UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

ONEIDA TRIBE OF INDIANS OF WISCONSIN,

Plaintiff,

v.

VILLAGE OF HOBART, WISCONSIN,

Defendant/Third-Party Plaintiff, Case No. 10-CV-00137

v.

UNITED STATES OF AMERICA,
UNITED STATES DEPARTMENT OF JUSTICE,
UNITED STATES DEPARTMENT OF THE INTERIOR,
and KENNETH SALAZAR, SECRETARY, UNITED
STATES DEPARTMENT OF THE INTERIOR,

Third-Party Defendants.

PLAINTIFF'S REPLY MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

The Oneida Tribe of Indians of Wisconsin ("Tribe") moves for summary judgment on its first two claims for relief: first, that the Village of Hobart's ("Hobart") Stormwater Management Utility Ordinance is an impermissible tax upon the subject trust lands; and second, that federal common and statutory law pre-empt application of the ordinance on the subject trust lands, whether or not it constitutes a tax. There is nothing in Hobart's opposition material - legal memorandum or affidavits - that provides any basis for denying the Tribe's motion.

First, even though Hobart purports to find disputed facts, Hobart fails to identify a single disputed, *material* fact that precludes summary judgment on the Tribe's claims. Part I, below. Second, Hobart appears to wilfully misread the Clean Water Act, 33 U.S.C. § 1323, to authorize, indeed, mandate, the imposition of its ordinance on the Tribe's trust lands and to decree the charges to constitute fees, not taxes. The act does no such thing. Part II, below. Third, Hobart applies the wrong legal standard in its analysis of the tax versus fee issue. Under the governing federal law standard, Hobart's ordinance, which plainly imposes a minimum payment on *all* the Tribe's trust lands as well as all other parcels in Hobart, constitutes an impermissible tax. Part III, below. Finally, Hobart raises a number of constitutional provisions that allegedly preclude removing trust lands from state and local jurisdiction. Hobart's constitutional arguments are clearly frivolous. Part IV, below.

ARGUMENT

I. HOBART HAS FAILED TO IDENTIFY ANY DISPUTED ISSUES OF MATERIAL FACT THAT PRECLUDE SUMMARY JUDGMENT.

Hobart identifies five facts or sets of facts that it claims are disputed. Three of the five are disputed by the Tribe but are beside the point for purposes of the Tribe's motion for summary judgment. The fourth set of disputed issues relates to construction of the Hobart ordinance, not facts. The fifth allegedly disputed fact does not relate to any of Hobart's grounds for opposition and, as a result, requires no response.[1] Thus, there are no material factual disputes between the parties and summary judgment is appropriate.

[1] This is Hobart's claim that each outstanding stormwater charge is less than $10,000 in amount. Village of Hobart's Brief in Opposition to Plaintiff's Motion for Summary Judgment ("Hobart Opp."), p. 2. Hobart does not explain the relevance of this fact and does not invoke it in support of any of its arguments in opposition to the Tribe's motion.

The three immaterial facts all relate to historical circumstances — the claimed allotment of the Oneida Reservation in 1838,[2] the alleged absence of federal jurisdiction over the Tribe in 1934,[3] and the claimed one hundred years of state and local jurisdiction over the subject trust lands.[4] Hobart Opp., pp. 2-3. But the immunity from Hobart's ordinance flows from the modern day status of the lands as trust lands, not the historical status of those lands. Hobart admits that the subject trust lands are, in fact, held in trust by the United States. *See* Village of Hobart's Response to Plaintiff's Statement of Proposed Material Facts, ¶ 6. Thus, the disputed title status of individual parcels pre-dating trust status is immaterial. *See Hoffman-Dombrowski v. Arlington Intern. Racecourse, Inc.,* 254 F.3d 644, 650 (7th Cir. 2001) (a fact is material if it "might affect the outcome of the suit under the governing law."). Further, the jurisdictional

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[2] The Reservation was, in fact, allotted pursuant to the General Allotment Act in 1891. This Court so indicated in other litigation between the Tribe and Hobart. *Oneida Tribe of Indians of Wisconsin v. Village of Hobart,* 542 F. Supp.2d 908, 911 (E.D. Wis. 2008).

