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 REPLY BRIEF IN SUPPORT OF MOTION TO STRIKE AFFIRMATIVE DEFENSES AND DISMISS COUNTERCLAIMS

Respectfully submitted this 26th day of June, 2010.

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INTRODUCTION

The Village of Hobart ("Village") opposes the Oneida Tribe of Indians of Wisconsin's ("Tribe's") motion to strike the Village's affirmative defenses and dismiss its counterclaims but presents no authority that supports its position. The Village relies upon a flawed analysis of the standard governing motions to strike and fails to meet the thrust of the Tribe's motion that the Village's affirmative defenses are legally insufficient and unnecessarily clutter this litigation. *See* Part I, *below.* The Village seeks to avoid dismissal of its counterclaims by recasting its counterclaim for declaratory relief and by claiming that the Tribe has waived its sovereign immunity. As recast by the Village, the counterclaim for declaratory relief is legally insufficient, and the claimed waiver of the sovereign immunity does not extend to the Village's expansive claims. Both counterclaims should be dismissed. *See* Part II, *below.*

ARGUMENT

I. THE VILLAGE OFFERS NO LEGAL BASIS FOR ITS AFFIRMATIVE DEFENSES.

A. Standard for the Motion to Strike.

Motions to strike affirmative defenses are granted where the motion expedites the litigation by eliminating defenses that are either legally insufficient or redundant. *See* Plaintiff's Brief in Support of Motion to Strike Affirmative Defenses and Motion to Dismiss Counterclaims ("Opening Brief"), p. 4-5; *Golemine, Inc. v. Town of Merrillville, Indiana,* 652 F. Supp.2d 977, 980 (N.D. Ind. 2009) (motion appropriate to remove unnecessary clutter); *Imperial Const. Mgt. v. Local 96,* 818 F. Supp. 1179, 1186 (N.D. Ill. 1993) (motion useful to remove material that is

cumulative or complicates the issues in the case).

The Village cites no authority to the contrary. Indeed, authority cited by the Village supports the Tribe's motion. For instance, in *Williams v. Jader Fuel Co.,* 944 F.2d 1388, 1400 (7th Cir. 1991), the court noted that motions to strike are generally not favored but should be granted when the affirmative defenses are legally insufficient or tend to clutter and confuse the litigation with extraneous matter. Similarly, *Bobbitt v. Victorian House, Inc.*, 532 F. Supp. 734 (N.D. Ill. 1982), illustrates the utility of motions to strike affirmative defenses in circumstances such as those present here. In *Bobbitt,* the court observed that motions to strike present three questions: whether the matter pleaded is, in fact, an affirmative defense;[1] whether the matter is adequately pleaded under F.R.C.P. 8 and 9; and whether it would be possible to prove a set of facts in support of the defense as under F.R.C.P. 12(b)(6). *Id.,* at 737. Applying this standard, the *Bobbitt* court granted the motion to strike six (6) affirmative defenses: three because they merely "echo[ed]" the denials, *id.* at 738-39; the other three because they were legally insufficient on their face. *Id.*

Motions to strike affirmative defenses are particularly appropriate in cases such as this, where the dispute is over the law and not the core facts. "[M]otions to strike provide a useful and appropriate tool where the parties disagree only on the legal implications to be drawn from uncontroverted facts, or where questions of law are involved." *Dixon v. Americall Group, Inc.,* 390 F. Supp. 2d 788, 790 (D.C. Ill. 2005) (internal quotations omitted); *see also Wright & Miller*, Vol. 5C, §1381 ("these motions are a useful and appropriate tool when the parties disagree only

[1] The court defined an affirmative defense as a matter pled in avoidance of liability, a matter that cannot be raised by a simple denial since it generally presents something outside the scope of the plaintiff's prima facie case. *Bobbitt,* 532 F. Supp. at 736.

on the legal implications to be drawn from uncontroverted facts.")

