UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN
GREEN BAY DIVISION

ONEIDA TRIBE OF INDIANS OF WISCONSIN,

Plaintiff,

v.

VILLAGE OF HOBART, WISCONSIN,

Defendant/Third-Party Plaintiff,

Case No. 10-CV-00137-WCG

v.

UNITED STATES OF AMERICA,
UNITED STATES DEPARTMENT OF THE INTERIOR AND
KENNETH SALAZAR, SECRETARY OF THE INTERIOR,

Third-Party Defendants.

VILLAGE OF HOBART'S RESPONSE TO THIRD-PARTY DEFENDANTS' MOTION TO DISMISS

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I. INTRODUCTION

The Village finds itself in the untenable position of being required by the federal government to implement stormwater management practices, and then being sued for doing just that. To make matters worse, the Tribe claims that if the charges are appropriate, they are to be paid by the United States as the title holder to the land. The United States in turn claims it owes nothing. This is not the case because § 313 of the Clean Water Act (CWA), by its unambiguous terms, allows the Village to seek payment of the stormwater charges from the United States.

II. LEGAL STANDARD

Under Rule 12(b)(1) of the Federal Rules of Civil Procedure, a party may move to dismiss a pleading for lack of subject matter jurisdiction. In reviewing this type of motion, the court "must accept the complaint's well-pleaded factual allegations as true and draw reasonable inferences from those allegations in the plaintiff's favor." *Transit Exp., Inc. v. Ettinger*, 246 F.3d 1018, 1023 (7th Cir. 2001), citing *Rueth v. EPA*, 13 F.3d 227, 229 (7th Cir. 1993). In addition, to determine whether the court has subject matter jurisdiction, the court is permitted to "look beyond the allegations in the complaint to any evidence that has been submitted regarding jurisdiction." *Iddir v. I.N.S.*, 301 F.3d 492, 496 (7th Cir. 2002), citing *Capitol Leasing Co. v. FDIC*, 999 F.2d 188, 191 (7th Cir. 1993).

Under 28 U.S.C. § 1331, federal courts "have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." According to Supreme Court precedent, "[t]his provision for federal-question jurisdiction is invoked by and large by plaintiffs pleading a cause of action created by federal law." *Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg.*, 545 U.S. 308, 312 (2005). A federal cause of action "may be created either

expressly or by implication." *Id.* at 282. Courts have held that Congressional intent to create a federal cause of action can be found in a federal statute "permit[ing] a claimant to bring a claim in federal court." *International Union of Operating Engineers, Local 150, AFL-CIO, v. Ward*, 563 F.3d 276, 283 (7th Cir. 2009). Courts have interpreted § 313 of the CWA, 33 U.S.C. § 1323(a), as containing "a limited waiver of sovereign immunity." *In Re Operation of the Mo. River Sys. Litig.*, 418 F.3d 915, 917 (8th Cir. 2005), citing *United States Dep't of Energy v. Ohio*, 503 U.S. 607, 615 (1992).

Under Rule 12(b)(6) of the Federal Rules of Civil Procedure, a party may move to dismiss a pleading for failure to state a claim upon which relief can be granted. However, "[a] complaint or portion thereof may be dismissed for failure to state a claim 'only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations.'" *Jeanty v. Washington Mut. Bank F.A.*, 305 F.Supp.2d 962, 963 (E.D. Wis. 2004), citing *Hishon v. King & Spaulding*, 467 U.S. 69, 73 (1984). Whether the plaintiff has pleaded sufficient facts is not the focus; rather, the court must consider whether, accepting all of the plaintiff's allegations as true, the plaintiff has no legal claim. *Jeanty*, 305 F.Supp.2d at 963-64, citing *Payton v. Rush-Presbyterian-St. Luke's Med. Ctr.*, 184 F.3d 623, 627 (7th Cir. 1999). In addition, a plaintiff is not required to include all of the "essential facts" in its complaint; rather, the plaintiff "may add them by affidavit or brief in order to defeat a motion to dismiss if the facts are consistent with the allegations of the complaint." *Help At Home, Inc. v. Med. Capital, LLC*, 260 F.3d 748, 752-53 (7th Cir. 2001), citing *Hrubec v. Nat'l R.R. Passenger Corp.*, 981 F.2d 962, 963-64 (7th Cir. 1992).

The canons of construction for Indian law only apply to laws enacted specifically for the benefit of Indians or for the regulation of Indian affairs. *San Manuel Indian Bingo & Casino v.*

N.L.R.B., 475 F.3d 1306, 1312 (C.A.D.C. 2007). Additionally, the concept of construing laws in the favor of Indians "only applies to ambiguous statutes." *United States v. Doe*, 572 F.3d 1162, 1183 (10th Cir., 2009).

III. ARGUMENT

A. The clear and unambiguous terms of § 313 of the CWA compel the United States to comply with the Village's stormwater management requirements, including the payment of the utility fees.

The Village's claim against the United States is based upon § 313 of the CWA. It reads in pertinent part as follows:

> (a) Compliance with pollution control requirements by Federal entities.
>
> Each department, agency, or instrumentality of the executive, legislative, and judicial branches of **the Federal Government** (1) **having jurisdiction over any property** or facility, or (2) engaged in any activity resulting, or which may result, in the discharge or runoff of pollutants, and each officer, agent, or employee thereof in the performance of his official duties, **shall be subject to, and comply with, all Federal, State, interstate, and local requirements**, administrative authority, and process and sanctions **respecting the control and abatement of water pollution** in the same manner, and to the same extent as any nongovernmental entity **including the payment of reasonable service charges**.

33 U.S.C. § 1323(a) (emphasis added).

Clarifying the breadth of the United States' obligations under this section of the CWA, the statute goes on to state the following:

> The preceding sentence shall apply (A) to any requirement whether substantive or procedural (including any recordkeeping or reporting requirement, any requirement respecting permits and any other requirement whatsoever), (B) to the exercise of any federal, state or local administrative authority, and (C) to any process and sanction, whether in force in federal, state or local courts, or any other manner. This subsection shall apply notwithstanding any immunity of such agencies, officers, agents, or employees under any law or rule of law.

Id.

To eliminate any uncertainty as to what was meant by "the control and abatement of water pollution" and "payment of reasonable service charges" the Act was amended on January 4, 2011. The amendment added the following subsection:

> (c) Reasonable Service Charges.
>
> (1) In general
>
> For the purpose of this chapter, **reasonable service charges** described in subsection (a) **include any reasonable nondiscriminatory fee, charge, or assessment that is** – (A) based on some fair approximation of the proportionate contribution of the property or facility to stormwater pollution (in terms of quantities or pollutants, or volume, or rate of stormwater discharge or runoff from the property or facility; (B**) used to pay or reimburse the costs associated with any stormwater management program** (whether associated with a separate storm sewer system or sewer system that manages a combination of stormwater and sanitary waste) including the full range of programmatic and structural costs attributable to collecting stormwater, reducing pollutants in stormwater, and in reducing the volume and rate of stormwater discharge, regardless of whether that reasonable fee, charge or assessment is denominated a tax.

