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. 1:10-cv-00137-WCG
The Honorable William C. Griesbach Presiding

BRIEF OF THE PLAINTIFF-APPELLEE, ONEIDA TRIBE OF INDIANS OF WISCONSIN

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CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

The undersigned, counsel of record for Plaintiff-Appellee Oneida Tribe of Indians of Wisconsin, provides the following disclosure statement in accordance with Circuit Rule 26.1.

1) The full name of every party that the attorney represents in the case:

Plaintiff-Appellee Oneida Tribe of Indians of Wisconsin

2) The names of all law firms whose partners or associates have appeared for the party in the case or are expected to appear:

Office of Arlinda F. Locklear

3) Plaintiff-Appellee Oneida Tribe of Indians of Wisconsin is a federally recognized Indian Tribe and has no parent corporation and no stock.

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JURISDICTIONAL STATEMENT

Plaintiff-Appellee Oneida Tribe of Indians of Wisconsin ("Tribe") supplements the Jurisdictional Statement of Defendant-Third/Party Plaintiff Appellant Village of Hobart ("Hobart") as follows.

Final judgment in this matter was entered on September 5, 2012, and Hobart filed a timely notice of appeal on October 19, 2012, in accordance with F.R.A.P. 4(1)(B). (SA128).[1]

STATEMENT OF THE CASE

The Tribe supplements Hobart's Statement of the Case as follows.

The Tribe asserted three claims for relief against Hobart in its complaint, two based upon the Hobart Stormwater Management Utility Ordinance ("ordinance") as written and a third against the ordinance as applied. First, the Tribe alleged that the ordinance and charges imposed therein constitute an impermissible tax upon the subject lands. (SA51 - SA52). Second, the Tribe alleged that Hobart's ordinance, if deemed a regulation of the subject lands, is pre-empted by the Supremacy Clause of the United States, U.S. Const., Art. VI, §2. (SA52). Third, the Tribe alleged that Hobart's ordinance as applied to the subject lands is pre-empted as an infringement of tribal self-government, whether or not it constitutes a tax. (SA53).

[1]Hobart filed a Short Appendix with pages numbered SA1 through SA48. The Tribe and the United States have filed a Joint Supplemental Appendix with pages numbered SA49 through SA151.

On January 23, 2012, the Tribe moved for summary judgment on the first two of the three claims asserted in its complaint, supported by a memorandum of law and affidavits. On March 23, Hobart filed papers in opposition to both the Tribe's grounds for summary judgment. Docket No. 57, Brief in Opposition. Specifically, Hobart insisted that its ordinance does not constitute an impermissible tax. In addition, Hobart maintained that the necessary federal authority to regulate the subject lands is found in the Clean Water Act ("CWA"). *Id.*

The district court granted summary judgment for the Tribe on its first claim and did not reach the second, alternative claim for relief. (SA12 - SA33).

STATEMENT OF FACTS

The Tribe supplements Hobart's Statement of Facts as follows.

The Tribe is organized under a Constitution adopted pursuant to the Indian Reorganization Act ("IRA"), 25 U.S.C. § 476, and approved by the Secretary of the Interior. (SA115). The subject lands are located within the exterior boundaries of the Oneida Reservation, as established by the Treaty of February 3, 1838, 7 Stat. 566, and the boundaries of Hobart. *Id.* The subject lands consist of 148 parcels comprising approximately 1400 acres in total. All of the subject lands were either held or placed into trust before 2007, when Hobart adopted its ordinance.[2] (SA116).

[2] Hobart makes much of the 56 million acres of trust land over which the United States has authority. *See* Brief and Required Short Appendix of Defendant-Third/Party Plaintiff-Appellant, Village of Hobart, Wisconsin ("Hobart Br."), pp. 12, 20. This figure does not appear in the record and Hobart cites no source for it. But even if accurate, it is not relevant. Obviously, there are not 56 million acres of land presently before the Court but only the 1400 acres located in Hobart and held in trust by the United States for the Tribe. Similarly, the pending trust applications for 2,924 acres, and to which Hobart has objected,

Hobart's Board of Trustees ("Board") enacted an ordinance to create a stormwater management utility based upon its finding "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." *Village of Hobart Code of Ordinances,* ch. 4.5.[3] The ordinance places the utility under the direct supervision of Hobart's legislative body, the Board. *Id.,* § 4.502(2). The ordinance imposes mandatory charges on "each and every lot or parcel within the Village," with the rates to be set directly by the Board, not the utility. *Id.,* § 4.505(1). The stated purpose of the charges is to raise revenues "in such amount in order to pay for all or a part of operation and maintenance, administrative fees, debt service, and other costs related to the operation of the storm water management utility." *Id.*

There are two types of charges imposed by the ordinance: first, a "base charge" that is imposed on all developed property and, second, an "equivalent runoff unit charge" ("ERU") based upon the amount of impervious surface area on the property. *Id.,* § 4.505(4)(a) and (b). In addition, a flat ERU is imposed on undeveloped parcels at the rate of two-tenths of one unit per parcel up to 100 acres. *Id.,* § 4.507(4)(g). Offsets are permitted against the ERU, based upon mitigation efforts undertaken by the property owner, subject to either a 50% or 80% cap

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are irrelevant to this appeal. *See* Hobart Br., p. 3; *Village of Hobart, Wisconsin v. Midwest Regional Director, Bureau of Indian Affairs,* 57 IBIA 4 (May 9, 2013).

[3]The ordinance is reproduced in the Addendum to this Brief.

depending upon the property use. *Id.,* § 4.506(l). Offsets against the base charge are prohibited. *Id.* As a result, every parcel, whether developed or undeveloped, is subject to some amount of the ERU and all of any imposed base charge.[4]

Delinquent charges under the ordinance "shall be a lien upon the property served and shall be enforced as provided in § 66.0809(3)." *Id.,* § 4.508(3). The referenced provision is that process 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.*

The Tribe has applied for an MS4 permit from the Environmental Protection Agency ("EPA") and EPA has made a tentative determination to issue the permit.

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[4] The charges challenged in this suit are those Hobart sought to impose on the subject lands from the enactment of the ordinance in 2007 to the filing of the complaint in 2010. Hobart claims that it "has never imposed base charges and such charges are not the subject of this appeal." (Hobart Br., p. 5). But the affidavit cited by Hobart does not make this sweeping statement. Instead, it states, "The Village *does not currently assert a base charge* as part of its stormwater management fee." (Affidavit dated March 23, 2012; SA 129) (italics supplied). The 2007-2010 bills the Tribe received did not break the charges down so it is not possible to tell whether the base charge was ever imposed on the subject lands. As noted above, though, every parcel is charged with some amount of the ERU charge. So even if Hobart's more sweeping statement regarding the base charge is correct, it does not alter the fact that every parcel in Hobart, including all the subject lands, was assessed with stormwater management charges between 2007 and 2010. (Docket No. 49, Affidavit of Rebecca M. Webster, ¶ 11, Exh. B).

(SA69 - SA76). The tentative permit concluded, "Pursuant to the definition, the Reservation of the Oneida Tribe of Indians of Wisconsin is part of Indian Country and permits for discharges within the Reservation boundaries are the responsibility of the EPA." (SA71). Further, the tentative permit specifically includes regulation of stormwater runoff. *Id.*

SUMMARY OF ARGUMENT

Federal law broadly pre-empts state and local authority over tribes and tribal land. This rule prohibits state and local attempts to tax or regulate tribal lands, absent express authority from Congress to do so. Further, the standard of pre-emption that applies in federal Indian law and protective canons of construction require a clearly expressed intent by Congress to authorize state or local jurisdiction over tribal lands. There is no federal law that confers authority on Hobart to impose its ordinance on the subject lands. As a result, Hobart's ordinance is pre-empted.

Hobart does not directly dispute these general rules. Rather, Hobart attempts to avoid them by purporting to find congressional authority to tax or regulate in the CWA, even in the absence of an express statement by Congress therein to that effect. (Hobart Br., pp. 23-27). According to Hobart, it is not necessary that the CWA include an express statement authorizing the imposition of its ordinance on the subject lands since the CWA is not an Indian statute. Further, Hobart insists that the CWA must be read to authorize the imposition of its

ordinance on the subject lands in order to combat the "cancer" of unregulated stormwater runoff from those lands. (Hobart Br., p. 5). But Hobart is incorrect.

The judgment below properly leaves the management of stormwater runoff from the subject lands to the Tribe, along with the EPA, not Hobart. The disputed legal issue here is not whether the CWA applies to the subject lands; it plainly does apply. The disputed legal issue here is which government has authority to manage stormwater runoff from those lands. The overall structure of the CWA, EPA's long-standing construction of the Act, and precedent support the district court's judgment that Hobart lacks authority to impose its ordinance.

The CWA statutory scheme regulates the discharge of pollutants into the nation's waters. It does not compel state or local governments to make such discharges or to regulate the discharges of third parties. It regulates any discharges they or third parties make through a permitting process. EPA is the permitting entity; states and tribes can displace EPA as the permitting entity as to their territory, upon demonstration of jurisdiction and ability to manage the permitting program. *See* 33 U.S.C. §§ 1342 and 1377, respectively. There is nothing in the CWA, though, that expands the underlying jurisdiction of those governments that seek to displace EPA as the permitting entity. To the contrary, those governments must demonstrate sufficient authority to manage the programs independent of the CWA as part of their application. 33 U.S.C. §§ 1342(b) and 1377(e). If the applying government fails to demonstrate authority to so regulate, the EPA itself retains permitting authority as to that state or tribe.

The EPA has consistently construed this statutory scheme to preserve the principle that state and local governments lack authority over tribal trust lands absent congressional consent. And EPA has never found such authority in the CWA itself. Courts construing other environmental statutes structured like the CWA have reached the same result, i.e., that the environmental statute reaches tribal lands but does not authorize states or local jurisdictions to regulate tribal trust lands. Hobart's strenuous effort to establish the applicability of the CWA to the subject lands, then, is really beside the point. Clearly, Congress contemplates the regulation of stormwater runoff from trust lands by either EPA or tribes themselves. And Hobart fails to cite a single authority that construes the CWA to authorize local governments to tax or regulate tribal trust lands for that purpose. The judgment below should be affirmed, whether the Hobart ordinance is deemed an impermissible tax upon or unauthorized attempt to regulate the subject lands.

ARGUMENT

I. The District Court Properly Determined That Hobart Lacks Authority to Impose its Stormwater Ordinance as to the Subject Trust Lands. This Court Should Therefore Affirm the Decision and Order of the District Court.

A. Standard of Review.

The Court of Appeals reviews the district court's grant of summary judgment *de novo. Peretz v. Sims,* 662 F.3d 478, 480 (7th Cir. 2011); *Dierson v. Chicago Car Exchange,* 110 F.3d 481, 487 fn. 5 (7th Cir. 1997); *Halpin v. W.W. Graninger, Inc.,* 962 F.2d 685, 688 (7th Cir. 1992). Further, the Court of Appeals may affirm summary judgment on any ground supported by the record "so long as that ground

was adequately addressed in the district court and the nonmoving party had an opportunity to contest the issue." *Cardoso v. Robert Bosch Corp.,* 427 F.3d 429, 432 (7th Cir. 2005); *see also Peretz* 662 F.3d at 480; *Riordan v. Commonwealth Edison Co.,* 128 F.3d 549, 551 (7th Cir. 1997); *Dye v. U.S.,* 360 F.3d 744, 750 (7th Cir. 2004).

