No. 12-3419

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Oneida Tribe of Indians of Wisconsin,

Plaintiff-Appellee,

v.

Village of Hobart, Wisconsin,

Defendant-Third/Party Plaintiff-Appellant,

v.

United States of America, et al.,

Third/Party Defendants-Appellees.

Appeal from the United States District Court
for the Eastern District of Wisconsin
Case No. 10-C-137
The Honorable William C. Griesbach, Presiding Judge

BRIEF AND REQUIRED SHORT APPENDIX OF DEFENDANT-THIRD/PARTY PLAINTIFF-APPELLANT, VILLAGE OF HOBART, WISCONSIN

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I. CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

The undersigned, counsel of record for the Defendant-Third/Party Plaintiff-Appellant, Village of Hobart, Wisconsin, furnishes the following list in compliance with Circuit Rule 26.1:

1. We appear as counsel for Defendant-Third/Party Plaintiff-Appellant, Village of Hobart, Wisconsin, in this appeal.

Dated: March 22, 2013.

s/Frank W. Kowalkowski
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II. TABLE OF CONTENTS

Page

III. TABLE OF AUTHORITIES

Cases

Statutes

Regulations

Legislative Materials

Other

IV. JURISDICTION STATEMENT

The district court had jurisdiction as a civil action arising under the laws of the United States pursuant to 28 U.S.C. § 1331 (controversy arising under a federal statute); 28 U.S.C. § 1362 (actions brought by an Indian Tribe); 33 U.S.C. § 1323 (Federal Facilities Pollution Control); 28 U.S.C. § 2201(a) (action for a declaratory judgment), and 5 U.S.C. § 702. (Administrative Procedure Act). The Court further had jurisdiction to award injunctive relief under Rule 65 of the Federal Rules of Civil Procedure and 28 U.S.C. § 2202 (further necessary or proper relief based on a declaratory judgment). Appellate court jurisdiction is conferred by 28 U.S.C. § 1291 and the district court's final judgment dated September 5, 2012.

V. STATEMENT OF THE ISSUES

1. Did the district court erroneously grant the government's motion to dismiss on the grounds that 33 U.S.C. § 1323(a) did not waive the government's immunity from suit?
2. Did the district court erroneously grant summary judgment in favor of the Tribe, on the grounds that the Village's stormwater fees are impermissible taxes?

VI. STATEMENT OF THE CASE

On February 9, 2010, the Oneida Tribe of Indians of Wisconsin (Tribe) sued the Village of Hobart (Hobart) in district court seeking a declaratory judgment that Hobart's stormwater fees could not be asserted against the Tribe for the property owned by the government but held in trust for the Tribe's benefit. The Tribe argued, among other things, that the fees were in reality taxes which could not be asserted against trust parcels. (Docket No. 1, p. 9). Additionally, the Tribe claimed that if anyone owed the fees it was the government, given it is the party that actually owns the land. (Docket No. 8, p. 21).

On April 20, 2010, Hobart filed its answer and asserted a counterclaim seeking a declaration its stormwater management system, including the obligation to pay fees, was enforceable against

the trust land. (Docket No. 4, p. 6). On July 20, 2010, Hobart also filed a third-party complaint against the United States and its departments and agencies (government) claiming it owed the fees pursuant to §313 of the Clean Water Act (CWA), 33 U.S.C. §1323(a). (Docket No. 15).

On April 18, 2011, in response to the government's motion to dismiss, the district court found § 313 of the CWA waived the government's immunity from suit. (Short Appendix (SA) 4-5). However, the Court dismissed the cause of action because the requisite final agency action, necessary to assert a claim under the Administrative Procedure Act (APA), was lacking. (SA 6-7). The Court then stayed the action to provide Hobart with time to demand payment from the government. (SA 11). The demand for $237,862.06 was rejected on October 20, 2011. (Docket No. 40-1).

As a result of obtaining final agency action, the stay on the underlying proceeding was lifted. Hobart then re-filed its third-party complaint against the government on November 23, 2011. (Docket No. 43). Just like in the first third-party complaint, Hobart sought declaratory and injunctive relief confirming Hobart's ability to implement its stormwater management system and seeking payment for the fees related to that system pursuant to §313 of the CWA. Hobart also claimed that to the extent 25 C.F.R. §1.4 was the mechanism through which the government or the Tribe was attempting to avoid its stormwater obligations, that regulation was unconstitutional, as applied in this case. (Docket No. 43, p. 15).

On January 23, 2012, the government again moved to have the third-party complaint dismissed, again claiming the government had not waived its immunity from suit and for failure to state a claim. (Docket No. 53). On September 5, 2012, the district court dismissed the second third-party complaint on the grounds that the government did not waive its sovereign immunity from suit. (SA 12-33).

In its second decision, the district court also ruled that, as far as the Tribe was concerned, the fees were actually taxes. (Id. at p. 17). The court concluded that since land held in trust for Indians, like other governmental land, is not subject to taxation, the Tribe's request for summary judgment should be granted. (Id.)[1].

Hobart now appeals the district court's second decision that the government is immune from suit, arguing that such a finding is contrary to the waiver provision of § 313 of the CWA as well as the district court's own previous decision. Hobart also appeals the district court's decision the fees were impermissible taxes and requests a reversal of the summary judgment granted in favor of the Tribe on that particular defense.

VII. STATEMENT OF THE FACTS

Hobart is an incorporated municipality in Brown County, Wisconsin, first organized as the Town of Hobart on March 4, 1908. (Docket No. 50, p. 2). The Tribe appears on the list of Indian Entities Recognized and Eligible to Receive Services From the United States Bureau of Indian Affairs. (Docket No. 50, p. 1).

Since the dramatic increase in revenue the Tribe achieved after the enactment of the Indian Gaming Regulatory Act in 1988, the Tribe has been reacquiring land within its historic reservation, some of which has been taken back into trust for the benefit of the Tribe, by the Secretary of Interior. (SA 15). The United States now holds 148 parcels of land in trust for the Tribe located within the boundaries of Hobart. (SA 15). The parcels at issue are not contiguous, but rather are interspersed throughout Hobart in a kind of checkerboard pattern. (Id.)

The subject trust lands total approximately 1,400 acres. (Docket No. 50, p. 2). The Tribe has applied to have an additional 2,924 acres placed into trust. *Village of Hobart v. Midwest*

[1] After determining the fees were impermissible taxes, the court did not address the Tribe's other arguments and they therefore are not the subject of this appeal.

Regional Director, Bureau of Indian Affairs, Docket No. IBIA 10-131 and IBIA No. 11-002, Village of Hobart's Opening Brief, dated 12/7/10, p. 55.

In 1999, the EPA published Phase II of the National Stormwater Regulations. Congress enacted the CWA "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). Operators of regulated small MS4s were required to apply for permit coverage by March 2003. (64 Fed. Reg. 68, 722 (Dec. 8, 1999); Docket No. 60, p. 6). "NPDES permits issued to Phase II MS4s require small MS4s to develop and implement a stormwater management program." (Docket No. 60, p. 6). The Village is a regulated small MS4 community and is therefore required to develop, implement and enforce a stormwater management program. (Id.).

In 2007, Hobart adopted its Stormwater Management Utility Ordinance in accordance with the CWA. (SA 16). As an operator of a Municipal Separate Storm Sewer System (MS4), Hobart is required to "develop, implement, and enforce a stormwater management program designed to reduce the discharge of pollutants from [the] MS4 to the maximum extent practicable (MEP), to protect water quality, and to satisfy the appropriate water quality requirements of the Clean Water Act." 40 C.F.R. § 122.34(a). After creation of its ordinance, the Village implemented its program for all property within the Village boundaries.

Consistent with the direction of the CWA, the Ordinance authorizes Hobart through its Stormwater Management Utility to "acquire, construct, lease, own, and operate . . . such facilities as are deemed by the Village to be proper and reasonably necessary for a system of storm and surface water management," including "surface and underground drainage facilities, sewers, watercourses, retaining walls and ponds and such other facilities as will support a stormwater management system." Hobart Municipal Code (HMC) § 4.503(1). (SA 16). The ordinance also

authorizes Hobart through the Stormwater Management Utility to "establish such rates and charges as are necessary to finance planning, design construction, maintenance, administration, and operation of the facilities in accordance with the procedures set forth in this ordinance." *Id.* § 4.503(2). (SA 17).

Two basic types of "charges" are authorized under the Ordinance. First, a "base charge" may be imposed on developed property. *Id.* § 4.505(4)(a). (Docket No. 60, p. 3). Hobart has never imposed base charges and such charges are not the subject of this appeal. (Docket No. 60, p. 3). Additionally, an "equivalent runoff unit charge" (ERU) may be imposed based upon the amount of impervious area a parcel contains. *Id.* § 4.505(4)(b). (SA 17). The Ordinance authorizes a landowner to obtain offsets or credits against the "equivalent runoff charge" but not the "base charge." *Id.* § 4.506(1). (SA 17).

Each year since its enactment, Hobart has billed all owners or occupants of property, including the Tribe, the corresponding ERU fee, for charges due under the Ordinance. (Docket No. 50, pp. 2-3). The Tribe has refused to pay the charges as it believes its trust land is immune from the Ordinance. (Id.).

On May 18, 2011, Hobart made a demand for payment to the government in the amount of $237,682.06, representing the amount owed under the Ordinance. (Docket No. 50, p. 3). On October 20, 2011, by letter signed by the Assistant Secretary – Indian Affairs, Department of the Interior, the government refused to pay the charges claimed by Hobart as to the subject trust lands. (Docket No. 50, p. 3).

VIII. SUMMARY OF THE ARGUMENT

When enacting the CWA, Congress described the problem of water pollution as a cancer destroying this nation's waters. As part of the cure, § 313 of the CWA was enacted to require all federal departments, agencies and instrumentalities, without exception, to be subject to and

comply with all federal, state, interstate and local requirements respecting the control and abatement of water pollution. Pursuant to § 313, these obligations apply to "*any*" property and includes reimbursement of local costs associated with "*any*" stormwater management program. Additionally, the government's obligations in this regard apply "notwithstanding *any* immunity…under *any* law or rule of law." 33 U.S.C. § 1323(a). (emphasis added).

Despite the clear and unambiguous language of § 313 of the CWA, the government attempts to shirk its responsibilities to protect America's waters by claiming a waiver of sovereign immunity does not exist. The government's reliance on the canons of statutory construction, that a waiver of immunity must be clear and unequivocal, should not be entertained. All statutes, even statutes waiving the government's immunity, must be enforced as unambiguously written. Section 313 of the CWA's waiver of immunity could not be more clear. Moreover, the expansive reach of the CWA and the need for uniform application of stormwater management compel the same result. Stormwater flows through and under all properties of this nation and allowing for checkerboard exclusions of stormwater management is not only contrary to the clear intent of Congress, but would destroy the effectiveness of a unified management system.

Additionally, this Court should overturn the erroneous decision that the stormwater management fees are impermissible taxes. When analyzing this issue the focus should be on the use of the funds rather than some artificial criteria which can be easily manipulated by the governmental entities asserting the stormwater fees. In this case it is undisputed that 100% of the stormwater fees are kept in a segregated account and have been used only for the provision of stormwater management. As such, they are a permissible fee. Moreover, when certain governmental agencies attempted to argue that the reasonable service charges referenced in § 313 of the CWA were really taxes, Congress immediately corrected this misapplication of the

law. On January 4, 2011, Congress passed an amendment to clarify that reasonable service charges include those used to pay for the cost associated with any local stormwater management program. The legislative history of this amendment confirms that it has always been Congress' intent that local cost for stormwater management be treated as fees owed by tax exempt entities such as the government. The amendment was enacted to put an end to the government's continued gamesmanship and attempts to avoid its statutory obligations. In addition, the EPA has always viewed local stormwater management charges as fees rather than taxes. In fact, the EPA has expressly advised local municipalities to create a stormwater utility, as did Hobart, to insure that these fees could be collected even from tax exempt property owners, such as the government. Therefore, this Court should reverse the district court's erroneous decision that Hobart's stormwater fees are impermissible taxes.

IX. STANDARD OF REVIEW

All issues on appeal are subject to a de novo standard of review. In reviewing issues that are exclusively legal, the appellate court has essentially the same power as the trial court. It is not curtailed in any formal way by the earlier decision; the standard of review is de novo or plenary review. *See, e.g., Pullman-Standard v. Swint*, 456 U.S. 273, 287 (1982). The de novo standard applies to the review of any legal determination made by the trial court. *E.g., Eirhart v. Libbey-Owens Ford Co., 996 F.2d 846, 849 (7th Cir. 1993).*

X. ARGUMENT

A. Section 313 Of The CWA Ambiguously Waives The Government's Immunity From Suit.

1. The Canon Of Statutory Construction Require A Court To Enforce An Unambiguous Waiver Of Immunity.

The doctrine of federal sovereign immunity holds that the United States cannot be sued without the consent of Congress. *Block v. North Dakota*, 461 U.S. 273, 287 (1983). As a result of

this precedent, a sovereign immunity canon of construction has evolved which instructs courts to read any statutory waiver narrowly and to strictly construe its scope in favor of the United States. *Lane v. Pena*, 518 U.S. 187, 192 (1996); *U.S. v. Williams*, 514 U.S. 527, 531 (1995). As such, under this canon, "[a]ny ambiguities in the statutory language are to be construed in favor of immunity." *F.A.A. v. Cooper*, 566 U.S. ____, 132 S.Ct. 1441, 1448 (2012) (citing *Williams*, 514 U.S. at 531).

However, the sovereign immunity canon of construction is still simply a canon of construction. It neither displaces nor supersedes the other traditional canons of construction that are used to determine a statute's intent. *Richlin Sec. Serv. Co. v. Chertoff*, 553 U.S. 571, 589 (2008). It is not an inflexible and indelible rule to be employed to defeat the plain intent of Congress. This canon is not intended to be "an inexorable command to override common sense and evident statutory purpose." *U.S. v. Brown*, 333 U.S. 18, 25 (1948).

The sovereign immunity canon is only to be employed as a measure of last resort, when traditional rules of statutory construction have failed to clearly decipher Congressional intent. *Richlin Sec.*, 553 U.S. at 589. Recently, in *F.A.A. v. Cooper*, the Supreme Court summarized the sovereign immunity canon and its place among other more traditional methods of statutory interpretation:

> Although this canon of interpretation requires an unmistakable statutory expression of congressional intent to waive the Government's immunity, Congress need not state its intent in any particular way. We have never required that Congress use magic words. To the contrary, we have observed that the sovereign immunity canon 'is a tool for interpreting the law' and that it does not 'displac[e] the other traditional tools of statutory construction.' What we thus require is that the scope of Congress' waiver be clearly discernable from the statutory text in light of traditional interpretive tools. If it is not, then we take the interpretation most favorable to the Government.

F.A.A. v. Cooper, 132 S.Ct. at 1448 (citation omitted). In sum, if there is no ambiguity, there is no need to resort to the sovereign immunity canon. *Richlin Sec.*, 553 U.S. at 590.

The Supreme Court has further explained the rule by stating that although a court should not extend a waiver beyond what Congress intended, "[n]either, however, should [it] assume the authority to narrow the waiver that Congress intended." *U.S. v. Kubrick,* 444 U.S. 111, 118 (1979). Similarly, in interpreting the Tort Claims Act, the Supreme Court noted that although a court should be careful not to carelessly construct a statute to create a waiver of immunity from suit, where none exists, "[n]either should it as a self-constituted guardian of the Treasury import immunity back into a statute designed to limit it." *Indian Towing Co. v. U.S.*, 350 U.S. 61, 69 (1955).

2. Section 313 Of The CWA Unambiguously Evinces Congress' Intent To Waive The United States' Immunity In Disputes Involving The United States' Refusal To Pay Charges Associated With Municipal Stormwater Management Programs On Any Federal Property.

Any inquiry into a statute's meaning, even one waiving the government's immunity from suit, must start with "[t]he cardinal rule of statutory interpretation" which dictates "that courts 'must first look to the language of the statute and assume that its plain meaning accurately expresses the legislative purpose.'" *U.S. v. Miscellaneous Firearms, Explosives, Destructive Devices, & Ammunition*, 376 F.3d 709, 712 (7th Cir. 2004). (citation omitted). The plain language and words used in a statute must be given their ordinary and common-sense meaning. *Lara–Ruiz v. Immigration and Naturalization Serv.*, 241 F.3d 934, 940 (7th Cir. 2001).

Section 313 of the CWA reads in pertinent part as follows:

> (a) Each department, agency, or instrumentality of the executive, legislative, and judicial branches of the Federal Government (1) having jurisdiction over an***y*** 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 . The preceding sentence shall apply (A) to any requirement whether substantive or procedural (including any recordkeeping or

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

33 U.S.C. § 1323 (a) (Emphasis added).

The government claims that "Section 313 of the CWA does not unambiguously contain a waiver of the government's immunity from suit." (Docket No. 66, pp. 10-15). Yet, it is unable to point to any such ambiguity. Instead, the government attempts to artificially create one by stating the statute does not expressly include the magic words "Indian trust land". (Docket No. 66, p. 10). According to the government's logic, § 313 would never apply. Nothing in §313 expressly references the local post office, federal office buildings, or the Pentagon. The reason each and every type of property, over which the federal government has jurisdiction, is not expressly named, is because §313 unequivocally applies to them all. Its application to "*any* property" or "*any* activity" and "*any* requirement," enforced in "*any* …manner," "notwithstanding *any* immunity … under *any* law or rule of law" could not be more clear. As the Supreme Court recently explained "five 'anys' in one sentence and it becomes to seem Congress meant (the statute being applied) to have expansive reach." *U.S. v. Clintwood Elkhorn Mining Co.*, 553 U.S. 1, 7 (2008).

The district court, in this very case, originally concluded §313(a) contains an unambiguous waiver of the government's immunity from Hobart's suit. In its decision relating to the government's first motion to dismiss, the district court held:

> The federal government does have jurisdiction over the property at issue here, which is land owned by the government and held in trust for the Tribe. The text of § 313 governs the dispute because the Department of the Interior is an agency of the federal government having jurisdiction over the property and thus § 313 makes it subject to local requirements "respecting the control and abatement of water pollution … including the payment of reasonable service charges." (SA 4).

> Accordingly, because the Village is attempting to obtain payment of services charges from the government for property in the government's jurisdiction, **§ 313 and its waiver of immunity apply**. I am thus unable to conclude that the government is immune from suit.

(SA 4-5). (emphasis added)[2]

In support of the foregoing arguments is *U.S. v. City of Renton*, No. C11-1156JLR, 2012 WL 1903429 (W.D. Wash., May 25, 2012). The *Renton* Court concentrated on the language of § 313 and its 2011 amendment as what it clearly is, an expression of Congressional intent to waive immunity for the purposes of the CWA. The *Renton* Court began its analysis by observing:

> Since 1977, the Clean Water Act has required that the Federal Government comply with all state 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." CWA § 313(a), as amended in 1977 (see 33 U.S.C. § 1323). The Clean Water Act states that such compliance is necessary "notwithstanding any immunity ... under any law or rule of law." Id. This language reflects an unequivocal and unambiguous waiver of sovereign immunity. See *Cooper*, 132 S.Ct. at 1448. The court concludes, based on the above-cited language, that Congress clearly waived the Federal Government's sovereign immunity from the "payment of reasonable service charges" for "the control and abatement of water pollution."

City of Renton, 2012 WL 1903429, *5.

3. The Stated Congressional Intent Of The CWA Also Requires A Finding Of A Waiver Of The United States' Immunity From Suit.

