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 BRIEF IN OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

Regulations

Constitutional Provisions

I. INTRODUCTION

The Village finds itself in the untenable position of being sued by the Oneida Tribe of Indians of Wisconsin ("Tribe") seeking a declaratory judgment that the Village's stormwater fees are not owed. Dkt. No. 1. The Tribe has also asserted that to the extent any fees are owed, the payor should be the federal government. Dkt. No. 8. The Village filed a counterclaim against the Tribe seeking a declaratory judgment the fees are owed. Dkt. No. 4. The Village also filed a Third Party Complaint against the federal government as the titleholder, and the United States Department of the Interior, the agency with jurisdiction over the trust parcels, pursuant to 28 U.S.C. § 1323(a) also known as § 313. *See* Dkt. No. 15. The U.S. filed a motion to dismiss. Dkt. No. 24. On April 18, 2011, the Court dismissed the Village's Third Party Complaint because there was no "final agency action" for the Court to review. Dkt. No. 34. Subsequently, the Village submitted a certified list of stormwater charges to the U.S. Department of the Interior, Bureau of Indian Affairs, and the Environmental Protection Agency. On October 20, 2011, the Village received a denial from the U.S. Department of the Interior. Dkt. No. 40-1. The Village thereafter filed an Amended Third Party Complaint on November 23, 2011, against the United States of America, United States Department of the Interior, and Kenneth Salazar, Secretary of the Interior (referred to hereinafter, collectively, as "United States"). Dkt. No. 43.

On January 23, 2012, the Tribe filed a Motion for Summary Judgment. Dkt. No. 47. On the same date, the United States filed a Motion to Dismiss. Dkt. No. 53. The Tribe argues that the Village's ordinance constitutes an impermissible tax, that the ordinance is pre-empted by federal law, and that "imposition of the ordinance on the subject trust lands impermissibly infringes upon the Tribe's inherent powers of self-government, whether or not it constitutes a tax." (Tribe's Br., p. 6-7.) However, the fee versus tax question has already been answered

through § 313 of the Clean Water Act, confirming that stormwater charges are fees, and case law also supports that the stormwater charges are fees, not taxes. Additionally, the IRA does not pre-empt the Village's stormwater regulation. The IRA only states that land held in trust is exempt from taxation. It does not mention, let alone prohibit, local fees or regulations. Moreover, 25 C.F.R. § 1.4 does not preclude enforcement of the Village's ordinances because a regulation cannot override a Congressional Act or another regulation issued from a different agency. Additionally, § 1.4 does not apply in this case because it only applies to leased land which has not been shown to be the case here. Furthermore, to the extent the regulation is applied to eliminate all local jurisdiction, it is unconstitutional.

II. DISPUTED FACTS

The original 1838 reservation was allotted, so that no surplus lands were left. (Kowalkowski Aff., ¶ 3, Ex. B; ¶ 4, Ex. C; ¶ 13, Ex. L.) Additionally, the Tribe was not under federal jurisdiction in 1934, and therefore was not eligible to utilize the IRA. (*Id.* at ¶ 7, Ex. F; ¶ 6, Ex. E; ¶ 9, Ex. H; ¶ 10, Ex. I; ¶ 11, Ex. J.) Furthermore, the Village had jurisdiction over the trust parcels for nearly a century prior to the Tribe applying to have them held in Trust. (*Id.* at ¶ 5, Ex. D; ¶ 8, Ex. G; ¶ 3, Ex. B.)

The stormwater fees asserted by the Village are charged per year, per parcel. (*Id.* at ¶ 2, Ex. A.) Each individual stormwater charge asserted on trust parcels is less than $10,000. (*Id.*) After the addition of interest, only two of the individual charges exceed $10,000. (*Id.*)

The Village's stormwater management fees are used solely to offset the Village's regulatory costs relating to stormwater management. (Vickers Aff., ¶ 3.) The stormwater fees are charged by a separate stormwater utility created by the Village solely for the purpose of managing stormwater. (*Id.* at ¶ 4.) The Village created and maintains a separate budget for stormwater management purposes, and all fees collected relating to stormwater management are

identified in a segregated account and not comingled with the Village's general fund budget. (*Id.* at ¶¶ 5, 6.) The stormwater fees were specifically designed to equal the cost of the services, equipment, supervision, enforcement, and regulation relating to stormwater management. (*Id.* at ¶ 7.) The Village retained the engineering firm of Robert E. Lee that calculated the estimated cost of the management system and the fees were based directly off of that engineering firm's measurements, calculations, and methods. (*Id.*) None of the stormwater fees collected have ever been used for general purposes or for anything else not related to the stormwater management system. (*Id.* at ¶ 8.)

The stormwater management fee was designed to and does provide a benefit to the regulated property owners. (*Id.* at ¶ 9.) Additionally, the stormwater fees are based upon a fair approximation of the proportionate contribution of the property to stormwater runoff and potential pollution. (*Id.* at ¶ 10.) The charges are based primarily upon a determination of impervious surfaces associated with a given parcel. (*Id.*) The Village does not currently assert a base charge as part of its stormwater management fees. (*Id.* at ¶ 13.) The current fees are based on Equivalent Runoff Unit (ERU), which is based on amount of impervious area. (*Id.*) Moreover, the Village's stormwater ordinance contains a section under which one can request that the Village waive all or part of the minimum on-site stormwater management requirements. (*Id.* at ¶ 12.) Neither the Tribe nor the United States has requested an exemption from the Village's stormwater ordinance. (*Id.* at ¶ 12.) No parcel owners are treated any differently in the application or enforcement of the Village's stormwater ordinance. (*Id.* at ¶ 14.) Furthermore, the Village was required to apply for a National Pollutant Discharge Elimination System (NPDES) permit, as an operator of a regulated small MS4, by March 2003. (*Id.* at ¶ 11.)

Several trust parcels are occupied by businesses or buildings which are open to the public, regardless of tribal membership. (*Id.* at ¶¶ 15-22.)

III. SUMMARY JUDGMENT METHODOLOGY

Summary judgment may be granted only "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." *See* Fed. R. Civ. P. 56(a). A genuine issue of material fact exists if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). In assessing the evidence, all reasonable inferences must be drawn in favor of the nonmoving party. *BMC Res., Inc. v. Paymentech, L.P.*, 498 F.3d 1373, 1378 (Fed. Cir. 2007). Moreover, "[c]redibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge." *Anderson*, 477 U.S. at 255.