B. The Village's Affirmative Defense Are Legally Insufficient and Unnecessarily Clutter the Litigation.

1. The Trust Land is not "properly held" in trust.

In probably its most creative response, the Village attempts to recast its first affirmative defense that "[t]he property at issue is not properly held in trust..." Answer, Affirmative Defenses, ¶ 1. The Tribe reasonably took this to be a challenge to the United States' title to the Trust Lands and moved to strike it due to the indispensability of the United States. Opening Brief, pp. 5-10. Now, the Village claims that this affirmative defense is not meant as a challenge to the United States' title. Rather, the Village proposes two classes of trust land:

> For the purposes of this litigation it is admitted that the U.S. holds title in some form of trust for the Tribe with some level of corresponding restrictions. For example, alienation without the federal government's approval may be prohibited. However, the fact the Tribe was not a recognized Tribe under federal jurisdiction in 1934, limits the benefits the Tribe receives from the U.S. taking title.

Village's Response, p. 4.

Two major objections remain to the revised defense. First, the application of the Village's storm water charges to the Trust Land threatens the title to the land, despite the Village's protestations to the contrary. By its terms, the storm water ordinance provides for forfeiture of title for non-payment of the charges. *See* Storm Water Management Ordinance, §§ 4.508(2) and (3); Wis. Stat. § 66.0809(3). Thus, even under the Village's recast affirmative defense, the Village does in fact seek the right to alienate the Trust Land without the federal government's approval, notwithstanding the bar against such claims in the Quiet Title Act.[2]

[2] Whether the Village's attempt to bring the United States into this litigation will succeed is uncertain at best, as the Village seeks to impair the title to trust land, and seeks the authority to

Second, the Village does not cite a single authority for the proposition that the United States can acquire or hold some lesser form of trust title for Indian tribes, because no such authority exists. The IRA provision authorizing the Secretary to acquire land in trust for Indian tribes states, "Title to any lands or rights acquired...shall be taken in the name of the United States in trust for the Indian tribe or individual Indian for which the land is acquired..." 25 U.S.C. § 465. Nothing in this section or elsewhere in the IRA authorizes a lesser category of trust land with fewer restrictions. If any provision of the IRA speaks to this proposition, it is the 1994 amendment to the IRA which expressly precludes the Secretary from diminishing the privileges and immunities of one recognized tribe relative to other recognized tribes. 25 U.S.C. §476(f). On its face, this section prohibits the lesser category of trust lands for some recognized tribes as proposed by the Village. There is no authority for the Village's recast first affirmative defense and it should be stricken as patently frivolous. *Bobbitt,* 532 F. Supp. at 738.

2. Applicable laws "mandate" the storm water charges.

The federal and state law "mandates" that the Village relies upon expressly require that permitted entities enact ordinances pursuant to storm water permits to the "extent authorized by law" and "to the extent allowable under State, Tribal or local law." *See* Opening Brief, pp. 10-12. The Village has not identified a single federal or state law which requires that the Village impose storm water charges against any lands. Instead, the Village responds that there is no

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alienate the trust land. *See Imperial Granite Company v. Pala Band of Mission Indians*, 940 F.2d 1269, 1272 (9th Cir. 1991) (the "whole purpose of trust land is to protect the land from unauthorized alienation..."); *Wildman v. United States*, 827 F.2d 1306, 1308-09 (9th Cir. 1987); *Iowa Tribe of Kansas and Nebraska v. Salazar*, ___ F.3d ___ (10th Cir. 2010) (where the United States establishes colorable title, the Quiet Title Act prohibits courts from examining United States' title to trust lands.)

express exception from these federal and state law "mandates" for trust land.