Hobart is incorrect, then, that the Tribe's alternative argument, that the ordinance is a pre-empted attempt to regulate the subject lands, is not "the subject of this appeal" because the district court did not reach the issue. (Hobart Br., fn. 1). That issue was raised below, was fully contested by the parties, and this Court can affirm the judgment below on that basis.

B. Federal Law Pre-empts Hobart's Authority To Tax Or Regulate The Subject Trust Lands Absent Express Consent Of Congress.

Hobart appears to concede that federal law pre-empts state and local authority to either tax or regulate tribal trust lands, without the consent of Congress. (Hobart Br., p. 23). But Hobart goes on to dispute the corollary to this rule that any claimed consent by Congress to such authority must be plainly expressed. According to Hobart, this is a rule of statutory construction that applies to Indian statutes only, not statutes of general applicability like the CWA. (Hobart Br., pp. 23-24). Hobart argues that the opposite rule applies to the CWA, i.e., that in the absence of an express exception to the CWA, it applies to tribal trust lands. (Hobart Br., pp. 23-27). Hobart is incorrect in its analysis of the governing rules of federal pre-emption.

The rule requiring expressed consent from Congress to state and local authority over tribal lands is a substantive part of the pre-emption analysis that applies in federal Indian law. It is not merely a canon of statutory construction and cannot be avoided by mischaracterizing it as such. Even if it were a mere canon of statutory construction, it applies nonetheless to the CWA. In either case, Hobart cannot impose its ordinance without express consent of Congress, which consent is lacking in the CWA or any other statute.

1. The pre-emption rules that apply in federal Indian law require the pre-emption of state and local authority over tribal lands unless there is an express statement of Congress consenting thereto.

The importance of tribal land to the continued existence and vitality of tribes and tribal governments cannot be overstated. The leading authority in federal Indian law summarizes this reality as follows:

> Land forms the basis for social, cultural, religious, political, and economic life for American Indian nations. The interests that Indian tribes hold in real and personal property represent a unique form of property right in the American legal system, shaped by the federal trust over tribal land and statutory restraints against alienation.

Cohen's Handbook of Federal Indian Law, § 15.01 (2012 ed.). Tribal and federal interests in the integrity of trust land are particularly keen. The trust acquisition of these lands reflects a conscious federal dedication of them to the goals of tribal self-determination and economic development. *Alaska v. Native Village of Venetie Tribal Government,* 522 U.S. 520, 529-32 (1998); 25 C.F.R. Part 151.[5] Thus,

[5] There is no question that tribal trust lands are under federal jurisdiction, but that

reservations and tribal lands in general are places "totally within the sphere which the relevant treaty and statutes leave for the Federal Government and the Indians themselves." *McClanahan v. Arizona State Tax Commission,* 411 U.S. 164, 179-80 (1973).[6]

With regard to taxation of reservation lands and Indians, the Supreme Court applies a categorical rule that "a State is without power to tax reservation lands and reservation Indians," absent some federal statute authorizing the tax. *Oklahoma Tax Commission v. Chickasaw Nation,* 515 U.S. 450, 458 (1995), quoting *County of Yakima v. Confederated Tribes and Bands of Yakima Nation,* 502 U.S.

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federal jurisdiction exists for the purpose of preserving those lands permanently for tribal purposes. Indeed, all instances of federal jurisdiction over trust lands cited by Hobart are those enacted for the expressed purpose of enhancing and preserving those lands for exclusive tribal use. *See, e.g.,* http://www.bia.gov/WhoWeAre/index.htm, cited at Hobart Br., p. 19 (BIA duty "to protect and improve trust assets of tribes..."), and 25 C.F.R. §162.107(b), cited at Hobart Br., p. 19 ("We will promote tribal control and self-determination over tribal land..."). Notwithstanding the clear purpose and limits of federal jurisdiction in these regards, Hobart cites this federal jurisdiction as evidence that Congress intended in the CWA to subject the Tribe's trust land to local authority. This tortured interpretation of federal jurisdiction over the Tribe's trust lands is a clear perversion of the common understanding of the federal trust responsibility in general and an abrogation of the traditional immunity from local authority for trust lands in particular.

[6] Tribal land is unlike any other species of federal property. Even though the United States holds the fee title, tribal land is dedicated to the exclusive use and occupancy of Indians and is regarded "as securely safeguarded as is fee simple absolute." *United States v. Shoshone,* 304 U.S. 111, 117 (1938). The United States cannot simply appropriate tribal land for its own purposes without payment of just compensation. *Id.* Neither is tribal land considered part of the United States' public domain which can be conveyed by the United States in disregard of the tribes' exclusive rights. *Minnesota v. Hitchcock,* 185 U.S. 373, 391 (1902) (whether states acquired title to so-called school sections on Indian reservations); *Missouri, Kansas & Texas Railway Co. v. Roberts,* 152 U.S. 114, 119 (1914), and *Leavenworth L. & G. R. Co., v. United States,* 92 U.S. 733, 742 (1875) (tribal land is not public domain land subject to railroad rights of way.)

251, 258 (1992). Congress has not enacted legislation authorizing taxation of tribal trust lands by state and local governments.[7] To the contrary, the IRA, under which authority the subject lands were placed into trust, explicitly states that such lands "shall be exempt from State and local taxation." 25 U.S.C. § 465.

With regard to regulatory authority over trust lands, the Supreme Court applies a broad rule of federal pre-emption that generally places such land beyond the civil regulatory reach of state and local governments. The Court explained this federal common law rule of pre-emption in *White Mountain Apache Tribe v. Bracker,* 448 U.S. 136 (1980):

> The tradition of Indian sovereignty over the reservation and tribal members must inform the determination whether the exercise of state authority has been pre-empted by operation of federal law. As we have repeatedly recognized, this tradition is reflected and encouraged in a number of congressional enactments demonstrating a firm federal policy of promoting tribal self-sufficiency and economic development... *We have thus rejected the proposition that in order to find a particular state law to have been pre-empted by operation of federal law, an express congressional statement to that effect is required...*When on-reservation conduct involving only Indians is at issue, state law is generally inapplicable, for the States' regulatory interest is likely to be minimal and federal interest in encouraging tribal self-government is at its strongest.

Id., at 143-144 (italics supplied, citation omitted); *see also California v. Cabazon Band of Mission Indians,* 480 U.S. 202, 208 (1987). The IRA embodies this broad

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[7] In the General Allotment Act of 1887, Congress did authorize the taxation of reservation lands once those lands were released from restrictions against alienation. *County of Yakima,* 502 U.S. at 263-64. But there is no question that, where the restraint against alienation has been reimposed by placing the land into trust, the traditional immunity from taxation re-attaches as well.

rule of federal pre-emption. *Santa Rosa Band of Indians v. Kings County,* 532 F.2d 655 (9th Cir. 1970) (applying rule to preclude application of county's zoning ordinance to trust land); *United States v. Humboldt,* 615 F.2d 1260 (9th Cir. 1980).

As the Supreme Court has noted, Congress can authorize state and local governments to tax or regulate tribal lands. But the Court's pre-emption analysis in federal Indian law reverses the usual inquiry to determine whether a state or local law has been pre-empted. Generally, state laws are pre-empted by federal law only if Congress expressly so provided. But as the Court noted in *White Mountain Apache,* the pre-emptive reach in federal Indian law is much broader. Federal law pre-empts the application of state law to tribal lands and tribes even in the absence of "an express congressional statement to that effect" because of the tradition of Indian sovereignty over tribal lands and members. *Id.* For this reason, the necessity for an express statement from Congress to consent to state and local authority is properly considered a function of the special doctrine of pre-emption in federal Indian law. *New Mexico v. Mescalero Apache Tribe,* 462 U.S. 324, 334 (1983) (rejecting the notion that an explicit congressional statement is required to pre-empt state authority over tribes or tribal land). As a result, Hobart's analysis is upside down — there must be an expressed statement authorizing imposition of its ordinance, not an expressed statement excepting tribal trust lands from state and local authority. (Hobart Br., p. 23).

2. Canons of construction also require an expressed congressional statement to consent to Hobart jurisdiction over the subject lands and these canons apply to the CWA.

The Supreme Court employs canons of construction to federal statutes in determining the impact, if any, on tribal immunity from state law — canons that produce the same result as the special rules of federal pre-emption in the field. The Supreme Court's decision in *Bryan v. Itasca County,* 426 U.S. 373 (1976), illustrates these canons of construction. There, the Court considered whether Congress consented to state taxation of tribal members in Pub. L. 280 when it authorized the extension of "civil laws...of general application" of certain states to tribal Indians. 28 U.S.C. §1360(a). Notwithstanding this expansive language, the Court decided the act did not authorize the imposition of state taxes, relying in part upon two canons of construction: first, that statutes are to be construed liberally, with doubtful expressions resolved in favor of the Indians; and second, that there must be a clear intent on Congress' part to abrogate the traditional immunity from state taxation. *Id.,* at 392-93; *see also Moe v. Confederated Salish & Kootenai Tribes,* 425 U.S. 463, 476 (construing the General Allotment Act, 25 U.S.C. § 349).

These canons of construction apply to statutes of general applicability as well as Indian statutes. *See generally* B. Wildenthal, *Federal Labor Law, Tribal Sovereignty, and the Indian Canons of Construction,* 86 Oregon L. Rev. 413, 489-502 (1986) (discussing examples). *United States v. Dion,* 476 U.S. 734 (1986), one of the cases cited for the contrary proposition by Hobart, is actually "the leading modern case" applying the clear intent to abrogate canon of construction to a

statute of general applicability. *Cohen's Handbook of Federal Indian Law,* § 2.03. (Hobart Br., p. 28). In *Dion,* the Supreme Court considered whether the Eagle Protection Act, 16 U.S.C. §§ 703 *et seq.*, abrogated tribes' treaty rights to hunt eagles. Like the CWA, the Eagle Protection Act is a generally applicable environmental statute, not an Indian statute. Nonetheless, the Supreme Court applied the rule requiring that Congress clearly express its intent to abrogate or limit tribal rights; the Court found an expressed intent to do so in the Eagle Protection Act. *Id.,* at 738-39.[8]

Whether viewed as a consequence of the pre-emption analysis in federal Indian law or a canon of construction, the CWA or any other federal statute must contain an expressed statement by Congress consenting to Hobart authority over the subject lands. There is no such statement in the CWA or any other federal statute.

[8] *San Manuel Indian Bingo & Casino v. NLRB,* 475 F.3d 1306 (D.C. Cir. 2007) is not to the contrary. That opinion includes a wide-ranging discussion of statutory construction, some of which is pertinent here and some of which is not. On the question of whether generally applicable federal statutes apply to Indian tribes, the court declined to apply the Indian-favorable construction rule and found that the particular statute applied to Indian tribes. *Id.,* at 1311. This is not pertinent here since the Tribe does not dispute the applicability of the CWA to tribes. However, the court also inquired whether the statute abrogated tribes'rights; it indicated that a clear and plain statement by Congress was necessary to accomplish this. *Id.,* at 1312. This is the rule of statutory construction that is pertinent here.

3. The CWA does not authorize the imposition of Hobart's ordinance upon the subject lands, whether the ordinance is deemed a tax upon or regulation of those lands.