The party seeking summary judgment has the burden of establishing the lack of any genuine issue of material fact. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Where the movant bears the burden of persuasion and its motion fails to satisfy that burden, a non-movant need not provide affidavits or other evidence from its own experts to defeat a summary judgment motion. *See Zenith Elecs. Corp. v. PDI Commun. Sys.*, 522 F.3d 1348, 1363 (Fed. Cir. 2008).

IV. ARGUMENT

A. The utility fees charged pursuant to the Village's stormwater ordinance are not impermissible taxes.

The Village's stormwater charges are fees which are owed by even tax exempt entities. This fact is confirmed by congressional definition and by case law.

1. Congress has expressly defined stormwater charges as permissible fees owed for otherwise tax exempt properties.

The Tribe argues that state and local governments cannot tax trust land absent special authority from Congress. (Tribe's Br., p. 12.) The Tribe then claims that the stormwater fees being asserted by the Village are in reality unauthorized taxes and therefore impermissible. (*Id*.)

First, it is important to note what the Tribe's argument concedes by implication. If the charges are fees, rather than taxes, they may be asserted by the Village. In this case, the fee versus tax issue has been expressly answered by Congress:

§ 313 of the Clean Water Act (CWA) 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).

The CWA goes on to define what is meant by a reasonable service charge that may be asserted even though taxation is prohibited:

> **(c) Reasonable service charges**
> **(1) In general**
> For the purposes 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 of pollutants, or volume or rate of stormwater discharge or runoff from the property or facility); and
> **(B) used to pay or reimburse the costs associated with any stormwater management program** (whether associated with a separate storm sewer system or a 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 reducing the

> volume and rate of stormwater discharge, regardless of whether that reasonable fee, charge, or assessment is denominated a tax.

Id. (emphasis added). In other words, via a Congressional Act, stormwater charges are expressly defined as permissible fees rather than taxes. The Tribe's argument that stormwater charges are impermissible taxes simply cannot stand in light of § 313 of the CWA.[1] [2]

2. <u>Case law also confirms the Village's stormwater charges are permissible fees rather than impermissible taxes.</u>

Even if the CWA was not dispositive of the fee versus tax issue, an analysis of the common law draws one to the same conclusion. In *Sarasota County v. Sarasota Church of Christ*, 667 So.2d 180 (Fla. 1995), the city imposed a stormwater charge on all developed property. The church argued that the ordinance imposed a tax because it benefited the community at large and the church received no specific benefit. The court held the fee was valid because all properties with impervious surfaces benefited from the stormwater service. *Id.* at 185.

In *Kentucky River Authority v. City of Danville, Kentucky*, 932 S.W.2d 374 (Ky. Ct. App. 1996), the city attempted to avoid a stormwater fee by claiming it received no benefit. The court disagreed holding that the preservation of watershed was a benefit that accrued to all within its boundaries. The court likened the fee to emission fees collected from entities that emitted air pollutants and are used to fund the state air program, noting that although there may be no direct or immediate benefit to the payor of the fees, the use of the air and the contamination of it are sufficient to justify the imposition of the fee. *Id.* at 377.

---

[1] Regardless of whether the Tribe (as the occupant of the land) or the federal government (having jurisdiction over the land), owes the fees, § 313 of the CWA is still controlling. Regardless of the payor, § 313 demonstrates a congressional intent to define stormwater charges as permissible fees. The Tribe cannot legitimately argue it is less obligated to pay fees than the United States government.

[2] The Tribe cites several cases in support of its argument that federal land, including that held in trust, may not be taxed. It also cites cases analyzing the distinction between a fee and tax. However, all of those cases pre-date congress's pronouncement in 33 U.S.C. § 1323(c)(1)(B), that confirms a charge is not a tax if it is asserted "to pay or reimburse the costs associated with any stormwater management program." A review of antiquated case law is no longer necessary nor appropriate to settle the fee versus tax debate.

In *City of River Falls v. St. Bridgets Catholic Church of River Falls*, 182 Wis. 2d. 436, 513 N.W.2d. 673 (Ct.App. 1994), a church challenged the city's fees for the cost associated with storing water for fire protection purposes. The city calculated the amount of the charge each customer pays according to the customer's property value. *Id*. at 439. The church's argument was that the charge was not based on services rendered to utility customers but a mechanism for collecting revenue to pay for the cost of providing public fire protection. *Id*. at 442. The church noted that the charge was assessed regardless of whether the utility customer actually used water to fight a fire. *Id*. at 441. The court ruled that "[t]he church's argument incorrectly assumes that to be a fee, a charge must be assessed for commodities actually consumed. As we previously stated, if the primary purpose of a charge is to cover the expense of providing services, supervision, or regulation, the charge is a fee and not a tax." *Id*. at 442, citing *State v. Jackman*, 60 Wis. 2d. 700, 707, 211 N.W. 2d. 480 (1973).

In *El Paso Apartment Ass'n v. City of El Paso*, No. EP-08-CA-145-DB, 2008 WL 2641350, (W.D. Tex., June 24, 2011), the City of El Paso formed a drainage utility and levied a stormwater fees upon all water consumers calculated upon the square footage of impervious land. The plaintiff alleged that the stormwater drainage fee was not intended to finance the cost of a stormwater utility but was a means of raising general revenue for the city. The court noted that "[t]he storm-water fee is imposed upon the entire population of El Paso, from private homeowners to commercial business. Although there is a disparity between the amount charged, all are taxed their share based on the size of their lot." *Id.* at *5.[3]

[3] See also *Vandergriff v. City of Chattanooga*, 44 F.Supp.2d 927, (E.D. Tenn. 1998) (charges collected under city's stormwater ordinance were "fees" rather than "taxes"); *Long Run Baptist Ass'n. v. Sewer Dist.*, 775 S.W.2d 520 (Ky. Ct.App. 1989) (stormwater service charge was not a tax because it was reasonable and uniform in its application*); City of Littleton v. State*, 855 P.2d 448 (Colo. 1993) (stormwater management fee asserted against state owned school property found to be a service fee reasonably designed to meet the overall costs of the service provided and that the fee used to construct and maintain the drainage system was essential to provision of the services*); Zelinger v. City and County of Denver*, 724 P.2d 1356 (Colo. 1986) (the Colorado

In *Massachusetts v. United States*, 435 U.S. 444 (1978), the United States Supreme Court established a three pronged test for determining whether fees imposed by local governments on federal facilities are reasonable service charges or taxes. Under the *Massachusetts* case, (1) the federal government must not be treated any differently in the enforcement of the fee requirement than any other regulated entity; (2) the fee charge must be a fair approximation of the benefit received to be considered "reasonable" and; (3) the fee must be structured to produce revenues that will not exceed the total cost of the benefits. *Id.* at 466-67.