33 U.S.C. § 1323(c) (emphasis added).

§ 313 also confirms the United States' obligations apply not to just some property, or properties used for certain purposes, but to "any" property. The responsibility of the federal government in this sense is so broad that the statute references only one extremely narrow exception to its application. The statute goes on to state as follows:

> **The President may exempt** any effluent source of any department, agency, or instrumentality in the executive branch from compliance with any such a requirement **if he determines it to be in the paramount interest of the United States** to do so; …. any exemption shall be for a period not in excess of one year, but additional exemptions may be granted for periods not to exceed one year upon the President's making a new determination. (emphasis added).

33 U.S.C. 1323(a) (emphasis added)

The President has not exempted the trust parcels at issue in this case from the reaches of § 313. Therefore the United States, pursuant to the clear language of the Act, having jurisdiction over the land, is obligated to abide by the Village's stormwater ordinances, including the payment of the reasonable service charge.[1]

Additionally, the United States' argument that states and local governments cannot regulate on Indian trust land, ignores the fact this case addresses the application of a law enacted by the Congress of the United States. The fact this federal law expressly authorizes the enforcement of state and local laws, does not change the fact it is a federal law that is at issue. It is the federal government, not the Village, that is regulating the land via § 313. Similarly, it was another federal law, more precisely a regulation, which required the Village to create its stormwater ordinances in the first place.[2] Therefore, the case law cited by the United States, purporting to limit the enforcement of state and local laws on Indian land, absent the express

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[1] It is undisputed that the Department of Interior is an agency of the federal government "having jurisdiction over" the trust land which is the subject of this litigation. Additionally, this court has previously come to the same conclusion**.** (April 18, 11 Decision and order, pg. 4)

[2] The Statement of Basis, drafted by the EPA, states as follows:

> In 1999, EPA published Phase II of the National Storm Water Regulations. Operators of regulated small Ms4 were **required** to apply for permit coverage by March 2003 (Federal Register/Vol. 74, No. 235, 12/18/1999, pg. 68722). NPDES permits issued to Phase II Ms4s **require** small Ms4s to develop and implement a storm water management program which addresses six minimum control measures described in the rule ….
>
> For each of the minimum control measures, the operator **must** develop and implement best management practices (DMTS) to reduce pollutants and discharge to the maximum extent practicable and establish measureable goals for each minimum control measure. (See 40 C.F.R. 122.34(b) and (d)).
>
> The Village of Hobart Ms4 (permittee) is located within the Green Bay urbanized area and is a regulated small Ms4 community….

(Vickers' Aff., ¶ 11, Ex. A.) (emphasis added).

consent of Congress, is of no consequence.[3] In those cases, the local laws stood on their own and were not linked to or authorized by federal law.

B. The Indian canons of construction cannot be applied to rewrite § 313 of the CWA.

Faced with a statute that by its express terms applies to "any property" over which the federal government has jurisdiction, the United States reaches well beyond the statute in an attempt to create an argument that § 313 should not be enforced as written. The United States' entire argument in this regard can be distilled down to its claim that "states cannot regulate on Indian land without Congressional consent." (United State's Br., p. 10). The United States goes on to claim that when applying the canons of statutory construction applicable to Indian law, the requisite consent cannot be found within §313.[4] (United State's Br., p. 20).

1. The canons of Indian law construction are not implicated because § 313 was not enacted specifically for the benefit of Indians or for the regulation of Indian affairs.

The United States claims that the canons of statutory construction for Indian law differ from other fields of law. Therefore, it claims, § 313 must be interpreted in a way that is inconsistent with its plain language.

First, § 313 of the CWA does not directly involve "Indian law." It relates to, and places mandates on, the federal government. Therefore, the canons of construction for Federal Indian law do not apply. In *San Manuel Indian Bingo & Casino*, 475 F.3d at 1311, the Federal Court of

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[3] The United States cites several cases for the proposition that states may not tax or regulate the affairs of Indians on a reservation. See generally pages 9-16 of the United States' brief. However, none of the cases cited dealt with a federal law such as § 313 of the CWA and the provisions of a federal regulation which required the local ordinance in the first place. In other words, case law suggesting a state cannot enforce, against trust land, purely local laws, locally created without any authorization from or link to, Congressional Acts or Federal Regulations, provides the Court no assistance in this case.

[4] The United States apparently makes this argument because it cannot cite to any subsection of 313 nor any other federal statute that expressly precludes the Village from applying § 313 as written.

Appeals, for the District of Columbia, declined to apply the canons of Indian law construction, noting that they only apply to statutes regulating Indian affairs. The court clarified as follows:

> Each of the cases petitioner cite in support of the principal that statutory ambiguities must be construed in favor of Indians (as well as the cases we have found supporting the principle) involved construction of a statute or a provision of a statute Congress enacted specifically for the benefit of Indians or for the regulation of Indian affairs. We have found no case in which the Supreme Court applied this principle of pro-Indian construction when resolving an ambiguity in a statute of general application.

San Manuel Indian Bingo & Casino, 475 F.3d at 1312.

Consequently, pro-Indian construction of § 313 is not warranted. The statute must be enforced as written.

2. <u>Even if the canons of construction for Indian law might apply, they can apply only after the Court determines the statute is ambiguous, which is not the case here.</u>

Even if § 313 could be viewed as an "Indian law," "enacted specifically for the benefit of Indians or for the regulation of Indian affairs," interpreting it liberally, in favor of Indians, is not automatic. The concept of construing laws in the favor of Indians "only applies to ambiguous statutes." *United States v. Doe,* 572 F.3d at 1183 citing *White Mountain Apache Tribe v. Bracker*, 448 U.S. 143-44 (1980). Similarly, in *Chevron v. National Res. Defense Council Inc.*, 467 U.S. 837 (1984), the Court ruled that only after a court determines that a statute is ambiguous, should the court defer to permissible agency interpretation of that law. *Id.* at 842-43.

In *Chickasaw Nation v. United States,* 534 U.S. 84 (2001), the Supreme Court refused to apply the Indian law canons in determining if a tribe must pay federal wagering and occupational excise taxes. The Court indicated that the tribe must pay the taxes because the statute was simply not "fairly capable" of two interpretations. *Id.* at 94. Because the Court found there was no ambiguity for the Indian law canons to resolve, the canons could play no role in the outcome of that case. *Id.* at 95.