The Village's circular reasoning does not avoid the Tribe's point. By expressly limiting their reach to the extent authorized by law, the federal and state statutes incorporate the well established prohibition against state and municipal regulation of trust land. *See, e.g., Santa Rosa Band of Indians v. Kings County,* 532 F.2d 655, 666 (9th Cir. 1975) ("We are confident that when Congress in 1934 authorized the Secretary to purchase and hold title to lands for the purpose of providing land for Indians, it understood and intended such lands to be held in the legal manner and condition in which trust lands were held under the applicable court decisions free of state regulation."); *U.S. v. Humboldt,* 615 F.2d 1260 (9th Cir. 1980) (declining to overrule *Santa Rosa Band*); 25 C.F.R. § 1.4. The federal and state statutes therefore do not mandate that the Village apply its storm water ordinance to the Trust Land, and the Village's affirmative defense claiming a "mandate" for its storm water charges against the Trust Land should be stricken.

3. The charges constitute a fee, not a tax.

The Village now suggests that, pursuant to an agreement between the Tribe and the Bureau of Indian Affairs ("BIA"), the Tribe is obligated to pay any costs the United States might incur as the owner of the Trust Land. The Village also suggests that the Court should await the results of its FOIA request to the BIA before addressing this affirmative defense. The Village's new allegations are unavailing, because even if there were an agreement which obligated the Tribe to pay charges incurred by the United States, the Village has failed to demonstrate that the United States is obligated to pay the Village's storm water charges.[3]

[3]The Village conflates two excerpts from a March 17, 2010 Notice of Decision issued by the BIA. One excerpt refers to the Tribe's self-governance agreement, under which the Tribe is responsible for providing certain services for trust land. The other excerpt notes that the Tribe is

The Village elsewhere relies on 33 U.S.C. § 1323 for the proposition that the federal government is responsible for paying municipal storm water charges assessed against trust land. Section 1323, however, does not address trust land, but rather speaks to the responsibilities of federal departments, agencies, and instrumentalities "having jurisdiction over any property or facility". 33 U.S.C. § 1323(a)(1). The context indicates that this phrase refers to federal buildings, such as post offices and federal courthouses, not to trust land. For instance, subsection (b)(1) requires the EPA administrator to coordinate with "the head of each department, agency, or instrumentality of the Federal Government having jurisdiction over any property or facility utilizing federally owned wastewater treatment facilities . . ." 33 U.S.C. § 1323(b)(1). Similarly, subsection (b)(2) imposes requirements for construction of "facilities for treatment of wastewater at any Federal property or facility . . ." 33 U.S.C. § 1323(b)(2).

The legislative history of section 1323 also indicates that Congress' purpose was to ensure that "Federal facilities meet the same effluent limitations as private sources of pollution". S.Rep.No. 92-414, p. 65 (1972), 1972 U.S.C.C.A.N. 3668, 3733. "The Federal Government cannot expect private industry to abate pollution if the Federal Government continues to pollute. This section requires that Federal facilities meet all control requirements as if they were private citizens." *Id.* Based upon this legislative history, the Supreme Court has interpreted § 1323 to require "federal installations to comply with general measures to abate water pollution". *EPA v. California*, 426 U.S. 200, 211 (1976). No court has ever equated "federal facilities" or "federal installations" with trust land or other Indian lands, as urged by the Village.

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prepared to pay for municipal services to trust land, and is based upon the Tribe's service agreement with Brown County. Neither excerpt is relevant because the Village lacks authority to impose its storm water charges.

Since section 1323 does not authorize the Village to impose its storm water charges against trust land, or otherwise make the United States responsible for payment of such charges, the Village's new claim that the Tribe is contractually obligated to pay charges incurred by the United States is wholly beside the point, and does not support the Village's affirmative defense.

4. The Tribe failed to name all necessary and indispensable parties.

The Village has filed a Third-Party Complaint against only one party, the United States, and has not identified any other necessary and indispensable parties. Nothing in the Third-Party Complaint raises or is even relevant to the indispensability of the United States as to the Tribe's claims against the Village, and the Village has offered no substantive opposition to the Tribe's argument that the United States is not indispensable on those claims. The Village nonetheless suggests that the Court should defer consideration of this issue.