In *New York Department of Environmental Conservation v. U.S. Dept. of Energy*, 850 F.Supp. 132 (N.D.N.Y. 1994)("NYSDEC II"), the district court explained that the *Massachusetts* test "requires only a rational relationship between the method used to calculate the fees and the benefits available to those who pay them." *Id.* at 143. This test would be no different simply because the United States' land, at issue in this case, is occupied by a tribe or its members.

In *Jorling v. U.S. Dept. of Energy*, 218 F.3d 96 (2nd Cir. 2000), the 2nd Circuit reviewed the reasonableness of the fees according to the *Massachusetts* test. It noted that "*Massachusetts* did not hold that a user fee must represent retrospectively a close approximation of the actual, historical benefit to the user. Rather, *Massachusetts* held only that the method used to calculate the fee must rationally be designed to approximate prospectively the benefit to the user." *Id.* at

---

Supreme Court held that the stormwater ordinance was rationally related to a state purpose of financing the maintenance and construction of new stormwater sewers, and that it established a valid service charge rather than an unconstitutional tax because the funds raised by the fee were not used for general revenue purposes but were segregated and used solely to pay for the costs of the operation, repair, maintenance, improvement, renewal, the placement and reconstruction of storm drainage facilities); *Smith v. Spokane County*, 948 P.2d 1301 (Wash. Ct.App. 1997) (funding for aquifer protection areas was not an unconstitutional tax and will be upheld if it was reasonable and designed to cover the cost of the program); *Teter v. Clark County*, 704 P.2d 1171 (Wash. 1985) (charge for a county storm and surface water utility was not a tax but a valid regulatory fee); *McCleod v. Columbia County*, 599 S.E.2d 152 (Ga. 2004) (county stormwater fee based on impervious area was determined to not be arbitrary and there is a reasonable relationship to the benefits received by the individual developed properties in the treatment and control of stormwater runoff); *Church of Peace v. City of Rock Island*, 828 N.E.2d 1282 (Ill. App. Ct. 2005) (city's stormwater fees not a tax and churches were therefore not exempt from payment of the fee because the stormwater service charge was in direct proportional relationship to the impervious soil, thus creating a rational relationship between the amount of a fee and the contribution of a parcel to the use of the overall stormwater system).

103. The court also found that the *Massachusetts* test applies not only to services used but also to services available for use. *Id.* The court then concluded that the fees were not taxes because the method of calculating the hazardous waste program charges were reasonably designed to fairly approximate the use of the systems and thereby to approximate the cost of supplying such services to particular generators of waste or operators of waste facilities. *Id.* at 105.

Another element found to be determinative in the fee versus tax analysis is whether or not the ordinance has any exceptions to its applicability. *Church of Peace v. City of Rock Island,* 828 N.E.2d at 1286. The Village's stormwater ordinance contains a section under which one can request that the Village waive all or part of the minimum on-site stormwater management requirements. Village of Hobart Ordinances § 4.207(C). (Vickers' Aff., ¶ 12.) Neither the Tribe nor the United States have availed themselves of this process. (Vickers' Aff., ¶ 12.)

Additionally, the EPA has acknowledged that charging stormwater fees, rather than simply increasing taxes, is a legitimate way to fund stormwater programs. In a January 2008 publication entitled Funding Stormwater Program, the EPA listed alternatives for stormwater managers to consider when determining how to fund their stormwater program. The publication specifically indicated as follows:

> There are many different mechanisms that municipalities can use to fund their stormwater programs. The two most common funding options, property taxes/general fund and stormwater service fees, are discussed below along with several funding alternatives….
>
> Many communities are now adopting stormwater service fees by means of a stormwater utility. A stormwater utility is a sustainable funding mechanism dedicated to recover the cost of stormwater infrastructure, regulatory compliance, planning, maintenance, capital improvements, and repairs and replacement. Stormwater fees are charged to tax paying and tax exempt properties and are typically based on property areas….

Funding Stormwater Programs, EPA Publication 833-F-07-012, January 2008, available at http://water.epa.gov/lawsregs/lawsguidance/cwa/tmdl/upload/region3_factsheet_funding.pdf, last accessed March 22, 2012.

The EPA then went on to explain why collecting revenue through general taxation was not the preferred choice. One of the problems it mentioned with the tax method was that "tax-exempt properties do not support any of the cost, even though it can be shown that many of them, such as governmental properties, schools, colleges, and universities are major contributors of stormwater runoff." *Id.* Therefore, it is also the position of the EPA that stormwater fees are not impermissible taxes.

In this case, the fees charged by the Village are charged by a separate stormwater utility created solely for the purpose of managing stormwater. (Vickers' Aff., ¶ 4.) A separate and distinct budget is created for stormwater management. (Vickers' Aff., ¶ 5.) All money collected is segregated and is not comingled into the Village's general revenue fund. (Vickers' Aff., ¶ 6.) The money collected is not used to pay for the general operating cost of the Village. (Vickers' Aff., ¶ 8.) No property owner is treated differently with respect to the stormwater ordinances. (Vickers' Aff., ¶ 14.) The fee was specifically designed with the assistance of an engineering firm to equal the anticipated cost of the services, supervision and regulation related to stormwater management. (Vickers' Aff., ¶ 7.) The fee for the parcels are based on the engineering firm's measurements of impervious soil. (Vickers' Aff., ¶ 7 and Ordinance § 4.505.) The ordinance allows a property owner to request that the Village waive all or part of the minimum on-site stormwater management requirements. (Vickers' Aff., ¶ 12.) Consequently, the Village's stormwater charges have all the attributes of a fee and are therefore owed to the Village.

3. <u>The case law, cited by the Tribe, purporting to limit the taxation of Indian trust land is either irrelevant or distinguishable and therefore does not preclude the Village from asserting the stormwater fee.</u>

The Tribe cites several cases regarding the purported inability of a state or local government to tax Indians or land occupied by Indians. This case law is irrelevant because the

stormwater fees being asserted by the Village are not taxes. A state or local government can assert fees against a tribe, the federal government, a church or any other tax exempt entity. Consequently, a prohibition against taxation does not change the outcome of this case.

The case law cited by the Tribe is also distinguishable because it stands for the proposition a state or local government, standing on its own, cannot tax an Indian tribe or its trust land. In this case, however, it is the federal government that initiated and has required local stormwater management.[4] Additionally, a Congressional Act has expressly authorized the imposition of stormwater fees and regulations on any land over which the federal government had jurisdiction. 33 U.S.C. § 1323(a) and (c). Since the federal government called for the creation of the Village's stormwater management plan, and does have the ability to authorize both taxes and fees on trust land, the cases limiting the regulatory authority of a state do not advance the Tribe's position.