The Supreme Court recommitted itself to this proposition as recently as 2009. In *Carcieri v. Salazar*, 555 U.S. 379 (2009), the Supreme Court was asked to interpret the Indian Reorganization Act (IRA). More specifically, the Court interpreted the statutory phrase "now under federal jurisdiction" in § 479 of the IRA. The Supreme Court rejected the secretary's argument that the term "now" was ambiguous because the use of the word "now" could refer to the time of the statute's enactment or it could refer to the time of the statute's application. The Supreme Court held as follows:

> This case requires us to apply settled principals of statutory construction under which we must first determine whether the statutory text is plain and unambiguous. If it is, we must apply the statute according to its terms.

Id. at 387 (citations omitted.)

Despite the fact that the IRA is probably the most cited federal Indian law, used for the benefit of Indians and Indian tribes, the Supreme Court confirmed that if the text is plain and unambiguous the law must be applied according to its terms. The Supreme Court rejected the United State's argument, ruling that Congress limited the statute by the word "now" and "we are obligated to give impact, if possible, to every word Congress used." *Id.* at 391 citing *Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979).

The Supreme Court also noted the existence of competing policies as to how broad or how narrowly to interpret § 465 of the IRA. The Supreme Court refused to go beyond the statutory text stating as follows:

> We need not consider these competing policy views, because Congress' use of the word 'now' in § 479 speaks for itself and 'courts must presume that the legislature says in a statute what it means and means in a statute what it says there.'

Id. at 392-93 citing *Connecticut Nat. Bank v. Germain*, 503 U.S. 249, 253-54 (1992).

§ 313 of the CWA contains no ambiguities. The statute clearly indicates that the federal government "shall" comply with "local requirements" for "any property" over which it has "jurisdiction." If that were not enough, the statute specifically provides for the sole manner in which a property may be exempted. The statute requires a presidential order, authorized only after a finding that exempting the property from the provisions of the Act is in the "paramount interest of the United States."

Legislation is not somehow eviscerated by the canons of construction for Indian law. Those canons apply if and only if there is an ambiguity within the statute. That is not the case with § 313 of the CWA.

C. § 313 of the CWA requires a national and uniform application and therefore applies to the trust parcels held by the United States.

Even if a reference to "any property" over which the United States "has jurisdiction," does not clearly demonstrate Congress' intent to apply the Act to all land, the intent is confirmed elsewhere. "The requisite intent may be found in the legislative history and surrounding circumstances, **or when the congressional purpose of the statutory scheme clearly requires a national or uniform application**." Cohen's Handbook of Federal Indian Law, § 2.03, pg. 129-130 (2005), citing *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 811-813 (1976) (McCaran Amendment) (emphasis added). See also *Federal Power Comm'n v. Tuscarora Indian Nation*, 362 U.S. 99, 116-17 (1960) ("[I]t is now well settled by many decisions of this court that a general statute in terms applying to all persons includes Indians and their property interests.") *United States v. Farris*, 624 F.2d 890, 893 (9th Cir. 1980) (*superseded by the IGRA as recognized in U.S. v. E.C. Investments, Inc.*, 77 F.3d 327, 330 (9th Cir. 1996)), ("[F]ederal laws generally applicable throughout the United States apply with equal force to Indians on reservations.")

This is especially true when the law is designed to protect the environment. Consequently, many federal statutes apply to Indians and Indian land despite the fact they contain no reference to Indians. "As statutes of general applicability, federal environmental laws apply in Indian country unless they interfere with tribal self government or conflict with treaty or statutory rights, or unless Congress intended to exclude Indian lands from the reach of the statute." Cohen, *Supra* § 10.01(2)(a) citing *Donovan v. Coeur d 'Alene Tribal Farm*, 751 F.2d 1113, 1116 (9th Cir. 1985) (quoting *United States v. Farris*, 624 F.2d at 893). "Because federal environmental statutes apply in Indian country, Indian tribes themselves are potentially subject to regulation." Cohen, *Supra* § 10.01(2)(c).

For example, the 10th Circuit held that the Safe Drinking Water Act applied to the Osage Reservation because Congress intended to protect against groundwater contamination nationwide and because nothing in the statute conflicted with tribal treaty or statutory rights. *Philips Petroleum Co. v. EPA*, 803 F.2d 545, 555-56 (10th Cir. 1986). This was found to be the law, despite the fact the relevant portion of the Safe Drinking Water Act did not expressly mention Indians or Indian lands. Similarly, in *United States v. Dion*, 476 U.S. 734, (1986) the Supreme Court concluded the Bald Eagle Protection Act was intended to abrogate treaty rights to hunt. This was found despite the fact it did not reference tribes, Indians nor Indian land.[5] In short, the courts have repeatedly held that Indian tribes, and land held in trust for them, are subject to laws

[5] See also, *Blue Legs v. Bureau of Indian Affairs*, 867 F.2d 1094, 1098 (8th Cir. 1989) (tribe operating garbage service subject to resource conservation and recovery acts prohibition on open dumps). *Confederated Tribes of Warm Springs Reservation of Oregon v. Kurtz*, 691 F.2d 878 (9th Cir. 1982), cert. denied, 460 U.S. 1040 (1983) (holding that absent a "definitely expressed exemption" tribes and their members are subject to federal excise taxes); *Fry v. United States*, 557 F.2d 646 (9th Cir. 1977), cert. denied, 434 U.S. 1011 (1978) (holding that Indian logging operations are subject to federal taxes); *United States v. Burns*, 529 F.2d 114 (9th Cir. 1975) (holding that federal gun control law applies to Indians, citing Tuscarora). *Navajo Tribe v. NLRB*, 288 F.2d 162 (D.C.Cir.), cert. denied, 366 U.S. 928 (1961) (holding that National Labor Relations Act applies to employers located on reservation lands).

of general applicability, especially those protecting the environment, even when the law does not expressly reference that application.

In this case, the intent for uniform application of stormwater management is further evidenced by the legislative record, relating to the Act's recent amendment. The senator who introduced the bill stated the following:

> I believe that this administration recognizes its responsibility to manage the stormwater pollution that comes off Federal properties. But that responsibility needs to translate into payments to the local governments that are forced to deal with this pollution. That commitment needs more than an Executive order. Adopting the legislation that I am introducing today will remove all ambiguity about the responsibility of the Federal Government to pay these normal and customary stormwater fees.