[3] The Tribe directly challenges Hobart's facts on this score in other litigation. *See* Village of Hobart v. Midwest Regional Director, Bureau of Indian Affairs, Docket No. IBIA 11-045, where the Tribe establishes, among other things, that the Tribe appears on the so-called Haas list, which in the view of the BIA, is alone sufficient evidence that the Tribe was under federal jurisdiction in 1934. *Shawano County, Wisconsin v. Acting Midwest Regional Director,* 53 IBIA 62, 63 (2011). Finally, the Supreme Court has repeatedly rejected Hobart's theory that allotment alone abolishes an Indian reservation (and, according to Hobart, places the Tribe beyond federal jurisdiction). *See Solem v. Bartlett,* 465 U.S. 463 (1984); *Mattz v. Arnette,* 412 U.S. 481 (1973); *Seymour v. Superintendent,* 368 U.S. 351 (1962); *see also* 18 U.S.C. § 1151 (a).

[4] The case law cited by Hobart in support of its claimed jurisdiction for the last hundred years is not authoritative. *See* Hobart Opp., p. 23. *United States v. Hall,* 171 F. 214 (E.D. Wis. 1909), held that Indian allottees became citizens subject to state, not federal, jurisdiction. The Supreme Court flatly rejected this proposition and overruled inconsistent prior authority in *United States v. Nice,* 241 U.S. 591 (1916). And *Stevens v. County of Brown* (E.D. Wis., Unpublished Decision and Order, Nov. 3, 1933), held that allotment alone resulted in disestablishment of a reservation. As noted above, this proposition has also been rejected by the Supreme Court. *See* fn. 3, above.

status of the individual parcel's before trust acquisition is irrelevant since all of Hobart's constitutional arguments based thereon are frivolous. *See* Part IV, below. *Clifton v. Schafer,* 969 F.2d 278, 281 (7th Cir. 1992) (irrelevant facts do not deter summary judgment, even when disputed).

Finally, Hobart posits a number of provisions in its ordinance as factual disputes, e.g., the use of the stormwater charges, the separation of the charges from general revenues, how the charges are set, and whether the charges can be waived. Hobart Opp., pp. 2-3. There is no dispute that these provisions appear in Hobart's ordinances; the parties dispute the construction or affect of these provisions.[5] These are classic issues of law that are routinely resolved by summary judgment. *LTV Steel Co. v. Northwest Eng. & Const. Inc.,* 41 F.3d 332, 334 (7th Cir. 1994).

II. HOBART COMPLETELY MISREADS THE CLEAN WATER ACT ("CWA") AND STATE/LOCAL AUTHORITY THEREUNDER.

The Tribe has established that neither taxation nor regulation of the subject trust lands by Hobart can take place without Congress' expressed consent. Plaintiff's Memorandum of Law in Support of Motion for Summary Judgment ("Plaintiff's Memorandum"), pp. 12-14, 19-23. Hobart purports to find congressional authorization in the CWA. Hobart Opp., pp. 10-12. Further, Hobart purports to find in the CWA a congressional decree that any stormwater charge

[5] The Tribe challenges the ordinance as written and nothing in Hobart's affidavits or arguments raises any factual disputes regarding those terms. There are, however, evident discrepancies in Hobart's facts regarding the operation of the ordinance. For example, Hobart admits its attempt to levy stormwater charges against all the subject trust properties (*see* Village of Hobart's Response to Plaintiff's Statement of Proposed Material Facts, ¶¶ 8, 10, 12, 13, 14), even those that are undeveloped with no impervious surfaces. *See* Webster Affidavit, ¶ 23. Nonetheless, Hobart now insists that it "does not currently assert a base charge" upon undeveloped properties. Vicker's Affidavit, ¶ 13. But Hobart's suggestion that the base charge was not imposed upon the subject trust lands between 2007 and 2011 is disingenuous. Thus, Hobart's current restraint, even if true, is irrelevant to charges imposed between 2007 and 2011.

constitutes a fee, not a tax. *Id.,* pp. 4-6. Hobart's interpretation of the CWA bears no relation to the actual terms of the act.