The Tribe cites *City of Cincinnati v. U.S.*, 153 F.3d 1375 (Fed. Cir. 1998), in which the lower court admittedly ruled a stormwater charge was a tax. However, on appeal the Appellate

---

[4] The Statement of Basis, drafted by the EPA for granting the Village's NPDES permitting authority, 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).

Court upheld the lower court on other grounds and expressly rejected the basis for the lower court's decision, which was that the charge was a tax. The Appellate Court noted:

> The involuntary nature of the charge, however, is not dispositive of the latter inquiry [whether the charge is a fee or tax]. There may be some instances in which a municipal assessment is involuntarily imposed but would nonetheless be considered a permissible fee for services rather than an impermissible tax. Our decision in this case does not answer that question and thus we do not hold that Cincinnati's storm drainage service charge is a tax that cannot constitutionally be imposed on a federal entity.

Id. at 1378.

The Tribe also cited *National Cable Television v. United States*, 415 U.S. 336 (1974). That case did not address stormwater charges. Additionally, the court allowed for the charges to be made but indicated that under 31 U.S.C. 483(a) they could not exceed the "value to the recipient." *Id.* at 342-43.

The Tribe cites *Santa Rosa Band of Indians v. King County,* 532 F.2d 655 (9th Cir. 1975) for the proposition a local government could not impose ordinances on trust land. (Tribe's Br., pp. 20-21.) However, even that case says this prohibition does not apply if "congress chose to grant that power." *Santa Rosa*, 532 F.2d at 658. In this case, congress chose to grant that power by requiring local stormwater management, by initiating the issuance of NPDES permits and by enacting § 313 of the CWA.

The Tribe cites *Schneider Transport, Inc. v. Cattanach*, 657 F.2d 128 (7th Cir. 1981) for several propositions relating to the fee versus tax analysis. However, *Schneider Transport, Inc.* involved the multi-state registration of trucking companies and also the Tax Injunction Act of 1937. Furthermore, in that case, the registration fees collected by the State of Wisconsin were used for general transportation purposes related to revenue-raising which is why the court concluded it was a tax. *Id.* at 132.

The Tribe cites *Empress Casino Joliet Corp. v. Balmoral Racing Club, Inc.*, 651 F.3d 722 (7th Cir. 2011), but does not include a pinpoint cite. *Empress Casino* also related to the Tax Injunction Act (TIA). Furthermore, in *Empress Casino*, the 7th Circuit clarified as follows:

> If the fee is a reasonable estimate of the cost imposed by the person required to pay the fee, then it is a user fee and is within the municipality's regulatory power. If it is calculated not just to recover a cost imposed on the municipality or its residents but to generate revenues that the municipality can use to offset unrelated costs or confer unrelated benefits, it is a tax, whatever its nominal designation.

Id. at 728-29.

The Tribe also cites *McLeod v. Columbia County*, 254 F. Supp.2d 1340 (S.D. Ga 2003), which also implicates the Tax Injunction Act. The issue was "whether the storm water utility charge is a tax or a fee for purposes of the TIA. If the charge is a tax, the Court lacks jurisdiction to adjudicate the merits of the case." *Id.* at 1344. Ultimately, the District Court determined the stormwater charge was a tax, for purposes of the TIA. Because the District Court determined it did not have jurisdiction, it remanded the case to the state court, where the case was initially filed. *Id.* at 1349. There, the state court determined that the storm water utility charge was a fee, not a tax. *McLeod v. Columbia County*, 599 S.E. 2d 152, 155 (2004). The Tribe argues that the state decision is "not instructive" as to whether the stormwater charge constitutes a tax for purposes of federal law. (Tribe's Br., p. 16.) However, the District Court itself stated, "[s]tate law determinations as to whether a fee is a tax may still be pertinent or instructive." *McLeod*, 254 F.Supp.2d at 1345, quoting *Diginet, Inc. v. Western Union ATS, Inc.*, 845 F.Supp. 1237, 1240 (N.D. Ill. 1994).

B. <u>The IRA does not pre-empt the Village's stormwater regulation and the fees associated therewith.</u>

The Tribe claims that "the plain language of the IRA concludes this matter." (Tribe's Br., p. 14.) However, the IRA only states that land held in trust is exempt from taxation. It does not

mention, let alone prohibit, local fees or regulations. The IRA's omission of a prohibition against fees and regulations, when taxes are expressly addressed, is very telling

Moreover, the EPA has weighed in on this issues. The "Notice of Draft Permit for Village of Hobart" issued by the EPA 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 the Village's EPA granted authority excludes trust land. In fact, the draft permit suggests the exact opposite. Admittedly, what was issued by the EPA is a draft permit. However, it is hard to imagine that the EPA, the branch of the federal government most involved in the implementation and monitoring of stormwater management, would even preliminarily grant the Village authority it legally cannot possess.

The Tribe also cites case law indicating the IRA, despite containing no language to this effect, pre-empts the civil regulatory authority of local governments. (Tribe's Br., p. 20.) Here, the stormwater management plan was mandated by federal law[5] and the enforcement of this local regulation is expressly authorized by § 313 of the CWA. Therefore, cases addressing purely local ordinances, in no way linked to, let alone expressly required and authorized by, federal law, are inapplicable.

Additionally, the United States itself, via the same Attorney General that filed the United States' brief in this case, informed a federal court only a few months ago that "neither the IRA

[5] See footnote 2.

nor the Secretary's regulations implementing that statute remove land from state sovereignty."[6] Consequently, according to the United States, "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." *Id.*, 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 Tribe's position here is in direct conflict with the law, as articulated by the United States only a few months ago.

C. The fact a failure to pay the stormwater fees may result in an encumbrance on the property, does not prohibit the Village from seeking a declaration they are owed.

The Tribe argues that the Village lacks authority to regulate the trust parcels because the Non-Intercourse Act would prohibit the Village from foreclosing on the trust parcels. (Tribe's Br., p. 22-23.) However, whether the Village can enforce a judgment by means of foreclosure is completely irrelevant to whether the fees are owed in the first instance. Generally, one's collectability is not a legal defense to an otherwise valid claim. For instance, the fact a defendant may be exempt from a garnishment, or otherwise claim that certain property is exempt from execution, is not a legal defense that would prevent entry of a judgment. The Village has not brought a foreclosure action, nor is the Village attempting to enforce a judgment in the present action. This is because these are two separate and distinct issues. For example, the 2nd Circuit addressed this very issue in *Oneida Indian Nation of New York v. Madison County N.Y.*, 605 F.3d 149 (2nd Cir. 2010) (*vacated and remanded by Madison County, N.Y. v. Oneida Indian*

[6] *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 States' Brief Dkt. 91-1, filed November 15, 2011, Page 24 of 31.)