The Hobart ordinance has all the hallmarks of a tax. It is for the general benefit of the public, based upon a finding that the management of stormwater runoff "is a matter that affects the public health, safety, and welfare of the Village," and it legislates a "uniform system of storm water service charges that shall apply to each and every lot or parcel within the Village." Ordinance, §§ 4.501(1) and 4.505(1). It is not a fee for services but a mandatory charge; some level of the ERU charge must be paid as to every parcel or lot, regardless of the property owner's efforts to mitigate stormwater runoff. *Id.,* §§ 4.505(4)(a) and (b), and 4.507(4)(g). In the event the charges are not paid, the charges become a lien upon the property and are enforceable under state law in the same manner as real property taxes, i.e., through foreclosure proceedings against the property. *Id.,* § 4.508(3); WIS. STAT. § 66.0809(3).

Largely because of these features of the ordinance, the court below concluded that the ordinance constitutes an impermissible tax upon the subject lands. (SA21 - SA26). The district court inquired whether the charge is "imposed by the legislature upon all, or almost all, of the citizens or property to accomplish a public purpose..." (SA23). This is essentially the same analytical framework used by this Court in *Empress Casino Joliet v. Balmoral Racing Club, Inc.,* 651 F.3d 722 (7th Cir. 2011) and, most recently, in *Kansas City Southern Railway Co. v. Koeller,* 653

F.3d 496 (7th Cir. 2011).[9] Judged by this standard, the district court correctly concluded that the Hobart ordinance is an impermissible attempt to tax the subject lands.[10]

Even if not deemed a tax, the ordinance indisputably purports to regulate the subject lands. As described by Hobart, the purpose of the ordinance is to implement management programs for stormwater runoff for every parcel or lot within Hobart boundaries. (Hobart Br., p. 4). It does this by authorizing a 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, watercourse, retaining walls and ponds and such other facilities as will

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[9] There is one feature of the ordinance that departs from the usual tax, i.e., that the charges are sequestered into a separate account. But this alone does not distinguish the ordinance from other charges held to constitute a tax. *See Schneider Transport, Inc. v. Cattanach,* 657 F.2d 128 (7th Cir. 1981) (truck registration fee held to constitute a tax even though deposited into a segregated fund).

[10] Hobart does not analyze this question; it simply dismisses the authority relied upon by the district court as "antiquated case law" that predates a 2011 amendment to the CWA, which, according to Hobart, declares stormwater charges to constitute fees. (Hobart Br., fn. 7). This is wrong for two reasons. First, there is nothing in that provision that denominates stormwater charges as fees. The provision simply provides that the United States must pay stormwater charges for federal facilities "regardless of whether that reasonable fee, charge, or assessment is denominated a tax." 33 U.S.C. § 1323, cited by Hobart to its statute at large location at section 313. (For ease of reference, the Tribe will also cite to the statute at large location at section 313.) Second, there is nothing in this provision that expressly authorizes Hobart to tax the subject lands. As a result, the district court properly inquired whether the charge constitutes a tax in light of the common law rule prohibiting local taxation of trust lands and to avoid conflict with the IRA which explicitly prohibits such taxation. *See Morton v. Mancari,* 417 U.S. 535, 550-551 (1974) ("where there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one, regardless of priority of enactment").

support a stormwater management system." Ordinance, § 4.503(1). Hobart's scheme encourages property owners to undertake their own mitigation efforts by providing offsets against the charges, but only up to a certain point.[11] A credit is available as against the ERU charge, up to 80% of the charge for agricultural property and up to 50% of the charge for a property with an onsite stormwater management system. *Id.,* § 4.506(4), (5) and (6). Thus, the ordinance compels the Tribe to participate in the Hobart stormwater management system, either through Hobart's direct management of all stormwater programs or through Hobart supervision of the Tribe's own mitigation efforts. This is surely as much a restriction on the use and development of the subject lands as was the county zoning ordinance held pre-empted in *Santa Rosa Band of Indians,* 532 F.2d at 664.

For the purpose of stormwater management runoff, Hobart essentially proposes to substitute its own judgment for that of the Tribe with respect to the subject lands. All the subject lands are under the active management of the Tribe, for the purposes of water quality control in general and stormwater management runoff in particular, through a series of ordinances enacted well before Hobart adopted its ordinance in 2007. For example, through its 1966 Zoning Ordinance and its 1981 Shoreland Protection Ordinance, the Tribe has acted "to protect the

[11] The regulatory aspect of the ordinance is particularly evident in the offset mechanism set out in the ordinance. It requires the property owner to file an application supported by "documentation from a professional engineer and demonstrate[s] the conditions of this section has [*sic*] been met. The application is subject to review and approval of the Administrator." Ordinance, § 4.506(2). Further, the credit can be revoked if the basis for the credit materially changes. *Id.,* § 4.506(8). The ordinance, then, contemplates on-going regulation of any property owner who seeks to reduce the charges.

health and integrity of wetlands, watersheds, natural systems, environmental corridors, capacities of floodways and drainages" by restricting development near waterways "in a manner to minimize, insofar as practicable any resultant damage to the ecology, environment and capacities of natural systems." (SA117). Through its 1996 Water Resources Ordinance, the Tribe took steps "for the enhancement of the quality management and protection of all waters of the Reservation, ground and surface, public and private." (SA118). Indeed, two parcels that are the subject of this litigation contain a five-acre tribal stormwater retention pond, and the Tribe has received tax foreclosure notices for these parcels for its refusal to pay Hobart's stormwater management fees. (SA119).

In the end, there is no reading of the ordinance that, if imposed upon the subject lands, does not offend the fundamental principle that tribal lands are to be left to the governance of tribes themselves and the United States. See *McClanahan*, 411 U.S. at 179-80. Trust land in particular "is one of the main vehicles for the economic self-development necessary to equal Indian participation in American life." *Santa Rosa Band,* 532 F.2d at 664. To permit concurrent regulation of those lands by Hobart would "not only threaten to disrupt the federal and tribal regulatory scheme, but would also threaten Congress' overriding objective of encouraging tribal self-government and economic development." *Segundo v. City of Rancho Mirage,* 813 F.2d 1387, 1393 (9th Cir. 1987) (municipal rent control ordinance held pre-empted).

There is no statement in the CWA that a different rule applies to tribal trust land for purposes of stormwater management. To the contrary, the CWA preserved the principle that the subject trust lands are subject to the governance of the Tribe and the United States, not Hobart.

C. The CWA Contemplates EPA and Tribal Regulation of Tribal Trust Lands, Not State or Local Regulation.

Hobart claims that it has authority, is indeed mandated, to impose its ordinance on the subject lands by the CWA, regardless of whether the ordinance is a tax or regulation. Hobart insists that a nationwide, uniform application of the CWA is necessary to address the problem of stormwater runoff,[12] but focuses its claim for authority upon a single provision of the CWA — section 313 — without reference to other, more pertinent provisions of the Act. (Hobart Br., pp. 27-39). This myopic reading of the Act ignores the overall statutory scheme, is contrary to EPA's consistent understanding of the Act, and is undermined by decisions in which similarly structured environmental statutes are construed.[13]

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[12] Interestingly, Hobart fails to advise whether and how its ordinance fits into a consistent and uniform nationwide scheme of stormwater regulation.

[13] As a result, Hobart sidesteps the real issue here. This is illustrated by Hobart's reliance on *Cohen's Handbook of Federal Indian Law* for the proposition that federal statutes of general applicability apply to Indian tribes. (Hobart Br., p. 27). The citation is correct, but there is another section in the same authority dealing specifically with federal environmental statutes. There, Cohen concludes that federal environmental statutes apply to tribal lands but that tribes are the governments with authority to administer those programs, including those under the CWA. *Cohen's Handbook of Federal Indian Law*, § 10.03[2][a]. As established herein, the CWA applies but contemplates tribal and federal management, not local management, of trust lands.

1. Read as a whole, the CWA distinguishes tribal lands and delegates authority over tribal lands to EPA and Tribes.

A basic rule of statutory construction is that the court must read the statute as a whole. *Eke v. Mukasey,* 512 F.3d 373, 380 (7th Cir. 2008); *Matter of McFarland,* 84 F.3d 943 (7th Cir. 1997); *see also Boise Cascade Corp. v. U.S. E.P.A.,* 942 F.2d 1427 (9th Cir. 1991) (applying rule of construction to the CWA). As a result, it is inappropriate to lift a particular phrase or provision out of the overall statutory context since all statutory provisions must be construed in harmony with the complete statute. *Padash v. I.N.S.,* 358 F.3d 1161, 1170 (9th Cir. 2004); *U.S. v. Drury,* 344 F.3d, 1089, 1098 (11th Cir. 2003); *Alabama Power Co. v. U.S. E.P.A.,* 40 F.3d 450, 454 (D.C. Cir. 1994). When section 313 is read in its statutory context, it becomes clear that Congress did not therein abrogate the usual rule that tribal lands remain subject to tribal and federal authority, not local or state authority.[14]

The CWA, enacted in 1972, was a detailed and comprehensive Act that contained two major parts: first, it authorized federal financial assistance for municipal sewage treatment plant construction; and second, it directed the establishment of standards and a regulatory process governing the discharge of pollutants into the nation's waters from point sources. Pub. L. No. 92-500, 86 Stat. 816, Act of Oct. 18, 1972. Pollution was controlled through the issuance of permits

[14] Oddly, Hobart devotes a third of its brief to the argument that the CWA applies to tribal lands but fails to note the more pertinent provisions discussed here, i.e., those delegating the administration of programs to tribes for tribal lands and those requiring that any government proposing to administer programs demonstrate adequate authority to do so. (Hobart Br., pp. 11-24).

by EPA to point source polluters, which permits insured compliance with water quality standards set by the EPA. Governors who sought to administer the permitting program in their states were authorized to propose their own programs to EPA. *Id.,* § 402(b). In addition to showing program compliance with technical standards, such state proposals must be accompanied by a statement from the attorney general "that the laws of such state...provide adequate authority to carry out the described program." *Id.* The 1972 act did not provide for regulation of other sources of pollution, including stormwater runoff, or make specific provisions regarding tribal lands. *See generally* C. Copeland, *Clean Water Act: A Summary of the Law,* CRS Report for Congress, RL30030, April 23, 2010.

In 1987, Congress amended the CWA in two pertinent respects. Pub. L. No. 100-4, 101 Stat. 7, Act of Feb. 4, 1987. First, Congress authorized EPA to regulate broader categories of dischargers so as to more effectively capture stormwater runoff, again through a permitting regime. And again, states could propose their own programs and proposals to do so must be accompanied by a statement from the attorney general that the state had adequate authority under state law to implement such programs. *Id.,* § 319(b), codified at 33 U.S.C. § 1329. Second, Congress authorized the EPA to treat recognized Indian tribes as states for purposes of the administration of CWA programs pertaining to "the management and protection of water resources which are held by an Indian tribe, held by the United States in trust for Indians, held by a member of an Indian tribe if such property interest is subject to a trust restriction on alienation..." *Id.,* § 518(e),

codified at 33 U.S.C. § 1377. This is the only explicit reference to trust or tribal lands in the CWA. By simultaneously requiring a demonstration of state authority to administer programs and providing separately for the administration of stormwater management runoff programs for tribal lands, Congress respected the long-standing presumption against state and local authority over tribal lands.