A. General framework of the CWA.

The CWA authorizes the Environmental Protection Agency ("EPA") to regulate entities that pollute navigable waters through the issuance of permits. 33 U.S.C. § 1342. States can apply to EPA to establish and administer their own permitting system for that purpose. But the act does not expand state authority or jurisdiction. To the contrary, state applications to EPA must certify "that the laws of such state...provide adequate authority to carry out the described program." 33 U.S.C. § 1342(b). Known polluters, such as municipalities that operate separate storm sewer systems ("MS4s"), are obliged to apply for permits to regulate their discharges. *Id.* These provisions do not reference Indian tribes or tribal land and do not purport to delegate or expand state or local authority, either generally or over tribal lands in particular.

In 1987, Congress amended the CWA to authorize Indian tribes to apply to the EPA to establish and administer the permitting system for their reservations. 33 U.S.C. § 1377(e). In the absence of tribal regulation of reservations, though, the EPA itself remains the proper authority to administer CWA programs on tribal trust lands "because state laws may usually be applied to Indians on their reservations *only if Congress so expressly provides*." *Wisconsin v. EPA*, 266 F.3d 741, 747 (7th Cir. 2001) (italics supplied). The CWA does not so expressly provide.

B. Stormwater discharges by federal facilities.

Congress did not depart from this general framework in the specific regulation of stormwater runoff from federal facilities. The statute requires federal agencies with jurisdiction over property or facilities, again without any reference to tribal lands, to comply with local

regulations regarding stormwater management, including the payment of reasonable service charges:

> 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).[6] The subsection does not mention, much less mandate, any state or local regulation of Indian tribes or tribal lands.[7] Under the rule that state laws apply to Indian lands only if Congress expressly so provides, this language falls far short of Hobart's reading that federal law requires it to regulate stormwater runoff from the Tribe's trust lands. *Wisconsin v. EPA,* above; *see also State of Washington, Dep't of Ecology v. EPA,* 752 F.2d 1465 (9th Cir. 1985) (construing a similarly structured environmental statute to preclude state/local authority over tribal lands).

Neither is there is any language in the 2011 amendment to the CWA decreeing all state and local stormwater charges to constitute fees, rather than taxes. The amendment only directs that all reasonable service charges as to federal facilities shall be paid, whether or not they are

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[6] Congress authorized federal facilities to pay local stormwater fees in 1977. Public Law 111-378, 91 Stat. 1597. If this statute was intended to authorize regulation of tribal lands, presumably Congress would have been obliged to except stormwater regulation from tribal authority in 1987 when it enacted § 1377(e). But Congress did not because the 1977 statute did not grant authority to state and local governments over tribes and their lands.

[7] The Tribe agrees with and does not repeat the United States' additional argument that this provision does not authorize the imposition of stormwater charges on tribal trust land.

taxes:

> (1) In general - For the purposes of this Act, reasonable service charges described in subsection (a) include any reasonable nondiscriminatory *fee, charge, or assessment...regardless of whether that reasonable fee, charge, or assessment is denominated a tax.*

P.L. 111-378, 124 Stat. 4128, codified at 33 U.S.C. § 1323(c) (italics supplied).[8] Simply stated, the 2011 amendment merely provides that federal facilities must pay reasonable service charges whether they are fees or taxes.[9]

Finally, it bears emphasis that in the IRA Congress expressly prohibits state and local taxation of tribal trust lands. 25 U.S.C. § 465. Hobart's construction of the CWA, then, results in a repeal of the IRA in this respect by implication. This result would violate two rules of statutory construction: first, that requiring that ambiguities in Indian statutes be construed generously in favor of the tribes, *Bryan v. Itasca County,* 426 U.S. 373 (1976); and second, that disfavoring repeal by implication. *Morton v. Mancari,* 417 U.S. 535, 549-50 (1974).[10]

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[8] It should be noted that the 2011 amendment does not contain a retroactivity provision. The charges at issue in this litigation all accrued before enactment of this amendment and, as a result, this amendment would appear to be irrelevant to the issues here.