Congressional Record-Senate, June 10, 2010, S. 3481, by Mr. Cardin

> I continue to have grave concerns about the failure of the Federal Government to pay localities for reasonable costs associated with the control and abatement of pollution that is originating on its properties. At stake is a fundamental issue of equity: polluters should be financially responsible for the pollution that they cause. That includes the Federal Government . . . .
>
> Today I am introducing legislation that makes it clear. Uncle Sam must pay his bills just like every other American .

Congressional Record-Senate, June 10, 2010, S. 3481, by Mr. Cardin

> The house record reveals the following comments by Congressman Oberstar:
>
> Simply put, this legislation clarifies that Federal agencies and departments are financially responsible for any reasonable Federal, state, or locally derived charges for treating or otherwise addressing stormwater pollution that emanates from Federal property.

Congressional Record-House, December 22, 2010, S. 3481, by Mr. Oberstar

> In support of the amendment to the Act, Congressman Norton stated:
>
> Federal law has mandated that these local governments must collect these fees. No exemption has been granted to Federal facilities. Please support S. 3481 to clarify the original intent of the law.

Congressional Record-House, December 22, 2010, S. 3481, by Ms. Norton

The runoff impacts not only the rest of the Village, but the rest of the state and nation. Consequently, there is a need for general application of the stormwater ordinances and therefore the United States is subject to the local regulations. That is the whole purpose of the Act. To hold everyone, even the federal government, accountable.

Additionally, the draft NPDES permit the EPA granted to the Village confirms the desire for uniform application of this environmental law. The draft permit states the following:

> A federal NPDES permit is being issued for Hobart MS4 discharges located within the boundaries of the reservation of the Oneida Tribe of Indians of Wisconsin.

(Vickers' Aff., ¶ 11, Ex. A.) (emphasis added).

No where in the draft permit or the transmittal letter provided by the EPA is there any suggestion that the geographical boundaries of Hobart's EPA granted authority excludes trust land. In fact, the draft permit suggests the exact opposite by clearly stating the Village's permit is for "discharges located within the boundaries of the reservation."

The United States attempts to bolster there position by stating "the present case involves only Indian activity on tribal trust land." (United State's Br., fn. 4, p. 8.) First, even if that were true it would change nothing, as explained above. Second, although the United States would like the Court to believe the land the United States holds for the Tribe is truly an isolated island, not able to impact nor be impacted by adjoining lands, that is not the case. The fact stormwater flows far from its place of origin is precisely why the federal government has mandated local stormwater management in the first place and why that management only works if it is part of an uninterrupted system.

Additionally, contrary to the United States contentions, the trust land at issue in this case contains non-tribal businesses, tribal businesses open to non-tribal customers, and other activities engaged in by non tribal individuals on the subject trust parcels. (See generally Vickers' Aff.) All of these businesses utilize off-reservation vendors and otherwise are involved in and with non-tribal individuals. Similarly, tribes across the nation operate large casinos, for-profit jails, for-profit incinerators, strip malls, truck stops, offices and countless other businesses, all open to the public, that create a significant amounts of impervious soil. Allowing the federal government to ignore its stormwater responsibilities for these types of commercial ventures, would allow Uncle Sam to avoid paying his bills, contrary to the legislative intent of § 313 of the CWA.

Being an environmental law of general applicability, express language excluding Indians and land held for their benefit, would need to be included in the Act to make it unenforceable in this case. No such exclusion exists, nor as Congressman Norton confirmed, was intended, and therefore § 313 of the CWA clearly applies to land held by the United States for the benefit of Indians.

Additionally, the United States, as the owner of the land, is benefiting from the Village-wide improvements, for which the utility fees apply. It would be unjust to allow the United States to benefit from the infrastructure put in place by the Village, including ditches and other improvements contiguous to the federal government's parcels, and which handle runoff from those parcels, without the United States having to pay its fair share toward the associated cost.

D. Tribal sovereignty is not impaired by applying § 313 of the CWA as written.

In support of its general proposition, that § 313 cannot apply to the land at issue in this case, the United States argues that the Village's attempt to enforce the CWA would jeopardize tribal sovereignty. More specifically, the United States claims that the limitation on state and

local regulation stems, in large part, from a desire to protect tribal sovereignty. (United State's Br., pp. 10-11).

1. <u>A court must enforce a statute as unambiguously written, and a purported desire to protect tribal sovereignty does not alter the statute.</u>

A purported desire to protect tribal sovereignty does not authorize a court to ignore a law. As the 10th Circuit has stated, "[w]e have already concluded that the [law] is unambiguous and that it is therefore inappropriate for us to consider its legislative history. Thus, the defendant's invocation of Indian sovereignty must, *a fortiori* fail as well." *United States v. Doe*, 572 F.3d at 1183-84.

The Supreme Court recently confirmed:

> We need not consider these competing policy views [of how broadly to interpret the IRA for the benefit of Indians], because Congress' use of the word "now" in § 479 speaks for itself and 'courts must presume that a legislature says in a statute what it means and means in a statute what it says there.'

Carcieri, 555 U.S. at 392-93, citing *Connecticut Nat. Bank*, 503 U.S. at 253.

Consequently, even if the impact on tribal sovereignty is to be considered, that may only occur after it is concluded that the law is ambiguous. That is not the case with § 313.

Additionally, § 313 is a federal, not a state or local law. It is undisputed that the United States Congress can impact and even eliminate tribal sovereignty. "As the courts … [have] recognized . . ., Congress has plenary authority to limit, modify, or eliminate the powers of self government which the tribes otherwise possess." *Santa Clara Pueblo. v. Martinez*, 436 U.S. 49, 58 (1978).

Therefore, the cases cited by the United States for the proposition that state and local laws cannot jeopardize tribal sovereignty are not implicated. We are dealing with two federal

laws. The one that required the Village to create its stormwater management system in the first place and § 313 of the CWA, which allows for its application to "any" property.

2. <u>The United States' motion to dismiss cannot be based upon an alleged interference with tribal sovereignty because such a defense would require the court to make a finding of fact.</u>

First, as the Tribe points outs in its brief in support of its motion for summary judgment, "infringement of tribal self-government, is dependent upon factual allegations regarding stormwater activities and programs relating to the subject trust lands that may not be susceptible to disposition on summary judgment." (Tribe's Br., p. 2.) Acknowledging this fact, the Tribe only asked for relief on its first and second claims. The Village agrees with the Tribe in that if the impact on tribal sovereignty is a proper area of inquiry, discovery is necessary to determine the nature and extent of those alleged impacts. If the impact on tribal sovereignty is an inappropriate consideration for summary judgment, it certainly is inappropriate to hold it out as a basis for a motion to dismiss on the pleadings.[6] To the extent the Court concludes consideration of the United States' position on this issue is warranted, the motion to dismiss on the pleadings must be denied and the parties should be allowed to engage in necessary discovery.