Nation of New York, 562 U.S. ___, 131 S.Ct. 704 (2011)).[7] In that case, the 2nd Circuit considered whether two counties could foreclose on various parcels owned by the Oneida Indian Nation of New York ("OIN") after the Supreme Court had confirmed OIN's tax obligations in *City of Sherrill, N.Y. v. Oneida Nation of N.Y.*, 544 U.S. 197 (2005).

Later, however, despite a ruling the taxes were owed, OIN sought to enjoin the counties from foreclosing on the properties based on non-payment of the taxes due. *Id.* The 2nd Circuit ultimately held that, despite the determination that taxes were owed, the foreclosure actions were barred based on OIN's immunity from suit. *Id.* at 159. In reaching that determination, the 2nd Circuit addressed the counties' argument that "a right without a remedy is meaningless." *Id.*, fn. 8. Specifically, the 2nd Circuit stated, "[d]espite Chief Justice Marshall's eloquent statement that the government of the United States cannot be called a government of laws 'if the laws furnish no remedy for the violation of a vested legal right,'...our courts often conclude that there is no remedy to vindicate the violation of a right." *Id.* (internal citation omitted). Additionally, the concurring opinion of the 2nd Circuit provided as follows:

> The holding in this case comes down to this: an Indian tribe can purchase land (including land that was never part of a reservation); refuse to pay lawfully-owed taxes; and suffer no consequences because the taxing authority cannot sue to collect the taxes owed...This rule…defies common sense. But absent action by our highest Court, or by Congress, it is the law.

Id. at 163.

The 2nd Circuit, concurring opinion, continued as follows: "In the last twenty years, the Supreme Court has twice held that, although states may have a right to demand compliance with

[7] Following this decision, the counties petitioned the Supreme Court for a writ of certiorari proposing two questions for review, the first being as follows: "whether tribal sovereign immunity from suit, to the extent it should continue to be recognized, bars taxing authorities from foreclosing to collect lawfully imposed property taxes..." *Oneida Indian Nation of New York v. Madison County*, 665 F.3d 408, 422 (2nd Cir. 2011). The Supreme Court accepted review of this question, but did not reach this issue as the OIN then strategically waived its sovereign immunity. *Id.*

state laws by Indian tribes, they lack the legal means to enforce that right." *Id.* at 163-64, citing *Kiowa Tribe of Okla. v. Mfg. Tech., Inc.*, 523 U.S. 751, 755, 118 S.Ct. 1700 (1988) ("There is a difference between the right to demand compliance with state laws and the means available to enforce them."); *Okla. Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Okla.*, 498 U.S. 505, 514, 111 S.Ct. 905 (1991) ("holding that states have a right to collect taxes on certain cigarette sales on an Indian reservation, but the tribe is immune from suit seeking to enforce that right"). Thus, whether the Village ultimately possesses the ability to foreclose on the trust parcels at issue here is completely irrelevant to whether the Village may assert the charges in the first instance.

D. 25 C.F.R. § 1.4 does not preclude the enforcement of the Village's stormwater ordinances.

The Tribe claims that by regulation the Secretary has prohibited the application of the Village's stormwater management program. (Tribe's Br., p. 23.)[8] The reliance on 25 C.F.R. § 1.4 is misplaced for at least four reasons.

1. § 313 of the CWA, as a Congressional Act addressing environmental law and requiring uniform and national application, cannot be preempted by the provisions of a regulation.

In order to rely on 25 C.F.R. § 1.4, the Tribe has to claim that it is only the local Village stormwater ordinances that are at issue in this case. However, that ignores the fact the

---

[8] The regulation relied on reads in pertinent part as follows:

> 1.4 State and local regulations of the use of Indian property.
>
> (a) Except as provided in paragraph (b) of this section, none of the laws, ordinances, codes, resolutions, rules or other regulations of any State or political subdivision thereof limiting, zoning or otherwise governing, regulating, or controlling the use or development of any or personal property, including water rights, shall be applicable to any such property leased from or held or used under agreement with and belonging to any Indian or Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States.

25 C.F.R. § 1.4

ordinances were "required" by a federal law. The Village did not ask to have the additional burden of implementing a stormwater management plan thrust upon it.

Additionally, a different federal law, § 313 of the CWA, expressly provides for its enforcement. In other words, we are dealing with the enforcement of an EPA regulation and an Act of Congress neither of which come under the restrictions of 25 C.F.R. § 1.4.

Moreover, a state may apply its laws to Indians living on a reservation within its borders "if congress has expressly so provided." *California v. Cabazon Band of Indians*, 480 U.S. 202, 207, (1987). In *John v. City of Salamanca*, 845 F.2d. 37 (2nd Cir. 1988), the 2nd Circuit ruled that 25 C.F.R. § 1.4 did not preclude the city from enforcing its building codes on land set aside for the Senaca Nation in a 1794 treaty because an 1875 act of congress granted such authority to the city. The court succinctly noted that there is no "authority delegated to the Secretary . . . which would empower him effectively to repeal congressional legislation. The 1875 Act must take precedence over the regulation in the absence of a clear expression of congressional intent to the contrary." *Id.* at 43, FN 5. See also *United States v. Karnuth*, 74 F.Supp. 660 (W.D.N.Y. 1947), citing *Shizuko Kumanomido v. Nagle*, 40 F.2d 42, 44 (9th Cir. 1930) (regulations prescribed by Commissioner of Immigration and Naturalization, with approval of attorney general pursuant to statutory authorization, having the force of law, but if such regulations conflict with an act of Congress or with a treaty, which is the law of the land, they are to that extent void."); *Maloney v. Sheehan*, 453 F.Supp. 1131 (D. Conn. 1978) (if a regulation conflicts with an act, the statute controls).

Moreover, as discussed *supra*, the EPA granted the Village NPDES permitting authority for property "located within the boundaries of the reservation of the Oneida Tribe of Indians of Wisconsin." (Vickers' Aff., ¶ 11, Ex. A.). The EPA's action is consistent with the authority

granted under the EPA regulations and the CWA. Therefore, 25 C.F.R. § 1.4 does not prohibit enforcement of the stormwater ordinances.

2. <u>There is no evidence the trust land at issue is leased, and therefore 25 CFR § 1.4, purporting to limit local jurisdiction on leased land, is inapplicable</u>.