The expansive application Congress intended, for every aspect of the CWA, is demonstrated by the Act's declaration that "the objective of this chapter is to restore and maintain the chemical, physical and biological integrity of the *Nation's* water." 33 U.S.C. 1251(a) (emphasis

[2] After determining that the government had waived immunity, and that Hobart could assert its claim, the court looked at the government's second defense which was that the cause of action was premature because there had not yet been any final agency action under the APA. The court then granted the motion to dismiss only "because there is no final agency action to review …" (SA 10). The district court then stayed the rest of the action, allowing Hobart to obtain a final agency denial of the claim. Once final agency action was obtained, Hobart re-filed its third-party claim against the government.

added). Congress goes on to state the Acts implementation and objectives are a "*national* goal" to be implemented by "*national* policy," applicable to the "*nation's* waters." *Id.* (emphasis added). Congress' repeated reference to the elimination of pollution in the entire nation leaves no room for the carve out the government now seeks. The stated Congressional intent is totally at odds with the government's position § 313 does not apply to nearly 56 million acres over which the federal government has jurisdiction.

The all-encompassing Congressional intent of the CWA is also demonstrated by the comments made by the senators and congressmen who enacted it. Following are excerpts from the Congressional Record:

> Our planet is beset with a cancer which threatens our very existence and which will not respond to the kind of treatment that has been prescribed in the past. The cancer of water pollution was engendered by our abuse of our lakes, streams, rivers, and oceans; it has thrived on our half-hearted attempts to control it; and like any other disease, it can kill us.

Senate Consideration of the Report of the Conference Committee, S. 2770 93rd Cong. 1st Session, October 4, 1972, pg. 161. (Statement of Mr. Muskie).

> Senators will recall from the November debate on the Senate bill that there were three essential elements to it: *Uniformity*, *finality*, and *enforceability*. Without these elements a new law would not constitute any improvements on the old: we would not bring a conference agreement to the floor without them. (emphasis added).

Senate Consideration of the Report of the Conference Committee, S. 2779 93rd Cong. 1st Session, October 4, 1972, pg. 162. (Statement of Mr. Muskie) (emphasis added).

> *Every provision* of this bill has been *most carefully shaped* to enable us to achieve clean water without shattering the economic and social structure of our society.
>
> …

House Debate on H.R. 11896, 118 Cong. Rec. H2482 (March 27, 1972) (Statement of Mr. Blatnik) (emphasis added).

> I would like to call attention to the fact that we have tried in this legislation not to leave the final evaluation of the bill to legislative history, but instead to write into law as clearly as possible the intent of the Congress.
>
> …

Senate Consideration of the Report of the Conference Committee, S. 2770, 93rd Cong. 1st Session, October 4, 1972, pg. 163-64. (Statement of Mr. Muskie).

> This section would require *every* Federal agency with control over *any* activity *or* real property, to provide national leadership in the control of water pollution in such operations.

Federal Water Pollution Control Act Amendments of 1971, 92nd Cong. S. Report No. 92-44, pg. 1485. (emphasis added).

The expressly stated Congressional intent demands nationwide uniformity, finality and enforceability, to combat the cancer of water pollution. Those essential elements are not consistent with a piecemeal application, which excludes a checkerboard group of parcels in an ever growing community.

Treating the Tribe's trust parcels as impenetrable islands onto which stormwater can neither escape nor enter is inconsistent with the goal of effectively addressing water pollution. The fact stormwater flows far from its place of origin both over and under parcels of land, is why management only works if it is part of an uninterrupted system. If certain property is not subject to § 313, the ability to effectively attack the "*cancer*" is severely compromised.

4. Congress Knows Precisely How To Create An Exception To An Otherwise All-Encompassing Waiver Of Immunity From Suit.

The government seems to imply that Congress is not capable of indicating when it does not want an otherwise broad waiver of immunity to apply to trust land, and therefore the court must create that exception for Congress. In reality, Congress knows exactly how to exempt disputes involving trust land, from a waiver of immunity from suit. That is exactly what it did in the Quiet Title Act, 28 U.S.C. § 2409a (QTA), which states:

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

28 U.S.C. § 2409a.

The original draft legislation did not contain the second sentence stating the waiver "does not apply to trust or restricted Indian lands." (117 Cong. Rec. 46380 (1971)). Knowing that Indian trust land is undisputedly the type of property in which the United States has an interest, and not wanting the clear waiver of immunity from suit, to apply in that setting, the original draft of the QTA was rewritten to add the second sentence. Without the second sentence, there would be no Indian trust land exception to the QTA's waiver of immunity. That is precisely why Congress added the second sentence.

It is implausible to believe that when Congress enacted § 313 it was either unaware the United States held land in trust for Indian tribes, or intentionally ignored such land's existence. This is especially evident given the QTA was enacted in 1972, the exact same year as the major overhaul of the CWA. When the waivers found within the CWA and the QTA are compared, the only conclusion that can be reached is that Congress intended "any," as found in § 313, without a carve out for trust land, to have its ordinary, common-sense meaning. Namely, that all land under federal jurisdiction within this nation be subject to § 313's requirements unless expressly excluded. It is not the job of, or within the purview of, the executive branch or the courts to rewrite a statute and add a sentence that drastically changes its clear application. That is especially true when Congress has shown it knows exactly how and when to add such a limitation if it wants one to exist.

The position is further solidified by the fact that Congress did not ignore the possibility of an exception to the Act's application, but created a precise mechanism by which an exception could occur. The statute states:

> The President may exempt any effluent source of any department, agency, or instrumentality in the executive branch from compliance with any such a requirement

> if he determines it to be in the paramount interest of the United States to do so; …. [a]ny exemption shall be for a period not in excess of one year, but additional exemptions may be granted for periods not to exceed one year upon the President's making a new determination.

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

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

5. The District Court's Second Decision Granting The Government's Second Motion To Dismiss, Because The Government Did Not Waive Immunity From Suit, Was In Error Because § 313 Of The CWA Applies To Any Land Over Which The Government Has Jurisdiction.

Reversing its original decision, the district court pays little attention to the actual wording of § 313 itself. Instead, in granting the government's second motion to dismiss, the district court makes the broad general statement that "the language of §313 does not reasonably support a construction that would, in essence, substitute the immunity of Indian tribes from taxation of their trust property for liability on the part of the federal government." (SA 31). Along the same lines, the district court held that exposing the government to a suit for stormwater management fees would "circumvent the immunity from taxation that Indian trust lands enjoy." (SA 30). Therefore, the court went on to conclude despite its ruling on the first motion to dismiss, that "the United States is immune from the Village's suit and subject matter jurisdiction is therefore lacking." (SA 32).[3]

The district court apparently had difficulty rationalizing how the government could owe, what it determined to be a tax, when Indian trust land is exempt from taxation. That rational

[3] Compare with the district court's decision relating to the government's first motion to dismiss in which it stated "Section 313 and its waiver of immunity apply. I am thus unable to conclude that the government is immune from suit." (SA 5).

misses the point of Section 313 which was precisely designed to circumvent the immunity from taxation that would otherwise allow the government to avoid the payment of stormwater fees. Put another way, the government does not have to pay local real estate taxes on federal property such as the Pentagon. However, because of § 313, it must pay local stormwater service charges on that exact same parcel. Section 313 is therefore designed to prevent the federal government from using its immunity from taxation, whether it be Indian trust land or any other parcel, as a way to avoid its obligation to pay stormwater fees.

Ignacia S. Moreno, the same Assistant Attorney General who filed the government's brief in this case, recently argued to a New York district court, that "state and local authority over federal land is only curtailed to the extent necessary to ensure that the national purpose for which such land is used is not subject to interference by state and local officials." *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 Document 91-1, filed November 15, 2011, Page 24 of 31, citing *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 331-32 (1983). "This is the case whenever the federal government holds land within a state, not just when the land is held on behalf of Indians." *Id.*, citing *United States v. Matherson*, 367 F. Supp. 779, 781 (E.D.N.Y. 1973). Therefore, according to the government's own arguments, the application of § 313 should be the same whenever the federal government holds land and it makes no difference if it is held on behalf of Indians. It cannot be reasonably claimed that protecting all federal property from pollution caused by stormwater runoff defeats the national purpose for which Indian trust land is held. In reality, it bolsters that national purpose by fulfilling the trust obligations the government owes to the tribes as occupants of the land.

Moreover, the January 4, 2011 clarification of § 313 confirms the Congressional intent to circumvent the immunity from taxation. The amendment expressly states:

> (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 or pollutants, or volume, or rate of stormwater discharge or runoff from the property or facility; (B) **used to pay or reimburse the costs associated with any stormwater management program** (whether associated with a separate storm sewer system or sewer system that manages a combination of stormwater and sanitary waste) including the full range of programmatic and structural costs attributable to collecting stormwater, reducing pollutants in stormwater, and in reducing the volume and rate of stormwater discharge, regardless of whether that reasonable fee, charge or assessment is denominated a tax.

33 U.S.C. § 1323(c) (emphasis added).

The legislative history for the clarifying amendment also confirms that the obligation to pay stormwater fees applies to absolutely all federal properties. The senator who introduced the bill stated the following:

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

156 Cong. Rec. S4856 (June 10, 2010) (Statement of Mr. Cardin).

> I continue to have grave concerns about the failure of the Federal Government to pay localities for reasonable costs associated with the control and abatement of pollution that is originating on its properties. At stake is a fundamental issue of equity: polluters should be financially responsible for the pollution that they cause. That includes the Federal Government . . . .

> Today I am introducing legislation that makes it clear. Uncle Sam must pay his bills just like every other American .

156 Cong. Rec. S4856 (June 10, 2010) (Statement of Mr. Cardin).

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

156 Cong. Rec. H8978 (December 22, 2010) (Statement of Mr. Oberstar).

In support of the amendment to the Act, Congressman Norton stated:

> Federal law has mandated that these local governments must collect these fees. No exemption has been granted to Federal facilities. Please support S. 3481 to *clarify* the original intent of the law.

156 Cong. Rec. H8979 (December 22, 2010) (Statement of Ms. Norton).

The only other explanation the district court gave for its decision in this case was the statement: "Simply stated, holding bare legal title over Indian lands is not sufficient to bring such property within the jurisdiction of the United States within the meaning of § 313(a)." (SA 32).

No one disputes the fact that the government has jurisdiction over the property in question. Neither the government nor the Tribe has ever argued otherwise. No one disputes § 313, at least after the 2011 amendment, compels the federal government to pay stormwater fees even if they are considered taxes. Despite these accepted points, the district court ignores the unambiguous statutory mandate compelling the government to pay stormwater fees for any land over which it has jurisdiction. (SA 4).

Although the court does not explain what it means by "bare legal title," the use of that phrase suggests the court misunderstands the nature of the government's jurisdiction over Indian trust land. The government's jurisdiction is evidenced not just by the fact it owns the land. The government also has numerous controls, jurisdictional responsibilities and decision making

authority over trust land. The Bureau of Indian Affairs (BIA) is a federal agency within the Department of Interior. In addition to undisputedly being the owner of the land, the BIA is responsible for administration and management of land held in trust by the United States for American Indians and Indian tribes. (http://www.bia.gov/WhoWeAre/index.htm, last accessed 3/21/13). For Indian trust land, the BIA must expressly approve any leasing of the land for mineral, grazing, timber, water, and easement purposes (25 C.F.R. 162.103, removed and renumbered 25 C.F.R. 162.006); can sue for trespass (25 C.F.R. 106); collects rent and ensures other compliance with leases (25 C.F.R. 162.108); controls the development of forest lands (25 U.S.C. 466);controls and can restrict the number of livestock grazing (25 U.S.C. 466); directs agricultural programs (25 U.S.C. 3702); builds and maintains thousands of miles of roads, as well as bridges, dams, and other physical infrastructure (http://www.bia.gov/WhatWeDo/index.htm); funds and manages schools including construction projects (25 U.S.C. 2000 et. seq); and must approve any alienation of the land.

Moreover, when a tribe applies to have land placed into trust under the Indian Reorganization Act, the BIA must analyze the application under 25 C.F.R. § 151. This analysis requires the United States to determine "whether the Bureau of Indian Affairs is equipped to discharge the additional responsibilities resulting from the acquisition of the land in trust status." (25 C.F.R. 151.10(g)). That is precisely because the government has much more than bare legal title. It owns the land and has exposure relating thereto. For example, the Department of the Interior's manual on trust land acquisition has an entire chapter dedicated to the "required determinations of the risk of exposing the Department to liability for hazardous substances or other environmental cleanup costs and damages associated with the acquisition of any real property by the Department for the United States." (DOI, Dept. Manual, 602 DM2, 9/29/95). All of the above

confirms the government is much more than an uninvolved unimpacted entity having nothing more than "bare legal title."

Most significant is the fact these are the exact types of activities and controls that can cause stormwater runoff. There is no fathomable reason why Congress would want to exclude all of these types of activities on nearly 56 million acres of land, when all other federal properties, including crucial military bases, are included.

6. The CWA Cases Cited By The Government And The District Court, In Which The Canon of Sovereign Immunity Was Narrowly Applied, Are Distinguishable From The Facts Of This Case.

The government, in its reply brief in support of its motion to dismiss, cited to *E.P.A. v. California ex. Rel. State Water Res. Control Bd.*, 426 U.S. 200 (1976), for the proposition that courts have narrowly interpreted the waiver of federal immunity found within § 313. (Docket No. 66, pp. 12-13). The government's reliance on *E.P.A. v. California* is misplaced, as the facts are plainly distinguishable from those here.

In *E.P.A. v. California*, the State of California argued that federal facilities must comply with its state permit program pursuant to § 313. *Id.* at 209-10. California reasoned that requiring federal facilities to comply with state permit programs was implied under § 313 as a "requirement respecting control and abatement of pollution." *Id.* at 212-14. The Supreme Court rejected this argument finding that "[s]ection 313 does not expressly provide that federal dischargers must obtain state NPDES permits. Nor does s (sic) 313 or any other section of the Amendments expressly state that obtaining a state NPDES permit is a 'requirement respecting control and abatement of pollution.'" *Id.* at 212-13 (citing § 313). Additionally, the Supreme Court found the "including the payment of reasonable services charges" language in § 313 did not explicitly mean payment of charges required by a state permit program. *Id.* at 216.

The facts of *E.P.A. v. California* differ significantly from those before the Court now. First, *E.P.A. v. California* was decided before the 1977 amendments to the CWA. In 1977, Congress amended § 313 to explicitly provide the very requirement advocated for by the State of California in *E.P.A. v. California*. Specifically, Congress clarified what a "requirement respecting control and abatement of pollution" included, by adding the following language:

> The preceding sentence shall apply (A) to any requirement whether substantive or procedural (including any recordkeeping or reporting requirement, any requirement respecting permits and any other requirement, whatsoever), (B) to the exercise of any Federal, State, or local administrative authority, and (C) to any process and sanction, whether enforced in Federal, State, or local courts or in any other manner.

33 U.S.C. § 1323(a) (1977).

Undoubtedly, Congress' 1977 amendment to § 313(a) was in response to the Supreme Court's mistakenly-narrow interpretation of that section in *E.P.A. v. California* and had the practical effect of overruling that decision. *See U.S. v. Commonwealth of Puerto Rico*, 721 F.2d 832, 834-35 (1st Cir. 1983) (stating that Congress was "disenchanted" with the holding of *E.P.A. v. California*). In essence, the Supreme Court's overly-narrow interpretation of Congress' intent forced Congress to amend § 313 to reinforce its explicitly broad intent.

In this case, there is no need for such a narrow interpretation, as § 313 has now been amended to explicitly mandate that all federal properties must pay "reasonable services charges" which include charges "used to pay or reimburse the costs associated with any stormwater management program." 33 U.S.C. § § 1323(a), (c). Here, there is no need to inquire about whether § 313 contains an implicit waiver of the government's immunity, as was the case in *E.P.A. v. California*, because § 313 now explicitly provides a waiver for the government's immunity for the precise relief Hobart is seeking.

The only case the district court cited in its Order which involved an analysis of the waiver of sovereign immunity found within § 313 was *U.S. Dep't of Energy v. Ohio*, 503 U.S. 607 (1992). The district court cited *U.S. Dep't of Energy v. Ohio* for the proposition that waivers are to be strictly construed in favor of the sovereign and that any purported waiver must be express and cannot be enlarged beyond what the statutory language allows. *Id*. Although the district court cited the general proposition accurately, the basis on which *U.S. Dep't of Energy v. Ohio* was decided is distinguishable from the facts present here.

In *U.S. Dep't of Energy v. Ohio*, the State of Ohio sued the United States for violations of the CWA, among other things, relating to the government's operation of a federal facility in Ohio. *U.S. Dep't of Energy v. Ohio*, 503 U.S. at 611-12. The sole issue facing the court, relating to the CWA, was whether the CWA waived federal sovereign immunity from liability for punitive fines for past violations of the CWA. *Id*. at 613-14. The Court rejected Ohio's argument that the term "sanction" in § 313(a) encompassed punitive fines. *Id*. at 620-23. In order to reach this conclusion, the Court engaged in an analysis of the meaning of the term "sanction," which included looking at its use in other cases as well as the context in which it was used in the CWA. *Id*. The Court engaged in a similar analysis in rejecting Ohio's additional argument that punitive fines are one of the "civil penalties … arising under Federal law" that CWA § 313(a) referenced. *Id*. at 620, 623-27.

In this case, the Court does not have to engage in such an exercise to determine Congress' intent. The language at issue here is not ambiguous when describing the property subject to § 313 and the type of relief sought. Congress used the term "any" and confirmed reasonable sewer charges included stormwater fees, to foreclose the possibility that a court would have to undertake the type of analysis the Supreme Court was forced to in *U.S. Dep't of Energy v. Ohio*.

B. The Indian Law Canon Of Construction Cannot Be Applied To Nullify Congress' Express Waiver Of The Government's Immunity From Suit.

1. The Indian Law Canon Of Construction Cannot Be Applied To Rewrite § 313 Of The CWA.

Faced with a statute that by its express terms applies to "any property" over which the federal government has jurisdiction, the government reaches well beyond the statute in an attempt to create an argument that § 313 should not be enforced as written. The government's entire argument in this regard can be distilled down to its claim that "states cannot regulate on Indian land without Congressional consent." (Docket No. 54, p. 13). The government goes on to claim that when applying the canon of statutory construction applicable to Indian land, the requisite consent cannot be found within §313. (Id., p. 23). The government apparently makes this argument because it cannot cite to any part of § 313 nor any other federal statute that actually precludes Hobart from applying § 313 as written. It is not clear if this is an argument that the government has not waived immunity from suit, or if it is an argument on the merits. At least initially, the exact nature of the government's argument was not clear to the district court either. The district court, when addressing the government's first motion to dismiss on the same grounds, summarized the government's position as follows:

> Because the Village has no authority to impose fees on trust land the government argues that it has not waived its sovereign immunity under § 313. (SA 3).

The district court then held:

> The Village is correct that the government's immunity argument (if that is what it is) is really an argument on the merits.