In what EPA refers to as Phase II of the implementation of the first 1987 amendment, EPA requires that discharges from small municipal separate storm sewer systems ("MS4s") and from construction sites between one and five acres in size comply with the permitting requirements of the statute. *Environmental Defense Center, Inc. v. U.S. EPA,* 344 F.3d 832 (9th Cir. 2003). The CWA gives small municipalities such as Hobart two regulatory options to comply: first, MS4s can apply for a permit with conditions under which the MS4 would regulate third parties; or second, MS4s can apply for a permit that regulates its own discharges only. 40 C.F.R. § 122.34(b), 122.26(d). In other words, the CWA encourages state and municipalities to implement federal regulatory programs, but it does not compel them to do so. *Environmental Defense Center,* 344 F.3d at 836.[15]

Section 313, the provision relied upon by Hobart, appeared as a relatively minor provision in the 1972 CWA. It was carried forward and amended twice,

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[15] Hobart completely misunderstands the statutory scheme, then, when it insists that the CWA is compulsory and requires that Hobart regulate the stormwater discharges of third parties. (Hobart Br., p. 33). Had the CWA mandated that municipalities regulate third parties' discharges, it would have arguably run afoul of the Tenth Amendment. Precisely because the CWA did *not* compel municipalities to implement federal regulatory programs as to third parties, the Ninth Circuit concluded that the CWA did not violate the Tenth Amendment. *Environmental Defense Center,* 344 F.3d at 847.

mostly recently on January 4, 2011. Pub. L. No. 111-378, 124 Stat. 4128. It merely waived United States' immunity from local stormwater regulatory schemes, including payment of charges therein, where the regulation would otherwise apply but for United States' immunity.[16] There is nothing in the section that expands the underlying jurisdiction of local governments.[17] There is no reference in the section to tribal or trust lands, no cross-reference to other provisions in the same act that explicitly apply to tribal lands, and no cross-reference to the requirement that states demonstrate jurisdiction to administer programs. Construed together, as they must be, these provisions leave tribal lands to the jurisdiction of tribes and the EPA, not state and local governments. *Wisconsin v. EPA,* 266 F.3d 741, 747 (7th Cir. 2001) ("In fact, in the absence of tribal TAS status, the EPA and not the State of Wisconsin might well be the proper authority to administer Clean Water Act programs for the reservation, because state laws may usually be applied to Indians on the reservations only if Congress so expressly provides.")

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[16] The Tribe adopts the United States argument that section 313 does not constitute a waiver as to tribal trust lands and does not repeat that argument here.

[17] Of course, Hobart suggests that the section does expand its underlying jurisdiction, even in the absence of language so stating. (Hobart Br., p. 27). Taken to its logical conclusion, Hobart's construction leads to absurd results. For example, it would vest Hobart with jurisdiction over tribal trust lands even in the face of the State of Wisconsin's disclaimer of such jurisdiction. *See* discussion below. It would vest local governments with jurisdiction over federal facilities, even in the face of a determination by the EPA that the particular state had not demonstrated authority to administer programs under the CWA. And it would vest local governments with jurisdiction over federal facilities, presumably even in the absence of an appropriate and effective application for a permit as required by other provisions of the CWA.

The experience of Wisconsin in the administration of programs under the CWA reflects this plain reading of the act. In 1973, Wisconsin applied for approval from EPA to administer the permitting program in the state. EPA approved the state's application and observed that the state's application specifically excepted permits "issued to agencies and instrumentalities of the federal government *and for Indian activities on Indian lands."* (SA79) (italics supplied). The Wisconsin Attorney General has explained that the application did not seek approval for such because "the state was without authority to issue WPDES permits to Indian tribes or tribal organizations operating on Indian lands in Wisconsin." 75 Wis. Op. Att'y Gen. 220, 242 (1986). Instead, EPA holds authority to issue such permits, unless the governing tribe seeks and obtains treatment as a state to administer the programs. *Wisconsin v. E.P.A.,* 266 F.3d at 747.

Hobart's own MS4 application to the EPA reflects the residual authority of the EPA over tribal lands. Because Wisconsin lacks authority over Indian reservations, Hobart was obliged to apply to the EPA, not the state. Hobart's draft permit provides:

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

(SA62) (italics supplied). The Tribe has also applied for and been granted a draft permit, and the same language quoted above appeared in the Tribe's draft permit,

as well. (SA71). There is a consensus, then, that the State of Wisconsin (and by extension, Hobart) lack authority to administer programs for the subject lands, leaving those lands to EPA and tribal authority.

2. The EPA has consistently read the CWA to preserve the immunity of tribal lands from state and local governments' authority.

From the very beginning, EPA understood that the CWA does not give states and local governments jurisdiction over tribes' reservations. K. Porter, *Good Alliances Make Good Neighbors: The Case for Tribal-State-Federal Watershed Partnerships,* 16 Cornell J. L. & Pub. Pol'y 495 (2007). EPA's first expression of this view appeared in the 1973 regulations under the Act. In the final rule, EPA cautioned that "State programs do not cover agencies and instrumentalities of the Federal Government *and Indian activities on Indian reservations under the jurisdiction of the United States*." 38 Fed. Reg. 13528, 13530 (May 22, 1973) (italics supplied), codified at 40 C.F.R. § 125.2(b) (1973). EPA has since consistently indicated that it retained federal authority over discharges from Indian activity on Indian lands. *See generally* J. Grijalva, *The Origins of EPA's Indian Program,* 15 Kansas J. L. & Pub. Pol'y 191, 227 (2006) ("EPA perceived one consequence of the federal authority and trust responsibility as a general preclusion of state regulatory authority on Indian reservations absent Congressional authorization").[18]

[18] EPA's interpretation of the CWA is entitled to deference. *Phillips Petroleum Co. v. EPA,* 803 F.2d 545 (10th Cir. 1986).

EPA adhered to this view when it promulgated regulations under the 1987 amendments to the CWA. As the statute directed, it carried forward the requirement that states demonstrate adequate authority to carry out the program; it also specifically required that state proposals demonstrate authority over tribal lands, to the extent that states sought authority over such lands. *See* 40 C.F.R. § 123.23(b) (1983); 40 C.F.R. § 123.23(b) (1988). Plainly, EPA did not view the CWA itself as having authorized state authority over tribal lands; some independent basis for that authority was deemed necessary.[19]

This same requirement appeared in the final rule adopted by EPA implementing treatment as state for tribes. The final rule discussed the transition of permitting authority to tribes, indicating that such transfer will generally be from the EPA to tribes. The EPA noted that it was unaware of any state for which it had authorized the issuance of permits on a reservation. 58 Fed. Reg. 244 (Dec. 22, 1993). The current regulations contain this same requirement that states specifically establish authority over Indian lands, to the extent that states propose to extend its programs over those lands. 40 C.F.R. § 123.23(b).[20]

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[19] EPA regulations in this regard are a specific application of the broader Indian policy followed by the Department, one adopted in 1984. *See The Origins of EPA's Indian Program,* p. 277. The second principle of this policy provided: "In keeping with the principle of Indian self-government, the Agency [EPA] will view Tribal Governments as the appropriate non-Federal parties for making decisions and carrying out program responsibilities affecting Indian reservations, their environments, and the health and welfare of the reservation populace. Just as EPA's deliberations and activities have traditionally involved the interests and/or participation of State Governments, EPA will look directly to Tribal Governments to play this lead role for matters affecting reservation environments." *Id.*

[20] Another regulatory provision explicitly acknowledges that states generally lack

Finally, EPA Phase II regulations governing stormwater programs explicitly state that "EPA implements the program for discharges on your reservation as well as other Indian country, generally," in the absence of treatment as a state for a given reservation. 40 C.F.R. § 122.31(a). There is nothing in these regulations indicating state or local authority to impose their programs on tribal lands. Thus, EPA's entire Indian policy as well as its regulations implementing the CWA reflect the agency's view that the CWA itself does not expand upon or authorize state and local jurisdiction over tribal lands.

3. Other similarly structured federal environmental statutes have been construed to preserve the immunity of tribal lands from state regulation.

In *Washington Department of Ecology v. U.S. EPA,* 752 F.2d 1465 (9th Cir. 1985), the court considered state authority to apply its programs under the Resource Conservation and Recovery Act ("RCRA") to tribal lands. Like the CWA, the RCRA provided a mechanism for states to administer federal standards to regulate hazardous waste management through a permitting program. The State of Washington sought approval to implement its own programs in the state, including Indian lands. Like the CWA, the RCRA required state proposals to include a

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authority over tribal lands. States are not allowed to operate partial programs, as a general proposition. However, the EPA regulations provide that "In many cases, States (other than Indian Tribes) will lack authority to regulate activities on Indian lands. This lack of authority does not impair that State's ability to obtain full program approval with this part, i.e., inability of a State to regulate activities on Indian lands does not constitute a partial program. EPA will administer the program on Indian lands if a State (or Indian Tribe) does not seek or have authority to regulate activities on Indian lands." 40 C.F.R. § 123.1(h).

statement of authority to administer the programs. And like Hobart here, Washington State argued there that the RCRA itself authorized the state to regulate activities of Indians on reservation lands. The EPA concluded otherwise; it approved the state proposal, except as to Indian lands. The EPA found "that the state had not adequately demonstrated its legal authority to exercise jurisdiction" with regard to tribal lands. *Id.,* 752 F.2d at 1467.

Washington State challenged EPA's disapproval of its program as to tribal lands and the court agreed with the EPA. The Ninth Circuit rejected Washington State's principal arguments that are virtually identical to those made here by Hobart: that the RCRA applied to all persons and all geographical areas (Hobart Br., pp. 11-13); that the RCRA did not expressly exclude tribal lands (Hobart Br., pp. 13-15); and that consequently, the RCRA consented to state jurisdiction over tribal lands (Hobart Br., 27-30). As the Ninth Circuit put it, the state's construction of the RCRA "would reverse the fundamental principle that the established jurisdictional relationships between Indian tribes and the states remain intact unless Congress clearly expresses its desire to change them." 752 F.2d at 1471. Citing *Bryan* and *McClanahan*, the Ninth Circuit concluded that the RCRA must be construed against the backdrop of tribal sovereignty, "especially when the statute affects an area in which the tribes historically have exercised their sovereign authority or contemporary federal policy encourages tribal self-government." 752 F.2d at 1469.

The State of Washington persisted in its effort to regulate at least one reservation, Puyallup, even after the *Washington Department of Ecology* decision. It applied for interim program approval as to this single reservation, claiming jurisdiction over the reservation under an act of Congress that had settled a tribal land claim. *See* Puyallup Land Claim Settlement, 25 U.S.C. § 1773, Pub. L. No. 101-41, Act of June 3, 1989. The EPA rejected the application, finding that the state had not "adequately demonstrated authority to regulate Title V sources owned by the Tribal members and located on their territory or trust lands." 59 Fed. Reg. 216 (Nov. 9, 1994). The EPA relied upon the Ninth Circuit decision as well as Supreme Court authority for the proposition that "[s]tates are generally precluded from exercising jurisdiction over Indians in Indian country unless Congress has clearly expressed an intention to permit it." The EPA did not find an explicit intention to do so in the federal legislation implementing the land claim settlement. Finally, the EPA noted that Washington State had also asserted authority to regulate tribal lands under the Safe Drinking Water Act, but the State had similarly failed to demonstrate that its authority to regulate was not preempted by federal law. *Id.* Just as nothing in RCRA or the Safe Water Drinking Act changed the rule preempting state authority over tribal lands, nothing in the CWA does either.