However the United States responds to the Third-Party Complaint, it seems unlikely that the United States will offer an opinion with respect to its indispensability for the Tribe's claims against the Village. There is no reason, then, to await the United States' response. The Village has failed to even offer an argument that the United States is indispensable on those claims, and this affirmative defense should be stricken as legally insufficient.

5. The Secretary cannot remove land from Village jurisdiction.

The Village has clarified this affirmative defense consistently with its first affirmative defense. Thus, it suffers from the same defects discussed above regarding the first affirmative defense. *See,* I,B,1 above. In addition, none of the authority relied upon by the Village saves this affirmative defense from the legal insufficiency demonstrated by the Tribe in its opening brief. *See* Opening Brief, pp. 15-19 (discussing cases rejecting challenges to fee-to-trust acquisitions,

including those based upon the 10th Amendment, the Non-delegation Doctrine, the Equal Footing Doctrine, and the Enclaves Clause).

First, citing only *Hawaii v. Office of Hawaiian Affairs,* 129 S. Ct. 1436 (2009), the Village argues that the IRA is limited to federal public lands. There is no provision in the IRA that restricts trust land to "federal public lands", and *Hawaii v. Office of Hawaiian Affairs* does not compel this result.[4] The *Hawaii* case did not involve the IRA or tribal trust land at all. Instead, the question there was whether Congress' Apology Resolution relating to the acquisition of the Hawaiian territory stripped the state of its authority to dispose of lands that the United States had conveyed to the State of Hawaii upon its admission into the Union. The Supreme Court concluded that the Apology Resolution could not be so construed. Toward the end of its opinion, the Court observed that any other construction of the Apology Resolution would raise grave constitutional concerns since, once Congress conveys unencumbered title to a state, "Congress cannot, after statehood, reserve or convey submerged lands that have already been bestowed upon a State." *Id.,* at 1445, (quoting *Idaho v. United States,* 533 U.S. 262, 280, n.9 (2001)). The present case does not involve any federal limitations on a state's ability to dispose of its fee lands, and the *Hawaii* case is simply irrelevant.

Second, the Supreme Court has rejected the notion that the United States can only acquire land for Indians in their aboriginal territory, or "federal public land that retains its territorial

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[4] It is not entirely clear what the Village means when it refers to "federal public land." From its context, it appears to refer to land acquired by the federal government during the territorial period, i.e., before the territory is admitted into the Union as a state. Alternatively, it may refer to land subject to the public land laws of the United States. In either case, there is no such limitation on the Congress' ability to authorize the acquisition of trust land for Indians, for the reasons stated above.

status." Village's Response, p. 10. In *U.S. v. McGowan,* 89 F.2d 201 (9th Cir. 1937), the court of appeals held that the United States could only purchase land for Indians in their aboriginal territory, and that otherwise the acquisition would require state consent since it operated to displace state jurisdiction. The Supreme Court rejected this proposition, holding that Congress' protective authority over Indians extended "over all dependent Indian communities within its border, whether within its original territory or territory subsequently acquired, and whether within or without the limits of a state," 302 U.S. 535, 538 (1938), (quoting *United States v. Sandoval,* 231 U.S. 28, 46 (1913)); *see also United States v. John,* 437 U.S. 634, 652-653 (1978) (trust land acquired for tribe in Mississippi well after statehood nonetheless constitutes Indian country), and 25 C.F.R. 151.11 (providing for trust acquisition of off-reservation land).