The district court then ruled immunity was waived.[4]

[4] The determination of whether a court has subject matter jurisdiction is an entirely separate inquiry than whether the plaintiff has stated a valid claim for relief. *Bell v. Hood*, 327 U.S. 678, 681-82 (1946). "[w]hether the complaint states a cause of action on which relief can be granted is a question of law and just as issues of fact it must be decided after and not before the court has assumed jurisdiction over the

Regardless, the argument fails because the Indian canon of construction, just like those relating to the government's waiver of immunity from suit, does not apply. Section 313 is not a law enacted specifically for the benefit of Indians and therefore the canon of Indian law construction is not implicated. Moreover, even if § 313 was a law enacted for the benefit of Indians, the canon still would not apply because there is no ambiguity in § 313 triggering their application. Consequently, the Court must enforce the law as written.

a. The Indian Law Canon of Construction Is Not Implicated Because § 313 Of The CWA Was Not Enacted Specifically For The Benefit Of Indians Or For The Regulation Of Indian Affairs.

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

First, § 313 of the CWA does not directly involve "Indian law." It relates to, and places mandates on, the federal government. Therefore, the canon of construction for Federal Indian law does not apply. In *San Manuel Indian Bingo & Casino v. N.L.R.B.*, 475 F.3d 1306, 1311 (2007), the Federal Court of Appeals, for the District of Columbia, declined to apply the canon of Indian law construction, noting that it only applies to statutes regulating Indian affairs. The Court clarified as follows:

> Each of the cases petitioners cite in support of the principle that statutory ambiguities must be construed in favor of Indians (as well as the cases we have found supporting the principle) involved construction of a statute or a provision of a statute Congress enacted specifically for the benefit of Indians or for the regulation of Indian affairs.

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controversy." *Id.* Accordingly, if a complaint alleges a cause of action under a federal statute, it is likely that the court has subject matter jurisdiction based on a federal question; the court may then move on to its next inquiry of whether the complaint states a valid claim for relief, which is not a jurisdictional-related question. *See id* at 682-83. Here the district court should have retained its original decision that it had jurisdiction and denied the government's second motion to dismiss. Thereafter, the district court should have decided the question of law, which is whether § 313 applies to trust land.

> We have found no case in which the Supreme Court applied this principle of pro-Indian construction when resolving an ambiguity in a statute of general application.

San Manuel, 475 F.3d at 1312.

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

b. Even If The Canon Of Construction For Indian Law Might Apply, It Can Apply Only After The Court Determines The Statute Is Ambiguous, Which Is Not The Case Here.

Even if § 313 could be viewed as an "Indian law," "enacted specifically for the benefit of Indians or for the regulation of Indian affairs," interpreting it liberally, in favor of Indians, is not automatic. "The canon of construction regarding the resolution of ambiguities in favor of Indians, however, does not permit reliance on ambiguities that do not exist; nor does it permit disregard of the clearly expressed intent of Congress.." *South Carolina v. Catawba Indian Tribe, Inc.*, 476 U.S. 498, 506 (1986). Similarly, in *Chevron v. National Resources Defense Council Inc.*, 467 U.S. 837 (1984), the Court ruled that only after a court determines that a statute is ambiguous, should the court defer to permissible agency interpretation of that law. *Id.* at 842-43.

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

The Supreme Court recommitted itself to this proposition as recently as 2009. In *Carcieri v. Salazar*, 555 U.S. 379 (2009), the Supreme Court was asked to interpret the Indian Reorganization Act (IRA). More specifically, the Court interpreted the statutory phrase "now

under federal jurisdiction" in § 479 of the IRA. The Supreme Court rejected the secretary's argument that the term "now" was ambiguous because the use of the word "now" could refer to the time of the statute's enactment or it could refer to the time of the statute's application. The Supreme Court held as follows:

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

Id. at 387. (citations omitted.)

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

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

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

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

Section 313 of the CWA contains no ambiguities. The statute clearly indicates that the federal government "shall" comply with "local requirements" for "any property" over which it has "jurisdiction." If that were not enough, the statute specifically provides for the sole manner in which a property may be exempted. The statute requires a presidential order, authorized only

after a finding that exempting the property from the provisions of the Act is in the "paramount interest of the United States."

2. § 313 Of The CWA Requires A National And Uniform Application And Therefore Applies To The Trust Parcels Held By The United States.

Even if a reference to "any property" over which the United States "has jurisdiction," does not clearly demonstrate Congress' intent to apply the Act to all land, the intent is confirmed elsewhere. "The requisite intent may be found in the legislative history and surrounding circumstances, ***or* when the congressional purpose of the statutory scheme clearly requires a national or uniform application**." Cohen's Handbook of Federal Indian Law, § 2.03, pg. 129-130 (2005), citing *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 811-13 (1976) (McCaran Amendment) (emphasis added). See also *Federal Power Comm'n v. Tuscarora Indian Nation*, 362 U.S. 99, 116 (1960) ("[I]t is now well settled by many decisions of this court that a general statute in terms applying to all persons includes Indians and their property interests.") *United States v. Farris*, 624 F.2d 890, 893 (9th Cir. 1980) (*superseded by the IGRA as recognized in U.S. v. E.C. Investments, Inc.*, 77 F.3d 327, 330 (9th Cir. 1996)), ("[F]ederal laws generally applicable throughout the United States apply with equal force to Indians on reservations.")

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

statutes apply in Indian country, Indian tribes themselves are potentially subject to regulation." Cohen, *supra* § 10.01(2)(c).

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

In this case, the intent for uniform application of stormwater management is further evidenced by the legislative record, relating to the Act's recent amendment. As stated *supra*, the legislative history for the January 4, 2011 amendment confirms Congress was fed up with the government's wrongful attempts to avoid its responsibilities. The amendment repeatedly

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

references all federal properties and that the amendment was "to clarify the original intent of the law."

Additionally, stormwater runoff impacts not only the rest of Hobart, but the rest of the state and nation. Consequently, there is a need for general application of the stormwater ordinances and that is exactly why the government must be subject to the local regulations. That is the whole purpose of the Act. To hold everyone, even the federal government, accountable.

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

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

(Docket No. 60, p.7.)

Nowhere in the draft permit or the transmittal letter provided by the EPA is there any suggestion that the geographical boundaries of Hobart's EPA granted authority excludes trust land. In fact, the draft permit states the exact opposite by clearly stating Hobart's permit is for "discharges located within the boundaries of the reservation."

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

Additionally, the government, as the owner of the land, and the trustee charged with protecting it for the tribe, is benefiting from the Village-wide improvements, for which the utility fees apply. There is absolutely nothing to suggest Congress intended the government and its ward to benefit from the ditches and infrastructure put in place by Hobart, and which handle

runoff from those parcels, without the government having to pay its fair share toward the associated cost. The 1977 amendment (to clarify Congress' original intent to include permits within the scope of § 313) and the 2011 amendment (to clarify Congress' original intent to include the payment of stormwater fees) were designed by to put an end to the government's continued attempts to avoid its responsibilities under this law.

3. As A Second Basis, This Court Has Subject Matter Jurisdiction Over Hobart's Claims Based On The Administrative Procedure Act.

Not only does § 313 contain an unambiguous waiver of sovereign immunity, the Administrative Procedure Act (APA) also contains a waiver.

> A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party. The United States may be named as a defendant in any action, and a judgment or decree may be entered against the United States.

5 U.S.C. § 702.

The 7th Circuit, in reviewing § 702 of the APA, has stated as follows: "The first and second sentences of § 702 play quite different roles...The first supplies a right to seek review of agency action; the second, added by the 1976 amendments to the statute, provides a waiver of sovereign immunity..." *Michigan v. U.S. Army Corps of Eng'rs*, 667 F.3d 765, 774 (7th Cir. 2011). The 7th Circuit has held that actions seeking declaratory and injunctive relief fall under the waiver of sovereign immunity under the APA. *Id.* The 7th Circuit has further held, "the waiver in § 702 is not limited to claims brought pursuant to the review provisions contained in the APA itself. The waiver applies when any federal statute authorizes review of agency action, as well as in other cases involving constitutional challenges and other claims arising under federal law." *Id.* at 775.

In this case the federal government declined to pay stormwater fees or otherwise abide by Hobart's stormwater management ordinances. (Docket Nos. 40-1 and 43-1, pp. 36-38). Hobart has suffered a legal wrong because of that agency action. It has sought injunctive and declaratory relief to enforce the government's obligations to abide by the stormwater ordinances, both now and in the future. (Docket No. 43, p. 10-12; Docket No. 43-1, p. 32-33).

C. Congress Has Expressly Required Stormwater Charges To Be Treated As Permissible Fees, Owed For Otherwise Tax Exempt Properties, And Therefore An Analysis Of The Charges Under Common Law Criteria Is Not Necessary.

The Tribe argues that state and local governments cannot tax trust land "absent special authority from Congress." (Docket No. 48, p. 17). The Tribe then claims that the stormwater fees being asserted by Hobart are in reality unauthorized taxes and therefore impermissible. (*Id*.)

First, it is important to note what the Tribe's argument concedes by implication. If Congress does create special authority to impose a charge, even a tax, it is owed. In this case, the fee versus tax issue has been expressly answered by Congress exercising its authority to require stormwater charges to be treated as permissible fees owed even on tax exempt properties.

Section 313 of the CWA requires every federal "department, agency or instrumentality" from every branch of government, having jurisdiction over "any property or facility" "to 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)

The CWA goes on to define what is meant by "reasonable service charges" that may be asserted even though taxation is prohibited. Section 313 defines the permissible charge as "any reasonable nondiscriminatory fee, charge, or assessment" "used to pay or reimburse the costs

associated with any stormwater management program…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." 33 U.S.C. § 1323(c). In other words, via an extraordinarily clear Congressional Act, stormwater charges are to be treated as permissible fees, notwithstanding the Tribe's or the government's artificial label as a tax.[6]

The Tribe's argument that stormwater charges are impermissible taxes simply cannot stand in light of § 313 of the CWA. The common law fee versus tax analysis, although appropriate in some situations, has been rendered moot as it pertains to stormwater management fees owed pursuant to § 313 of the CWA.[7]

In *City of Renton*, the court confirmed that the court's analysis of taxes versus fees does not matter when Congress has answered that questions. Rather than utilize the analysis found in *McLeod* or any other common law, the *Renton* Court focused on the nature of the entire regulatory scheme of the CWA. In *City of Renton* the court held:

> The United States cites *National Cable Television Association v. United States*, 415 U.S. 336, 340, 94 S.Ct. 1146, 39 L.Ed.2d 370 (1974), in support of its distinction between services and taxes. In *National Cable*, the Supreme Court distinguished taxes and fees in that the latter are "incident to a voluntary act" and "bestow a benefit on the applicant not shared by other members of a society." *Id*. at 340–41. More recently, however, the Court found that the distinction between taxes and fees in *National Cable* did not matter when Congress clearly indicated its intention to delegate to the executive the power to impose "financial burdens, whether characterized as 'fees' or

[6] The clarification of the Act's original intent regarding the fee versus tax issue was effective January 4, 2011. However, it was always Congress' intent to define stormwater charges as permissible fees. See Footnote 8. Therefore, there is no need to engage in a judicially created analysis even for fees incurred prior to the clarifying amendment.

[7] In its brief to the district court, the Tribe cited 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' pronouncement in 33 U.S.C. § 1323(c)(1)(B), that confirms a charge is not an impermissible 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.

> 'taxes.' " *Skinner v. Mid–Am. Pipeline Co.*, 490 U.S. 212, 109 S.Ct. 1726, 1734, 104 L.Ed.2d 250 (1989)
>
> The text of the Clean Water Act requires compliance rather than choice with respect to local requirements, process, sanctions, and charges for stormwater management. While those charges may more closely resemble state and local taxes from which the Federal Government has immunity absent some waiver, Congress waived immunity and required compliance by Federal agencies. As with the non-delegation doctrine at issue in Skinner, the difference between taxes and fees is not relevant here as Congress clearly waived its immunity to "local requirements, administrative authority, and process and sanctions ... including reasonable service charges," and required compliance by the Federal Government, as Congress later clarified in the Stormwater Amendment. §§ 313(a) and (c). The United States is therefore responsible for reasonable service charges imposed prior to January 4, 2011.

City of Renton, 2012 WL 1903429, *10.

The compulsory nature of the mandates of the CWA cannot be discounted. The CWA is a comprehensive regulatory scheme that *requires* local regulation and at the same time states an undeniable intent that the regulations be enforceable against federal properties without exclusion and that all charges be paid regardless of how someone might try and label them. That is the only reading of the CWA that accomplishes its goal of creating nationwide, final, uniform and enforceable regulations. [8]

In line with that intent, the government itself, through the Environmental Protection Agency, instructs municipalities to accomplish the objectives of the CWA by utilizing a Utility, in much the same manner as Hobart has done. In a January 2008 publication entitled Funding Stormwater

[8] In *City of Renton*, the court confirmed that the 2011 amendment to the CWA, referencing stormwater charges was nothing more than a clarification of the Act's original intent. The court noted that "despite the Act's unambiguous waiver, Congress passed the Stormwater Amendment to clarify Federal responsibility to pay stormwater program charges in response to the federal agencies that had ceased paying the charges, claiming that they were taxes and must be on the scope of the CWA's waiver. As explained…the amendment's title and legislative history, as well as the illustration of reasonable service charges using established criteria for assessing the reasonableness of regulatory fees, indicate that the Stormwater Amendment was a clarification rather than a substantive amendment." *City of Renton*, 2012 WL 1903429, *6. "Here, Congress formerly subtitled the Stormwater Amendment as 'an Act to amend the Federal Water Pollution Act *to clarify* federal responsibility for stormwater pollution." *Id.*, citing Federal Responsibility to Pay for Stormwater Programs, Pub. L. 111-378, 124 Stat. 4128 (2011) (emphasis in original).

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.

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.* The intent of the CWA, as confirmed by the administrative entity charged with its enforcement, is that if a utility is used, the fees charged are not impermissible taxes.

The unequivocal intent on the part of Congress and the EPA, is to attack the cancer of water pollution on a nationwide basis with an arsenal of final, uniform and enforceable regulations. If the law is read to except all federal lands, including the vast Indian trust holdings, because the charge is really a tax, the effectiveness of the effort is undermined to the point of folly.

D. Even If The Wording Of § 313 Of The CWA Is Ignored, And Instead A Judicial Test Is Applied To The Fee Versus Tax Issue, It Is Evident The ERU Provisions Of Hobart's Stormwater Drainage Ordinance is a Regulatory Fee And Is Therefore Owed Regardless Of The Fact Indian Trust Land Is Exempt From Taxation.

It must first be noted that the trial court's analysis does not address the portion of the

Ordinance that forms the basis for Hobart's claim. As noted by the district court, there are two types of "charges" authorized by Hobart's stormwater drainage regulations:

> First, a "base charge" is imposed on all developed property "to reflect the fact that all developed properties benefit from storm water management activities of the Village and that all developed properties contribute in some way." Second, an "equivalent runoff unit charge" (ERU) is imposed based upon the amount of impervious area as determined by Hobart's Administrator. Id. § 4.505(4)(a) and (b).

(SA 17).

The district court noted that "[s]o far, the Village has not asserted a base charge as part of its stormwater management fees. The current fees are based solely on the Equivalent Runoff Unit." (SA 18). However, the district court inexplicably determined that "[t]he fact that the Village has not fully implemented its program and has so far assessed only the ERU rates and not the base charges authorized by the Ordinance does not alter the analysis." (SA 24). On the contrary, the issue before the district court was the collection of the ERU under HMC § 4.505(4)(b). There is no claim for fees under the base charge provisions of HMC § 4.505(4)(a) nor is there any attempt to enforce it. The ERU "type" of charge is the only charge that Hobart is seeking to enforce and the only provision that should be considered in the tax versus fee analysis.

The district court cites *San Juan Cellular Telephone Co. v. Public Service Commission of Puerto Rico*, 967 F.2d 683 (1st Cir.1992), to support its conclusion the stormwater fees are taxes:

> Courts have had to distinguish "taxes" from regulatory "fees" in a variety of statutory contexts. Yet, in doing so, they have analyzed the legal issues in similar ways. They have sketched a spectrum with a paradigmatic tax at one end and a paradigmatic fee at the other. The classic "tax" is imposed by a legislature upon many, or all, citizens. It raises money, contributed to a general fund, and spent for the benefit of the entire community. (internal citations omitted). The classic "regulatory fee" is imposed by an agency upon those subject to its regulation. (internal citations omitted). It may serve regulatory purposes directly by, for example, deliberately discouraging particular conduct by making it more expensive. (internal citations omitted). Or, it may serve such purposes indirectly by, for example, raising money placed in a special fund to help defray the agency's regulation-related expenses. (internal citations omitted).

San Juan Cellular, 967 F.2d at 685 (citations omitted).

After quoting the above passage the district court applied a three criteria interpretation of *San Juan* and concluded that Hobart's entire stormwater ordinance is a tax. That approach ignores the fact that only the ERU is at issue and that in this case the statute in question expressly answers the fee versus tax question, which was not the case in *San Juan* or any other cases cited by the district court.

Moreover, when determining if a charge is a fee or tax, the analysis should not be unnecessarily complicated. The three step test that some courts have generated out of *San Juan* places more emphasis on detail than on practical reality [9]. For example the first test, who has imposed the fee, can be readily manipulated by the local government. Wisconsin municipalities have broad authority in regard to how they choose to control their utilities as the municipalities are the owners of any Utilities they create (see Wis. Stat. § 66.0801). The statutes grant municipalities the option of creating utilities in lieu of using a standing committee of the governing body to govern the public service to be provided (Wis. Stat. § 66.0805). In Hobart, the Village Board through the Stormwater Management Utility establishes rates and charges for the ERU that are used by the customers. If, as the district court held, the fact that Hobart's Village Board sets the rates for the Utility strongly indicates that the charges constitute a tax, the Village Board could simply change its ordinance to name the Utility as the entity that sets the rates.[10] Such an easily modified factor should not be given undue weight. The above is

[9] The district court cites *McLeod v. Columbia County*, GA 254 F.Supp.2d 1340, 1345 (S.D.Ga.,2003), that reads *San Juan* to provide for a 3 step test in determining whether a charge is a fee or a tax: (1) What entity imposed the fee? (2) What parties are being assessed the fee? (3) Is the revenue generated by the fee expended for general public purposes or used for the regulation and benefit of the parties upon whom the assessment is imposed? See also *DeKalb Co v. United States*, 108 Fed.Cl. 681 (Fed. Cl. 2013).

[10] Notably however, as discussed earlier in the brief, Hobart's current regulatory scheme is based on the recommendation of the EPA, so that revenue from tax exempt entities can be captured.

particularly true in the context of a federally mandated regulatory scheme such as the of CWA, where the local governments are compelled to impose the ordinances.

The focus should be on the later part of the *San* Juan analysis, which is whether the charges are more for a general benefit, and therefore a tax, or charged on a use basis to defray the cost of the regulation and the use of the resource, and therefore a fee. Here the fee is directly related to the water that needs to be treated. 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 and nothing more. (Docket No. 60, p. 2). The fee for the parcels are based on the engineering firm's measurements of impervious soil, unique to each parcel. (Docket No. 60, p. 2; Ordinance § 4.505.) The Ordinance allows a property owner to request that Hobart waive all or part of the minimum on-site stormwater management requirements. (Docket No. 60, p. 3). Akin to paying for water the Tribe or government uses, this fee is for the water they have chosen by their direct actions to displace, and therefore must be treated. Just as the water use is based on the quantum of the water used, the ERU fee is based on the handling of the quantum of water disbursed.