[9] Hobart's reliance on an EPA publication for the proposition that the ordinance constitutes a service fee rather than a tax is similarly misguided, i.e., the language just is not there. *See* Hobart Opp., pp. 9-10. The publication makes no reference to tribes or tribal lands and does not conclude that all stormwater charges are service fees. *See* Funding Stormwater Programs, January 2008, EOA 833-F-07-012.

[10] *Morton v. Mancari* is particularly instructive here, since it involved alleged repeal by implication of a provision in the IRA by the 1964 Civil Rights Act. The Supreme Court relied upon the general rule disfavoring repeal. In the Court's view, Congress' long-standing solicitude for the unique status of Indian tribes made it particularly inappropriate to find a repeal of a very specific Indian statute by a more general statute: "where there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one, regardless of priority of enactment." 417 U.S. at 550-51.

C. The EPA and Wisconsin permitting systems, Hobart's and Tribe's applications.

The State of Wisconsin also reads the CWA to exclude state/local regulation of tribal trust lands. In 1973, the State applied for approval from EPA to administer the permitting program in the state. EPA approved the state's application and observed that the state's application specifically excepted permits "issued to agencies and instrumentalities of the federal government *and for Indian activities on Indian lands."* Exh. 3, United States' Motion to Dismiss the Third-Party Complaint, Dock. No. 24 (italics supplied). According to the Wisconsin Attorney General, the application did not seek approval for such because "the state was without authority to issue WPDES permits to Indian tribes or tribal organizations operating on reservations and Indian lands in Wisconsin." Instead, EPA holds authority to issue such permits. 75 Wis. Op. Att'y Gen. 220, 242 (1986).

Precisely because Wisconsin lacks authority over and expressly excluded Indian reservations from its program, Hobart was obliged to apply to the EPA for its MS4 application. And Hobart's own application acknowledges reserved EPA authority over tribal land:

> NPDES permits for discharges in Indian Country are issued by U.S. EPA... This definition [of Indian country] includes all land held in trust for a Federally-recognized American Indian Tribe. Pursuant to the definition, the Reservation of the Oneida Tribe of Indians of Wisconsin is part of Indian Country and permits for discharges within the Reservation boundaries are the responsibility of the U.S. EPA.[11]

The Tribe has also applied for an MS4 permit from the EPA. Like EPA's notice on the Hobart application, the Tribe's notice confirms EPA authority over discharges in Indian country,

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[11] Hobart gets it backwards: "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." Hobart Opp., p. 14. This is obviously untrue.

including trust lands. Exh. 2, United States' Motion to Dismiss Third-Party Complaint, Dock. No. 24. It repeats the language quoted above which specifically concludes that discharges within the Reservation are the responsibility of the EPA. There is, then, a consensus that the CWA does not authorize state or local governments to regulate stormwater runoff on tribal trust lands. Simply put, the CWA does not provide the necessary congressional authority for Hobart to either tax or regulate the subject trust lands.

III. HOBART APPLIES THE WRONG LEGAL STANDARD TO CONCLUDE THAT ITS ORDINANCE CONSTITUTES A SERVICE FEE, NOT A TAX.

The Tribe has already established that federal law supplies the governing rule of construction to determine whether Hobart's ordinance is a tax or a fee, and that under that standard, the ordinance constitutes an impermissible tax. Plaintiff's Memorandum, pp. 12-19. Hobart reaches the opposite conclusion by applying the wrong legal standard to the inquiry.

The Supreme Court has been very clear that the inquiry is governed by federal law. In *Carpenter v. Shaw,* 280 U.S. 363, 368-69 (1930), the Court held that federal courts are not bound by the state law characterization of a tax when the tax is imposed on a federal right. Hobart ignores *Carpenter* and cites a string of decisions which apply state law to determine the validity of a given tax under either a state constitutional provision or state statute.[12] None of these

