extent that the allegations in the counterclaim simply repeats the Village's denial of the Tribe's claims for relief, the presence of the counterclaim confuses the litigation on questions such as who carries the burden of persuasion and invites disruptive and unnecessary discovery. To the extent that the allegations in the counterclaim broaden the litigation to include challenges to title to the Trust Lands, the allegations are barred by the indispensability and immunity of the United States. The counterclaim should be dismissed on these grounds.

B. The Tribe holds sovereign immunity from the Village's counterclaims for declaratory relief and monetary damages.

The sovereign immunity of tribes from suit, absent consent by Congress or waiver by the tribe, is one of the most fundamental and consistently applied principles of federal Indian law. As the Supreme Court has said, tribal sovereign immunity "is a necessary corollary to Indian sovereignty and self-governance." *Three Affiliated Tribes of the Ft. Berthold Reservation v. Wold Eng'g, P.C.,* 476 U.S. 877, 890 (1986). The principle extends to tribe's commercial as well as governmental activities and applies to off reservation as well as on reservation activities by tribes. *C & L Enters. V. Citizen Band of Potawatomi Indian Tribe,* 532 U.S. 411 (2001); *Kiowa Tribe v. Mfg. Technologies, Inc.,* 523 U.S. 751 (1998); *Okla. Tax Comm'n v. Citizen Band of Potawatomi Indian Tribe,* 498 U.S. 505 (1991). And the doctrine bars suits for declaratory and injunctive relief as well as for money damages. *Santa Clara Pueblo v. Martinez,* 436 U.S. 49,58-59 (1978) (declaratory and injunctive relief); *Wilbur v. Locke,* 423 F.3d 1101 (9th Cir. 2005) (declaratory and injunctive relief); *Imperial Granite Co. v. Pala Band of Mission Indians,* 940 F.2d 1269 (9th Cir. 1991) (money damages).

There can be no serious question that the Tribe is entitled to invoke tribal sovereign immunity. The Tribe is recognized by and maintains a government-to-government relationship with the United States. 74 Fed. Reg., No. 153, August 11, 2009, at 40220; *see also Oneida Tribe of Indians of Wisconsin v. Village of Hobart,* 500 F.Supp.2d 1143 (E.D. Wis. 2007). The United States has continuously made, or been obligated to make, annuity payments to the Tribe under the 1794 Treaty of Canandaigua, 7 Stat. 44. *Six Nations, et al. v. United States,* Docket No. 84,

23 Ind. Cl. Comm. 376 (1970) [Docket 84].[3] The Tribe's status as a successor to the Oneida Nation was tried in other litigation and the court found that the Tribe is, in fact, a direct descendant of the aboriginal Oneida Nation. *Oneida Indian Nation v. County of Oneida,* 434 F.Supp. 527, 532 (N.D.N.Y. 1977). Eventually, the Supreme Court affirmed this 1977 judgment and observed, "The respondents [including the Tribe] in these cases are the direct descendants of members of the Oneida Indian Nation..." *Oneida County v. Oneida Indian Nation,* 470 U.S. 226, 230 (1985).

Under these circumstances, this court cannot look behind the Executive branch's determination to recognize the Tribe. Indeed, such determinations are akin to political questions beyond the scope of judicial review. *See, e.g., Baker v. Carr,* 369 U.S. 186, 199 (1962). At a minimum, Executive determinations are entitled to judicial deference to be disturbed only in the event of an arbitrary determination. *United States v. Sandoval,* 231 U.S. 28, 46 (1913). Because of the great deference extended to the political branches of government on this question, no court has overturned a congressional or executive determination on tribal status. *Handbook of Federal Indian Law,* §3.02[4]. The Village makes no allegations here that cast any doubt on the Tribe's

[3] The Tribe was one of the named plaintiffs in this suit, which sought compensation for those years where the 1794 annuity payment had not been made. Judgment was entered in favor of the plaintiffs and the Department of the Interior ultimately approved a judgment distribution under which the Tribe received 42% of the judgment. 42 Fed. Reg. 21665, April 28, 1977.

ability to claim sovereign immunity, absent a congressional abrogation or tribal waiver of immunity.[4]

No congressional abrogation of the Tribe's immunity to this action is alleged by the Village and none exists. The only remaining question is whether the Tribe has waived its sovereign immunity to either of the counterclaims for declaratory relief and money damages. There are two arguable bases for a waiver of immunity by the Tribe but neither of those fits these circumstances.