It is also critical to the analysis that Hobart's receipts are deposited in a fund that is used exclusively to defray the cost of regulating stormwater and cannot be used for general purposes. HMC § 4.511 provides:

> **4.511 BUDGET EXCESS REVENUES**
>
> The Storm Water Utility finances shall be accounted for in a separate Storm Water Management Fund by the Village. The Utility shall prepare an annual budget, which is to include all operation and maintenance costs, administrative costs, debt served and other costs related to the operation of the Storm Water Utility. The budget is subject to the approval by the Village Board. The costs shall be spread over the rate classifications as determined by the Board. Any excess of revenues over expenditures in a year will be retained by the Storm Water Management Fund for subsequent year's needs.

The segregation of and strict limitation of the use of the funds run counter to the district court's opinion the fee goes to the public benefit and are therefore a tax. Additionally, the district court's conclusion is at odds with the examples of "fees" set out in *San Juan*:

> On the other hand, the United States Supreme Court wrote, in 1884, that a statutory levy on shipowners of $.50 per passenger was not a tax because the revenue was used "'to defray the expense of regulating immigration ... for the care of immigrants ... and for the general purposes and expense of carrying the [immigration] act into effect.'" (internal citations omitted). More recently, the Ninth Circuit has held that a Public Utilities Commission's assessment was a "fee," not a "tax," because it helped "defray the cost of performing the regulatory duties imposed" on the Commission. (internal citations omitted). The Fifth Circuit has held that a Nuclear Regulatory Commission's charge was a "fee," not a tax, when it helped to pay the costs of "environmental reviews," "uncontested hearings," and "administrative and technical support" for licensing procedures. (internal citations omitted). The Seventh Circuit has commented that a Wisconsin Department of Transportation charge upon trucks was a "fee," not a "tax," when the revenues raised by that particular charge helped pay for efforts to "identify authorized vehicles for regulatory purposes." (internal citations omitted). And, the Fourth Circuit has found that a levy on milk sales which, in part, funded a milk price-support program was a regulatory fee. (internal citations omitted).

San Juan Cellular, 967 F.2d at 685-86.

In this case, the district court also cited *Schneider Transport, Inc. v. Cattanach* to support its conclusion stormwater fees are really taxes:

> In *Schneider Transport, Inc. v. Cattanach*, for example, the Seventh Circuit held that registration fees for trucks charged by the Wisconsin Department of Transportation was a "tax" even though the fees were deposited in a segregated fund used for highway construction.

(SA 25) citing *Schneider Transport, Inc. v. Cattanach,* 657 F.2d 128, 132 (7th Cir. 1981).

However the district court's analysis of the holding in *Schneider Transport* misses a critical point. The "segregated fund" was the State Transportation fund. As the Seventh Circuit observed, "the state transportation fund, Wis. Stat. § 25.40, is for transportation purposes, including highway construction. Wis. Stat. § 20.395." *Schneider Transport,* 657 F.2d at 132. The revenues from the fund "are deposited into funds other than the general fund and are available for the purposes for which such funds are created." *Id.* The fund's use is not limited to highway

regulation and administration costs; instead those funds can be used to pay for any highway purpose from law enforcement to highway construction. *Id.* In this case, the stormwater utility fund can be used for only one purpose, the management of stormwater.

Unlike a school district property tax, which the district court deemed analogous to Hobart's stormwater fee, Hobart is not free to spend the money collected on any issue that confronts the Village Board, like a school board could. The funds here can only be used for one purpose, to defray the cost of stormwater management. Similarly, the charge is not imposed on every parcel equally, but instead on parcels based on the impervious service they have chosen to create, and consequently is based on their contribution of stormwater to the system.

XI. CONCLUSION

"Courts must presume that a legislature says in a statute what it means and means in a statute what it says there." *Carcieri,* 555 U.S. at 392. (citation omitted). There is no doubt that § 313's use of "any property" combined with all of the other references to "any," means Congress included all land of the United States and all land over which it has jurisdiction, including land held for the benefit of Indians be subject its application. This is especially true when the statute expressly includes a mechanism to have certain land excluded, from the reaches of the state or local law, if such exclusion is deemed appropriate. Consequently, this Court should find the government waived its immunity from suit and that § 313 applies to trust land. Furthermore, this court should conclude, based on the wording of § 313, and the nature of how the fees are determined and used, that Hobart's stormwater charges are permissible fees and not taxes.

Dated this 22nd day of March, 2013.

Respectfully Submitted,
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XII. CERTIFICATE OF COMPLIANCE WITH RULE 32(A)

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because:

This brief contains 13,825 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and Cir. R. 32(b), and the type style requirements of Fed. R. App. P. 32(a)(6) because:

This brief has been prepared in a proportionally spaced typeface using Times in 12 point font in the body of the brief and 11 point font in footnotes.

Dated: March 22, 2013.

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XIII. CERTIFICATE OF SERVICE

I hereby certify that on March 22, 2013, I electronically filed Defendant-Third/Party Plaintiff-Appellant's Brief and Required Short Appendix with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

Dated: March 22, 2013.

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XIV. CIRCUIT RULE 30(D) STATEMENT

I hereby certify that all materials required by Cir. R. 30(a) & (b) are included in the Required Short Appendix.

Dated: March 22, 2013.

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XV. REQUIRED SHORT APPENDIX OF

DEFENDANT-THIRD/PARTY PLAINTIFF-APPELLANT

Page

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

ONEIDA TRIBE OF INDIANS
OF WISCONSIN,

Plaintiff,

v. Case No. 10-C-137

VILLAGE OF HOBART,

Defendant.

DECISION AND ORDER

In this action, Plaintiff Oneida Tribe of Indians of Wisconsin seeks declaratory and injunctive relief precluding the Village of Hobart from assessing a utility fee for land in the Village owned by the United States and held in trust for the Tribe. The Village filed a third-party complaint against the United States, including the United States Department of Interior and its Secretary Kenneth Salazar, in which it alleges that the Clean Water Act requires the United States to pay the Village's storm water fees to the extent the Oneida are not liable for such fees. The complaint also argues that a federal regulation exempting tribal trust land from property laws is illegal under the Administrative Procedure Act (APA) and provisions of the Constitution. Presently before me is the motion to dismiss filed by the United States in which the government argues that the Village's claims are barred by sovereign immunity. The Government further argues that any claims under the APA are not ripe because the Village has not appealed the decision of a Bureau of Indian Affairs official that it now challenges. For the reasons given below, the motion to dismiss will be granted.

In 2007 the Village of Hobart began enforcing a village ordinance that imposes a storm water run-off fee on property located within the Village. The Village states that it was forced by federal law to charge such fees in an effort to abate pollution. Within the Village, the United States owns roughly 1420 acres of land, which it holds in trust for the Tribe. The Village ordinance applies to both the Tribe's trust land as well as the land the Tribe owned in fee. The Tribe contested these charges but ultimately paid the money it was charged for its trust land into an escrow account subject to further proceedings to determine the legitimacy of the water charges. (Charges for the Tribe's fee land are not at issue here.) The Tribe applied to the Bureau of Indian Affairs for relief, and the regional director agreed with the Tribe. He deemed the fee an improper tax, directed the Village to remove the Tribe's trust property from the tax certificate list, and ordered the Village to cease any efforts to collect the fee. (Compl., Ex. D.) In its third-party complaint, the Village asserts that the government is liable for any fees for which the Tribe is not liable. It also seeks review of the BIA's determination that the storm water fees levied on tribal trust land are an improper tax.

I. Section 313 of the Clean Water Act

The Village's third-party complaint alleges that if the Tribe is not liable for payment of the fees, then the United States is. Citing § 313 of the Clean Water Act, 33 U.S.C. § 1323(a), the Village argues that the federal government is subject to all local water quality regulations, including service charges. It further argues that § 313 provides a waiver of the government's sovereign immunity. Section 313 provides as follows:

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

33 U.S.C. § 1323(a) (emphasis added).

In a nutshell, the statute provides that if an agency of the federal government is engaged in discharge of pollutants, or if it owns a property, it must comply with all local and state laws and regulations involving abatement of water pollution. This includes "the payment of reasonable service charges." *Id.* Section 1323(a) requires federal agencies to comply with state and local water-quality requirements "in the same manner, and to the same extent as any nongovernmental entity." "Congress intended this section to ensure that federal agencies were required to 'meet all [water pollution] control requirements as if they were private citizens.'" *Center For Native Ecosystems v. Cables,* 509 F.3d 1310, 1332 (10th Cir. 2007) (citation omitted).

The United States argues, however, that the Village has no authority to impose fees on tribal trust land, and thus § 313 and its waiver of sovereign immunity do not apply. The government concedes that § 313 allows recovery of service charges, but it argues such charges must have been validly imposed by the Village before the United States must pay them. Because the Village has no authority to impose fees on trust land, the government argues that it has not waived its sovereign immunity under § 313.

The Village protests that the government is using circular logic: after all, the question of the Village's authority to impose fees on tribal land is the crux of its case, so the government's immunity argument begs the question. That is, in the Village's view, the government has jumped to an argument on the *merits* of the case – whether the Village had authority to impose the fees – rather than asserting any basis for sovereign immunity. The Village is correct that the government's immunity argument (if that is what it is) is really an argument on the merits. In essence, the government is saying it is immune because the Village would lose its lawsuit if this Court were to consider the merits. But that, of course, is not what sovereign immunity provides. Immunity would preclude this Court from even reaching the merits because the government would not be a suable entity. The question is whether the waiver of immunity found in § 313 would apply here. But because the government merely argues that the Village's § 313 claim is a loser on the merits – not that § 313 is inapplicable – it appears that the government has conceded that § 313 would apply to the Village's claim.

In fact, it appears that § 313 is applicable here. Because the United States is not a discharger of pollutants on the trust land, I must assume that the Village is relying on subsection (1), which governs federal agencies "having jurisdiction over any property or facility." 33 U.S.C. § 1323(a)(1). The federal government does have jurisdiction over the property at issue here, which is land owned by the government and held in trust for the Tribe. The text of § 313 governs the dispute because the Department of the Interior is an agency of the federal government having jurisdiction over the property, and thus § 313 makes it subject to local requirements "respecting the control and abatement of water pollution . . . including the payment of reasonable service charges." 33 U.S.C. § 1323(a). Accordingly, because the Village is attempting to obtain payment of service charges

from the government for property in the government's jurisdiction, § 313 and its waiver of immunity apply. I am thus unable to conclude that the government is immune from suit.

But the fact that the government may have waived immunity for alleged violations of § 313 does not end matters. The government also argues that § 313 creates no independent cause of action. Instead, it asserts that parties seeking relief must rely on the APA.

The Clean Water Act itself contains a citizen suit provision. That clause provides that suits may be brought:

> (1) against any person (including (i) the United States, and (ii) any other governmental instrumentality or agency to the extent permitted by the eleventh amendment to the Constitution) who is alleged to be in violation of (A) an effluent standard or limitation under this chapter or (B) an order issued by the Administrator or a State with respect to such a standard or limitation, or
>
> (2) against the [EPA] Administrator where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator.

33 U.S.C. § 1365(a).

The Village does not argue that either of the above subsections is implicated here. In fact, it does not explain its argument that § 313 of the CWA authorizes an independent cause of action at all. This is perhaps not surprising, as cases support the government's position that the APA is the only way for a plaintiff to bring a claim for a § 313 violation when the CWA's citizen suit provision is inapplicable. For example, in *Center for Native Ecosystems v. Cables,* the plaintiff alleged that the U.S. Forest Service was violating Wyoming water quality regulations, in violation of § 313 of the CWA. 509 F.3d 1310,1332 (10th Cir. 2007). The claim was brought, and considered, under the APA. *Id.* at 1328 ("The APA, under which CNE's CWA claim is brought . . . limits judicial review not otherwise provided by statute to 'final agency action for which there is

no other adequate remedy in a court.'") The same was true in *Swanson v. U.S. Forest Service,* 87 F.3d 339, 345 (9th Cir. 1996), where the court found that the "Administrative Procedure Act [is] the statute which would entitle [plaintiff] to relief from the government's alleged violation of state water quality standards." *See also Hells Canyon Preservation Council v. Haines,* 2006 WL 2252554, *1 (D.Or. 2006) ("Plaintiffs' claims under . . . § 313 of the CWA are also governed by the APA."); *City of Shoreacres v. Waterworth,* 332 F. Supp.2d 992, 1004 (S.D. Tex. 2004) ("Because neither NEPA nor the CWA provide an independent right of action, Plaintiffs' claims for review under NEPA and the CWA fall under the Administrative Procedure Act.")

The Village has not explained how its CWA claim against the United States would be reviewable under the APA. The United States itself has not taken any final action with respect to the Village's demand that the government pay the fees assessed by the Village for tribal land. It was the *Tribe* that refused to pay the fee, not the United States. The Village asserts, briefly, that the Tribe's failure to pay the fees should be imputed to the United States because the Tribe, in refusing to pay, cited the Department of Interior's opinion that the fees constituted an impermissible tax. But that opinion merely addressed the viability of the fee relative to the Tribe itself; no one ever suggested to the BIA that the federal government should pick up the tab itself. The Village has not cited any authority that would allow this court to review a non-government party's actions under the APA standard for arbitrary and capricious conduct (discussed below). Nor has it provided any reason to believe that review of the Tribe's actions (even if "imputed" to the United States) would be appropriate under the APA. In sum, the question of whether the government should be liable under § 313 for payment of the Village's storm water fees has never been presented to any federal

agency. Accordingly, I can find no basis upon which the APA would grant the Village relief under these circumstances.

II. APA Review of the BIA's Decision that the Fees are an Improper Tax

The Village also challenges the BIA's conclusion that its storm water fees constitute an improper tax. The APA waives the government's sovereign immunity for review of some administrative decisions. Unless the action is made reviewable by statute (not applicable here), however, the challenged action must constitute a "final agency action" before it is subject to judicial review under the APA. 5 U.S.C. § 704. If the agency action is final and thus reviewable, a court may only overturn it if it finds the action was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A).

The United States argues that the APA does not apply here because there has been no "final agency action" to speak of. In *Bennett v. Spear,* the Supreme Court explained:

> As a general matter, two conditions must be satisfied for agency action to be considered "final": First, the action must mark the consummation of the agency's decisionmaking process--it must not be of a merely tentative or interlocutory nature. And second, the action must be one by which rights or obligations have been determined, or from which legal consequences will flow.

520 U.S. 154, 177-78 (1997).

The Village points to the letter sent by BIA Regional Director Terrance Virdan in which he deemed the storm water fee an improper tax and directed the Village to cease any efforts to collect the fee. (Compl., Ex. D.) The Village argues this was a final agency action because it was a definitive statement as to the validity of the storm water fees and the BIA expected immediate compliance with it.

The United States argues, however, that the Village failed to take advantage of administrative procedures to appeal the decision, and thus the decision of the regional director was not "final" for purposes of the APA. Applicable BIA regulations provide that "No decision . . . shall be considered final so as to constitute Departmental action subject to judicial review under 5 U.S.C. § 704, unless . . . the official to whom the appeal is made determines that public safety, protection of trust resources, or other public exigency requires that the decision be made effective immediately." 25 C.F.R. § 2.6(a). Similarly, 43 C.F.R. § 4.314(a) provides that decisions of a BIA official are not final unless the Interior Board of Indian Appeals makes the decision effective pending a decision on appeal. Neither of these conditions for finality has been satisfied.

> The federal regulations provide that administrative procedures must be followed before seeking relief in the court system. 25 C.F.R. § 2.6. There are clearly detailed administrative processes and remedies set forth in 25 C.F.R. Part 2 and 43 C.F.R. Part 4. Appellants, however, did not initiate even the first steps of the administrative appeal process. Instead, they asserted their claims for the first time in federal court.

Klaudt v. United States Dept. of Interior, 990 F.2d 409, 411 (8th Cir. 1993).

The Village's claim that the agency's action is final rests on nothing more than its own say-so. The purpose of the agencies' various exhaustion requirements is not to create an officious and burdensome bureaucracy, it is to allow the agency to direct its expertise at fully developing a record and solving regulatory problems after full consideration. *Id.* at 412. The Supreme Court has held that when the APA applies, appeal to "superior agency authority" is a prerequisite to judicial review when an agency rule requires appeal before review and the administrative action is made inoperative pending that review. *Darby v. Cisneros,* 509 U.S. 137, 154 (1993). Here, the regulations cited by the government explicitly state that agency action is *not* final for APA purposes unless the decision has been deemed final by the agency. The regulations further provide that any appeal may be taken

to the Interior Board of Indian Appeals (IBIA). 25 C.F.R. § 2.4(e). *See, e.g., Miami Tribe of Oklahoma v. United States,* 2008 WL 2906095, *5 (D. Kan. 2008) ("Applying these regulations, the Court finds that the October 23, 2007 decision of the Regional Director of the BIA is subject to appeal to the IBIA and has not been made effective pending a decision on appeal. As such, the decision is not yet a final agency action for purposes of APA review under 5 U.S.C. § 704.")

The Village suggests that appeal through the administrative process would be "futile" because it is clear what the government's position is. But the futility exception to the exhaustion requirement is not an open-ended invitation for disgruntled plaintiffs to put words in the mouths of federal agencies whose ultimate opinions have not yet been sought. The fact that a BIA regional director issued an opinion that the government is now defending in this litigation does not excuse the Village's failure to exhaust. Futility does not mean an administrative challenge is likely to lose, it means the challenge would be pointless. Presumably, the BIA created an appeals process not because it has nothing better to do, but because it serves a meaningful function. *Perez v. Wisconsin Department of Corrections,* 182 F.3d 532, 536 (7th Cir. 1999) ("As for the possibility that administrative remedies could be declared futile ex ante, without ever being tried: what would be the point of asking judges to be seers? . . . No one can know whether administrative requests will be futile; the only way to find out is to try.")

Accordingly, I conclude that the letter of the BIA regional director does not constitute a final agency action subject to review under the Administrative Procedure Act. And because there is no final agency action, the Village's "as applied" constitutional challenge to 25 C.F.R. § 1.4 is not yet ripe either. That is, absent any final action "applying" the regulation to the Village, the claim fails.

III. Conclusion

For the reasons given above, I conclude that the APA provides the only avenue for review of the issues presented in the Village of Hobart's third-party complaint. Because there is no "final agency action" to review, however, the APA does not provide a cause of action. Accordingly, the motion to dismiss the third-party complaint is **GRANTED**.

SO ORDERED this 18th day of April, 2011.

s/ William C. Griesbach
William C. Griesbach
United States District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

ONEIDA TRIBE OF INDIANS OF WISCONSIN,

Plaintiff,

Case No. 10-C-00137

v.

VILLAGE OF HOBART, WISCONSIN,

Defendant.

ORDER

The Court, having before it the parties' joint request to stay all proceedings for 90 days, to allow time for the Village of Hobart to obtain final agency action from the appropriate department or agency of the United States, finds the request reasonable and consistent with the terms of Rule 1 of the Federal Rules of Civil Procedures.

ACCORDINGLY, IT IS ORDERED that the joint motion to stay, pending the Village of Hobart obtaining final agency action from the appropriate department or agency of the United States as to the payment of storm water utility fees is granted.

IT IS ALSO ORDERED that all proceedings in this matter are stayed until August 8, 2011.

IT IS FURTHER ORDERED that a status conference be held on August 8, 2011, at 9:00 a.m. The Court will address the appropriateness of continuing the stay or enter a new scheduling order.

Dated this 14th day of May, 2011.

s/ William C. Griesbach
William C. Griesbach
United States District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

ONEIDA TRIBE OF INDIANS OF WISCONSIN,

Plaintiff,

v. Case No. 10-C-137

VILLAGE OF HOBART, WISCONSIN,

Defendant/Third-Party Plaintiff,

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.