The applicability of 25 C.F.R. § 1.4 is by its express terms limited to "such property leased from or held or used under agreement with and belonging to any Indian or Indian tribe …" Therefore, even if § 1.4 has any relevance to this case, it could only be applied after the confirmation of the existence of leases or agreements relating to the trust land, which conflict with the local jurisdiction. The federal courts agree. In *Cayuga Nation of New York v. Village of Union Springs*, 317 F.Supp.2d 128 (N.D.N.Y. 2004), the tribe in that case advanced § 1.4 as a basis to avoid local regulation. The court rejected that argument and stated:

> Because the property is not leased from the nation nor is it held or used under agreement with the Nation, but is instead owned by the Nation and will allegedly be used by members of the Nation or the Nation itself, this regulation [25 C.F.R. § 1.4] is inapplicable here.

Id. at 146, FN 16.

The limitations of this regulation are also confirmed by a review of the legislative history. The legislative history confirms the following:

> The purpose of this addition [section 1.4 limiting state jurisdiction] is twofold. First, it will enunciate and particularize the regulatory form for the benefit and guidance of those concerned the sense of existing law under which laws, ordinances, codes, resolutions, rules or other regulations of a state or its political subdivisions limiting zoning or otherwise governing, regulating or controlling the use or development of property applicable to trust or restricted Indian property <u>held or used under a lease or other agreement</u>….

30 Fed. Reg. 7520 (1965) (emphasis added).

> The reason for enacting § 1.4 is further explained in the record as follows:
>
> Because there are immediate cases of conflict between the attempts of state and local governments to enforce zoning ordinances, building codes and similarly

> regulated laws on the one hand and the provisions of leases and other agreements under which trust or restricted Indian property is being used on the other, it has been determined to be in the best interest of the Indians and the public to resolve those conflicts as quickly as possible.

Id. (emphasis added).

The fact that there was a recognized conflict between state and local ordinances on the one hand "and the provisions of leases and other agreements in which trust … property is being used" on the other, clarifies that state and local jurisdiction can still apply in the absence of conflicting leases. If that was not the case, there would have been no need for the creation of § 1.4, the stated purpose of which was to "resolve those conflicts." Neither the United States nor the Tribe have established the existence of any leases relating to the parcels at issue and therefore § 1.4 does not bar the application of the Village's stormwater ordinances.

3. The management of stormwater, including the assertion of fees related thereto, do not fall under the purview of 25 C.F.R. § 1.4.

The regulation has limited scope and applies only to limiting "zoning or otherwise governing, regulating or controlling the use or development of any real or personal property…." 25 C.F.R. § 1.4. Seeking a utility fee to address stormwater coming off of the trust parcels, does not fall within the express prohibitions. This particular fee is akin to one for water or electrical services. These fees are undisputedly owed even though they certainly include a component relating to the transmission of the water and electricity to and upon the trust land. Similarly, the stormwater fee is primarily for the maintenance of ditches, culverts, construction of infrastructure and other stormwater management costs, to handle the runoff from the trust parcels. 25 C.F.R. § 1.4 cannot be interpreted so broadly that it prohibits the Village from claiming a fee that otherwise is owed.

4. Applying 25 C.F.R. § 1.4 to remove the Village's ability to implement a village wide stormwater management plan, is unconstitutional in

that it strips the Village of the jurisdiction it had over these parcels for over a century.

Given the inapplicability of 25 C.F.R. § 1.4 to this case, as argued *supra*, the constitutionality of this regulation need not be decided for the Village to prevail. Additionally, if the constitutionality of this regulation, as applied to this Village is to be reviewed, additional facts need to be developed. Consequently, it is the Village's position that discovery and an opportunity to more fully brief this issue is warranted. However, given the Tribe's position the regulation does apply, the constitutionality of its provisions are addressed below, to the extent currently possible and to the limited extent space allows.

a. Constitutional Concerns in General.

The number of tribes seeking to secure trust land for whatever purpose makes the issue of removing land from state jurisdiction a growing and highly-controversial issue. In fact, as recently as March, 2009, the United States Supreme Court weighed in on this issue. In *Hawaii v. Office of Hawaiian Affairs*, 129 S.Ct. 1436 (2009), the Supreme Court reviewed a Congressional Act which purported to strip the State of Hawaii of its authority to alienate its sovereign territory. The United States Supreme Court in reversing the State Supreme Court, indicated this resolution would "raise grave constitutional concerns if it purported to 'cloud' Hawaii's title to its sovereign lands more than three decades after the State's admission to the union. " *Id.* at 1445. The Court went onto state that "[w]e have emphasized that 'Congress cannot, after statehood, receive or convey submerged lands that have already been bestowed upon a State.'" *Id.*

As the Supreme Court unanimously concluded in *Hawaii*, once Congress has disposed of territorial land and created the new state, its exclusive power over that land ceases. To conclude otherwise would allow the Congress to potentially remove any land from state jurisdiction, effectively cancelling the creation of the state.

In this case it should also be noted that the Enabling Act which created the State of Wisconsin contains no limitation of the State's authority over this former reservation. (Federal Enabling Act, August 6, 1846.) Additionally, the Act which allowed for the creation of the Towns of Hobart and Oneida, expressly states the towns are created out of what used to be the former reservation, rather than limiting local jurisdiction. (Chapter 339, Wisconsin Laws of 1903, May 20, 1903.)

Additionally, to the extent these parcels were originally held in trust pursuant to the 1838 Treaty, that status was terminated through allotments pursuant to the Dawes Act. It was only more recently, through the provisions of the IRA, that the parcels at issue in this case were again purported to be placed in trust. For approximately a century (the time between the allotment of the original reservation land and the time in which the Tribe reacquired the parcels and applied to have them placed in trust), these parcels were within the jurisdiction of the Village. The constitutional concerns arise not from an absence of local jurisdiction, but from a forced removal of jurisdiction 100 years later.[9] The historical record confirms the Village's earlier jurisdiction over this land.[10]

---

[9] 25 C.F.R. § 1.4 may be constitutional as applied to land that was always in trust or land that somehow truly reverted to federal territorial land.