Even authority cited by Hobart is consistent with this analysis. In *Phillips Petroleum Co.*, the court considered whether the Safe Drinking Water Act authorized the EPA or the Bureau of Indian Affairs ("BIA") to regulate drinking

water on the Osage Reservation. 803 F.2d 545. Like the CWA and RCRA, the Safe Drinking Water Act regulated the discharge of pollutants into groundwater through permits issued by the EPA, or the state in accordance with an EPA approved program; the statute also authorized treatment as state status for tribes as to their reservations. There was no question that the act covered tribal lands because the Osage Tribe acknowledged the applicability of the act. *Id.,* at 549. There was also no question that the State of Oklahoma lacked jurisdiction over the reservation; the state had made no attempt to assert jurisdiction. *Id.* The only question was which federal agency, the EPA or the BIA, had authority to implement the statute as to tribal lands. The court concluded that, in the absence of treatment of state status for the Osage Tribe, the EPA held authority to regulate tribal lands. *Id.,* at 557. This is precisely how the CWA should be construed, i.e., to authorize EPA regulation of tribal lands, not Hobart regulation, in the absence of treatment as state status for the Tribe.[21]

CONCLUSION

The question here is not whether stormwater runoff from the subject lands will be managed in accordance with the CWA. The question is whether Hobart has authority itself to undertake taxation or regulation of the subject lands for that

[21] For the same reason, other cases cited by Hobart regarding application of general federal statutes to tribal land are beside the point. (Hobart Br., fn. 5). In addition, the analysis of *Federal Power Commission v. Tuscarora Indian Nation,* 362 U.S. 99 (1960), on this point is merely dictum. Whatever the reliability of that analysis, though, it is not pertinent here since there is no dispute that the CWA applies to tribal lands.

purpose. There is nothing in the CWA (and Hobart identifies no other statute) that delegates such authority to Hobart. To the contrary, the CWA expressly authorizes tribal management of programs for those tribes that seek treatment as states. For tribes like Oneida that have not sought treatment as a state, the EPA retains permitting authority to impose conditions upon discharging entities for the purpose of managing stormwater runoff. The CWA and federal policy preserve the subject lands for the exclusive use and control of the Tribe, in partnership with the United States. There is simply no place in this federal scheme for Hobart taxation or regulation of the subject lands. The district court judgment should be affirmed.

Respectfully submitted this 29th day of May, 2013.

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

This brief complies with the type-volume limitation of F.R.A.P. 32(a)(7)(B) because it contains 8,973 words, excluding the parts of the brief exempted by F.R.A.P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of F.R.A.P. 32(a)(5) and Cir. R. 32(b) because it has been prepared in a proportionally spaced typeface using Century in 12 point font in the body and 11 point font in the footnotes.

Dated: May 29, 2013

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CERTIFICATE OF SERVICE

I hereby certify that on May 29, 2013, I electronically filed Plaintiff-Appellee's Response Brief 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.

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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. 1:10-cv-00137-WCG
The Honorable William C. Griesbach Presiding

ADDENDUM OF THE PLAINTIFF-APPELLEE, ONEIDA TRIBE OF INDIANS OF WISCONSIN

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TABLE OF CONTENTS OF ADDENDUM

CHAPTER 4.5

STORMWATER MANAGEMENT UTILITY

Chapter 4.5 Storm Water Management Utility
Application: The rules, regulations and rates set forth in this section shall apply to all real property within the boundaries of the Village of Hobart.

4.501 FINDINGS.

(1) 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. The development of land increases impervious surfaces and results in increased storm water runoff. Failure to effectively manage this increased storm water runoff affects the sanitary sewer utility operations of the Village Sanitary District by, among other things, increasing the likelihood of infiltration and inflow into the sanitary sewer. In addition, surface water runoff may create erosion of lands, threaten businesses and residences with water damage and create sedimentation and other environmental damage in surrounding areas such as, Ashwaubenon Creek, Duck Creek, Dutchman's Creek, Hemlock Creek, Lancaster Brook, Silver Creek, and Trout Creek. Specific requirements have been placed on the Village through the Wisconsin Department of Natural Resources' (DNR) Regulation 216 requiring the Village to improve the quality of storm water discharged to the waters of the State.

(2) The cost of operating and maintaining the Village storm water management system, ensuring regulatory compliance, and financing necessary plans, studies, repairs, replacements, improvements and extension thereof should, to the extent practicable, be allocated in relationship to the benefits enjoyed and services received there from.

4.502 ESTABLISHMENT OF STORMWATER MANAGEMENT UTILITY.

(1) In order to protect the health, safety, welfare of the public, Village Assets, and natural resources, the Village Board is exercising its authority to establish the Village of Hobart's Storm Water Management Utility and set the rates for storm water management services.

(2) The operation of the Storm Water Management Utility shall be under the supervision of the Village Board. The Village Administrator will be in charge of the Storm Water Management Utility.

(3) The Village is acting under the authority of the Village of Hobart Ordinance 4.2 Storm Water Runoff, Chapters 60, 61, and 66 of the Wisconsin Statutes, and particularly without limitation the following sections: §§ 60.01, 60.22, 60.23, 60.50, 60.53, 66.0621, 60.0627, 61.34, 66.066, 66.069, 66.0701, 66.0703, 66.076, 66.0809, 66.0811, 66.0813 and 66.0821.

4.503 POWERS AND DUTIES OF UTILITY.

(1) ***Facilities:*** The Village through the Storm Water Management Utility may acquire, construct, lease, own, operate, maintain, extend, expand, replace, clean, dredge, repair, conduct, manage and finance such facilities as are deemed by the Village to be proper and reasonably necessary for a system of storm and surface water management. These facilities may include, without limitation by enumeration, surface and underground drainage facilities, sewers, watercourses, retaining walls and ponds and such other facilities as will support a storm water management system.

(2) ***Rates and Charges:*** The Village through the Storm Water Management Utility may 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.

(3) ***Budgeting Process:*** The Village through the Storm Water Management Utility shall prepare an annual budget, which is to include all operation and maintenance costs, debt service, administrative fees and other costs related to the operation of the Storm Water Management Utility. The costs shall be spread over the rate classifications as determined by the Board. The budget is subject to the public hearing and approval process, set forth in Wis. Stat. §65.90.

(4) ***Excess Revenues:*** The Village will retain any excess of revenues over expenditures in a year in segregated Storm Water Enterprise Fund which shall used exclusively for purposes consistent with this ordinance.

(5) ***Financing Methods*****:** The Village has the authority provided in §66.0821, and may exercise such authority with respect to all financing methods such as user charges and liens so stated therein.

4.504 DEFINITIONS: In this chapter, the following terms have the meanings set forth below:

(1) ***Administrator:*** The Village Administrator or his/her designee.

(2) ***Agricultural Land Uses:*** Means related to or used for production of food and fiber, including but not limited to, general farming, livestock and poultry enterprises, grazing, nurseries, horticulture, viticulture, truck farming, forestry, sod production, cranberry productions and wild crop harvesting and includes lands for onsite buildings and other structures necessary to carry out such activities.

(3) ***Developed Property:*** The term "developed property" means the 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.

(4) ***Detention Storage:*** Is the temporary detaining or storage of storm water in reservoirs under predetermined and controlled conditions, with the rate of discharge regulated by installed devices.

(5) ***Duplex Unit:*** A residential space containing two dwelling units.

(6) ***Dwelling Unit:*** One or more rooms that are arranged, designed or used as living quarters for one family only. Individual bathrooms and complete kitchen facilities, permanently installed, shall always be included for each dwelling unit.

(7) ***Equivalent Runoff Unit or ERU:*** The term "ERU" means the statistical average of horizontal impervious area of "single family homes" within the Village of Hobart the date of the adoption of this Ordinance. The horizontal impervious area includes but it is not limited to, all areas covered by structures, roof extensions, patios, porches, driveways, and sidewalks.

(8) ***Farmstead Home Site:*** That portion of any agricultural property which contains one or more dwelling units, and vehicle garage regardless of whether the dwelling units are on a separate lot or parcel.

(9) ***Impervious Area or Impervious Surface:*** The term "impervious area or impervious surface" means areas that have been paved, covered or compacted to inhibit the natural infiltration of water into the soil or cause water to run off the area in greater quantities or at an increased rate of flow from the present under the natural conditions as undeveloped property. Such areas may include, but are not limited to, roofs, roof extensions, patios, porches, driveways, sidewalks, pavement, gravel, athletic courts, and compacted surfaces, private roads, and parking lots. Excluded from this definition are undisturbed land, lawn, fields and public streets.

(10) ***Lot:*** A parcel of land having a width and depth sufficient for one principal building and its accessory building together with open spaces required by the Village of Hobart zoning ordinance and abutting a public street or access easement.

(11) ***Multifamily Unit:*** A residential space consisting of three or more dwelling units within a single building including apartments, residential condominiums, and townhouses.

(12) ***Non-residential Property:*** Any developed lot or parcel other than residential property as defined herein, including, but not limited to, transient rentals (such as hotels and motels), mobile home parks, commercial, industrial, institutional, governmental property, parking lots, and agricultural accessory buildings.

(13) ***Residential Property:*** Any lot, parcel or farmstead home site with a vehicle garage developed exclusively for residential purposes including single family homes, duplex units, multifamily units, manufactured homes and condominiums but not including transient rentals (such as hotels and motels) and mobile-home parks.

(14) ***Runoff:*** The term "runoff" means the surface water, including rain and snowmelt, which is inhibited by impervious surfaces from naturally infiltrating into soil.

(15) ***Single Family Home:*** Any residential property consisting of a single dwelling unit.

(16) ***Storm Water System:*** Any natural or manmade Storm Water conveyance facility, means all constructed facilities or natural features used for collecting, storing, and conducting storm water to, through, and from drainage areas to a point of outlet. It may be operated or maintained by the Village including, but not limited to retention/detention ponds, ditches, storm sewer, roads and navigable and non-navigable waterways.

(17) ***Undeveloped Property:*** Property that has not been altered by the addition of any improvements such as a building, structure, change of grade or substantial landscaping; agricultural use of property; or property that has been graded for residential or commercial development but does not have buildings, structures or other improvements. A property shall be considered developed pursuant to this chapter, upon issuance of a certificate of occupancy, or upon substantial completion of construction or final inspection if no such certificate is issued or where construction is at least 50% complete and construction is halted for a period of three (3) months.

4.505 RATES AND CHARGES.

(1) The Village Board shall establish a uniform system of storm water service charges that shall apply to each and every lot or parcel within the Village. It shall be the policy to establish storm water service charges in such amount in order to pay for all or a part of operation and maintenance, administrative fees, debt service, and other costs related to the operation of the storm water management utility. The Village Board may establish and modify storm water service charges, as necessary, so as to assure that the charge generate adequate revenues to pay the costs of the storm water management program and that costs are allocated fairly and proportionately to all parcels in the Village.

(2) By this Ordinance, the Village Board is establishing the basis for the rates that will be used to calculate and impose a charge upon each developed lot and parcel within the Village for services and facilities provided by the Storm Water Management Utility consistent with this ordinance. Charges imposed under this chapter is in addition to assessments imposed by resolution of the Village of Hobart Municipal Code.

(3) The amount of the charge to be imposed, for each customer classification shall be made by resolution of the Village Board. The current rates will be set forth in a Storm Water Utility Rate Table and kept on file in the office of the Village Clerk. The rates shall be reviewed by the Village Board on an annual basis and adjusted as necessary.