ORDER GRANTING MOTION FOR SUMMARY JUDGMENT AND GRANTING MOTION TO DISMISS

This case represents another battle in the ongoing conflict between the Oneida Tribe of Indians of Wisconsin and the Village of Hobart over the regulatory control of the land situated within their common boundaries. Plaintiff Oneida Tribe of Indians of Wisconsin (the Tribe) filed this action on February 19, 2010, seeking a declaratory judgment that the Village of Hobart (the Village) lacks authority to impose charges under its Storm Water Management Utility Ordinance on parcels of land held in trust by the United States for the Tribe located on the Oneida Reservation and within Hobart (subject trust lands). The Tribe also seeks injunctive relief enjoining the Village from attempting to enforce its Ordinance upon tribal lands. (Compl., ECF No. 1.) There is no

question that the Tribe is the beneficial owner of the subject trust lands. The case is before me now on the Tribe's motion for summary judgment. The Tribe moves for summary judgment on two claims for relief: first, that the charges imposed on its trust property under the Village's Storm Water Management Utility Ordinance (the Ordinance) constitute an impermissible tax on the subject trust lands; and second, that federal common and statutory law preempt application of the Ordinance on the subject trust lands, whether or not it constitutes a tax.[1] (Tribe's Br. in Supp., ECF No. 48 at 1–2.)

The Village denies that the Tribe is entitled to such relief, but in the alternative, if the Tribe is not responsible for the utility charges, the Village claims that the United States must pay. Thus, in July 2010, the Village filed a third-party complaint against the United States, alleging that the United States, as holder of the bare title to the tribal trust lands, must pay the storm water fees if the Tribe is not responsible for doing so. (Third Pty. Compl., ECF No. 15.) This Court dismissed the third-party complaint, holding that the Village had failed to state a claim under the Administrative Procedure Act (APA), 5 U.S.C. §§ 701–706, because there had been no final agency action. (April 18, 2011 Order, ECF No. 34.) The Village then presented the Department of the Interior with a request for payment of $237,862.06 in storm water fees, which the Department denied by letter dated October 20, 2011. (ECF No. 40-1.) Having thus obtained the final agency action required for a suit under the APA, the Village has renewed its third-party claims against the United States.

[1] The Tribe also asserts a third claim for relief: 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. But the Tribe concedes this third claim is dependent upon factual allegations regarding storm water activities and programs relating to the subject trust lands that may not be susceptible to disposition on summary judgment. (*See, e.g.*, Compl. ¶ 20.) Accordingly it will not be addressed here.

(Am. Third Pty. Compl., ECF No. 43.) The Village seeks a declaratory judgment that the United States must pay "all past and future storm water related fees" and a monetary judgment "for all fees currently due and owing." (*Id.* at 16.) The Village also seeks declaratory and injunctive relief affirming the Village's jurisdiction to impose its Storm Water Management Utility charges on Indian trust land and preventing the United States from invoking a federal regulation, 25 C.F.R. § 1.4, which exempts trust land from state and local property laws. *Id.* In response, the United States filed a motion to dismiss the Amended Third Party Complaint for lack of subject matter jurisdiction or failure to state a claim upon which relief can be granted. (Mot. to Dismiss, ECF No. 53.)

Both motions have been fully briefed and argued by the parties. For the reasons discussed herein, the Court concludes that the Village's Storm Water Utility Management charges constitute an impermissible tax on Tribal trust property for which neither the Tribe nor the United States are liable. Accordingly, the motions of the Tribe and the United States will be granted.

BACKGROUND

The Tribe is a federally recognized Indian tribe in possession of the Oneida Reservation, set aside by treaty in 1838. (Treaty with the Oneida, 7 Stat. 566.) The Tribe adopted a Constitution under the Indian Reorganization Act (IRA), which authorizes tribes to organize and authorizes the Secretary of the Interior to acquire and hold land in trust for tribes. 25 U.S.C. §§ 465 and 476. On December 21, 1936, the Secretary of the Interior approved the Tribe's IRA Constitution. (Webster Aff., ECF No. 49 ¶ 3.) The Tribe is located on the Oneida Reservation in Wisconsin, which was established by the 1838 Treaty with the Oneida. The Reservation once encompassed 64,000 acres

of tribal land; all or almost all of that land was allotted and fell out of Tribal ownership between 1889 and 1934. *Oneida Tribe of Indians of Wisc. v. Village of Hobart*, 542 F. Supp. 2d 908, 910–12 (E.D. Wis. 2008). Following passage of the IRA, and particularly since the dramatic increase in revenue the Tribe achieved after the enactment of the Indian Gaming Regulatory Act in 1988, the Tribe has been reacquiring land within the original reservation, some of which has been taken back into trust for the benefit of the Tribe by the Secretary of Interior.

Today, the United States holds in trust for the Tribe 148 parcels comprising approximately 1400 acres of land that are located within the boundaries of Hobart. (Stipulation of Facts, ECF No. 50, ¶¶ 4, 5.) The Tribe also owns land in fee within the Reservation, but that land is not the subject of this action. The subject trust lands include, among others, the following parcels, as identified in the county tax records: HB-1295, the site of the Oneida Police Department; HB-97, the site of the Oneida Community Health Center; HB-1317, the site of the Tribe's Oneida Elder Services Complex and the Tribe's Airport Road Child Care; HB-753, the site of the Oneida Cultural Heritage Department; HB-753-2, the site of the Tribe's Oneida Language House; HB-753-2 and HB-746, the site of a tribal, five-acre storm water retention pond known as Osnusha Lake; and HB-1313-1, the site of the Tribe's community building known as Parish Hall. (Webster Aff., ¶¶ 18–24.) Parcels held in trust also include an auto body shop, a park and a library. (Tribe's Resp. To Village Statement of Additional Facts, ECF No. 65, ¶¶ 26-37.)) The parcels at issue are not contiguous, but rather are interspersed throughout Hobart in a kind of checkerboard pattern.

The Town of Hobart (now the Village) was created by the state legislature in 1903 and lies wholly within the exterior boundaries of the Reservation. *Oneida Tribe*, 542 F. Supp. 2d at 912. In 2002, the Village incorporated under Wisconsin law, granting it additional authority under State

law. *Id.* at 913. According to the United States Census Bureau, the estimated 2011 population for the Village was 6,254, approximately 17.5% of which were Native American. http://quickfacts.census.gov/qfd/states/55/5535150.html (last visited September 1, 2012). The Village is adjacent to the City of Green Bay and the Village of Ashwaubenon.

In 2007, Hobart adopted its Storm Water Management Utility Ordinance in accordance with the Clean Water Act (the CWA). Congress enacted the CWA "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). As an operator of a Municipal Separate Storm Sewer System (MS4), Hobart is required to "develop, implement, and enforce a storm water management program designed to reduce the discharge of pollutants from [the] MS4 to the maximum extent practicable (MEP), to protect water quality, and to satisfy the appropriate water quality requirements of the Clean Water Act." 40 C.F.R. § 122.34(a).

The Ordinance identifies its purpose as protecting the general public welfare: "The Village of Hobart finds that the management of storm water and other surface water discharges within and beyond its borders is a matter that affects the public health, safety, and welfare of the Village, its citizens, businesses, and others in the surrounding area." Village of Hobart Code of Ordinances § 4.501(1). To accomplish this purpose, the Ordinance creates a storm water management utility, which is placed under the supervision of Hobart's legislative body, the Board. *Id.* § 4.502(1) and (2). The Ordinance authorizes the Village through the Storm Water Management Utility to "acquire, construct, lease, own, and operate . . . such facilities as are deemed by the Village to be proper and reasonably necessary for a system of storm and surface water management," including "surface and underground drainage facilities, sewers, watercourses, retaining walls and ponds and such other facilities as will support a storm water management system." *Id.* § 4.503(1). The

Ordinance also authorizes the Village through the Storm Water Management Utility to "establish such rates and charges as are necessary to finance planning, design construction, maintenance, administration, and operation of the facilities in accordance with the procedures set forth in this ordinance." *Id.* § 4.503(2).

Two basic types of "charges" are authorized under the Ordinance. First, a "base charge" is imposed on all developed property "to reflect the fact that all developed properties benefit from storm water management activities of the Village and that all developed properties contribute in some way."[2] Second, an "equivalent runoff unit charge" (ERU) is imposed based upon the amount of impervious area as determined by Hobart's Administrator. *Id.* § 4.505(4)(a) and (b). In addition, a flat "equivalent runoff unit charge" is imposed even on undeveloped parcels at the rate of two-tenths of one unit per parcel up to 100 acres. *Id.* § 4.507(4)(g). The Ordinance authorizes offsets against the "equivalent runoff charge" but offsets against the "base charge" are specifically prohibited. *Id.* § 4.506(1). There are also percentage caps on the allowable credits which ensure that some amount of the "equivalent runoff unit charge" will always be assessed.

The Ordinance also authorizes an additional special charge that is linked to the delivery of storm water services, i.e., for those parcels "in a specific area benefited [sic] by a particular storm water management facility," and a one-time connection charge when a parcel converts from undeveloped to developed or otherwise connects to Hobart's system. *Id.* § 4.505(4)(c) and (d). Offsets against the special charges are authorized, again subject to a percentage cap. *Id.* § 4.506(1).

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[2] The Ordinance defines developed property as real property that "has been altered from its natural state by the addition of any improvements that may include a building, structure, impervious surface, and change in grade or landscaping." *Id.* § 4.504(3).

The Ordinance also sets forth a collection procedure and a set of penalties for nonpayment. It provides that the property owner is responsible for the storm water charges on real property "that he/she or it owns." *Id.* § 4.508(2). Unpaid delinquent charges "shall be a lien upon the property served and shall be enforced as provided in [Wis. Stat.] § 66.0809(3)." *Id.* § 4.508(3). The statutory provision adopted by the Ordinance for enforcement is that set out in state law for the collection of municipal public utility charges. This process requires delinquency notice; it further provides that unpaid charges become a lien upon the property and "the clerk shall insert the delinquent amount and penalty as a tax against the lot or parcel of real estate." Wis. Stat. § 66.0809(3). Finally, the statute directs, "All proceedings in relation to the collection of general property taxes and to the return and sale of property for delinquent taxes apply to the tax if it is not paid within the time required by law for payment of taxes upon real estate." *Id.*

So far, the Village has not asserted a base charge as part of its storm water management fees. The current fees are based solely on the Equivalent Runoff Unit. Each year since its enactment, Hobart has billed the Tribe for "charges" allegedly due under the Ordinance as to the subject trust lands. (Stip. ¶¶ 8–11.) The Tribe has refused to pay the "charges" as it believes its trust land is immune from the Ordinance and that Hobart lacks authority to impose charges under the Ordinance on the subject trust lands.[3] (*Id.* ¶¶ 8,9.) Because of its refusal to pay the allegedly outstanding "charges," the Tribe has received tax foreclosure notices from Brown County as to 143 of the

[3] The Tribe had also requested the assistance of the Regional Director, Bureau of Indian Affairs, Midwest Region, regarding Hobart's demand. The Regional Director responded in a letter to the Tribe and Hobart, dated March 24, 2009, that the "charge is clearly a tax that may not be imposed on land held in trust by the United States." (Compl., Ex. D. ECF No. 1.)

subject trust lands. (Webster Aff. ¶ 11.) These notices state that, unless payment is made, the Tribe will incur "foreclosure costs and the publication of delinquent taxes in the newspaper." *Id.*

It is on the basis of these facts that the Tribe contends it is entitled to judgment as a matter of law. The Village opposes the Tribe's motion, but contends that if the Tribe is not responsible for the charges imposed under its Ordinance, then the Government is pursuant to Section 313 of the CWA. Because the Village's claim against the Government arises only if the Tribe is not liable, I will address the Tribe's motion first.

LEGAL STANDARD

A motion for summary judgment should be granted when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). "Material" means that the factual dispute must be outcome-determinative under law. *Contreras v. City of Chicago*, 119 F.3d 1286, 1291 (7th Cir. 1997). A "genuine" issue must have specific and sufficient evidence that, were a jury to believe it, would support a verdict in the non-moving party's favor. Fed. R. Civ. P. 56(e); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). The moving party has the burden of showing there are no facts to support the non-moving party's claim. *Celotex*, 477 U.S. at 322 (1986). In determining whether to order a motion for summary judgment, the court should consider the evidence presented in the light most favorable to the non-moving party. *Anderson*, 477 U.S. at 255. When the record, taken as a whole, could not lead a rational jury to find for the nonmoving party, there is no genuine issue and therefore no reason to go to trial. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

ANALYSIS

A. The Village's Storm Water Management Charges Constitute A Tax Upon Tribal Trust Property.

The Supreme Court long ago determined that tribal lands, held by Indians with whom the United States maintains a formal trust relationship, cannot be taxed by states wherein they are located. *The Kansas Indians*, 72 U.S. 737 (1866). Although this immunity from taxation was lost as to Indian lands that were conveyed by patent to tribal members during the allotment period, it was restored to those lands later acquired and taken in trust by the Government under the Indian Reorganization Act (IRA) of 1934. *County of Yakima v. Confederated Tribes and Bands of Yakima Indian*, 502 U.S. 251, 264 (1992). The IRA expressly provided that lands taken into trust for an Indian tribe would be "exempt from State and local taxation." 25 U.S.C. § 465. It therefore remains the law that "a State is without power to tax reservation lands and reservation Indians" absent some federal statute permitting it. *Okla. Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450, 458 (1995) (quoting *Cnty. of Yakima*, 502 U.S. at 258). Courts have declined to find a grant of such authority in federal statutes without clear Congressional intent. *See Bryan v. Itasca Cnty.*, 426 U.S. 373, 380–87 (1976) (construing P.L. 280, 28 U.S.C. § 1360); *Moe v. Confederated Salish & Kootenai Tribes*, 425 U.S. 463, 376 (1976) (construing the General Allotment Act (GAA), 25 U.S.C. § 349). Based on this settled law, the Tribe argues that the Village has no right to impose charges on its trust property under its Storm Water Management Utility Ordinance.

The Village does not dispute the Tribe's claim that it's trust property is exempt from Village taxation. Instead, the Village denies it has imposed a tax on the Tribe's trust property. The Village contends that the charges its has imposed on the subject trust lands under its Ordinance constitute

not taxes, but fees for the services performed, or to be performed, by its Storm Water Management Utility that will benefit all of the landowners of the Village, including the Tribe. Since the charges do not constitute taxes, the Village contends they are lawful and the Tribe's attempt to avoid them should be rejected.

In support of its argument that the Storm Water Utility Management charges are not taxes, the Village 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.[4] But as the Tribe points out, the determination of whether a given charge upon Indian property constitutes an impermissible tax is determined by *federal*, not state, law. *See Carpenter v. Shaw*, 280 U.S. 363, 368–69 (1930) ("Where a federal right is concerned we are not bound by the characterization given to a state tax by the state courts or legislatures, or relieved by it from the duty of considering the real nature of the tax and its effect upon the federal right asserted."). Moreover, whereas tax exemptions are generally construed narrowly, tax exemptions granted to Indians by the federal government are liberally construed. *Id.* at 366-37.

A tax is "a monetary charge imposed by the government on persons, entities, or property to yield public revenue." BLACK'S LAW DICTIONARY 1469 (7th ed. 1999). A fee, on the other hand, is generally a "charge for labor or services." *Id.* at 629. Of course, governments can also impose

[4] *See El Paso Apt. Ass'n v. City of El Paso*, 2008 WL 2641350 (W.D. Tx. June 24, 2008) (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 Cnty. of Denver*, 724 P.2d 1356 (Colo. 1986) (state constitution); *Teter v. Clark Cnty.*, 104 Wash. 2d 227 (1985) (state constitution); *State v. Jackman*, 60 Wis. 2d 700 (1973) (state constitution).

fees. And "[t]he line between a tax and a fee, and a tax and a fine, is sometimes fuzzy . . . ." *Empress Casino Joliet Corp. v. Balmoral Racing Club, Inc.*, 651 F.3d 722, 729 (7th Cir. 2011) (*en banc*). Yet, courts are frequently required to distinguish between them. The issue most frequently arises in federal courts in the context of deciding whether the requested relief is barred by the Tax Injunction Act, 28 U.S.C. § 1341.

Perhaps the clearest discussion of the issue appears in *San Juan Cellular Telephone Co. v. Public Service Commission of Puerto Rico*, 967 F.2d 683 (1st Cir.1992). There, then Chief Judge, now Justice, Breyer set out a framework for distinguishing between a tax and a fee:

> Courts have had to distinguish "taxes" from regulatory "fees" in a variety of statutory contexts. Yet, in doing so, they have analyzed the legal issues in similar ways. They have sketched a spectrum with a paradigmatic tax at one end and a paradigmatic fee at the other. The classic "tax" is imposed by a legislature upon many, or all, citizens. It raises money, contributed to a general fund, and spent for the benefit of the entire community. *See, e.g., National Cable Television Ass'n. v. United States*, 415 U.S. 336, 340-41(1974); *Robinson Protective Alarm Co. v. City of Philadelphia*, 581 F.2d 371, 376 (3d Cir.1978); *Butler* [*v. Maine Supreme Judicial Court*, 767 F. Supp. [17] at 19 (D. Me. 1991). The classic "regulatory fee" is imposed by an agency upon those subject to its regulation. *See New England Power Co. v. U.S. Nuclear Regulatory Commission*, 683 F.2d 12, 14 (1st Cir.1982). It may serve regulatory purposes directly by, for example, deliberately discouraging particular conduct by making it more expensive. *See, e.g., South Carolina ex rel. Tindal v. Block*, 717 F.2d 874, 887 (4th Cir.1983), *cert. denied*, 465 U.S. 1080 (1984). Or, it may serve such purposes indirectly by, for example, raising money placed in a special fund to help defray the agency's regulation-related expenses. *See, e.g., Union Pacific Railroad Co. v. Public Utility Commission*, 899 F.2d 854, 856 (9th Cir.1990); *In re Justices*, 695 F.2d at 27; *see also National Cable*, 415 U.S. at 343-44.

967 F.2d at 685. Distilled further, *San Juan Cellular* suggests that in determining whether a government exaction is a tax or a fee, a court should focus on three questions: "(1) What entity imposed the fee? (2) What parties are being assessed the fee? (3) Is the revenue generated by the fee expended for general public purposes or used for the regulation and benefit of the parties upon

whom the assessment is imposed?" *McLeod v. Columbia County, GA*, 254 F. Supp.2d 1340, 1345 (S.D. Ga. 2003). If the exaction is imposed by the legislature upon all, or almost all, of the citizens or property to accomplish a general public purpose, it is more likely to be a tax. If, on the other hand, the charge is imposed by a government agency on a specific subset of citizens or conduct subject to regulation by the agency and is set at such amount as to discourage certain conduct or defray the costs of the agency, it is a fee.[5]

In *McLeod*, the plaintiff landowners sued their county in state court seeking to enjoin the assessment and collection charges imposed under a storm water management ordinance virtually identical to the one at issue here. Upon removal of the case to federal court, the Court raised the question of whether the Tax Injunction Act precluded federal jurisdiction. Using the framework described above, the Court concluded that the charges imposed on the property constituted taxes and remanded the case back to state court for lack of federal jurisdiction. I find the Court's analysis persuasive here.