[10] C.J. Rhoads Letter to Chauncey Doxtator, November 19, 1931. (…the Oneida Reservation has been broken up.); Some Observations on the Results of the Allotment System Among the Oneidas of Wisconsin," dated January 24, 1933. (…the entire reservation was allotted, so that no surplus lands were left….) Report of Commissioner of Indian Affairs, June 30, 1929. (The Oneida's have severed their relationship with the agency with the exception of annuity payments.); House Congressional Record, p. 5877, March 3, 1927. (…Indians generally and individually…released from government supervision.); Report of Commissioner of Indian Affairs, June 30, 1929. (…the property is wholly within state jurisdiction.); 1912 Annual Report of the Department of the Interior. (The maintenance of order now evolves upon the township and county officers, and require only the cooperation of this Office.); 1912 Annual Report of the Department of the Interior. (The Oneida Reservation has been divided into two townships with a full set of officers in each, and there is no longer any need for agency employees.); Letter to Commissioner of Indian Affairs, October 26, 1933. (…we have no field employee in Oneida country, neither do we have any clerk to handle Oneida affairs.); Memo dated February 26, 1934 from Commissioner Collier to Secretary Ickes. (…[this Tribe] is not in any real way under Federal Jurisdiction.); De Pere Journal Article, January 8, 1931. (…the Oneidas are no longer government charges and therefore cannot be aided through the regular channels.); Some Observations on the Results of the Allotment System Among the Oneidas of Wisconsin," dated January 24, 1933. (…the entire reservation was allotted, so that no surplus lands were left….); House Congressional Record, p. 5877, March 3,

Case law was also confirms that the parcels at issue in this case were under state and local jurisdiction. The first Wisconsin federal district court case to confirm the removal of federal jurisdiction and the creation of state and local jurisdiction, on the Oneida Reservation, was *United States v. Hall*, 171 F. 214 (1909). The court agreed with the tribal defendants that they were not subject to federal prosecution. The court stated the following:

> It is obvious that the later legislation of Congress providing for allotments and consequent citizenship has changed the attitude of the parties. The defendants, being allottees, are citizens of the state of Wisconsin to all intents and purposes, receiving protection from the laws of the state, and being amenable thereto. Here the color line fades out.

Id. at 217.

See also *Stevens v. County of Brown*, (C.A. No. 307) (E.D. Wis. 10, Nov. 3, 1933), ("[t]here is no escape from the proposition that the Government, in passing and applying the Dawes Act, but conceived itself in duty bound to carry out its provisions in the interest of the tribe and its members. Plainly, this resulted in a discontinuance of the reservation, and a recognition of the power of the state to incorporate the lands in the towns in question.")

The above historical record and the two eastern district of Wisconsin decisions confirm the property at issue was under state and local jurisdiction. Consequently, the subsequent attempt to apply 25 C.F.R. § 1.4 to extinguish that state jurisdiction is unconstitutional for the reasons stated below.

b. <u>The 10th Amendment to the United States Constitution prohibits the elimination of State jurisdiction.</u>

1927. (The Oneidas are citizens released from government supervision.); C.J. Rhoads Letter to Chauncy Doxtator Archiquette, November 19, 1931. (An Oneida Indian informed he needed to obtain a hunting license from the state and comply with the state regulations as to season, quantity, etc., just the same as any other citizen.); Commissioner Collier Letter to Osloch Smith and Chauncey Doxtator, June 27, 1934. (The government therefore has no further jurisdiction over the lands disposed of.) (Kowalkowski Aff., ¶¶ 3-13, Exs. B through L.)

The Constitution created a federal government with only specifically enumerated powers. (U.S. Const., art. I, § 8.) This constitutional structure was then further limited by the adoption of the Bill of Rights which includes the Tenth Amendment. Under the Tenth Amendment:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

U.S. Const., amend. X.

The powers delegated to the federal government and those reserved to the states are mutually exclusive. *See New York v. U.S.*, 505 U.S. 144 (1992) ("If a power is delegated to Congress in the Constitution, the Tenth Amendment expressly disclaims any reservation of that power to the States…."). Therefore, all federal statutes must be grounded upon a power enumerated in Article I of the Constitution. *Id.* at 155. No less can be said about a departmental regulation. If the Congressional Act or a regulation based on some Act, lacks Article I authority, then the federal government has invaded the province of the states' reserved powers. *Id.*

The United States Supreme Court has also stated:

> Just as the separation and independence of the coordinate branches of the Federal Government serve to prevent the accumulation of excessive power in any one branch, *a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front.*

U.S. v. Lopez, 514 U.S. 549, 552 (1995), quoting *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991)(emphasis added).

It is axiomatic that Congress cannot unilaterally expand its authority including that supposedly delegated to an agency, with respect to the states. As the Supreme Court noted, "[s]tates are not mere political subdivisions of the United States….The Constitution instead 'leaves to the several States a residuary and inviolable sovereignty,'…reserved explicitly to the States by the Tenth Amendment." *New York*, 505 U.S. at 188.

With the exception of the Enclave Clause, the federal government lacks any Constitutional authority to impinge upon state sovereignty by removing land from a state's jurisdiction. Consequently, 25 C.F.R. § 1.4, to the extent it is applied to create a loss of local jurisdiction to implement a stormwater management system (an environmental law requiring uniform application), on land the Village had jurisdiction over for nearly a century, is unconstitutional.

c. Congressional authority to create a Federal Enclave is limited and does not allow for the placement of land into trust for the benefit of a tribe under § 465 of the IRA to then result in a loss of jurisdiction under 25 C.F.R. § 1.4.

The Constitution provides the federal government only limited ability to reduce the land under control of the states. Under the Enclave Clause, congressional power is limited to establishing a federal "enclave," over which the federal government exercises "exclusive jurisdiction," to that needed for "the erection of forts, magazines, arsenals, dock-yards, and other needful Buildings…."[11] Even then, the land cannot be taken into federal jurisdiction without first obtaining the affected State's consent.[12] No other provision of the Constitution provides the federal government the authority to take land from state jurisdiction.[13]

Various courts, including the Supreme Court, have described "Indian country" and Indian reservations as federal enclaves.[14] *See U.S. v. Antelope*, 430 U.S. 641, 648 n.9 (1977); *U.S. v. Goodface*, 835 F.2d 1233, 1237, n. 5 (8th Cir. 1987)(stating that the phrase "'within the exclusive jurisdiction of the United States' refer to the law in force in federal enclaves, including Indian

---

11 U.S. Const. art. I, § 8.

12 *Id.*

13 *See also* U.S. Const. art. IV, § 3 (expressly prohibiting the "involuntary reduction" of the State's sovereign territory in the creation of the new state.)