First, the Tribe agreed to a limited waiver of its sovereign immunity in the Escrow Agreement with the Village. *See* Exhibit C, Complaint. By its expressed terms, that waiver is limited to "[c]laims by a party for declaratory and/or injunctive relief and the distribution of the Escrow Agreement..." *Id.,* Art. 5. Neither the Tribe nor the Village makes any claim for or distribution of the escrow amount. In addition, both of the Village's counterclaims seek relief that goes far beyond that contemplated in the limited waiver of immunity in the Escrow Agreement. On the first, the Village challenges the very title to the Trust Lands, a challenge not contemplated in the Escrow Agreement or the Tribe's Complaint and one that cannot proceed in the absence of the United States. On the second, the Village seeks payment of "all charges and fees now due and owing" without regard to the amount in escrow. Nothing in the Escrow Agreement can be reasonably read to waive the Tribe's immunity to these broad claims.

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[4]The Village effectively concedes that the Executive branch has determined that the Tribe is under federal jurisdiction and has, on that basis, actually placed land into trust for the Tribe. *See* Answer, ¶ 8. While the Village "denies that the Tribe is a successor in interest to the Oneida Nation..." [Answer, ¶ 4], the Village does not allege that the United States' determination on the Tribe's status is arbitrary. Indeed, the Village could not reasonably do so in light of the United States' adjudicated obligation to continuously make annuity payments to the Tribe under the 1794 Treaty of Canandaigua. As a result, the Village's allegations are insufficient on their face to justify reconsideration of the Tribe's status by this court.

Second, the Village will surely argue that the Tribe waived its sovereign immunity by having filed this action. As a general proposition, this is not correct. The Supreme Court has held that even compulsory counterclaims cannot be asserted against plaintiff tribes because of tribal sovereign immunity. *Okla. Tax Comm'n v. Citizen Band of Potawatomi Indian Tribe, supra.* Even so, there is authority indicating that defendants may be able to claim recoupment against plaintiff tribes: where the counterclaim arises out of the same transaction as that sued on by the tribe, seeks comparable relief, and seeks an amount not in excess of the amount sought by the tribe. *Berrey v. Asarco, Inc.,* 439 F.3d 646 (10th Cir. 2006). However, even this exception to the tribal sovereign immunity doctrine does not apply here. The Village's first counterclaim for declaratory relief is not a mirror image of the Tribe's claims. Instead, the first counterclaim puts into play not just the applicability of the storm water charges but the very title to the Trust Lands. Further, the Tribe seeks no money damages so that the Village's second counterclaim can in no sense be viewed as an offset. *Oneida Tribe of Indians of Wisconsin v. Village of Hobart,* 500 F.Supp.2d 1143; *see also Oneida Indian Nation of New York v. Madison County and Oneida County, New York,* ___ F.3d ___, 2010 WL 1659452 (2d Cir. 2010) (where the Second Circuit recently ruled that tribal sovereign immunity shields a tribe from judgment in the amount of taxes previously found owed and payable by the Supreme Court).

There is no exception or circumstance that breaches the Tribe's immunity from the Village's far reaching declaratory and money damages claims. Both counterclaims should be dismissed on grounds of the Tribe's sovereign immunity from suit.

CONCLUSION

By its Complaint, the Tribe has placed into controversy the applicability of the Village's storm water charges on the Trust Lands. The Tribe alleges that the charges constitute a tax and the Village cannot impose or attempt to collect through foreclosure or otherwise a tax on the Tribe's Trust Lands. Alternatively, the Tribe alleges that, even if the charges constitute a fee for services, the charges are pre-empted by the pervasive federal regulation of the Trust Lands and the Tribe's inherent powers of self-government over the Trust Lands.

The Village attempts to complicate and confuse this litigation by not only denying the Tribe's allegations but by repeating and recasting many of those denials as either affirmative defenses and/or counterclaims. The Village also attempts to significantly expand the scope of this litigation by injecting new issues, such as the Tribe's status and the United States' authority to place land into trust for the Tribe. The Village fails altogether to suggest any basis for reconsidering the United States' recognition of the Tribe. Further, the absence of the United States precludes consideration of the United States' authority to take place the Trust Lands into trust. For these and the other reasons detailed above, the affirmative defenses should be stricken and the counterclaims dismissed, leaving the Village to adjudicate the new matters against the United States elsewhere.

Respectfully submitted this 18th day of May, 2010.

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