Like the ordinance in *McLeod*, a fair reading of the Ordinance in this case reveals that it is the legislative body, here, the Village Board, that imposed the fee. Although the Village established a Storm Water Management Utility, the Ordinance expressly states that "the Village Board is

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[5] The Village offers a different test in its attempt to determine whether charges imposed by local governments upon federal facilities constitutes a service charge or a tax. It cites *Massachusetts v. United States*, 435 U.S. 444 (1978). The Tribe notes that the question in Massachusetts was whether a federal charge imposed on state interests constituted a tax — not whether a local charge could be imposed on a federal interest. *Id.* at 446. Federal immunity from state taxation is predicated on the Supremacy Clause whereas state immunity from Federal taxation is *implied* from the states' relationship to the national government within the constitutional scheme. *Id.* at 455. The difference is significant and makes the two analytically distinct. *Massachusetts* is accordingly inapplicable here.

exercising its authority . . . . to set the rates for storm water management services." Ordinance at § 4.502(1). It is the Village, acting through the Storm Water Management Utility that is authorized to "establish such rates and charges as are necessary to finance planning, design construction, maintenance, administration, and operation of the facilities in accordance with the procedures set forth in this ordinance." *Id.* at § 4.503(2). Finally, the Ordinance states that "The amount of the charge to be imposed, for each customer classification shall be made by resolution of the Village Board." *Id.* at § 4.505(3). Thus, just as the Village Board is authorized to levy taxes on property within the Village, *see* Wis. Stat. § 61.34(4), it also is the body that determines the Storm Water Management charges. In fact, the assessments made under the Ordinance are collected in the same way and using the same procedure as unpaid property taxes. Ordinance at § 4.508.

The question of who is assessed the fees also supports the conclusion that the fee is a tax. The Ordinance authorizes an assessment on all property within the district, whether developed or not. *Id.* § 4.507(4). It expressly directs the Village Board to "establish a uniform system of storm water service charges that shall apply to each and every lot or parcel within the Village." *Id.* at § 4.505(1). The fact that the Village has not fully implemented its program and has so far assessed only the ERU rates and not the base charges authorized by the Ordinance does not alter the analysis. The Village has not suggested that the fact it has failed to so far fully implement the Ordinance reflects any intent to retreat from its claimed authority to impose such charges on all of the Tribe's trust property. Nor has the Village argued that its phased implementation of the Ordinance should somehow change the result.

Finally, the revenue generated by the fees is for a public benefit, as opposed to the individual owners of the property upon which the charges are assessed. *See McCleod*, 254 F. Supp.2d at 1348

("Storm water management was and is the type of service that is often funded through general tax revenue."). Storm water run-off can carry pollutants into waterways and thereby cause damage to the environment. But the resulting damage is to the public generally, not the individual property owner. Everyone who lives in the Village, and even many outside the Village boundaries, have an interest in preventing environmental damage due to storm water run-off.

The Village argues that the assessments should nevertheless be considered fees rather than taxes because the rates imposed are set at a rate reasonably estimated to cover the costs of the program, and the Village created and maintains a separate budget for storm water management purposes. All revenue generated from the fees are used solely to fund the Storm Water Management Utility in the performance of its duties, and none of the money is commingled with the Village's general fund. But the segregation of funds for a particular purpose is not enough to change the character of the assessment. In *Schneider Transport, Inc. v. Cattanach*, for example, the Seventh Circuit held that registration fees for trucks charged by the Wisconsin Department of Transportation was a "tax" even though the fees were deposited in a segregated fund used for highway construction. 657 F.2d 128, 132 (7th Cir.1981), cert. denied, 455 U.S. 909 (1982). Storm water management and control, like highway construction, is a public service typically funded by government through tax revenue.

In reality, the Village's funding mechanism for its storm water management utility operates comparably to a school tax. Each property owner within a community is assessed a school property tax regardless of whether the property owners themselves have children attending public schools. The goal of school property tax is, of course, to benefit the community as a whole rather than individuals receiving a denominated service. Like a school tax, Hobart's ordinance assesses each

property within the community a charge, the revenues of which will be collected to support the operation of the storm water management utility that benefits the community as a whole. In short, Hobart's "charge" is a tax for all meaningful purposes here. And like property taxes used to pay for schools, the storm water management fees confer a benefit on the public generally, as opposed to only those who pay.

Notwithstanding these considerations, the Village argues that in Section 313 of the CWA Congress expressly defined storm water charges as permissible fees owed for otherwise tax exempt properties, including Indian Tribes. Section 313 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). 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. Based on these provisions, the Village argues that Congress has expressly defined storm water charges as permissible fees, rather than taxes, and authorized the collection of such fees from Indian Tribes otherwise immune from state and local taxation. (Hob. Br. in Op., ECF No. 57, at 6.)

Section 313 of the CWA, however, is not the kind of clear statement of intent that is required to allow local taxation of Indian trust land. *See Cass County, Minn. v. Leech Lake Band of Chippewa Indians*, 524 U.S. 103, 110 (1998) ("We have consistently declined to find that Congress has authorized such taxation unless it has 'made its intention to do so unmistakably clear.' (quoting *Yakima*, 502 U.S. at 258)). That section, by its terms, establishes the Government's duty to comply with the substantive and procedural requirements of the CWA at federal facilities and explicitly waives its immunity for civil penalties. *U.S. Dept. of Energy v. Ohio*, 503 U.S. 607, 627-28 (1992). But it says nothing about Indian tribes or property owned by Indian tribes. It therefore falls far short of the unmistakable clarity required for a waiver of immunity from taxation.

That the CWA does not provide the Village the power to tax the Tribe is also clear from the general framework of the CWA. The CWA prohibits the discharge of pollutants into navigable waters unless the discharge is authorized under a National Pollutant Discharge Elimination System (NPDES) permit. 33 U.S.C. § 1342. Permits can be issued by the EPA or by state agencies subject to EPA review. 33 U.S.C. § 1342. States can establish their own water quality standards for waters within their boundaries. 33 U.S.C. § 1313. In 1987, Congress amended the CWA to authorize Indian tribes to apply to the EPA for authorization to establish and administer a system for issuing permits within 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) (emphasis added);*see also State of Washington, Dep't of Ecology v. EPA*, 752 F.2d 1465 (9th Cir. 1985) (construing a related environmental statute and concluding it precluded state and local authority over tribal lands). Nothing in the language of Section 313 of the CWA suggests that Congress intended to provide State or local governments authority to administer the CWA on Indian trust lands. The statute merely requires that *federal agencies* with jurisdiction over property or facilities comply with local regulations regarding storm water management.

The Village also suggests that Congress' 2011 amendment to the CWA adding subsection (c), which defined the "reasonable service charges" for which federal agencies are liable under subsection (a), constitutes a Congressional determination that such charges are not taxes and can thus be properly assessed against tribal trust property. Again, the Village reads too much into the language of the statute. It simply states that the federal agency in charge of the facility is to be responsible for the charges regardless of what they are called. For the reasons set forth, the Court concludes that the Village's storm water management charges against the Tribe's trust property constitute an impermissible tax. Accordingly, the Village will be enjoined from assessing or collecting such taxes.

B. The Village May Not Collect Its Storm Water Management Charges Against the Government.

Having concluded that the storm water management charges on the subject trust lands constitute an impermissible tax, I now turn to the question of whether the Village's third-party complaint against the United States should be dismissed. The Government argues that dismissal

is appropriate because this Court lacks subject matter jurisdiction and the complaint fails to state a claim upon which relief may be granted. Before reaching the merits on the Government's 12(b)(6) motion to dismiss, the Court must first determine whether there is any arguable basis for subject matter jurisdiction.

Under Federal Rule of Civil Procedure 12(b)(1), a court may dismiss an action for lack of subject matter jurisdiction. "[T]he district court must accept the complaint's well-pleaded factual allegations as true and draw reasonable inferences from those allegations in the plaintiff's favor." *Transit Express, Inc. v. Ettinger*, 246 F.3d 1018, 1023 (7th Cir. 2001) (citing *Rueth v. EPA*, 13 F.3d 227, 229 (7th Cir. 1993)). However, the plaintiff bears the burden of establishing jurisdictional requirements. *Apex Digital, Inc. v. Sears, Roebuck & Co.*, 572 F.3d 440, 443 (7th Cir. 2009). Moreover, when considering a motion to dismiss for lack of jurisdiction, "the district court may properly look beyond the jurisdictional allegations of the complaint and view whatever evidence has been submitted on the issue to determine whether in fact subject matter jurisdiction exists." *Johnson v. Apna Ghar, Inc.*, 330 F.3d 999, 1001 (7th Cir. 2003) (quoting *Long v. Shorebank Dev. Corp.*, 182 F.3d 548, 554 (7th Cir. 1999)).

In a suit against the United States, "the jurisdictional allegations in the plaintiff's complaint must refer to a statute that waives the sovereign's immunity." *Metro. Sanitary Dist. Of Greater Chicago v. United States*, 737 F. Supp. 51, 52 (N.D. Ill. 1990). The Village's complaint refers to § 313 of the CWA, 33 U.S.C. § 1323(a), and asserts the statute is a waiver of the Government's immunity. Under 28 U.S.C. § 1331, federal courts "have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." According to Supreme Court precedent, "[t]his provision for federal-question jurisdiction is invoked by and large by plaintiffs

pleading a cause of action created by federal law." *Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg.*, 545 U.S. 308, 312 (2005). A federal cause of action "may be created either expressly or by implication." *Id.* at 282. Courts have held that Congressional intent to create a federal cause of action can be found in a federal statute "permit[ting] a claimant to bring a claim in federal court." *Int'l Union of Operating Eng'rs, Local 150, AFL-CIO, v. Ward*, 563 F.3d 276, 283 (7th Cir. 2009). As an initial matter, the Village's claim does arise under the laws of the United States sufficient to confer jurisdiction under § 1331 provided that the Village's interpretation of the statute is correct.

The Village, in its amended third-party complaint seeks declaratory judgment that "it may impose upon the property held in trust for the benefit of the Oneida Tribe of Indians of Wisconsin ("Tribe"), its storm water ordinances and assert fees and charges associated therewith, all pursuant to the Village's storm water ordinances and the Clean Water Act." (Am. Third Pty. Compl., ECF No. 43, ¶ 1.) For the reasons outlined above, the Village's claim that it can assess its charges against the Tribe's trust property fails. Since the Tribe's trust property is immune, there is no liability to impose upon the United States. To require the United States to pay the Village's storm water management fees would circumvent the immunity from taxation that Indian trust lands enjoy. For this reason alone, the Village's claims against the United States should be dismissed.

The Village contends, however, that the United States is liable in its own right because it owns the property in trust for the Tribe and has expressly waived its own immunity. The Village again relies on CWA Section 313(a), claiming that this subsection contains, if not a waiver of

immunity as to the Tribe, at least a waiver of United States' immunity. (Hobart Br. in Opp'n, ECF No. 58 at 3–6.) To repeat, Section 313(a) provides in pertinent part :

> Each department, agency, or instrumentality of the executive, legislative, and judicial branches of the Federal Government (1) having *jurisdiction over any property* or facility, . . . 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). According to the Village, the language "jurisdiction over any property" is a waiver of the Government's immunity as it relates to its position as title holder over the subject trust lands. (ECF No. 58 at 3–4.)

As the Government points out, Congress can, of course, waive federal sovereign immunity to suit, *Block v. North Dakota*, 461 U.S. 273, 280 (1983), but it must do so unequivocally. Under the Supreme Court's strict construction rule, any waiver of sovereign immunity must not only be express, but also must be "construed strictly in favor of the sovereign" and "not 'enlarged . . . beyond what the language requires.'" *Dep't of Energy v. Ohio*, 503 U.S. at 615 (citations omitted). The waiver may not be implied, assumed, or based upon inference or ambiguity. *Lane v. Pena*, 518 U.S. 187, 192 (1996); *Bethlehem Steel Corp. v. Bush*, 918 F.2d 1323, 1329 (7th Cir. 1990). The existence of "plausible" alternative interpretations of statutory language "is enough to establish that a reading imposing monetary liability on the Government is not 'unambiguous,'" *United States v. Nordic Vill., Inc.*, 503 U.S. 30, 37 (1992), and therefore cannot stand.

The language of Section 313 does not reasonably support a construction that would, in essence, substitute the immunity of Indian tribes from taxation of their trust property for liability on the part of the federal government. Certainly, it falls far short of unequivocally indicating such an

intent by Congress. By its terms, Section 313 requires federal facilities to comply with the specified state and local water pollution control requirements and therefore is a waiver of sovereign immunity from suit in specific instances. Simply stated, holding bare legal title over Indian lands is not sufficient to bring such property within the jurisdiction of the United States within the meaning of Section 313(a). The Village's claim against the United States therefore fails. The United States is immune from the Village's suit and subject matter jurisdiction is therefore lacking. Accordingly the Village's third party claims will be dismissed.

CONCLUSION

As suggested above, this is not the first case over which this Court has presided between the Tribe and the Village, and it is unlikely to be the last. The central problem is that a significant portion of land interspersed throughout the Village is owned by a sovereign Indian tribe and is therefore not subject to the Village's taxing and regulatory or zoning powers. Although counsel for the Government stated at oral argument that checkerboard patterns of Indian trust land within municipal boundaries are not unique to the Village of Hobart, it is clear that such situations present serious problems for local governments. Providing and funding public services becomes more difficult as various parcels are removed from the municipal tax rolls and are no longer subject to municipal zoning or land use regulations. *See* Amanda Hettler, *Beyond A Carcieri Fix: The Need For Broader Reform Of The Land-Into-Trust Process Of The Indian Reorganization Act Of 1934*, 96 Iowa L. Rev. 1377, 1396-98 (2011). These difficulties are exacerbated when the land placed in trust is interspersed throughout the municipal boundaries. In order to overcome them, there must be cooperation between the Village and the Tribe. The plain fact, however, is that the interests of

the Village and the Tribe are not aligned; their constituencies are not the same and they have vastly different plans for the future. As a result, cooperation is more difficult. But this does not change the law.

For the reasons set forth above, the "charges" in the Ordinance cannot stand against the Tribe. The "charges" under the Ordinance constitute an impermissible tax on the Tribe's trust property. The Tribe is therefore immune from Hobart's Storm Water Management Utility Ordinance. Accordingly, the Tribe's motion for summary judgment (ECF No. 47) is **GRANTED**. The clerk is directed to enter judgment in favor of the Tribe declaring that the Tribe's trust land is immune from the Village's Storm Water Management Utility Ordinance and that the Village lacks authority to impose charges under the Ordinance on the Tribe's land directly or indirectly. The judgment shall also enjoin the Village from attempting to impose and collect "charges" under the Ordinance from the Tribe or from foreclosing on the Tribe's lands.

Furthermore, the Village's claims against the United States are dismissed for lack of subject matter jurisdiction because Section 313 of the CWA does not constitute a waiver of the United States' sovereign immunity over Indian trust lands. Accordingly, the United States' motion to dismiss (ECF No. 53) is **GRANTED**.

SO ORDERED this 5th day of September, 2012.

s/ William C. Griesbach
William C. Griesbach
United States District Judge

AO 450 (Rev. 5/85) Judgment in a Civil Case ⊗

United States District Court

EASTERN DISTRICT OF WISCONSIN

ONEIDA TRIBE OF INDIANS OF WISCONSIN,
Plaintiff,

JUDGMENT IN A CIVIL CASE

v.

Case No. 10-C-137

VILLAGE OF HOBART, WISCONSIN,
Defendant and Third-Party Plaintiff,

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.

☐ **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☒ **Decision by Court.** This action came before the Court for consideration.

IT IS HEREBY ORDERED AND ADJUDGED that the Oneida Tribe of Indians of Wisconsin's trust land is immune from the Village of Hobart, Wisconsin's Storm Water Management Utility Ordinance and that the Village lacks authority to impose charges under the Ordinance on the Tribe's land directly or indirectly.

IT IS FURTHER ORDERED that the Village of Hobart, Wisconsin is enjoined from attempting to impose and collect "charges" under the Ordinance from the Tribe or from foreclosing on the Tribe's lands.

IT IS FURTHER ORDERED that the Village of Hobart, Wisconsin's claims against the United States are dismissed for lack of subject matter jurisdiction.

Approved: s/ William C. Griesbach
WILLIAM C. GRIESBACH
United States District Judge

Dated: September 5, 2012.

JON W. SANFILIPPO
Clerk of Court

s/ Terri Lynn Ficek
(By) Deputy Clerk

Only the Westlaw citation is currently available.

United States District Court, W.D. Washington, at Seattle.
UNITED STATES of America, Plaintiff,
v.
CITY OF RENTON, et al., Defendants.

No. C11–1156JLR.
May 25, 2012.

Jonathan D. Carroll, Joseph E. Hunsader, U.S. Department of Justice, Washington, DC, Brian C. Kipnis, U.S. Attorney's Office, Seattle, WA, for Plaintiff.

Garmon Newsom, II, Mark Edward Barber, City of Renton, Renton, WA, Linda Anne Marousek, City of Vancouver, Vancouver, WA, for Defendants.

ORDER

JAMES L. ROBART, District Judge.

I. INTRODUCTION

***1** Plaintiff United States of America ("United States") ceased paying fees assessed by Defendants City of Renton ("Renton") and City of Vancouver ("Vancouver") for their stormwater systems in 2009 and 2010, respectively, but resumed paying the fees effective January 4, 2011. The United States seeks the return of any fees paid prior to January 4, 2011. Renton and Vancouver (collectively, "the Cities") seek the fees not paid prior to that date. Before the court at this time is the Cities' motion for partial summary judgment (Dkt. # 17) and the United States' motion to defer ruling on the Cities' motion for partial summary judgment, under Federal Rule of Civil Procedure 56(d) (Dkt. # 30). Having reviewed the submissions of the parties, the record, and the relevant law, and having heard oral argument on May 17, 2012, the court GRANTS in part and DENIES in part the Cities' motion for summary judgment (Dkt.# 17) and DENIES in part and DENIES in part as MOOT the United States' Rule 56(d) motion (Dkt.# 30).

II. BACKGROUND AND PROCEDURAL HISTORY

A. The Clean Water Act

As amended in 1977, § 313 of the Clean Water Act states,

> Each department, agency, or instrumentality of ... the Federal Government (1) having jurisdiction over any property or facility ... 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. The preceding sentence shall apply (A) to any requirement whether substantive or procedural ... and (C) to any process and sanction .... This subsection shall apply notwithstanding any immunity of such agencies, officers, agents, or employees under any law or rule of law.

Clean Water Act ("CWA") § 313(a) (*see* 33 U.S.C. § 1323(a)) (as amended by Pub.L. 95–217, § § 60, 61(a), 91 Stat. 1566 (1977)).[FN1]

> FN1. The 1972 text of the Clean Water Act linked "reasonable service charges" to "Federal, State, interstate, and local requirements." *See* An Act to amend the Federal Water Pollution Control Act, Pub.L. No. 92–500, 86 Stat. 816, 875 (1972). It stated that the Federal Government "shall comply with Federal, State, interstate, and local requirements respecting control and abatement of pollution to the same extent that any person is subject to such requirements, including the payment of reasonable service charges." *Id.* In 1976, the Supreme Court held that Congressional consent to local regulation under the 1972

> Act did not extend to state permitting requirements in part because the language was not unambiguous that fees for obtaining a permit, and thus the requirement of a permit itself, were a part of the "reasonable service charges" required by the Act. *EPA v. Cal. EPA. ex rel. State Water Resources Control Bd.*, 426 U.S. 200, 216–17, 96 S.Ct. 2022, 48 L.Ed.2d 578 (1976). The following year, Congress responded with amendments to the Clean Water Act regarding substantive and procedural requirements, including permitting, and an explicit waiver of sovereign immunity. Thus, the requirement that the Federal Government pay reasonable service charges appears to be part of Congress' consent that the Federal Government "be subject to, and comply with ... local requirements." § 313(a).