3. <u>Placing land into trust does not remove it from state jurisdiction to such an extent that application of § 313 of the CWA can be avoided.</u>

Even if the impact on tribal sovereignty is considered, the question is not whether any impairment would result from the statute's enforcement, but whether that enforcement would impinge on tribal sovereignty to such an extent that it would jeopardize the national purpose for which tribal sovereignty is recognized. That is precisely why the United States, by the same

[6] The United States concedes that state and local governments' ability to regulate Indian lands is more complex when non-Indians are involved, but claims that in this case only Indian activity is involved. (U.S. Br., FN 4, p. 9.) The former is true but not the latter. In this case there are non-Indian customers , vendors, employees and other activities on the trust parcels. (See generally Vickers' Aff.) The United States also mentions that congress has established a mechanism that accounts for the need to control water pollution in Indian Country, referring to 33 U.S.C. § 1377, providing for eligible tribes to be treated as a state for the purpose of administering certain CWA programs. However, the Oneida Tribe of Indians of Wisconsin does not have TAS status.

Assistant Attorney General who filed the brief in this case, argued to a New York district court, only a few months ago, that "state and local authority over federal land is only curtailed to the extent necessary to ensure that the national purpose for which such land is used is not subject to interference by state and local officials." Document 91-1, filed 11/15/11 Page 25 of 31, citing *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 331-32 (1983). "This is the case whenever the federal government holds land within a state, not just when the land is held on behalf of Indians." *Id.*, citing *United States v. Matherson*, 367 F. Supp. 779, 781 (E.D.N.Y. 1973).

The United States' position, in the New York case is well founded.

> A federal statute of general applicability that is silent on the issue of applicability to Indian tribes will not apply to them if: (1) the law touches "exclusive rights of self-governance in purely intramural matters;" (2) the application of the law to the tribe would "abrogate rights guaranteed by Indian treaties"; or (3) there is proof "by legislative history or some other means that Congress intended [the law] not to apply to Indians on their reservations.

Chickasaw Nation v. U.S., No. 97-511-P, 1998 WL 975690, *6 (E.D. Okla. Dec. 30, 1998) citing to *Federal Power Comm'n*, 362 U.S. at 116 (1960).

In addressing an IRS code section, the Chickasaw Nation court decided as follows:

> [I]f the statute is construed as being silent on its applicability to Indian tribes, the court nonetheless finds the Internal Revenue Code applies because none of the three exceptions apply. As to the first exception, the law must touch on "exclusive rights of self-governance in purely intramural matters." "Purely intramural matters generally involve matters such as tribal membership, inheritance rules, and domestic relations." *Donovan v. Coeur d'Alene Tribal Farm*, 751 F.2d 1113 (9th Cir. 1985). The "tribe's retained sovereignty reaches only that power 'needed to control…internal relations [,]…preserve their own unique customs and social order [, and]…prescribe and enforce rules of conduct for [their] own members." *Reich v. Mashantucket Sand & Gravel*, 95 F.3d 174, 177 (2d Cir. 1996) (quoting *Duro v. Reina*, 495 U.S. 676, 685-86, 110 S.Ct. 2053, 109 L.Ed.2d 693 (1990). "Toward this end, the Supreme Court has recognized that a tribe may regulate any internal conduct which threatens the 'political integrity, the economic security, or the health or welfare of the tribe.'" *Id.* at 178,

> quoting *Montana v. United States*, 450 U.S. 544, 566, 101 S.Ct. 1245, 67 L.Ed.2d 493 (1981).

Chickasaw Nation, WL 975690, *6.

See also *Reich v. Mashantucket Sand & Gravel*, 95 F.3d 174 (2nd Cir. 1996) (application of OSHA to tribally owned business did not interfere with self governance of non treaty tribe).

Furthermore, in the brief filed in the New York case, the United States took a very different approach than it does here. In that case, the Plaintiffs argued that the government's decision to place land into trust should be vacated because it resulted in a wrongful loss of state jurisdiction. The United States responded as follows: "Plaintiffs' allegations that the regulations exceed any statutory authority appears premised on their belief that placing land in trust removes land from the state's jurisdiction . . . ." *Central New York Business Ass'n, et al. v. Ken Salazar, et al.*, Civil Action No. 6:08-cv-00660-LEK-DEP, District of New York (United State's Brief Document 91-1, filed November 15, 2011, Page 24 of 31.) The United States reasoned that, "[t]his argument fails because **placing land in trust does not remove it from state sovereignty or jurisdiction**." *Id.* (emphasis added.) The United States concluded that "[b]ecause neither the IRA nor the Secretary's regulations implementing that statute remove land from state sovereignty, Plaintiffs fail to state a claim." *Id.* at 23. To serve its purposes in this case, the same Assistant Attorney General now argues that Congress intended that the Indians for whom the land was acquired in trust, pursuant to the IRA, would be completely free from state or local regulation, interference and taxation. (United State's Br., p. 11.)

The United States' position in the New York case is well founded. As recently as 2001, the United States Supreme court held that "[o]ur 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. Though tribes are often

referred to as 'sovereign entities' it was 'long ago' that the 'Court departed from Chief Justice Marshall's view that the laws of [a state] can have no force within reservation boundaries.'" *Nevada v. Hicks*, 533 U.S. 353, 361 (2001) (citations omitted). "When on-reservation conduct involving only Indians is at issue, state law is generally inapplicable, for the State's regulatory interest is likely to be minimal and the federal interest in encouraging tribal self government is at its strongest. When, however, state interests outside the reservation are implicated, states may regulate the activities even of tribe members on tribal land, as exemplified by our decision in *Confederated Tribes*." *Nevada*, 533 U.S. at 361. (citation omitted).

Here, "state interests outside the reservation" are certainly implicated. If stormwater remained only on the parcels from which it originated, the federal government's mandate to control stormwater runoff would be entirely unnecessary. It is the fact that stormwater flows outside of the parcel from which it originates, to streams, rivers and lakes, that makes it necessary to regulate on all land within the Village.

Other rulings also confirm that there needs to be a significant impact on tribal sovereignty, and that the impact must be on internal affairs, before the enforcement of a law may be called into question. In *San Manuel Indian Bingo & Casino*, 475 F.3d. 1306, the United States Court of Appeals for the District of Columbia Circuit held that tribal sovereignty did not prevent the application of the National Labor Relations Act to union organizing efforts at a casino a tribe operated on its reservation. The court came to this conclusion despite the fact the casino was operated on trust land, despite the fact the tribe had enacted its own ordinances to govern labor matters, and despite the recognition that enforcement of the NLRA "will impinge, to some extent, on these governmental activities." *Id*. at 1314-15.