14 *See also U.S. v. Marcyes*, 557 F.2d 1361, 1364 (9th Cir. 1997); *U.S. v. Sloan*, 939 F.2d 499, 501(7th Cir. 1991), *cert denied*, 502 U.S. 1060 (1992)(tax code imposes taxes upon U.S. citizens through the nation not just in federal enclaves "such as ... Indian reservations"). Notwithstanding this fact, the First Circuit rejected an argument that taking trust lands for Indian tribes violates the Enclave Clause. *Carcieri v. Kempthorne*, 497 F.3d 15, 40 (1st Cir. 2007), *rev. on other grounds*, *Carcieri v. Salazar*, 555 U.S. 379.

country."). The Enclave Clause was adopted in the interest of safeguarding our nation's then-unique system of federalism. *Com. of Va. v. Reno*, 955 F.Supp. 571, 577 (E.D. Va. 1997) *vacated on other grounds*, *Com. of Va. v. Reno*, 122 F.3d 1060 (4th Cir. 1997) (unpublished). The founders limited and balanced this grant of power by requiring state consent to the federal acquisition of land for an enclave.[15]

The federal government simply lacks Constitutional authority to take land from the states without the state's consent. This includes taking away jurisdiction via 25 C.F.R. § 1.4.

d. <u>The Indian Commerce Clause does not allow for the placement of this land into trust.</u>

The Indian Commerce Clause[16] is often cited as the authority for Congressional actions including those delegated to a department or agency with respect to Indian tribes. *See e.g. Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 191-92 (1989); *Morton v. Mancari*, 417 U.S. 535, 551-552 (1974).[17] Although some courts have interpreted the Indian Commerce Clause to give Congress "plenary power…to deal with the special problems of Indians," see *Id.*, the Supreme Court has limited this assertion of plenary power. See *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996).

---

[15] As James Madison noted, many delegates expressed concern that Congress' exclusive legislation over federal enclaves would provide it with the means to "enslave any particular state by buying up its territory, and that the strongholds proposed would be a means of awing the State into an undue obedience to the [national] government." James Madison, 2 Debates in the Federal Convention, 513 (quoting Elbridge Gerry of Massachusetts). Ultimately, the delegates' apprehension about excessive federal power was allayed by requiring the national government to obtain the states' express consent to acquire and employ state property for federal purposes. *Id.*

[16] U.S. Const. art I, § 8, cl. 3. "The Congress shall have the power…to regulate commerce with foreign nations, and among the several states, and with the Indian tribes."

[17] Federal courts deciding Tenth Amendment challenges have often based their opinions on the false assumption that Article I provides Congress with plenary authority over all matters involving Indians, no matter how remote, indirect, or tenuous the facts of the case related to the notion of "commerce," which is the only Constitutional authority actually granted the federal government. *See e.g.*, Robert G. Natelson, *The Original Understanding of the Indian Commerce Clause*, 85 DENVER UNI. L. REV. 201, 217 (2007)("Natelson")("When eighteen-century English speakers wished to describe interaction with the Indians of all kinds, they referred not to Indian commerce but to Indian 'affairs.'").

That limitation is appropriate. The language of the Constitution does not support the assertion of plenary authority under the Indian Commerce Clause. That clause grants the federal government authority "to regulate commerce with…the Indian tribes." (U.S. Const. art I, § 8, cl. 3.) In the legal and constitutional context, however, "commerce" means only mercantile trade. Natelson, *supra* at 214. The phrase "to regulate commerce" means the governing of the purchase and sale of goods, navigation, marine insurance, commercial paper, money, and banking.[18] There is, therefore, no basis to argue that the language of the Constitution grants to the federal government authority over local stormwater management. The text of that Constitutional provision provides only authority over Indian commerce and 25 C.F.R. § 1.4 cannot be read to expand that authority.

e. <u>The Tribe's use of 25 C.F.R. § 1.4 in this case is unconstitutional in that it violates Article IV, Section 3 of the United States Constitution by depriving the Village of a Republican form of Government.</u>

The Congress does have authority under the Property Clause over lands ceded by treaty or through war to the United States. This power has been interpreted as remaining in Congress until the lands are disposed of and placed under the jurisdiction of a state. *Winters v. U.S.*, 207 U.S. 564 (1908). This authority to reserve federal public lands from application of state law at statehood has been consistently upheld. But the lands for the Oneida Reservation were not reserved when Wisconsin became a state. (Federal Enabling Act, August 6, 1846) This leads to the conclusion that 25 C.F.R. § 1.4, is unconstitutional.

---

[18] The ability to distinguish a reference to "commercial activities" and references to all other activities was common at the time the Constitution was written.

> "When eighteenth-century English speakers wished to describe interaction with the Indians of all kinds, they referred not to Indian commerce but to Indian 'affairs.'"

Id. at 216-17.

f. The removal of state and local jurisdiction violates the Fourteenth Amendment of the United States Constitution.

Section 1 of the Fourteenth Amendment reads as follows:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction of the equal protection of the laws.

Fourteenth Amendment of the United States Constitution.

In analyzing the Fourteenth Amendment, the United States Supreme Court discussed the issue of a Republican form of government.

> The equality of the rights of citizens is a principle of republicanism. Every republican government is in duty bound to protect all of its citizens in the enjoyment of this principle, if within its powers. That duty was originally assumed by the states; and it still remains there. The only obligation resting upon the United States is to see that the states do not deny the right. This the amendment guarantees, but no more. The power of the National Government is limited to the enforcement of this guaranty.

U.S. v. Cruikshank, 92 U.S. 542, 555 (1875).

By taking these parcels into trust under 25 U.S.C. § 465 and removing all state and local jurisdiction via 25 C.F.R. § 1.4, the United States is abridging the privileges and immunities of the citizens of the State and the Village. The Village and its citizens have no ability to participate in the governance over the trust parcels which create runoff onto and pollute the other Village parcels. The Fourteenth Amendment does not allow for such a result. Consequently, 25 C.F.R. § 1.4, to the extent it prohibits the enforcement of an environmental ordinance that impacts land on and off of trust parcels on in land that was under local jurisdiction for more than 100 years, is unconstitutional.

V. CONCLUSION

There is no prohibition against asserting fees on any federal land, including federal land held in trust for the benefit of the Tribe. Given that congress and case law have confirmed that the stormwater charges being asserted by the Village are fees, rather than taxes, they must be paid. This is true regardless of any tax exempt status the land at issue in this case may have. Neither the IRA nor the Secretarial regulation, 25 C.F.R. § 1.4, change the fact that permissible fees may be charged. Neither the IRA nor the regulation expressly prohibit the assertion of fees on otherwise tax exempt land. Just as there is no preemption for charging other fees, such as those for water and electricity, there likewise can be no preemption prohibiting the assertion of stormwater management fees. Finally, to the extent the regulation is construed as triggering such preemption, it is unconstitutional. For all the above reasons, the Village respectfully requests that the Court deny the Tribe's motion for summary judgment and declare that the stormwater management fees are owed.

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
Jenna E. Clevers 920.431.2227 direct dial
920.431.2267 direct fax
jclevers@dkattorneys.com