To clarify the phrase "reasonable service charges," Congress added subsection (c) to the Clean Water Act ("Stormwater Amendment") in 2011. It states,

> 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 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.

***2** CWA § 313(c)(1) (*see* 33 U.S.C. § 1323(c)) (as amended by Pub.L. 111–378, § 1, 124 Stat. 4128 (2011)).

B. Renton's Stormwater Program

Renton has operated "a storm and surface water utility" since 1987. (Zimmerman Aff. (Dkt.# 18) ¶ 2.) Renton is required under the Clean Water Act to take efforts to minimize pollution from stormwater, and it maintains its stormwater program to comply with those requirements and with requirements under Washington State law and the National Pollution Discharge Elimination System. (*Id.* ¶ 3.) It charges rates based on square footage of impervious surface. (*Id.* ¶ 4.) "The fees collected are used solely for expenditures associated with the surface water utility to provide, maintain, and improve Renton's municipal separate storm sewer system." (*Id.* ¶ 5.)

The Bonneville Power Administration ("BPA"), an entity of the United States, administers two parcels within Renton, known as the Maple Valley Substation. (*Id.* ¶ 4.) BPA paid Renton stormwater fees for those parcels until July 30, 2009, when BPA claimed sovereign immunity and terminated its payments. (*Id.*) BPA resumed payments for the storm and surface water fees with an effective date of January 4, 2011. (*Id.*)

C. Vancouver's Stormwater Program

Vancouver has operated a "municipal separate storm sewer system" since January 1995. (Carlson Aff. (Dkt.# 19) ¶ 2.) Like Renton, Vancouver is required under the Clean Water Act to take efforts to minimize pollution from stormwater, and it maintains the system to comply with those requirements and requirements under Washington State law and the National Pollution Discharge Elimination System. (*Id.*) It charges rates based on the square footage of impervious surface, with uniform rates for

each class of users. (*Id.*)

BPA owns property, the Ross Complex facility, within Vancouver. (*Id.* ¶ 5.) In 1996, BPA provided a map to Vancouver showing the impervious surface at the facility. (*Id.*) Beginning with an effective date of January 1, 1995, BPA paid the stormwater fees until January 21, 2010. (*Id.*)

After Congress passed the Stormwater Amendment, BPA submitted questions to Vancouver about its "method of rate calculation, services provided, and methods of rate reduction," and it met with the city on May 18, 2011. (*Id.* ¶ 7.) In September 2011, BPA resumed payments for the stormwater fees, retroactive to January 4, 2011. (*Id.*) The United States declares that it is "paying the newly accruing chares [sic] only as it continues to negotiate over the charged rates to ensure that ... the rates are reasonable and nondiscriminatory." (Reply to U.S. Mot. (Dkt.# 40) at 6.)

D. Procedural History

On July 12, 2011, the United States filed a complaint in the Western District of Washington for declaratory relief and a refund of fees paid to Renton and Vancouver prior to January 4, 2011. (Compl.(Dkt.# 1).) Count 1 alleges that the stormwater fees are taxes and that the United States has not waived its immunity to those taxes prior to January 4, 2011. (*Id.* ¶¶ 22–24.) Count 2 alleges that the United States is not liable for late payment penalties. (*Id.* ¶ 27.) Count 3 alleges that the United States is entitled to a refund for fees paid to Renton between July 12, 2005, and June 30, 2009, in the amount of $38,606.00. (*Id.* ¶ 30.) Count 4 alleges that the United States is entitled to a refund for fees paid to Vancouver between July 12, 2005, and January 31, 2010, in the amount of $443,148.00. (*Id.* ¶ 33.) The United States requests that the court enter a judgment declaring that it is not liable for any charges prior to January 4, 2011, and directing the Cities to return any fees paid between July 12, 2005, and January 4, 2011. (*Id.* at 6.)

***3** Renton filed a counterclaim requesting, with respect to King County Tax Parcel No. 2023059082, $7,530.75 for unpaid fees from December 30, 2008, through June 30, 2009, and a late fee of $95.03; $8,242.44 for unpaid fees from July 30, 2009, through December 30, 2009; $8,242.44 for unpaid fees from January 30, 2010, though June 30, 2010; and $8,370.84 for unpaid fees from July 30, 2010, through January 3, 2011. (Renton Counterclaim (Dkt.# 9) ¶¶ 58–59, 61, 63, 65.) Renton also requests, with respect to Tax Parcel No. 2123059042, $8,525.72 for unpaid fees from January 30, 2008, through January 3, 2011. (*Id.* ¶ 67.) It further requests judgment for past due penalties and interest. (*Id.* ¶ E.)

Vancouver asserts in its answer and counterclaim that the amount the United States paid from July 12, 2005, though January 31, 2010, was $418,599.04, not $443,148.00. (Vancouver Counterclaim (Dkt.# 10) ¶ 32.) It also requests $2,999.37, including a 10% penalty, for unpaid fees from January 22, 2010, through January 31, 2010; $102,278.66—or $9,298.06 for each month from February 1, 2010, through December 31, 2010, including a 10% penalty; and $899.81, including a 10% penalty, for the period from January 1, 2011, through January 3, 2011. (*Id.* ¶¶ 58–82.) Vancouver also requests judgment for past due penalties and interest. (*Id.* ¶ E.)

On February 7, 2012, the Cities filed a joint motion for partial summary judgment. (SJ Mot. (Dkt.# 17).) They ask the court to rule that (1) the Clean Water Act waives the sovereign immunity of the United States with respect to payments for reasonable service charges imposed by local governments for the control and abatement of water pollution; (2) the Stormwater Amendment was a clarification, rather than an amendment, of the United States' waiver of immunity and responsibility to pay reasonable service charges under the Clean Water Act; and (3) the United States is responsible for paying stormwater management fees imposed prior to January 4, 2011. (*Id.* at 11–12.)

In response, the United States argues that a

waiver of sovereign immunity and the scope of a waiver must be unambiguous, and that sovereign immunity for the stormwater charges was not waived until the 2011 Stormwater Amendment. (Resp. to SJ Mot. (Dkt.# 25) at 14.) The United States further asserts that the charges imposed are taxes and not service charges because it never requested a service, and that the Cities have not provided a service to the United States. (Statement of Material Facts in Opposition to SJ Mot. ("U.S.Facts") (Dkt.# 26) ¶ 2.) The United States also argues that the Cities have not demonstrated that their stormwater charges automatically qualify as reasonable service charges, in particular the requirement that they be nondiscriminatory and that the rates be based on a fair approximation of the United States' contribution to stormwater pollution. (Resp. to SJ Mot. at 27.)

On March 23, 2012, the United States filed a motion to defer ruling on the Cities' motion for partial summary judgment, pursuant to Rule 56(d). (U.S.Mot.(Dkt.# 30).) The United States requests—should the court conclude that the United States has not submitted sufficient evidence to create a genuine dispute of material fact as to the Cities' motion for summary judgment—that the court give it additional time to conduct discovery. FN2 (*Id.* at 3; Reply to U.S. Mot. at 3.)

FN2. The United States also requests that the court grant partial summary judgment that the 2011 Stormwater Amendment is not retroactive and that the Cities' stormwater charges did not qualify as reasonable service charges prior to the 2011 amendment. (Reply to U.S. Mot. at 2, 8.) The court will not consider this request as it was improperly raised in a reply brief supporting a non-dispositive motion.

III. ANALYSIS

A. The Cities' Motion for Summary Judgment

***4** The court will first review the standards for summary judgment and for determining whether Congress has waived the United States' sovereign immunity. It will then analyze the Cities' claims that: (1) the Clean Water Act waives sovereign immunity with respect to payments for reasonable service charges, (2) the Stormwater Amendment was a clarification rather than an amendment, and (3) the United States is responsible for paying reasonable service charges for stormwater programs prior to the Stormwater Amendment. For the reasons described below, the court grants the Cities' motion for summary judgment on the first two issues, and grants in part and denies in part the Cities' motion on the third issue.

1. Summary Judgment Standard

Summary judgment is proper "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." Fed.R.Civ.P. 56(a). The court draws "all reasonable inferences supported by the evidence in favor of the non-moving party." *Satey v. JPMorgan Chase & Co.*, 521 F.3d 1087, 1091 (9th Cir.2008) (citations and quotations omitted).

The moving party has the initial burden of producing evidence or showing the absence of evidence and the burden of persuasion on the motion. *Nissan Fire & Marine Ins. Co. v. Fritz Cos.*, 210 F.3d 1099, 1102 (9th Cir.2000). The moving party may meet its burden of production by producing "evidence negating an essential element of the nonmoving party's case" or by showing "that the nonmoving party does not have enough evidence of an essential element of its claim or defense to carry its ultimate burden of persuasion at trial." *Id.* at 1106. The moving party must first have "made reasonable efforts ... to discover whether the nonmoving party has enough evidence to carry its burden of persuasion at trial." *Id.* at 1105. Then, the moving party "need only point out that there is an absence of evidence to support the nonmoving party's case." *Devereaux v. Abbey*, 263 F.3d 1070, 1076 (9th Cir.2001) (citations and quotations omitted).

If the moving party carries its initial burden of production, the nonmoving party "must produce evidence to support its claim or defense." *Nissan*,

210 F.3d at 1103. The nonmoving party "must provide ... evidence that set[s] forth specific facts showing that there is a genuine issue for trial." *Devereaux*, 263 F.3d at 1076 (internal quotations and citations omitted). If the nonmoving party does not "produce enough evidence to create a genuine issue of material fact, the moving party wins the motion for summary judgment." *Nissan*, 210 F.3d at 1103.

2. Waiver of Sovereign Immunity Standard

"[A] waiver of sovereign immunity must be unequivocally expressed in statutory text." *F.A.A. v. Cooper*, —— U.S. ——, ——, 132 S.Ct. 1441, 1448, 182 L.Ed.2d 497 (2012) (citations and quotations omitted). "Any ambiguities in the statutory language are to be construed in favor of immunity," and "[a]mbiguity exists if there is a plausible interpretation of the statute that would not authorize money damages against the Government." *Id.* Moreover, any ambiguities in the scope of a waiver are construed in favor of the Government. *Id.* Courts cannot "expand the scope of Congress' sovereign immunity waiver beyond what the statutory text clearly requires," *id.* at 1453, but they also cannot "narrow the waiver that Congress intended," *Aageson Grain & Cattle v. U.S. Dept. of Agric.*, 500 F.3d 1038, 1045 (9th Cir.2007) (quoting *U.S. v. Kubrick*, 444 U.S. 111, 117–18, 100 S.Ct. 352, 62 L.Ed.2d 259 (1979)).

***5** The Ninth Circuit has held that a waiver of sovereign immunity "will not be applied retroactively if" it is established in a "new law [that] provides a *new* waiver of sovereign immunity." *Or. Natural Desert Ass'n v. Locke*, 572 F.3d 610, 617 (9th Cir.2009) (emphasis in original). It appears to be a novel question of law, however, whether a new law may be applied retroactively, in the absence of a specific statement declaring the law's retroactive effect, when it purports to clarify an *existing* waiver of sovereign immunity.

The Supreme Court has held "that the sovereign immunity canon is a tool for interpreting the law and that it does not displace the other traditional tools of statutory construction." *Cooper*, 132 S.Ct. at 1448 (citations, quotations, and indications of alterations omitted). Congress does not have to "use magic words" to waive sovereign immunity, but "the scope of Congress' waiver [must] be clearly discernable [sic] from the statutory text in light of traditional interpretive tools." *Id.*

Among these interpretive tools is Congress' power to clarify the law—"to confirm what the law has always meant." *Beverly Cmty. Hosp. Ass'n v. Belshe*, 132 F.3d 1259, 1265 (9th Cir.1997). "Subsequent legislation declaring the intent of an earlier statute is entitled to great weight in statutory construction." *Loving v. United States*, 517 U.S. 748, 770, 116 S.Ct. 1737, 135 L.Ed.2d 36 (1996) (quotations, citations, and indications of alteration omitted); *see also Beverly*, 132 F.3d at 1265. This is particularly true where Congress formally declares an act to be a clarification of the earlier statute. *Beverly*, 132 F.3d at 1265–66. When a court thus deems an amendment to be "clarifying rather than substantive," the amendment is "[n]ormally ... applied retroactively." *ABKCO Music, Inc. v. LaVere*, 217 F.3d 684, 689 (9th Cir.2000) (citations and quotations omitted).

3. The Clean Water Act Unambiguously Waives Sovereign Immunity

The Cities seek a ruling that the Clean Water Act waived the sovereign immunity of the United States with respect to payments for reasonable service charges imposed by local governments for the control and abatement of water pollution. (SJ Mot. at 11–12.) Since 1977, the Clean Water Act has required that the Federal Government comply with all state 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." CWA § 313(a), as amended in 1977 (*see* 33 U.S.C. § 1323). The Clean Water Act states that such compliance is necessary "notwithstanding any immunity ... under

any law or rule of law." *Id.* This language reflects an unequivocal and unambiguous waiver of sovereign immunity. *See Cooper,* 132 S.Ct. at 1448. The court concludes, based on the above-cited language, that Congress clearly waived the Federal Government's sovereign immunity from the "payment of reasonable service charges" for "the control and abatement of water pollution." FN3 § 313(a). Moreover, the United States conceded in oral argument that it disputes only the scope of the waiver prior to the Stormwater Amendment, not the existence of the waiver of reasonable service charges in the 1977 version of the Clean Water Act. As there are no issues of material fact and the Cities have demonstrated that they are entitled to judgment as a matter of law, the court grants the Cities' motion for summary judgment on this issue.

FN3. In *City of Cincinnati v. United States*, the United States District Court for the Southern District of Ohio similarly concluded that a "stormwater system charge [fell] squarely within the waiver of sovereign immunity contained in" the 1977, pre-Stormwater Amendment text of § 313. No. C1–03–731 (S.D.Ohio March 27, 2007) (order regarding summary judgment at 8).

4. The Stormwater Amendment Was a Clarification Rather than a Substantive Amendment of the Clean Water Act

***6** Next, the Cities ask for a ruling that the Stormwater Amendment was a clarification of the waiver of sovereign immunity in the Clean Water Act rather than a substantive amendment to the law. (SJ Mot. at 11.) When Congress added § 313(c) to the Clean Water Act with the Stormwater Amendment, it illustrated the meaning of "reasonable service charges" by stating non-exclusive criteria for such charges. FN4 It also stated that the "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." § 313(c)(1)(B).

FN4. Section 313(c) states:

> 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 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.
>
> CWA § 313(c)(1) (emphasis added).

As discussed above, the statutory language has been clear since the 1977 amendment to the Clean Water Act that Congress waived sovereign immunity from reasonable service charges, and the reasonableness of service charges for stormwater pollution programs was rarely litigated prior to the Stormwater Amendment. In one of those rare cases, the United States District Court for the Southern District of Ohio concluded that the City of Cincinnati's "stormwater system charge [fell] squarely within the waiver of sovereign immunity contained in" the 1977 text of the Act. *City of Cincinnati v. United States,* No. C1–03–731 (S.D.Ohio March

27, 2007) (order regarding summary judgment at 8).

Despite the Act's unambiguous waiver, Congress passed the Stormwater Amendment to clarify Federal responsibility to pay stormwater program charges in response to Federal agencies that had ceased paying the charges, claiming that they were taxes and thus beyond the scope of the Clean Water Act's waiver. (*See* Amicus Br. Ex. A, Congressional Record—House ("House Record") (Dkt.# 24–1) at H8979.) As explained in more detail below, the amendment's title and legislative history, as well as the illustration of reasonable service charges using established criteria for assessing the reasonableness of regulatory fees, indicate that the Stormwater Amendment was a clarification rather than a substantive amendment.

"[S]ubsequent legislation declaring the intent of an earlier statute is entitled to great weight in statutory construction," *Loving*, 517 U.S. at 770 (citations and quotations omitted), particularly when Congress formally declares an act to be a clarification, *Beverly*, 132 F.3d at 1265–66. Here, Congress formally subtitled the Stormwater Amendment as "An Act To amend the Federal Water Pollution Control Act *to clarify* Federal responsibility for stormwater pollution." Federal Responsibility to Pay for Stormwater Programs, Pub.L. 111–378, 124 Stat. 4128 (2011) (emphasis added).

Moreover, while "the statements of one legislator made during debate may not be controlling," the remarks of the sponsors of the bill "are an authoritative guide to the statute's construction." *United States v. Maciel–Alcala*, 612 F.3d 1092, 1100 (9th Cir.2010) *cert. denied*, —— U.S. ——, 131 S.Ct. 673, 178 L.Ed.2d 501 (2010) (quoting *N. Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 526–27, 102 S.Ct. 1912, 72 L.Ed.2d 299 (1982)). Senator Cardin, the sponsor of the Senate version of the bill, stated that it was "a bill to clarify Federal responsibility to pay ... localities for reasonable costs associated with the control and abatement" of stormwater pollution. (Amicus Br. Ex. A, Congressional Record—Senate ("Senate Record") (Dkt.# 24–1) at S1 1023.) Representative Norton, the House sponsor of the bill, similarly stated, "[T]his bill simply clarifies current law, that the Federal Government has a responsibility to pay its normal and customary fees assessed by local governments for managing polluted stormwater runoff from Federal properties, just as private citizens pay." (House Record at H8979.) Representative Norton noted that although § 313 already stated that "the Federal Government shall be subject to, and comply with ... [those] requirements in the same manner, and to the same extent as any nongovernmental entity," the Government Accounting Office had issued letters instructing agencies not to pay the fees. (*Id.*) She stated, "This bill clarifies that ... Federal agencies must *continue* to pay their utility fees." (*Id.* (emphasis added).) While not the sponsor of the bill, Representative Eddie Bernice Johnson similarly stated that § 313 already required that the Federal Government pay stormwater fees, but that Congress had learned in the preceding months that agencies had begun to declare that they had sovereign immunity from paying the fees. (*Id.*) Like the bill's sponsors, she stated that the bill would clarify Federal responsibility to pay those fees. (*Id.*) No one in the House or Senate voiced any contrary views when these speeches were made. (*See id.*)

***7** Furthermore, in establishing non-exclusive criteria for determining whether a fee is a reasonable service charge, Congress appears to have used its power to "confirm what the law has always meant." *Beverly*, 132 F.3d at 1265–66. The language Congress used in formulating those non-exclusive criteria reflects the standards that courts likely would have applied in Clean Water Act litigation prior to the Stormwater Amendment to determine whether a municipality's fee qualifies as a reasonable service charge under the Act. Section 313(c) states that reasonable service charges "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 ...

and (B) used to pay or reimburse the costs associated with any stormwater management program." § 313(c). These requirements parallel those articulated by the Supreme Court for the reasonableness of regulatory taxes. *See Massachusetts v. United States,* 435 U.S. 444, 464, 98 S.Ct. 1153, 55 L.Ed.2d 403 (1978). In *Massachusetts,* the Supreme Court declared that regulatory taxes are valid if they do not discriminate, are based on a fair approximation of use, and are not excessive in relation to the benefit conferred. *Id.*

While *Massachusetts* dealt with fees assessed by the federal government on a state, the First and Second Circuits have recognized the *Massachusetts* test's factors as the test for the reasonableness of regulatory charges on a government entity in general. *State of Me. v. Dep't of Navy,* 973 F.2d 1007, 1013 (1 st Cir.1992) (using *Massachusetts* test to determine whether regulatory charges on a government entity are permissible); *Jorling v. U.S. Dept. of Energy,* 218 F.3d 96, 100–04 (2d Cir.2000) (reasonableness of regulatory charges under Resource Conservation and Recovery Act ("RCRA") determined by *Massachusetts* test); *see also United States v. Manning,* 434 F.Supp.2d 988, 1016 (E.D.Wash.2006) *aff'd,* 527 F.3d 828 (9th Cir.2008) (even if surcharge qualified as regulatory charge under RCRA, would still have to meet *Massachusetts* criteria). Moreover, the *Massachusetts* test was itself merely a restatement of the test the Supreme Court articulated in *Evansville–Vanderburgh Airport Authority v. Delta Airlines, Inc.,* in which the Supreme Court applied the test's factors to a tax levied by an airport authority, as authorized by the state, against airline passengers. *Evansville–Vanderburgh Airport Auth. Dist. v. Delta Airlines, Inc.,* 405 U.S. 707, 716–20, 92 S.Ct. 1349, 31 L.Ed.2d 620 (1972), *superseded by statute as recognized in Nw. Airlines, Inc. v. Cnty. of Kent, Mich.,* 510 U.S. 355, 368, 114 S.Ct. 855, 127 L.Ed.2d 183 (1994); *see also Nw. Airlines,* 510 U.S. at 368 ("[T]he *Evansville* formulation has been used to determine 'reasonableness' in related contexts."); *Am. Trucking Ass'ns, Inc. v. Scheiner,* 483 U.S. 266, 289–90, 107 S.Ct. 2829, 97 L.Ed.2d 226 (1987) (applying the *Evansville* test to state tax on private parties); *United States v. Sperry Corp.,* 493 U.S. 52, 60, 110 S.Ct. 387, 107 L.Ed.2d 290 (1989) (applying the fair approximation prong to Takings Clause analysis); *Garneau v. City of Seattle,* 147 F.3d 802, 815 (9th Cir.1998) (applying the fair approximation prong to Takings Clause analysis).[FN5] As demonstrated by the cases cited above, the factors in the *Massachusetts* test have been recognized as a test of the reasonableness of regulatory charges.