(4) Charges shall be imposed to recover all or a portion of the costs for the Storm Water Management Utility set forth in paragraph (1). Such charges may include the following components:
   (a) *Base Charge (BC):* The base charge may be imposed on all developed property in the Village. The base charge will be designed to reflect the fact that all developed properties benefit from the storm water management activities of the Village and that all developed properties contribute in some way to the storm water discharge that must be managed by the Village. The base charge will be designed to collect the administrative costs of the storm sewer utility and the portion of capital costs not covered by other means.
   (b) *Equivalent Runoff Unit (ERU) Charge:* The ERU charge shall be imposed for all property in the Village based upon the amount of impervious area as reasonably determined by the Administrator under **Sec. 4.507.**
   (c) *Special Charge (SC):* A special charge may be imposed on property that is in a specific area benefited by a particular storm water management facility. The special charge will be developed to reflect the benefits/services in a particular area that may not be appropriate to spread to property throughout the Village. The special charge shall be calculated on an ERU basis or impervious surface area.
   (d) *Connection Charge (CC):* A one-time charge may be imposed when a property is converted from undeveloped to developed property or otherwise becomes connected to the Village Storm Water Management System. The charge may vary based on the size of the parcel.

(5) The Village Board may make such other classifications in accordance with **Sec. 4.507** as will be likely to provide reasonable and fair distribution of the costs of the

Storm Water Management Utility. In so doing, the Board may provide credits against certain charges set for the above facilities installed and maintained by the property owner for the purpose of lessening the storm water flow from that given property.

(6) The Village of Hobart is hereby appointed as the collection agency for the Village Storm Water Utility. Bills shall be prepared by the Village, or its agent, and sent to the owner a minimum of thirty (30) days prior to such bill being due pursuant to Section 4.508 of each premise served. The Village shall allocate the actual cost of billing and collecting as a base charge.

4.506 CREDITS.

(1) The Village Board may provide credits against the ERU and SC Charges pursuant to the 4.506 paragraphs (2) through (9) The Village Board will not provide credits against the base charge or connection charge, unless a scrivener error is made and it is determined that the property owner paid an erroneous charge.
(2) To be entitled to consideration for a credit, the property owner shall file an application together with a review fee with the Village Administrator that is supported by documentation from a professional engineer and demonstrates the conditions of this section has been met. The application is subject to review and approval of the Administrator. If the Administrator and property owner cannot agree on credits, then the Administrator can deny the application unless the property owner agrees to pay for the necessary engineering services.
(3) Credits may be provided under the following circumstances:
    (a) A non-residential property owner may seek a credit on the ERU charge where they have installed and maintained facilities that result in an approved storm water system on site. An ERU Credit may be obtained based on the percent of a 25-year storm event that is detained on site prior to discharge.
    (b) Any property owner may seek a credit on the SC charge if storm water from the property does not drain into any storm water system that is the subject of the special charge.
(4) An 80% credit for parcels used exclusively for agricultural, forest, or agricultural forest.
(5) An 80% credit for agricultural buildings being used as such on exclusively agricultural classified property.
(6) A maximum of 50% credit if the property owner can document to the Administrator that an onsite approved storm water system is treating storm water.
(7) No credit shall be considered for any "natural" features, limited to, wetlands, streams, and creeks, floodplains, or water impoundment of any kind in existence prior to the passage of this Ordinance.
(8) The Administrator may revoke the credit if the basis for the credit has materially changed. The Administrator shall provide at least 30 days advance written notice of any proposed revocation.
(9) A denial or revocation of any credit may be appealed under **Sec. 4.509.**

4.507 CUSTOMER CLASSIFICATIONS.

(1) For purposes of imposing the base and ERU charges, all lots and parcels within the Village shall be classified into the following (5) five customer classes:
    (a) Residential –Single Family, including Farmstead Home Sites

(b) Residential – Duplex
(c) Residential – Multifamily including condominiums, townhouses, and apartments
(d) Non-residential
(e) Undeveloped

(2) The Administrator shall prepare a list of lots and parcels within the Village of Hobart and assign a customer classification of residential, non-residential, or undeveloped to each lot or parcel.

(3) The average square footage of impervious area of (1) ERU is established to be equivalent to 4000 Square Feet

(4) ERU's shall be calculated per classification as follows:
(a) Residential – Single Family including mobile homes: 1 ERU.
(b) Residential – Duplex: .75 ERU for each dwelling unit.
(c) Residential – Multifamily including condominiums, townhouses and apartments: .6 ERU times the number of dwelling units.
(d) The charges imposed for non-residential properties, as defined herein, shall be the rate for one (1) ERU, multiplied by the numerical factor obtained by dividing the total impervious area of non-residential property by the square footage of (1) ERU. The factor shall be rounded down to the nearest $1/10^{th}$, i.e.:

$$\frac{\text{Impervious area in square feet}}{\textbf{4000} \text{ square feet}} = \frac{1}{\text{ERU Rate}}$$

$$\text{e.g.} \quad \frac{10{,}500 \text{ square feet}}{\textbf{4000} \text{ square feet}} = \textbf{2.625 ERUs} = \textbf{2.6 ERUs}$$

(e) The Administrator/Consultant shall be responsible for determining the impervious area, based upon the best available information, including, but not limited to, data supplied by the Public Works Director, aerial photography, the Property Owner, Tenant, or Developer. The Administrator/Consultant may require additional information, as necessary, to make the determination. The billing amount shall be updated by the Administrator/Consultant on any additions to the impervious area. Upon property owner's written notification and request, the Administrator/Consultant shall review impervious area for possible reductions.

(f) All unoccupied developed lots and parcels shall be subject to the Storm Water Utility charges. Upon filing of a final plat or certified survey map, a charge of .5 ERU times the rate shall be imposed on each newly created undeveloped lot. Appropriate ERU rate charges shall be made in accordance with the "New Construction" section at the time of building construction.

(g) All undeveloped lands and parcels, including agricultural, forest, and agricultural forest classified properties, shall be subject to the Storm Water Utility charges. The minimum charges for any non-residential parcel shall be equal to the rate of two-tenths of one ERU per parcel up to 100 acres.

4.508 BILLING AND PENALTIES.

(1) Storm Water Management Utility charges will be billed in advance and on an annual basis. Storm Water Management Utility 2007 charges shall begin July 1, 2007 and end December 31, 2007. Nothing in this paragraph shall be construed to preclude the Storm Water Management Utility from billing on a more frequent basis should the frequency of billing for municipal water and sanitary sewer service be increased.

(2) The property owner is held responsible for all storm water service charges on real property that he/she or it owns. All storm water bills and notices of any nature relative to the storm water management program will be addressed to the owner and delivered with reasonable care to the addressee by first class mail. A failure to receive a storm water service charges bill shall not relieve any person of the responsibility for payment of storm water service charges within the prescribed period nor exempt any party from any penalty imposed for delinquency in payment thereof.

(3) Unpaid delinquent Storm Water Management Utility charges shall be a lien upon the property served and shall be enforced as provided in §66.0809(3). The Village shall collect delinquent charges under Wis. Stat. §§ 66.0821(4) and 66.0809 (3).

(4) All delinquent charges shall be subject to a three (3%) percent penalty per quarter in addition to all other charges, including prior penalties that exist when the delinquent charge is extended upon the tax roll.

4.509 METHOD OF APPEAL.

(1) The Storm water Management Utility charge, a determination of ERU's, or ERU credits may be appealed by filing a written appeal with the Village Clerk prior to the utility charge due date if not paid, or within thirty (30) days of payment. The appeal shall specify all bases for the challenge and the amount of the storm water charge the appellant asserts is appropriate. Failure to file a timely appeal waives all rights to challenge such charge.

(2) The Village Administrator will determine whether the storm water charge is fair and reasonable, or whether an adjustment or refund is due the appellant. The Administrator may act with or without a hearing, and will inform the appellant in writing of his or her decision.

(3) The appellant has thirty (30) days from the decision of the Administrator to file a written appeal to the Village Board.

(4) The Village Board shall review said written appeal and shall determine whether the storm water charge is fair and reasonable, or whether an adjustment or refund is due the appellant. The Village Clerk shall provide five (5) business days prior written

notice of the time and place of the Board's consideration of the appeal to the appellant/owner at the address listed in the appeal. The appellant shall be notified in writing, by first class mail, of the Board's decision. If the Board or the Administrator determines that a refund is due the appellant, the refund will be applied as a credit on the customer's next storm water bill, or will be refunded at the discretion of the Administrator.

4.510 SPECIAL ASSESSMENT AND CHARGES.

In addition to any other method of charging for Storm Water Management Utility costs, the Village Board may by resolution collect special assessments on property in a limited and determinable area for special benefits conferred upon property pursuant to Wis. Stat. §66.0703. The failure to pay such special assessments may result in a lien on the property enforced pursuant to Wis. Stat. §66.0703(13).

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 years needs.

4.512 SEVERABILITY.

(1) If any provision of this Chapter 4.5, or the application thereof to any party or circumstance is, held invalid, the invalidity shall not affect other provisions or applications of this chapter which can be given effect without the invalid provision or application, and to this end the provisions of this chapter are declared severable.

(2) If any section, sentence, clause, phrase or portion of this ordinance is for any reason held invalid or unconstitutional by any court of competent jurisdiction, such portion shall be deemed a separate, distinct and independent provision, and such holding shall not affect the validity of the remainder of such ordinance.

33 USC Section 1323 provides:

§ 1323. Federal facilities pollution control

(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. 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. Nothing in this section shall be construed to prevent any department, agency, or instrumentality of the Federal Government, or any officer, agent, or employee thereof in the performance of his official duties, from removing to the appropriate Federal district court any proceeding to which the department, agency, or instrumentality or officer, agent, or employee thereof is subject pursuant to this section, and any such proceeding may be removed in accordance with section 1441 et seq. of title 28. No officer, agent, or employee of the United States shall be personally liable for any civil penalty arising from the performance of his official duties, for which he is not otherwise liable, and the United States shall be liable only for those civil penalties arising under Federal law or imposed by a State or local court to enforce an order or the process of such court. 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; except that no exemption may be granted from the requirements of section 1316 or 1317 of this title. No such exemptions shall be granted due to lack of appropriation unless the President shall have specifically requested such appropriation as a part of the budgetary process and the Congress shall have failed to make available such requested appropriation. Any exemption shall be for a period not in excess of one year, but additional exemptions may be granted for periods of not to exceed one year upon the President's making a new determination. The President shall report each January to the Congress all exemptions from the requirements of this section granted during the preceding calendar year, together with his reason for granting such exemption. In addition to any such exemption of a particular effluent source, the President may, if he determines it to be in the paramount interest of the United States to do so, issue regulations exempting from compliance with the requirements of this section any weaponry, equipment, aircraft, vessels, vehicles, or other classes or categories of property, and access to such property, which are owned or operated by the Armed Forces of the United States (including the Coast Guard) or by the National Guard of any State and which are uniquely military in nature. The President shall reconsider the need for such regulations at three-year intervals.

(b) Cooperation with Federal entities and limitation on facility construction

(1) The Administrator shall coordinate with the head of each department, agency, or instrumentality of the Federal Government having jurisdiction over any property or facility utilizing federally owned wastewater facilities to develop a program of cooperation for utilizing wastewater control systems utilizing those innovative treatment processes and techniques for which guidelines have been promulgated under section 1314 (d)(3) of this title. Such program shall include an inventory of property and facilities which could utilize such processes and techniques.