Finally, contrary to the Village's claims, none of the cases cited by the Tribe in its Opening Brief support the Village's contention that trust status in general and 25 C.F.R. § 1.4 in particular permit the imposition of the Village's storm water charges. Those cases discuss whether a federal reservation constitutes a federal enclave, thereby requiring the consent of the affected state for the establishment of the reservation. *See* Opening Brief, p. 18, citing *City of Roseville v. Norton,* 219 F. Supp.2d 130 (D.D.C.), *aff'd on other grounds,* 348 F.3d 1020 (D.C. Cir. 2003). The *Roseville* court rejected the federal enclave argument, relying on Supreme Court decisions holding that state sovereignty does not end at the reservation boundary. Significantly for present purposes, though, the *Nevada v. Hicks,* 533 U.S. 353 (2001) decision quoted by the Village, and *Washington v. Confederated Tribes of Colville Reservation,* 447 U.S. 134 (1980), relied upon in *Hicks,* both refer to state authority to regulate the conduct of non-Indians on a reservation, not state or local authority over trust lands or tribal members on the reservation.

And the same authority also holds that, where the question is state or local authority over on-reservations Indians, such as this case, "state law is generally inapplicable." *Hicks,* 447 U.S. at 362 (quoting *White Mountain Apache Tribe v. Bracker,* 448 U.S. 136, 144 (1980)).

6. Wholly redundant affirmative defenses.

The Village has failed to distinguish three of its affirmative defenses from nearly identical denials. First, its defense that the charges constitute fees, not taxes, simply repeats the Village's denial of allegations in the Tribe's complaint that the charges constitute impermissible taxes. *Compare* Complaint, ¶¶ 10, 28, *with* corresponding paragraphs in Answer. Second, its defense that the charges are not pre-empted by federal law simply repeats denial of allegations in the Tribe's complaint that the charges are pre-empted by federal law. *Compare* Complaint, ¶ 28, *with* corresponding paragraph in Answer. Finally, its defense that, even if the charges are taxes, they are not pre-empted by federal law, again simply repeats denial of allegations in the Tribe's complaint that the charges are pre-empted whether they are taxes or fees. *Compare* Complaint, ¶ 32, *with* corresponding paragraph in Answer. The Village essentially concedes the identity between its defenses and its denial of the Tribe's allegations: "The Village's affirmative defenses demonstrate the bases of the Village's denials of the Tribe's allegations against it . . ." Village's Response, p. 1. This statement suggests the confusion created by improperly pled affirmative defenses, i.e., which party bears the burden of persuasion on these matters -- the Tribe, since these issues constitute a part of its prima facie case, or the Village, since it has pled these issues as affirmative defenses?

None of these matters are properly pled as affirmative defenses. They do not raise

matters in avoidance of the Tribe's claims but go to the core of the Tribe's prima facie case. The denial in each instance is sufficient and the affirmative defenses should be stricken. *Bobbitt,* 532 F. Supp. at 739.

II. EVEN AS CLARIFIED BY THE VILLAGE, THE TWO COUNTERCLAIMS SHOULD BE DISMISSED.

A. The Village's Clarified First Counterclaim is Virtually Identical to its Clarified First Affirmative Defense and Similarly Fails to State a Claim for Relief.

The Village's first counterclaim is now effectively limited to the claim that, "In the event it is determined that the property is properly held in trust, the IRA does not remove land from the jurisdiction of the state and the Secretary of the Interior does not have such authority..." Answer, First Counterclaim, ¶ 13.[5] In other words, the first counterclaim makes the same claim asserted in the Village's now clarified first affirmative defense and is subject to dismissal on the same grounds as that affirmative defense. *See* Part I, B,1, above.[6]

B. The Tribe has not Waived its Immunity from the Village's Two Counterclaims, either by Filing this Action or in the Escrow Agreement.

The Village accepts the Tribe's immunity from suit, but purports to find a waiver from two events: first, recoupment from this action filed by the Tribe, and second, in the terms of the 2009 Escrow Agreement. Neither constitutes the necessary waiver of immunity.

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[5] The Village's first counterclaim also alleges that the storm water charges are fees for services, not taxes. Answer, First Counterclaim, ¶ 14. This is substantially the same as the Village's third affirmative defense and is subject to the same objections. *See* I, B, 3, above.