[12] *See El Paso Apt. Ass'n v. City of El Paso,* 2008 WL 2641350 (state constitution); *Church of Peace v. City of Rock Island,* 828 N.E.2d 1282 (Ill. App. 2005) (state statute); *Smith v. Spokane Co.,* 948 P.2d 101 (Wash. Ct. App. 1997) (state constitution); *Sarasota Co. v. Sarasota Church of Christ,* 667 S.2d 180 (Fla. 1995) (state statute); *City of River Falls v. St. Bridget's Catholic Church of River Falls,* 182 Wis. 2d 436 (Ct. App. 1994) (state constitution); *City of Littleton v. State,* 855 P.2d 448 (Colo. 1993) (state constitution); *Long Run Baptist Ass'n v. Sewer Dist.,* 775 S.W.2d 520 (Ky. Ct. App. 1989) (state constitution); *Zelinger v. City and County of Denver,* 724 P.2d 1356 (Colo. 1986) (state constitution); *Teter v. Clark County,* 104 Wash. 2d 227 (1985) (state constitution); *State v. Jackman,* 60 Wis. 2d 700 (1973) (state constitution).

decisions is relevant to the federal law question here. *Carpenter,* above.

Further, the only federal law standard cited by Hobart does not apply to this case. Hobart cites *Massachusetts v. United States,* 435 U.S. 444 (1978), which, according to Hobart, set out a test to determine whether charges imposed by local governments upon federal facilities constituted a service charge or a tax. Hobart Opp., p 8. This is not correct. The question there was whether a federal charge imposed on state interests constituted a tax, not whether a local charge could be imposed upon a federal interest. *Id.* at 446. The two questions are analytically distinct. As the Supreme Court pointed out, state or local taxation of federal interests implicates the Supremacy Clause, while federal taxation of state or local governments does not:

> The immunity of the Federal Government from state taxation is bottomed on the Supremacy Clause, but the States' immunity from federal taxes was judicially implied from the States' role in the constitutional scheme...State immunity was narrowly limited.

Id., at 456. Thus, for the reasons articulated by the Supreme Court, the *Massachusetts* test does not apply to this case, where the issue is the validity of a local tax on federal interests.[13]

Finally, Hobart attempts to avoid the conclusion that its ordinance constitutes a tax under the governing federal rule by manufacturing an exception to its ordinance. As the Tribe

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[13] Hobart cites two cases that rely upon the *Massachusetts* test to determine the validity of a local tax upon federal interests, *New York Dept. of Environmental Conservation v. U.S. Dept. of Energy,* 850 F. Supp 132 (N.D.N.Y. 1994), and *Jorling v. U.S. Dept. of Energy,* 218 F.3d 96 (2d Cir. 2000). In both cases, though, the Department of Energy conceded the applicability of the *Massachusetts* test so neither court had reason to analyze the issue. *New York Dept. of Environmental Conservation,* 850 F. Supp. at 135; *Jorling,* 218 F.3d at 99. But the *Jorling* court did note the limitations of the rule: "Although this case involves a state charge imposed on the federal government, the USDOE has agreed that the test for determining the reasonableness of the charges is the one articulated by the Supreme Court in *Massachusetts...*in upholding a federal charge imposed on a state government." *Id.* (citation omitted). Thus, these cases provide no analytical basis for the application of the *Massachusetts* rule.

demonstrated, Hobart's ordinance is mandatory, that is, it imposes a charge on every parcel of land without regard to any effort by the property owner himself to mitigate stormwater runoff, an important feature of a tax. *See* Plaintiff's Memorandum, pp. 14-18. Hobart now advises that there is a waiver provision in the ordinance, one that allows a property owner to apply for a waiver of the charge, giving it more of the appearance of a voluntary fee rather than a tax. Hobart Opp., p. 9-10.

The alleged waiver is manufactured because it is only available in another Hobart ordinance to possibly waive the imposition of stormwater management practices, not the stormwater charges imposed by the Stormwater Management Utility Ordinance. The waiver provision is found in chapter 4.2 of Hobart's ordinances, a distinct ordinance that regulates "all land development activities" and requires that property owners adopt certain on-site stormwater management practices. Hobart Code of Ordinances, ch. 4.2, Storm Water Runoff, § 4.207. It is not a fee based regulation but a management practices regulation. *Id.* The chapter authorizes the "administering agency" (which may or may not be the Hobart Stormwater Utility) to impose less stringent stormwater management practices for one of four reasons, including the presence of other stormwater management activities. 4.207(C). While the provision does not explicitly so provide, it appears Hobart could waive all stormwater management practices because of mitigation efforts undertaken by a landowner *during land development activities*.