(2) Construction shall not be initiated for facilities for treatment of wastewater at any Federal property or facility after September 30, 1979, if alternative methods for wastewater treatment at such property or facility utilizing innovative treatment processes and techniques, including but not limited to methods utilizing recycle and reuse techniques and land treatment are not utilized, unless the life cycle cost of the alternative treatment works exceeds the life cycle cost of the most cost effective alternative by more than 15 per centum. The Administrator may waive the application of this paragraph in any case where the Administrator determines it to be in the public interest, or that compliance with this paragraph would interfere with the orderly compliance with conditions of a permit issued pursuant to section 1342 of this title.

(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.

(2) Limitation on accounts

(A) Limitation

The payment or reimbursement of any fee, charge, or assessment described in paragraph (1) shall not be made using funds from any permanent authorization account in the Treasury.

(B) Reimbursement or payment obligation of Federal Government

Each department, agency, or instrumentality of the executive, legislative, and judicial branches of the Federal Government, as described in subsection (a), shall not be obligated to pay or reimburse any fee, charge, or assessment described in paragraph (1), except to the extent and in an amount provided in advance by any appropriations Act to pay or reimburse the fee, charge, or assessment.

33 USC § 1329 provides:

(a) State assessment reports

(1) Contents

The Governor of each State shall, after notice and opportunity for public comment, prepare and submit to the Administrator for approval, a report which

(A) identifies those navigable waters within the State which, without additional action to control nonpoint sources of pollution, cannot reasonably be expected to attain or maintain applicable water quality standards or the goals and requirements of this chapter;

(B) identifies those categories and subcategories of nonpoint sources or, where appropriate, particular nonpoint sources which add significant pollution to each portion of the navigable waters identified under subparagraph (A) in amounts which contribute to such portion not meeting such water quality standards or such goals and requirements;

(C) describes the process, including intergovernmental coordination and public participation, for identifying best management practices and measures to control each category and subcategory of nonpoint sources and, where appropriate, particular nonpoint sources identified under subparagraph (B) and to reduce, to the maximum extent practicable, the level of pollution resulting from such category, subcategory, or source; and

(D) identifies and describes State and local programs for controlling pollution added from nonpoint sources to, and improving the quality of, each such portion of the navigable waters, including but not limited to those programs which are receiving Federal assistance under subsections (h) and (i) of this section.

(2) Information used in preparation

In developing the report required by this section, the State

(A) may rely upon information developed pursuant to sections 1288, 1313 (e), 1314 (f), 1315 (b), and 1324 of this title, and other information as appropriate, and

(B) may utilize appropriate elements of the waste treatment management plans developed pursuant to sections 1288 (b) and 1313 of this title, to the extent such elements are consistent with and fulfill the requirements of this section

(b) State management programs

(1) In general

The Governor of each State, for that State or in combination with adjacent States, shall, after notice and opportunity for public comment, prepare and submit to the Administrator for approval a management program which such State proposes to implement in the first four fiscal years beginning after the date of submission of such management program for controlling pollution added from nonpoint sources to the navigable waters within the State and improving the quality of such waters.

(2) Specific contents

Each management program proposed for implementation under this subsection shall include each of the following:

(A) An identification of the best management practices and measures which will be undertaken to reduce pollutant loadings resulting from each category, subcategory, or particular nonpoint source designated under paragraph (1)(B), taking into account the impact of the practice on ground water quality.

(B) An identification of programs (including, as appropriate, nonregulatory or regulatory programs for enforcement, technical assistance, financial assistance, education, training, technology transfer, and demonstration projects) to achieve implementation of the best management practices by the categories, subcategories, and particular nonpoint sources designated under subparagraph (A).

(C) A schedule containing annual milestones for (i) utilization of the program implementation methods identified in subparagraph (B), and (ii) implementation of the best management practices identified in subparagraph (A) by the categories, subcategories, or particular nonpoint sources designated under paragraph (1)(B). Such schedule shall provide for utilization of the best management practices at the earliest practicable date.

(D) A certification of the attorney general of the State or States (or the chief attorney of any State water pollution control agency which has independent legal counsel) that the laws of the State or States, as the case may be, provide adequate authority to implement such management program or, if there is not such adequate authority, a list of such additional authorities as will be necessary to implement such management program. A schedule and commitment by the State or States to seek such additional authorities as expeditiously as practicable.

(E) Sources of Federal and other assistance and funding (other than assistance provided under subsections (h) and (i) of this section) which will be available in each of such fiscal years for supporting implementation of such practices and measures and the purposes for which such assistance will be used in each of such fiscal years.

(F) An identification of Federal financial assistance programs and Federal development projects for which the State will review individual assistance applications or development projects for their effect on water quality pursuant to the procedures set forth in Executive Order 12372 as in effect on September 17, 1983, to determine whether such assistance applications or development projects would be consistent with the program prepared under this subsection; for the purposes of this subparagraph, identification shall not be limited to the assistance programs or development projects subject to Executive Order 12372 but may include any programs listed in the most recent Catalog of Federal Domestic Assistance which may have an effect on the purposes and objectives of the State's nonpoint source pollution management program.

(3) Utilization of local and private experts

In developing and implementing a management program under this subsection, a State shall, to the maximum extent practicable, involve local public and private agencies and organizations which have expertise in control of nonpoint sources of pollution.

(4) Development on watershed basis

A State shall, to the maximum extent practicable, develop and implement a management program under this subsection on a watershed-by-watershed basis within such State.

(c) Administrative provisions

(1) Cooperation requirement

Any report required by subsection (a) of this section and any management program and report required by subsection (b) of this section shall be developed in cooperation with local, substate regional, and interstate entities which are actively planning for the implementation of nonpoint source pollution controls and have either been certified by the Administrator in accordance with section 1288 of this title, have worked jointly with the State on water quality management

planning under section 1285 (j) of this title, or have been designated by the State legislative body or Governor as water quality management planning agencies for their geographic areas.

(2) Time period for submission of reports and management programs

Each report and management program shall be submitted to the Administrator during the 18-month period beginning on February 4, 1987.

(d) Approval or disapproval of reports and management programs

(1) Deadline

Subject to paragraph (2), not later than 180 days after the date of submission to the Administrator of any report or management program under this section (other than subsections (h), (i), and (k) of this section), the Administrator shall either approve or disapprove such report or management program, as the case may be. The Administrator may approve a portion of a management program under this subsection. If the Administrator does not disapprove a report, management program, or portion of a management program in such 180-day period, such report, management program, or portion shall be deemed approved for purposes of this section.

(2) Procedure for disapproval

If, after notice and opportunity for public comment and consultation with appropriate Federal and State agencies and other interested persons, the Administrator determines that—

(A) the proposed management program or any portion thereof does not meet the requirements of subsection (b)(2) of this section or is not likely to satisfy, in whole or in part, the goals and requirements of this chapter;

(B) adequate authority does not exist, or adequate resources are not available, to implement such program or portion;

(C) the schedule for implementing such program or portion is not sufficiently expeditious; or

(D) the practices and measures proposed in such program or portion are not adequate to reduce the level of pollution in navigable waters in the State resulting from nonpoint sources and to improve the quality of navigable waters in the State;

the Administrator shall within 6 months of the receipt of the proposed program notify the State of any revisions or modifications necessary to obtain approval. The State shall thereupon have an additional 3 months to submit its revised management program and the Administrator shall approve or disapprove such revised program within three months of receipt.

(3) Failure of State to submit report

If a Governor of a State does not submit the report required by subsection (a) of this section within the period specified by subsection (c)(2) of this section, the Administrator shall, within 30 months after February 4, 1987, prepare a report for such State which makes the identifications required by paragraphs (1)(A) and (1)(B) of subsection (a) of this section. Upon completion of the requirement of the preceding sentence and after notice and opportunity for comment, the Administrator shall report to Congress on his actions pursuant to this section.

(e) Local management programs; technical assistance

If a State fails to submit a management program under subsection (b) of this section or the Administrator does not approve such a management program, a local public agency or organization which has expertise in, and authority to, control water pollution resulting from nonpoint sources in any area of such State which the Administrator determines is of sufficient geographic size may, with approval of such State, request the Administrator to provide, and the

Administrator shall provide, technical assistance to such agency or organization in developing for such area a management program which is described in subsection (b) of this section and can be approved pursuant to subsection (d) of this section. After development of such management program, such agency or organization shall submit such management program to the Administrator for approval. If the Administrator approves such management program, such agency or organization shall be eligible to receive financial assistance under subsection (h) of this section for implementation of such management program as if such agency or organization were a State for which a report submitted under subsection (a) of this section and a management program submitted under subsection (b) of this section were approved under this section. Such financial assistance shall be subject to the same terms and conditions as assistance provided to a State under subsection (h) of this section.

(f) Technical assistance for States

Upon request of a State, the Administrator may provide technical assistance to such State in developing a management program approved under subsection (b) of this section for those portions of the navigable waters requested by such State.

(g) Interstate management conference

(1) Convening of conference; notification; purpose

If any portion of the navigable waters in any State which is implementing a management program approved under this section is not meeting applicable water quality standards or the goals and requirements of this chapter as a result, in whole or in part, of pollution from nonpoint sources in another State, such State may petition the Administrator to convene, and the Administrator shall convene, a management conference of all States which contribute significant pollution resulting from nonpoint sources to such portion. If, on the basis of information available, the Administrator determines that a State is not meeting applicable water quality standards or the goals and requirements of this chapter as a result, in whole or in part, of significant pollution from nonpoint sources in another State, the Administrator shall notify such States. The Administrator may convene a management conference under this paragraph not later than 180 days after giving such notification, whether or not the State which is not meeting such standards requests such conference. The purpose of such conference shall be to develop an agreement among such States to reduce the level of pollution in such portion resulting from nonpoint sources and to improve the water quality of such portion. Nothing in such agreement shall supersede or abrogate rights to quantities of water which have been established by interstate water compacts, Supreme Court decrees, or State water laws. This subsection shall not apply to any pollution which is subject to the Colorado River Basin Salinity Control Act [43 U.S.C. 1571 et seq.]. The requirement that the Administrator convene a management conference shall not be subject to the provisions of section 1365 of this title.

(2) State management program requirement

To the extent that the States reach agreement through such conference, the management programs of the States which are parties to such agreements and which contribute significant pollution to the navigable waters or portions thereof not meeting applicable water quality standards or goals and requirements of this chapter will be revised to reflect such agreement. Such management programs shall be consistent with Federal and State law.

(h) Grant program

(1) Grants for implementation of management programs

Upon application of a State for which a report submitted under subsection (a) of this section and a management program submitted under subsection (b) of this section is approved under this section, the Administrator shall make grants, subject to such terms and conditions as the Administrator considers appropriate, under this subsection to such State for the purpose of assisting the State in implementing such management program. Funds reserved pursuant to section 1285 (j)(5) of this title may be used to develop and implement such management program.

(2) Applications

An application for a grant under this subsection in any fiscal year shall be in such form and shall contain such other information as the Administrator may require, including an identification and description of the best management practices and measures which the State proposes to assist, encourage, or require in such year with the Federal assistance to be provided under the grant.

(3) Federal share

The Federal share of the cost of each management program implemented with Federal assistance under this subsection in any fiscal year shall not exceed 60 percent of the cost incurred by the State in implementing such management program and shall be made on condition that the non-Federal share is provided from non-Federal sources.