The court reasoned as follows:

> The total impact on tribal sovereignty at issue here amounts to some unpredictable, but probably modest, affect on tribal revenue and the displacement of legislative and executive authority that is secondary to a commercial undertaking. We do not think this limited impact is sufficient to demand a restrictive construction of the NLRA.

Id. at 1315.

The *San Manuel* court reviewed Supreme Court precedent and concluded as follows:

> In sum, the Supreme Court's decisions reflect an earnest concern for maintaining tribal sovereignty, but they also recognize that tribal governments engage in a varied range of activities many of which are not activities we normally associate with governance …. The Supreme Court's concern for tribal sovereignty distinguishes among the different activities tribal governments pursue, focusing on acts of governance as the measure of tribal sovereignty. The principal of tribal sovereignty in American law exists as a matter of respect for Indian communities. It recognizes the independence of these communities as regard to internal affairs, thereby giving them latitude to maintain traditional customs and practices. But tribal sovereignty is not absolute autonomy, permitting a tribe to operate in a commercial capacity without legal constraint.

Id. at 1314 (emphasis added).

> Therefore, we need not choose between *Tuscarora's* statement that laws of general applicability apply also to Indian tribes and *Santa Clara Pueblo's* statement that courts may not construe laws in a way that impinges on tribal sovereignty absent a clear indication of congressional intent. Even applying the more restrictive rule of *Santa Clara Pueblo*, the NLRA does not impinge on the tribe's sovereignty enough to indicate a need to construe the statute narrowly against application to employment at the casino.

Id. at 1315.

In this case, there is no tribal activity which could be labeled as purely "internal governance" that would call into question the tribe's sovereignty, if § 313 is applied against the federal government as written. Nothing in § 313 of the CWA prohibits the Tribe from engaging in any activity within its trust parcels. Finally, the payment of stormwater utility fees, pursuant to the CWA, is to be made by the United States and not the Tribe, so there is not even a

monetary concern. There is no impingement upon tribal sovereignty at all, let alone one justifying a wholesale disregard of § 313 of the CWA. [7]

E. The Village's ordinances are authorized by the CWA and are not preempted by 25 C.F.R. § 1.4.

The United States indicates it "does not rely on 25 C.F.R. § 1.4 for its position in this case." (United State's Br., p. 21.) It claims that regulation only codifies the common law. The United States goes on to state that "[t]herefore, this Court can grant judgment as a matter of law in favor of the united states without opining on the constitutionality of 25 C.F.R. § 1.4." (United State's Br., p. 22.) Although the Village disagrees with the United States' position on the common law, the Village does agree that the constitutionality of 25 C.F.R. § 1.4 does not need to be decided because the regulation simply does not apply in this case as is more fully explained in the Village's brief in opposition to the Tribe's Motion for Summary Judgment. As far as the United States' motion is concerned the Village simply relies on the United States' proclamation that it is not advancing the regulation as a basis for its Motion to Dismiss. Consequently no response is necessary.[8]

F. This Court has subject matter jurisdiction over all of the Village's claims based on 28 U.S.C. § 1331 and § 313 of the CWA, the Administrative Procedure Act, and because the Village could have brought separate claims under $10,000 for each stormwater charge.

1. This Court has subject matter jurisdiction over all of the Village's claims based on 28 U.S.C. § 1331 and § 313 of the CWA.

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[7] Additionally, not one of the cases cited by the United States relates to the enforcement of environmental protection statutes enacted by the Congress of the United States, as is the case here. Construed in a light most favorable to the United States, the cases it cites, stand for the limited notion that congressional action is needed for states or local communities to regulate Indian land. Even if that is true, that is exactly what § 313 of the Clean Water Act does. Additionally, requiring the United States to pay the stormwater fees furthers its trust relationship with the Tribe by protecting the resources inside the reservation as well as those outside.

[8] The Tribe does advance the regulation in support of its motion for summary judgment. To the extent the Court believes further review of the application of 25 C.F.R. § 1.4 is necessary, to address the United States' motion, the Court is directed to pages 17 to 28, of the Village's brief in response to the Tribe's Motion for Summary Judgment.

The United States argues that this Court lacks subject matter jurisdiction for the Village's claim seeking "money damages" as the claim exceeds $10,000.[9] (United State's Br., p. 25.) The U.S. argues that the Little Tucker Act serves as the "only possible basis" for the Village's request for a money judgment, and the Court would only have jurisdiction to award $10,000, as the "Big" Tucker Act "grants exclusive jurisdiction to the Court of Federal Claims for money claims against the United States exceeding $10,000." (*Id.* at p. 26.) The United States is incorrect. The Court has subject matter jurisdiction because the Village's claim arises under a federal law which contains a waiver of sovereign immunity.

This Court has subject matter jurisdiction of the Village's claims under 28 U.S.C. § 1331, federal question jurisdiction, based on § 313 of the CWA. The Village brings this claim under § 313, which contains an unambiguous waiver of sovereign immunity, and also confirms the responsibility of federal agencies to pay stormwater fees. In addition to the waiver of sovereign immunity, § 313 contains an enforcement mechanism, and also permits a federal agency to remove an action brought under § 313 to district court. Specifically, § 313(a)(2)(C) provides, in pertinent part, as follows:

> Nothing in this section shall be construed to prevent any department, agency, or instrumentality of the Federal Government, or any officer, agent, or employee thereof in the performance of his official duties, from removing to the appropriate Federal district court any proceeding to which the department, agency, or instrumentality or officer, agent, or employee thereof **is subject pursuant to this section**…. (emphasis added).

§ 313, at the very least, creates an implied cause of action, if not an express cause of action. Courts have held that "a claim 'arises under' federal law if the law in question creates a federal cause of action." *International Union of Operating Engineers, Local 150, AFL-CIO*, 563 F.3d at 281. An express cause of action exists when "the law permits a claimant to bring a claim

[9] The U.S. does not dispute that this Court has subject matter jurisdiction relating to the Village's claims for declaratory and injunctive relief.

in federal court." *Id.* at 283. Here, § 313 expressly states that federal agencies are responsible for the payment of stormwater charges, and § 313 also provides an enforcement mechanism. In fact, § 313 permits federal agencies to remove proceedings brought pursuant to that section to district court. Thus, it appears that § 313 provides an express cause of action. However, even if the Court finds no express cause of action, it can nonetheless be implied. To determine whether an implied cause of action exists, Courts must "focus[] solely on the question of congressional intent." *Id.* at 285. This analysis has two steps: "Congress must have intended to create both a private right and a private remedy." *Id.* This analysis begins with the text of the statute, including a search for "rights-creating language" and "an enforcement regime suggesting the existence of a private remedy." *Id.* at 286. Here, Congress passed the Stormwater Amendment confirming the federal government's responsibility to pay stormwater fees and § 313 contains an enforcement mechanism.