This waiver provision has nothing to do with the charges imposed on all property owners by Hobart's Stormwater Management Utility Ordinance that is being challenged here. Hobart Code of Ordinances, ch. 4.5. This chapter imposes various charges, including a minimum base charge, on all property owners within Hobart by virtue of the simple ownership of the parcels,

without regard to mitigation efforts by the individual property owner. *See* Plaintiff's Memorandum, pp. 5-7.[14] There is nothing in this chapter that authorizes a property owner to apply for a waiver as to any part of the charges and there is no reference to chapter 4.2 adopting the so-called waiver provision for management practices related to land development activities. In short, there is no opt out provision in this particular ordinance and Hobart's effort to manufacture one cannot save its attempted tax on the subject trust lands. Tribe's Memorandum, p. 15; Hobart Opp., p. 9.[15]

IV. HOBART'S CONSTITUTIONAL OBJECTIONS ARE FRIVOLOUS.

Hobart attempts to meet the Tribe's alternative argument that federal law pre-empts the ordinance, whether or not it constitutes a tax,[16] with two feeble responses: first, Hobart purports to find congressional authorization to regulate the subject trust lands in the CWA; and second,

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[14] The ordinance does allow a property owner to apply for credits against certain portions of the charges, but it specifically provides that Hobart "will not provide credits against the base charge..." Hobart Ordinances, ch. 4.5, § 4.506(1).

[15] Hobart attempts to avoid another troubling feature of its ordinance — that it purports to authorize foreclosure on the subject trust lands — by insisting that no foreclosure proceedings have been commenced and that, in any event, the Tribe holds sovereign immunity from any such proceedings. Hobart Opp., pp. 15-17. The fact remains that the ordinance specifically authorizes the use of foreclosure proceedings as the enforcement mechanism, regardless of whether any such proceedings are pending. Hobart Ordinance, ch. 4.5, §4.508(3). Further, the cases cited by Hobart are beside the point, since they involved valid taxes imposed on tribal fee lands, not trust lands. Finally, those cases tend to support, not to distinguish, the Tribe's argument that the use of foreclosure proceedings as an enforcement mechanism is further evidence that Hobart's ordinance is a tax.

[16] The Tribe argued in its motion for summary judgment that Hobart has no authority to tax the subject trust lands through imposition of its ordinance and Hobart has failed to refute this immunity. The Tribe argued alternatively that, even if the ordinance is not a tax, the attempted regulation of the Tribe's subject trust lands is pre-empted by federal common and statutory law. *See* Plaintiff's Memorandum, pp. 19-24.

Hobart dismisses 25 CFR § 1.4 as inapplicable. Neither response has merit. As discussed above, the CWA does not grant any authority over the Tribe or the subject trust lands to state and local governments, to either tax or regulate those lands. Further, Hobart cannot distinguish the federal common law rule pre-empting state or local regulation of tribal trust lands by focusing on the particular terms of 25 CFR § 1.4. Even if read narrowly to apply only to leased trust lands, the regulation merely codifies the broader rule of federal common law and the IRA that state and local governments lack authority to regulate tribal trust lands. *White Mountain Apache Tribe v. Bracker,* 448 U.S. 136, 142 (1980); *Segundo v. City of Rancho Mirage,* 813 F.2d 1387, 1393 (9th Cir. 1987); *Santa Rosa Band of Indians v. Kings County,* 532 F.2d 655, 666 (9th Cir. 1975).[17]

Hobart attempts to sidestep the Tribe's argument by invoking what it claims are constitutional bars. According to Hobart, once state and local regulatory authority have attached to real property, any attempt by the federal government to displace or limit state and local regulatory authority by placing such land into trust is unconstitutional, for a variety of reasons. Hobart Opp., pp. 23-29. These arguments are plainly frivolous and can be quickly dismissed.[18]

Hobart fails to cite a single authority that is on point in support of any of its constitutional

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[17] Hobart concedes that leased tribal trust lands would be immune from its ordinance by section 1.4. *See* 75 Op. Att'y Gen. 220, 242 (state environmental regulation of trust land pre-empted by section 1.4). But it makes no sense that trust lands used by the Tribe would have less immunity from state and local regulatory control than trust lands leased to third parties. As discussed above, the federal common law rule and premptive effect of the IRA avoid this absurd result.