FN5. At oral argument, the United States cited to the Eighth Circuit decision in *United States v. City of Columbia, Mo.,* 914 F.2d 151, 154 (8th Cir.1990), in arguing that the *Massachusetts* test should not be applied here. The court there rejected the use of the *Massachusetts* test in determining "whether a charge levied by a sovereign [on the federal government] was a tax," in part based on the distinctions between state and federal immunity. *United States v. City of Columbia, Mo.,* 914 F.2d 151, 154 (8th Cir.1990). The issue here, however, is not whether reasonable service charges for stormwater programs are taxes, but the use of the *Massachusetts* factors in determining the reasonableness of regulatory charges.

***8** Moreover, prior to the Stormwater Amendment, Congress used similar factors as a test of whether regulatory charges are reasonable. In 1992, Congress clarified the meaning of reasonable service charges that could be levied against the Federal Government under the RCRA by adding that such charges include "any ... other nondiscriminatory charges that are assessed in connection with ... waste regulatory" programs. 42 U.S.C. § 6961; Resource Conservation and Recovery Act of 1976, Pub.L. 94–580, 90 Stat. 2795 (1976); Federal Facility Compliance Act of 1992, Pub.L. 102–386, 106 Stat. 1505 (1992); *see also N.Y. State Dept. of En-*

vtl. Conservation v. U.S. Dept. of Energy, 772 F.Supp. 91, 99 (N.D.N.Y.1991), *supplemented*, 850 F.Supp. 132 (N.D.N.Y.1994) (applying the *Massachusetts* test to determine whether RCRA charges were impermissible taxes or permissible fees).

The legislative history and statutory text demonstrate that even before the Stormwater Amendment, the Clean Water Act waived the government's sovereign immunity and was clear in the requirement that the government pay reasonable service charges. Section 313(c) merely stresses the government's existing responsibility to pay stormwater system fees by setting down common, long-standing requirements for the reasonableness of regulatory fees. Accordingly, the court concludes that the Stormwater Amendment was a clarification rather than a substantive amendment, and grants the Cities' motion for summary judgment on this issue of law.

5. Responsibility for Fees Prior to January 4, 2011

Finally, the Cities ask that the court rule that the United States is responsible for the payment of the stormwater fees imposed prior to January 4, 2011. (SJ Mot. at 12). This issue raises two distinct questions: (1) whether the United States is generally responsible for the payment of reasonable service charges imposed prior to January 4, 2011; and (2) whether it is responsible for the charges imposed by the Cities prior to January 4, 2011. The court addresses each issue in turn.

As discussed above, the statutory text prior to the Stormwater Amendment was clear that the government had to pay reasonable service charges and that the government had waived any claims to sovereign immunity for those charges. As the court has also already discussed, the legislative history demonstrates that the Stormwater Amendment "confirm[ed] what the law has always meant." *Beverly*, 132 F.3d at 1265. Indeed, the House sponsor of the bill, Representative Norton, stated that the purpose of the bill is to tell Federal agencies that they "must *continue* to pay their utility fees." (House Record at H8979 (emphasis added).) The amendment was meant to indicate that the government had to do what it should already have been doing. According to traditional canons of statutory construction, such clarifying statements should be applied retroactively. *ABKCO*, 217 F.3d at 689–90. Thus, it is clear "in light of traditional interpretive tools" that Congress waived the Federal Government's immunity from reasonable service charges prior to January 4, 2011. *Cooper*, 132 S.Ct. at 1448 (traditional tools of statutory construction are applicable to determinations of waiver of sovereign immunity). The Court thus concludes that the United States is responsible for paying reasonable service charges imposed prior to that date.

***9** The court's conclusion is unaffected by the United States' argument that it is immune from retroactively paying such fees because they are taxes or because they are not for services. Absent a waiver by Congress consenting to taxation by a state or local government, the United States is "not subject to any form of state taxation." *Novato Fire Prot. Dist. v. United States*, 181 F.3d 1135, 1138 (9th Cir.1999). The United States can "be charged reasonable fees related to the cost of government services provided," however. *Id.* at 1139.

First, the United States attempts to avoid the retroactive effect of the Stormwater Amendment by asserting that stormwater management fees are taxes from which it had not waived immunity prior to the amendment. (Resp. to SJ Mot. at 6, 13 n. 8; Compl. ¶ 24.) As discussed above, the Stormwater Amendment was merely a clarification of the Clean Water Act, and as a clarification it is entitled to retroactive effect. *See Cooper*, 132 S.Ct. at 1448 (traditional tools of statutory construction applicable to interpreting law granting waiver); *Beverly Cmty. Hosp. Ass'n v. Belshe*, 132 F.3d 1259, 1265 (9th Cir.1997) (one interpretive tool is Congress' power to clarify the law); *ABKCO Music, Inc. v. LaVere*, 217 F.3d 684, 689 (9th Cir.2000) (amendment deemed clarifying normally applied retroactively). The Stormwater Amendment unam-

biguously states that the government is subject to reasonable service charges "regardless of whether that reasonable fee, charge, or assessment is denominated a tax." FN6 § 313(c)(2). Accordingly, even if the stormwater management fees are characterized as taxes, the clarification provided by the Stormwater Amendment indicates that Congress had waived immunity to such taxes even prior to the amendment. The United States' argument is unavailing that it should not have to pay reasonable service charges assessed prior to January 4, 2011, because they are taxes.FN7

FN6. Even without the clarification provided by the Stormwater Amendment, the United States District Court for the Southern District of Ohio, concluded that "stormwater system charge[s] fall[ ] squarely within the waiver of sovereign immunity contained in" the 1977 text. *City of Cincinnati v. United States*, No. C1–03–731 (S.D.Ohio March 27, 2007) (order regarding summary judgment at 8).

FN7. Moreover, the text of the 1972 and 1977 Acts indicates that Congress consented to more than service fees. Local authorities could have assessed reasonable service charges, if such charges were restricted to fees for services provided to the United States, even without the waiver in the Clean Water Act. *See Novato*, 181 F.3d at 1139 (government can be charged reasonable fees related to cost of services provided). Congress went further in the Clean Water Act, however, waiving immunity to requirements that would otherwise be unconstitutional: Congress did so both by its explicit consent to local regulation in the 1972 Act—with the requirement that the Federal Government "be subject to, and comply with ... local requirements," 86 Stat. at 875—and with an explicit waiver in the 1977 Act—with the waiver of "any immunity ... under any law or rule of law" with respect to "local requirements, administrative authority, and process and sanctions," Pub.L. 95–217, § 61(a). *See Envtl. Prot. Agency v. Cal. ex rel. State Water Res. Control Bd.*, 426 U.S. 200, 217, 96 S.Ct. 2022, 48 L.Ed.2d 578 (1976) (stating "rule that federal agencies are subject to state regulation only when and to the extent Congress has clearly expressed such a purpose").

Second, the United States asserts that it should not have to pay the fees because they are not for services—in the sense that the government never "voluntarily sought a benefit or service" and that the "stormwater charges are not imposed for a service or benefit provided to the United States." (Reply to U.S. Mot. at 3–5; Compl. ¶¶ 22–23; U.S. Facts ¶ 2; Resp. to SJ Mot. at 11, 13 n. 8.) This distinction is only important if the United States has no liability because the charges are taxes rather than fees. *See Novato*, 181 F.3d at 1139 (United States may be charged reasonable fees for services but cannot be taxed). The court has already concluded, however, that such fees are not unconstitutional taxes.FN8

FN8. Moreover, as stated by the Federal Circuit in dicta, even an involuntary charge may be a permissible fee rather than an unconstitutional tax. *City of Cincinnati v. United States*, 153 F.3d 1375, 1378 (Fed.Cir.1998). Cincinnati had requested stormwater fees based on a theory of implied contract, and it did not rely on the Clean Water Act or its waiver of immunity. *City of Cincinnati v. United States*, 39 Fed. Cl. 271, 273 (Fed.Cl. Oct.28, 1997). The Court of Federal Claims had ruled both that Cincinnati failed to state a claim for which relief could be granted and that stormwater charges were unconstitutional taxes. *Id.* at 276. Although affirming the Court of Federal Claims on the basis of failure to state a claim, the Federal Circuit

> wrote that the trial court had erred in ruling that a stormwater program charge was an unconstitutional 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." 153 F.3d at 1378.

Furthermore, just as courts are not allowed to widen the scope of a waiver, they are not allowed to narrow it. *Kubrick*, 444 U.S. at 117–18. Nowhere in § 313 does Congress require that a government agency request a service, or even that it receive one. Rather, § 313 requires that government agencies comply with all "local requirements ... 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." § 313(a). Moreover, nowhere in the Clean Water Act does it require that charged services be to the government's benefit. Rather, it directs the United States to comply with requirements "respecting the control and abatement of water pollution." § 313(a).

***10** The United States cites *National Cable Television Association v. United States*, 415 U.S. 336, 340, 94 S.Ct. 1146, 39 L.Ed.2d 370 (1974), in support of its distinction between services and taxes. (Response to SJ Mot. at 13 n. 8.) In *National Cable*, the Supreme Court distinguished taxes and fees in that the latter are "incident to a voluntary act" and "bestow a benefit on the applicant not shared by other members of a society." *Id.* at 340–41. More recently, however, the Court found that the distinction between taxes and fees in *National Cable* did not matter when Congress clearly indicated its intention to delegate to the executive the power to impose "financial burdens, whether characterized as 'fees' or 'taxes.' " *Skinner v. Mid–Am. Pipeline Co.*, 490 U.S. 212, 109 S.Ct. 1726, 1734, 104 L.Ed.2d 250 (1989).

The text of the Clean Water Act requires compliance rather than choice with respect to local requirements, process, sanctions, and charges for stormwater management. While those charges may more closely resemble state and local taxes from which the Federal Government has immunity absent some waiver, Congress waived immunity and required compliance by Federal agencies. As with the non-delegation doctrine at issue in *Skinner*, the difference between taxes and fees is not relevant here as Congress clearly waived its immunity to "local requirements, administrative authority, and process and sanctions ... including reasonable service charges," and required compliance by the Federal Government, as Congress later clarified in the Stormwater Amendment. §§ 313(a) and (c). The United States is therefore responsible for reasonable service charges imposed prior to January 4, 2011. Therefore, the court concludes that there are no genuine issues of fact and that the Cities are entitled to summary judgment as a matter of law with respect to the question whether the United States is responsible for paying reasonable service charges imposed prior to January 4, 2011.

Nevertheless, to be entitled to judgment as a matter of law as to the specific service charges imposed by the Cities prior to January 4, 2011, the Cities must show that there is no dispute as to any material fact and that the charges satisfy the requirements of § 313(c). As discussed above, it is clear by traditional tools of statutory construction that the scope of the waiver of sovereign immunity includes and—by Congress' power to "confirm what the law has always meant," *Beverly*, 132 F.3d at 1265–66—has always included at a minimum the fees that meet the requirements of § 313(c). *See Cooper*, 132 S.Ct. at 1448 (scope of waiver must be clearly discernible in light of traditional interpretive tools). Accordingly, to be entitled to summary judgment on this issue, the Cities must show that their charges meet the requirements of § 313(c), which states that "reasonable service charges" 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 ... and

(B) used to pay or reimburse the costs associated with any stormwater management program." § 313(c).

***11** While the Cities have submitted some evidence relevant to this issue, including supplemental authority provided after oral argument, they have failed satisfy their initial factual burden on summary judgment. The court will not scour the record in an attempt to piece together facts that would satisfy the Cities' burden. *See Little v. Cox's Supermarkets*, 71 F.3d 637, 641 (7th Cir.1995) ("a district court is not required to scour the record [to look] for factual disputes [or] ... to piece together appropriate arguments"); *Greenwood v. F.A.A.*, 28 F.3d 971, 977 (9th Cir.1994) (quoting *United States v. Dunkel*, 927 F.2d 955, 956 (7th Cir.1991)) (" 'Judges are not like pigs, hunting for truffles buried in briefs' "). Viewing the evidence in the light most favorable to the nonmoving party, the court concludes that the Cities have not demonstrated that the fees assessed prior to January 4, 2011, are reasonable service charges within the meaning of § 313(c). Accordingly, the court denies summary judgment on this issue.

Nevertheless, in order to narrow the issues for trial, the court will address three arguments raised by the United States. First, the United States argues that the Cities' rate structures are discriminatory because they provide a discount to the Cities on their street acreage. (Resp. to SJ Mot. at 27; U.S. Facts ¶ 2[sic]; Reply to U.S. Mot. at 5–6.) In § 313(a), however, Congress indicates that the relevant comparison is not to other governmental bodies, but to nongovernmental entities also paying service charges. *See Graham Cnty. Soil & Water Conservation Dist. v. U.S. ex rel. Wilson*, —— U.S. ——, ——, 130 S.Ct. 1396, 1412, 176 L.Ed.2d 225 (2010) (words of a statute must be read in their context). The Act states that the Federal Government is to comply with all requirements, process, sanctions, and reasonable service charges "to the same extent as *any nongovernmental entity.*" § 313(a) (emphasis added). Moreover, the United States does not claim that it is the owner of the types of surfaces for which the Cities and the state receive the discount—public streets and highways. (*See* Vancouver Resp. to U.S. Mot. (Dkt.# 39) at 7.) Therefore, the United States' argument that the Cities' charges violate § 313(c) because they are discriminatory is unavailing.

The United States also argues that the Cities have not demonstrated that there is no genuine dispute of material fact as to the criterion that the fees be "based on some fair approximation of the proportionate contribution of the property or facility to stormwater pollution." (Resp. to SJ Mot. at 27.) The United States argues that "fair approximation cannot be assumed without proof for both Cities where Renton's and Vancouver's rate structures are not consistent." (*Id.*) The court agrees that the Cities must each demonstrate that their respective methods to assess "proportionate contribution" are a fair approximation of contribution, § 313(c), but that the Cities use different methods does not necessarily mean that either is not a fair approximation. FN9

FN9. "Renton charges BPA storm and surface water management fees that are based upon the square footage of impervious surface for plaintiff's respective parcels. The rates charged are uniform for each class of users. *See,* RMC 8–2–3." (Zimmerman Aff. at 3.) Likewise for Vancouver, "[r]ates charged under VMC Chapter 14.09 are based upon square footage of impervious surface. The rates are uniform for each class of users. VMC 14.09.060." (Carlson Aff. ¶ 3.) In an unpublished decision, the Fifth Circuit has recognized the use of use of square footage of impervious surfaces as a fair approximation of use. *El Paso Apartment Ass'n v. City of El Paso*, 415 F. App'x 574, 578 (5th Cir.2011). The court wrote, "Impervious surfaces, such as buildings, driveways, and sidewalks, prevent stormwater from being absorbed into the ground.

> The resulting runoff burdens the stormwater drainage system. Therefore, the amount of impervious cover on a particular piece of property is directly related to that property's use of the stormwater drainage system. Given the legitimacy of the Board's objective, we conclude that the Board's use of two different methods to measure the impervious cover on the properties in the City is rationally related to its decision to charge each property for stormwater drainage services." *Id.*

***12** Finally, the United States contends that the "Cities' stormwater charges far exceed any cost related to ... nearby municipal stormwater facilities." (Reply to U.S. Mot. at 4.) Section 313(c) requires that the charges be "used to pay or reimburse the costs associated with any stormwater management program ... including the full range of programmatic and structural costs attributable to" reducing stormwater pollution. § 313(c). It nowhere states that the fees charged to each entity must be used solely for dealing with stormwater pollution attributable to that entity's property or for facilities near its property. Rather, program fees may be used for the "full range of costs" associated with the program as long as the charges are proportionate to an entity's contribution to stormwater pollution. § 313(c).

B. The United States' Motion to Defer

Rule 56(d) states that a court may defer considering a motion for summary judgment when "a nonmovant shows by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition." [FN10] Fed.R.Civ.P. 56(d). The issues for which the United States would like to defer summary judgment, however, are purely legal or are moot. The United States asks the court for additional time for discovery should the court determine that there is insufficient evidence to establish a genuine dispute of material fact regarding whether the Cities have provided services to BPA, whether the stormwater charges are discriminatory, and whether the charges are a tax. (U.S.Mot.2–3.) These requests deal with purely legal questions or with questions of fact relevant to the issue for which the Cities' motion for summary judgment was denied. Accordingly, the United States' motion to defer is denied in part and denied in part as moot.

> FN10. The United States' motion to defer implies that the discovery requested is not "essential to justify its opposition." Fed.R.Civ.P. 56(d). The government states, "[S]hould the Court determine that the United States' submitted evidence is not sufficient to create a genuine dispute of material fact, then the United States moves for time to conduct discovery to obtain additional evidence to oppose the Cities' motion for partial summary judgment." (U.S. Mot. at 3, 5–6; *see also* Reply to U.S. Mot. at 3.) Either the United States must argue that the evidence it has submitted is sufficient to survive the motion for partial summary judgment, or, for the purposes of the Rule 56(d) motion, it must argue that it has not submitted sufficient evidence because it cannot. It cannot have it both ways.

IV. CONCLUSION

For the reasons stated above, the court GRANTS in part and DENIES in part the Cities' motion for partial summary judgment (Dkt.# 17) and DENIES in part and DENIES in part as MOOT the United States' motion to defer ruling on the motion for summary judgment (Dkt.# 30).

W.D.Wash.,2012.
U.S. v. City of Renton
Not Reported in F.Supp.2d, 2012 WL 1903429 (W.D.Wash.), 75 ERC 2092

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