The United States cites *United States v. Navajo Nation,* 129 S.Ct. 1547, 1551 (2009), for its proposition. (United State's. Br., p. 26.) However, *Navajo Nation* does not state that claims for monetary relief are solely within the exclusive jurisdiction of the Claims Court. Rather, in *Navajo Nation*, the Supreme Court stated, "[t]he Federal Government cannot be sued without its consent…Limited consent has been granted **through a variety of statutes**, including one colloquially referred to as the Indian Tucker Act." *United States,* 129 S.Ct. at 1551 (emphasis added). Furthermore, both the 7th Circuit and 2nd Circuit have held that Tucker Act jurisdiction was not exclusive when the court otherwise had federal question jurisdiction and a waiver of sovereign immunity. *C.H. Sanders Co., Inc. v. BHAP Housing Dev. Fund Co., Inc.*, 903 F.2d 114, 119 (2nd Cir. 1990) (*superseded by statute on other grounds, as stated in United Am. Inc. v. N.B.C.—U.S.A. Hous., Inc. Twenty Seven*, 400 F.Supp.2d 59, 64 (D.D.C.2005)); *Western*

Securities Co., a subsidiary of Universal Mortg. Corp. v. Derwinski, 937 F.2d 1276, 1280-81 (7th Cir. 1991). In *C.H. Sanders Co., Inc.*, the 2nd Circuit held as follows:

> In other words, the Tucker Act provides merely one limited waiver of sovereign immunity. If Sanders were relying on the grant of jurisdiction provided by the Tucker Act, it would encounter the $10,000 limitation on actions commenced in district courts and its enforcement of the judgment claim necessarily would fail. § 1346(a)(2). Since we have held that the district court has § 1331 jurisdiction over Sanders' claim, however, it may be asserted in the district court provided there is an independent waiver of sovereign immunity outside of the Tucker Act.

903 F.2d at 119.

Furthermore, the 2nd Circuit noted, "[t]he Tucker Act does not expressly state that the jurisdiction of the Claims Court is exclusive. We find that omission significant." *Id.* Similarly, in *Western Securities Co.*, the 7th Circuit held as follows:

> These two elements-claim arising under federal law, and waiver of sovereign immunity-would have entitled [the plaintiff] to bring this suit in the district court in the first place….We do not think it should be objected that this interpretation of section 1331 disrupts the allocation of jurisdiction between the district courts and the Claims Court. That allocation is the creation of the Tucker Act, which waives sovereign immunity for contract claims against the government **that are not waived by other statutes**…**Here we have another statute**.

937 F.2d at 1280-81 (internal citations omitted) (emphasis added). Thus, where one has a claim arising under a federal law, combined with a waiver of sovereign immunity, the Tucker Act will not serve as a barrier to the Court's subject matter jurisdiction. *Id.*[10]

In this case, both elements are satisfied. The Village's claim is based on § 313 of the CWA that mandates the payment of stormwater charges and contains a waiver of sovereign immunity. § 313 requires the federal government "to comply with all…local requirements…respecting the control and abatement of water pollution…including the payment

[10] Additionally, in *Wyodak Resources Dev. Corp. v. U.S.*, 637 F.3d 1127, 1130 (10th Cir. 2011), the 10th held as follows: "If there is an independent source of subject-matter jurisdiction over a claim against the United States, and some waiver of sovereign immunity other than the Tucker Act, a plaintiff is free to proceed in district court."

of reasonable sewer charges." 33 U.S.C. § 1323(a). The Act goes on to state "[t]his subsection shall apply notwithstanding any immunity of such agencies, officers, agents, or employees under any law or rule of law." *Id.* Therefore, the court has subject matter jurisdiction regardless of the amount owed.

An opinion from the Office of Legal Counsel also supports the Village's position. The Office of Legal Counsel, in reviewing the recent Amendment to § 313, confirmed that the amendment "resolves the dispute over federal agencies' duty to pay stormwater assessments, by making clear that the phrase 'reasonable service charges' in § 313(a)—which is an unambiguous waiver of immunity—includes certain stormwater assessments." (Reimbursement of Payment Obligation of the Federal Government under § 313(c)(2)(B) of the CWA, Memorandum Opinion for the General Counsel Environmental Protection Agency, dated February 25, 2011, p. 5, available at http://www.justice.gov/olc/2011/stormwater-cardin-bill.pdf., last accessed March 21, 2012.) Additionally, the Office of Legal counsel confirmed that, "[t]he second provision, § 313(c)(2), sets forth requirements for the payment of such stormwater assessments by federal agencies." *Id.* It further concluded that no specific appropriation was necessary; rather, stormwater fees should be paid "from annual lump-sum appropriations." *Id.*

The Office of Legal Counsel also discussed how its conclusion relating to payments from lump-sum appropriations comported with the legislative history:

> Reading section 313(c)(2)(B) to restrict payment of stormwater assessments unless and until a *future* Congress makes a *specific* appropriation for that purpose would be in considerable tension with Congress's decision in the immediately preceding subsection—section 313(c)(1)—to clarify that federal agencies are responsible for paying reasonable stormwater assessments. Such a restriction would frustrate the ability of federal agencies to pay those assessments, and '[w]e are disinclined to say that what Congress imposed with one hand . . . it withdrew with the other.'

Id. at p. 8.

Furthermore, the language of § 313 specifically provides that the responsibility to pay reasonable service charges includes assessments "used to pay **or reimburse the costs** associated with any stormwater management program…" 33 U.S.C. § 1323(c)(1)(B). § 313 also speaks of enforcement in "Federal, State, or local courts or any other manner."