[18] As a backdrop to its constitutional challenges, Hobart cites *Hawaii v. Office of Hawaiian Affairs,* 556 U.S. 163 (2009), for the proposition that Congress cannot limit state authority after statehood. Hobart Opp., p. 21. *Hawaii* involved state title to land. It did *not* involve congressional limitations on state authority in Indian country, the IRA, or trust land. It is simply irrelevant to the questions presented here.

challenges.[19] Neither does Hobart refute the abundant authority to the contrary: that trust lands do not violate the Tenth Amendment;[20] that Indian country does not constitute a federal enclave requiring state consent;[21] that the Indian Commerce Clause is not limited to mercantile matters only;[22] and that trust land does not violate the state's organic act, the equal footing doctrine, or the Republican Guarantee Clause of the Constitution.[23] In the face of this overwhelming authority, Hobart's constitutional challenges should be rejected.

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[19] Even where Hobart purports to have authority, it distorts that authority to its purposes. For example, Hobart cites *United States v. Antelope,* 430 U.S. 641 (1977), as support for its argument that Indian country constitutes a federal enclave that requires state consent for its creation. Hobart Opp., p. 25. But the Court there went on to say "that Indian reservations differ in certain respects from other federal enclaves..." 430 U.S. at 648, fn. 9. Similarly, the court in *United States v. Goodface,* 835 F.2d 1233 (8th Cir. 1987), construed a federal statute in which Congress expressly extended federal criminal jurisdiction over Indian country as that "within the exclusive jurisdiction of the United States," i.e., as that applied in federal enclaves. *Id.,* at 1237. Nothing there suggests that Indian country constitutes a federal enclave otherwise.

[20] *County of Charles Mix v. U.S.,* No. 11-2217 (8th Cir. 2012); *Carcieri v. Kempthorne,* 497 F.3d 15 (1st Cir.), *rev'd on other grounds,* 555 U.S. 379 (2009); *State of New York v. Salazar,* 2009 WL 3165591 (N.D.N.Y. 2009); *City of Roseville v. Norton,* 219 F. Supp.2d 130 (D.D.C.), *aff'd on other grounds,* 348 F.3d 1020 (D.C. Cir. 2003).

[21] *Carcieri,* above; *State of New York v. Salazar,* above; *Nevada v. United States,* 221 F. Supp.2d 1421 (D. Nev. 2002).

[22] *United States v. Lara,* 541 U.S. 193 (2004); *Cotton Petroleum Corp. v. New Mexico,* 490 U.S. 163 (1989); *United States v. Lomayaoma,* 86 F.3d 143 (9th Cir. 1996). *Seminole Tribe v. Florida,* 517 U.S. 44 (1996) is not to the contrary; it merely holds that Congress lacks authority under the Indian Commerce Clause to abrogate states' Eleventh Amendment immunity from suit, not that Congress' power thereunder is limited to mercantile matters.

[23] *County of Charles Mix,* above; *City of Roseville,* above; *City of Lincoln v. United States Department of the Interior,* 229 F. Supp.2d 1109, 1117 (D. Ore. 2002); *see also United States v. John,* 437 U.S. 634 (1978); *Antoine v. Washington,* 420 U.S. 194 (1975); *United States v. McGowan,* 302 U.S. 535 (1938) (United States can constitutionally create Indian country within a state and thereby pre-empt state jurisdiction).

CONCLUSION

For the reasons stated in the Tribe's motion for summary judgment and above, the Tribe is entitled to summary judgment that Hobart cannot impose its Stormwater Management Utility Ordinance on the subject trust lands.

Respectfully submitted this 13th day of April, 2012.

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