[6] Since the Village now disclaims any intent to challenge the United States' title to the Trust Land, presumably it would have no objection to striking the affirmative defenses and dismissing counterclaims to the extent that they assert a challenge to the title.

First, characterizing its claims as the "reverse image of the Tribe's claim for declaratory relief," the Village finds a waiver of the Tribe's immunity from suit in the recoupment doctrine. Village's Response, p. 18. The doctrine of recoupment, as explicated by this Court in *Oneida Tribe of Indians of Wisconsin v. Village of Hobart,* 500 F. Supp.2d 1143 (E.D. Wis. 2007), requires three elements: the counterclaim must arise from the same transaction as the plaintiff's claim; the counterclaim must seek the same kind of relief as the plaintiff's suit; and the counterclaim must not seek an amount of money damages in excess of the plaintiff's claim. *Id.,* at 1148. The Village's counterclaims fail on both the latter two elements.

The Tribe's claims are for declaratory relief only regarding the Village's ability to impose and collect its storm water charges on the Trust Lands. The Village's counterclaims go far beyond the Tribe's claims. The first counterclaim, even as recast by the Village, asks the Court to create a lesser category of trust land for the Tribe, one that would leave its Trust Lands subject to unspecified and apparently unlimited state and local regulation, unlike the trust lands of other tribes. Similarly, the second counterclaim goes beyond the Tribe's claims and seeks money damages from the Tribe, i.e., all of the charges and penalties now allegedly due. In this regard the case is identical to *Oneida Tribe*. In that case, the Tribe sought reimbursement of assessments paid to the Village, and the Court determined that the Tribe's claim for reimbursement did not waive the Tribe's immunity from the Village's claim for payment of all assessments. In the present case, the Tribe's claim for declaratory relief, if granted, will entitle the Tribe to reimbursement of monies which the Tribe paid into escrow, and does not provide a waiver for the Village's claim for payment of all allegedly due and owing storm water charges. The recoupment doctrine does not support finding a waiver of the Tribe's immunity under these

circumstances. *Oneida, supra; Rosebud Sioux v. Val-U Const. Co.,* 50 F.3d 560, 562 (8th Cir. 1995) ("Recoupment is a defensive action that operates to diminish the plaintiff's recovery rather than assert affirmative relief.")

Second, the Tribe's waiver of immunity in the Escrow Agreement does not comprehend the Village's counterclaims here. The agreement limits the waiver, in relevant part, to:

> Claims by a party for declaratory and/or injunctive relief and the distribution of the Escrow Amount with respect to i) the Village's contention that it possesses authority to impose the SWMUO Charges; ii) the Village's contention that it may lawfully condition the issuance of the Liquor Licenses to OGEC on the payment of the SWMUO Charges.

Complaint, Exhibit C, ¶¶ 5.1(a), 5.2(a). As discussed throughout this reply, the Village's defenses and claims exceed these limitations by seeking to establish a new category of trust land with limited immunities from state jurisdiction and an affirmative award of money damages. The Tribe agreed to a limited waiver for the purpose of determining whether the Village can impose its storm water charges on the Trust Land and that is the very purpose of this litigation. The Village cannot use this limited waiver to assert claims not contemplated in the Escrow Agreement. *See, e.g., F. Cohen's Handbook of Federal Indian Law,* § 7.05(1)(c)(2005) ("A number of recent cases have considered whether various tribal agreements and actions waive tribal sovereign immunity; all have required an unambiguous waiver before finding the tribe was subject to suit.")

CONCLUSION

The Village's affirmative defenses are insufficient as a matter of law and, in some case, also tend to unnecessarily clutter this litigation. The Village's counterclaims are also insufficient

as a matter of law and are barred by the Tribe's immunity from suit. The Tribe is prepared to fully litigate the Village's authority to impose its storm water charges on Trust Lands but the Village's extraneous material should be stricken and dismissed.

Respectfully submitted this 26th day of July, 2010

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