2. <u>As a second basis, this Court has subject matter jurisdiction over all of the Village's claims based on the Administrative Procedure Act.</u>

Not only does § 313 contain an unambiguous waiver of sovereign immunity, the Administrative Procedure Act (APA) also contains a waiver of sovereign immunity. *See* 5 U.S.C. § 702. The 7th Circuit, in reviewing § 702 of the APA, has stated as follows: "The first and second sentences of § 702 play quite different roles...The first supplies a right to seek review of agency action; the second, added by the 1976 amendments to the statute, provides a waiver of sovereign immunity...The waiver covers actions that seek specific relief other than money damages..." *Michigan v. U.S. Army Corps of Engineers*, 667 F.3d 765, 775 (7th Cir. 2011) (citations omitted). The 7th Circuit has held that actions seeking declaratory and injunctive relief fall under the waiver of sovereign immunity under the APA. *Id.* The 7th Circuit has further held, "the waiver in § 702 is not limited to claims brought pursuant to the review provisions contained in the APA itself. The waiver applies when any federal statute authorizes review of agency action, as well as in other cases involving constitutional challenges and other claims arising under federal law." *Id.* at 775. Furthermore, the Supreme Court has differentiated between suits for specific relief in the form of monetary relief, versus suits seeking monetary damages. *Bowen v. Massachusetts*, 487 U.S. 879, 900 (1988). The Supreme Court has allowed suits to proceed under the APA waiver of sovereign immunity where "it is a suit seeking to enforce [a] statutory mandate itself, which happens to be one for the payment of money." *Id.*

In *Bowen*, the Supreme Court considered whether "a federal district court has jurisdiction to review a final order of the Secretary of Health and Human Services refusing to reimburse a State for a category of expenditures under its Medicaid program." *Id.* at 882. The State had filed suit seeking both declaratory and injunctive relief. *Id.* at 893. The Secretary argued that § 702 of the APA did not provide subject matter jurisdiction as it was really a suit for money damages. *Id.* at 891. The Supreme Court held as follows: "First, insofar as the complaints sought declaratory and injunctive relief, they were certainly not actions for money damages. Second, and more importantly, even the monetary aspects of the relief that the State sought are not 'money damages' as that term is used in the law." *Id.* at 893. Furthermore, "[t]he fact that a judicial remedy may require one party to pay money to another is not a sufficient reason to characterize the relief as 'money damages.'" *Id.* In *Bowen*, the Medicaid statute at issue directed that the Secretary "'shall pay' certain amounts for appropriate Medicaid services;" thus, it was a suit to enforce a statutory mandate, "not a suit seeking money in *compensation* for the damage sustained by the failure of the Federal Government to pay as mandated." *Id.* at 900 (emphasis in original).

Here, § 313 of the CWA unambiguously provides a waiver of sovereign immunity. Like the Medicaid statute at issue in *Bowen* containing a statutory mandate, § 313 similarly directs that federal agencies "shall be subject to, and comply with, all Federal, State, interstate, and local requirements, administrative authority, and process and sanctions respecting the control and abatement of water pollution in the same manner, and to the same extent as any nongovernmental entity including the payment of reasonable service charges." 33 U.S.C. § 1323(a)(2). Additionally, like the State's claims for relief in *Bowen*, the Village has similarly sought declaratory and injunctive relief. Furthermore, although a judgment in the Village's favor

may ultimately require the payment of money, such relief is specific relief enforcing the § 313 statutory mandate via the APA, rather than a suit purely seeking money damages. Nothing in § 313 places a specific monetary cap on the amount a federal agency may owe for reasonable stormwater fees. Rather, the Stormwater Amendment has clarified federal agencies' responsibility for the payment of reasonable stormwater fees, including reimbursement for stormwater fees.

The Village is not relying on the limited waiver of sovereign immunity provided under the Little Tucker Act. Rather, the Village has a claim arising under a federal law, § 313, that contains its own waiver of sovereign immunity. Additionally, the APA provides a waiver of sovereign immunity for claims seeking specific relief under a statutory mandate. Here, § 313 contains the statutory mandate. Thus, under the APA, this Court has subject matter jurisdiction over all of the Village's claims for relief.

3. <u>As a third basis, even if the Village had to rely on the Little Tucker Act for subject matter jurisdiction over its claims seeking monetary relief, this Court would nonetheless have subject matter jurisdiction as the Village could have brought separate claims under $10,000 and joined them for purposes of this case.</u>

Furthermore, even if the Village must rely on the Little Tucker Act for subject matter jurisdiction, as the U.S. argues, the Court would still have subject matter jurisdiction. Because the stormwater charges are assessed on a periodic basis, for each individual property, the Village could bring successive claims, each less than the $10,000 jurisdictional limit. The Federal Rules of Civil Procedure permit joinder of claims. *See* Fed. R. Civ. P. 18(a). Additionally, nothing in the Tucker Act prohibits such joinder of claims, and "such a provision should not be implied to deprive the Federal Courts of the right of availing themselves of this advantageous process." *See U.S. v. Louisville & N.R. Co.*, 221 F.2d 698, 702 (6th Cir. 1955). Moreover, whether a plaintiff pleads separate counts in its complaint is not determinative: "the label which a plaintiff applies

to his pleading does not determine the nature of the cause of action." *Id.* at 701. Here, the Village made separate claims against the United States, for each parcel, for each year. (Kowalkowski Aff., ¶ 2, Ex. A.). No one claim exceeds $10,000.[11] The Village has joined the claims in the interest of conserving the Court's time and resources, and also the time and resources of the parties.

IV. CONCLUSION

"Courts must presume that a legislature says in a statute what it means and means in a statute what it says there." *Carcieri,* 555 U.S. at 392. What is said in § 313 of the CWA could not be more clear. The federal government having "jurisdiction" over the land, "shall" be subject to and comply with "all" "local requirements," including the "the payment of…service charges," expressly defined to include "cost associated with any stormwater management program." Congress drove the broad applicability of § 313 home when it further indicated only the President himself, and only after finding it would be in "the paramount interest of the United States," can exempt any parcels.

Given the above case law and arguments of the United States, there is no reason to believe that "any property" as used in § 313 does not include the land of the United States held for the benefit of Indians. This is especially true when the statute expressly includes a mechanism to have certain land excluded, from the reaches of the state or local law, if such exclusion is deemed appropriate.

[11] Given that multiple years and interest are now involved, the grand total for some properties now exceeds $10,000.

Dated this 23rd day of March, 2012

Respectfully Submitted,
Attorneys for Defendant, Village of Hobart

/s/Frank W. Kowalkowski
Frank W. Kowalkowski (WI Bar No. 1018119)
Jenna E. Clevers (WI Bar No. 1065236)
Davis & Kuelthau, s.c.
318 S. Washington Street, Suite 300
Green Bay, WI 54301
Telephone: 920.435.9378
Facsimile: 920.431.2270
Email: fkowalkowski@dkattorneys.com

Direct contact information:

Frank W. Kowalkowski	920.431.2221 direct dial 920.431.2261 direct fax fkowalkowski@dkattorneys.com
Jenna E. Clevers	920.431.2227 direct dial 920.431.2267 direct fax jclevers@dkattorneys.com