(4) Limitation on grant amounts

Notwithstanding any other provision of this subsection, not more than 15 percent of the amount appropriated to carry out this subsection may be used to make grants to any one State, including any grants to any local public agency or organization with authority to control pollution from nonpoint sources in any area of such State.

(5) Priority for effective mechanisms

For each fiscal year beginning after September 30, 1987, the Administrator may give priority in making grants under this subsection, and shall give consideration in determining the Federal share of any such grant, to States which have implemented or are proposing to implement management programs which will—

(A) control particularly difficult or serious nonpoint source pollution problems, including, but not limited to, problems resulting from mining activities;

(B) implement innovative methods or practices for controlling nonpoint sources of pollution, including regulatory programs where the Administrator deems appropriate;

(C) control interstate nonpoint source pollution problems; or

(D) carry out ground water quality protection activities which the Administrator determines are part of a comprehensive nonpoint source pollution control program, including research, planning, ground water assessments, demonstration programs, enforcement, technical assistance, education, and training to protect ground water quality from nonpoint sources of pollution.

(6) Availability for obligation

The funds granted to each State pursuant to this subsection in a fiscal year shall remain available for obligation by such State for the fiscal year for which appropriated. The amount of any such funds not obligated by the end of such fiscal year shall be available to the Administrator for granting to other States under this subsection in the next fiscal year.

(7) Limitation on use of funds

States may use funds from grants made pursuant to this section for financial assistance to persons only to the extent that such assistance is related to the costs of demonstration projects.

(8) Satisfactory progress

No grant may be made under this subsection in any fiscal year to a State which in the preceding fiscal year received a grant under this subsection unless the Administrator determines that such State made satisfactory progress in such preceding fiscal year in meeting the schedule specified by such State under subsection (b)(2) of this section.

(9) Maintenance of effort

No grant may be made to a State under this subsection in any fiscal year unless such State enters into such agreements with the Administrator as the Administrator may require to ensure that such State will maintain its aggregate expenditures from all other sources for programs for controlling pollution added to the navigable waters in such State from nonpoint sources and improving the quality of such waters at or above the average level of such expenditures in its two fiscal years preceding February 4, 1987.

(10) Request for information

The Administrator may request such information, data, and reports as he considers necessary to make the determination of continuing eligibility for grants under this section.

(11) Reporting and other requirements

Each State shall report to the Administrator on an annual basis concerning

(A) its progress in meeting the schedule of milestones submitted pursuant to subsection (b)(2)(C) of this section, and

(B) to the extent that appropriate information is available, reductions in nonpoint source pollutant loading and improvements in water quality for those navigable waters or watersheds within the State which were identified pursuant to subsection (a)(1)(A) of this section resulting from implementation of the management program.

(12) Limitation on administrative costs

For purposes of this subsection, administrative costs in the form of salaries, overhead, or indirect costs for services provided and charged against activities and programs carried out with a grant under this subsection shall not exceed in any fiscal year 10 percent of the amount of the grant in such year, except that costs of implementing enforcement and regulatory activities, education, training, technical assistance, demonstration projects, and technology transfer programs shall not be subject to this limitation.

(i) Grants for protecting groundwater quality

(1) Eligible applicants and activities

Upon application of a State for which a report submitted under subsection (a) of this section and a plan submitted under subsection (b) of this section is approved under this section, the Administrator shall make grants under this subsection to such State for the purpose of assisting such State in carrying out groundwater quality protection activities which the Administrator determines will advance the State toward implementation of a comprehensive nonpoint source pollution control program. Such activities shall include, but not be limited to, research, planning, groundwater assessments, demonstration programs, enforcement, technical assistance, education and training to protect the quality of groundwater and to prevent contamination of groundwater from nonpoint sources of pollution.

(2) Applications

An application for a grant under this subsection shall be in such form and shall contain such information as the Administrator may require.

(3) Federal share; maximum amount

The Federal share of the cost of assisting a State in carrying out groundwater protection activities in any fiscal year under this subsection shall be 50 percent of the costs incurred by the State in carrying out such activities, except that the maximum amount of Federal assistance which any State may receive under this subsection in any fiscal year shall not exceed $150,000.

(4) Report

The Administrator shall include in each report transmitted under subsection (m) of this section a report on the activities and programs implemented under this subsection during the preceding fiscal year.

(j) Authorization of appropriations

There is authorized to be appropriated to carry out subsections (h) and (i) of this section not to exceed $70,000,000 for fiscal year 1988, $100,000,000 per fiscal year for each of fiscal years 1989 and 1990, and $130,000,000 for fiscal year 1991; except that for each of such fiscal years not to exceed $7,500,000 may be made available to carry out subsection (i) of this section. Sums appropriated pursuant to this subsection shall remain available until expended.

(k) Consistency of other programs and projects with management programs

The Administrator shall transmit to the Office of Management and Budget and the appropriate Federal departments and agencies a list of those assistance programs and development projects identified by each State under subsection (b)(2)(F) of this section for which individual assistance applications and projects will be reviewed pursuant to the procedures set forth in Executive Order 12372 as in effect on September 17, 1983. Beginning not later than sixty days after receiving notification by the Administrator, each Federal department and agency shall modify existing regulations to allow States to review individual development projects and assistance applications under the identified Federal assistance programs and shall accommodate, according to the requirements and definitions of Executive Order 12372, as in effect on September 17, 1983, the concerns of the State regarding the consistency of such applications or projects with the State nonpoint source pollution management program.

(l) Collection of information

The Administrator shall collect and make available, through publications and other appropriate means, information pertaining to management practices and implementation methods, including, but not limited to,

(1) information concerning the costs and relative efficiencies of best management practices for reducing nonpoint source pollution; and

(2) available data concerning the relationship between water quality and implementation of various management practices to control nonpoint sources of pollution.

(m) Reports of Administrator

(1) Annual reports

Not later than January 1, 1988, and each January 1 thereafter, the Administrator shall transmit to the Committee on Public Works and Transportation of the House of Representatives and the

Committee on Environment and Public Works of the Senate, a report for the preceding fiscal year on the activities and programs implemented under this section and the progress made in reducing pollution in the navigable waters resulting from nonpoint sources and improving the quality of such waters.

(2) Final report

Not later than January 1, 1990, the Administrator shall transmit to Congress a final report on the activities carried out under this section. Such report, at a minimum, shall—

(A) describe the management programs being implemented by the States by types and amount of affected navigable waters, categories and subcategories of nonpoint sources, and types of best management practices being implemented;

(B) describe the experiences of the States in adhering to schedules and implementing best management practices;

(C) describe the amount and purpose of grants awarded pursuant to subsections (h) and (i) of this section;

(D) identify, to the extent that information is available, the progress made in reducing pollutant loads and improving water quality in the navigable waters;

(E) indicate what further actions need to be taken to attain and maintain in those navigable waters

(i) applicable water quality standards, and

(ii) the goals and requirements of this chapter;

(F) include recommendations of the Administrator concerning future programs (including enforcement programs) for controlling pollution from nonpoint sources; and

(G) identify the activities and programs of departments, agencies, and instrumentalities of the United States which are inconsistent with the management programs submitted by the States and recommend modifications so that such activities and programs are consistent with and assist the States in implementation of such management programs.

(n) Set aside for administrative personnel

Not less than 5 percent of the funds appropriated pursuant to subsection (j) of this section for any fiscal year shall be available to the Administrator to maintain personnel levels at the Environmental Protection Agency at levels which are adequate to carry out this section in such year.

33 USC § 1377 provides:

(a) Policy
Nothing in this section shall be construed to affect the application of section 1251 (g) of this title, and all of the provisions of this section shall be carried out in accordance with the provisions of such section 1251 (g) of this title. Indian tribes shall be treated as States for purposes of such section 1251 (g) of this title.

(b) Assessment of sewage treatment needs; report
The Administrator, in cooperation with the Director of the Indian Health Service, shall assess the need for sewage treatment works to serve Indian tribes, the degree to which such needs will be met through funds allotted to States under section 1285 of this title and priority lists under section 1296 of this title, and any obstacles which prevent such needs from being met. Not later than one year after February 4, 1987, the Administrator shall submit a report to Congress on the assessment under this subsection, along with recommendations specifying

(1) how the Administrator intends to provide assistance to Indian tribes to develop waste treatment management plans and to construct treatment works under this chapter, and

(2) methods by which the participation in and administration of programs under this chapter by Indian tribes can be maximized.

(c) Reservation of funds
The Administrator shall reserve each fiscal year beginning after September 30, 1986, before allotments to the States under section 1285 (e) of this title, one-half of one percent of the sums appropriated under section 1287 of this title. Sums reserved under this subsection shall be available only for grants for the development of waste treatment management plans and for the construction of sewage treatment works to serve Indian tribes, as defined in subsection (h) of this section and former Indian reservations in Oklahoma (as determined by the Secretary of the Interior) and Alaska Native Villages as defined in Public Law 92–203 [43 U.S.C. 1601 et seq.].

(d) Cooperative agreements
In order to ensure the consistent implementation of the requirements of this chapter, an Indian tribe and the State or States in which the lands of such tribe are located may enter into a cooperative agreement, subject to the review and approval of the Administrator, to jointly plan and administer the requirements of this chapter.

(e) Treatment as States
The Administrator is authorized to treat an Indian tribe as a State for purposes of subchapter II of this chapter and sections 1254, 1256, 1313, 1315, 1318, 1319, 1324, 1329, 1341, 1342, 1344, and 1346 of this title to the degree necessary to carry out the objectives of this section, but only if—

(1) the Indian tribe has a governing body carrying out substantial governmental duties and powers;

(2) the functions to be exercised by the Indian tribe pertain to the management and protection of water resources which are held by an Indian tribe, held by the United States in trust for Indians, held by a member of an Indian tribe if such property interest is subject to a trust restriction on alienation, or otherwise within the borders of an Indian reservation; and

(3) the Indian tribe is reasonably expected to be capable, in the Administrator's judgment, of carrying out the functions to be exercised in a manner consistent with the terms and purposes of this chapter and of all applicable regulations.

Such treatment as a State may include the direct provision of funds reserved under subsection (c) of this section to the governing bodies of Indian tribes, and the determination of priorities by Indian tribes, where not determined by the Administrator in cooperation with the Director of the Indian Health Service. The Administrator, in cooperation with the Director of the Indian Health Service, is authorized to make grants under subchapter II of this chapter in an amount not to exceed 100 percent of the cost of a project. Not later than 18 months after February 4, 1987, the Administrator shall, in consultation with Indian tribes, promulgate final regulations which specify how Indian tribes shall be treated as States for purposes of this chapter. The Administrator shall, in promulgating such regulations, consult affected States sharing common water bodies and provide a mechanism for the resolution of any unreasonable consequences that may arise as a result of differing water quality standards that may be set by States and Indian tribes located on common bodies of water. Such mechanism shall provide for explicit consideration of relevant factors including, but not limited to, the effects of differing water quality permit requirements on upstream and downstream dischargers, economic impacts, and present and historical uses and quality of the waters subject to such standards. Such mechanism should provide for the avoidance of such unreasonable consequences in a manner consistent with the objective of this chapter.

(f) Grants for nonpoint source programs

The Administrator shall make grants to an Indian tribe under section 1329 of this title as though such tribe was a State. Not more than one-third of one percent of the amount appropriated for any fiscal year under section 1329 of this title may be used to make grants under this subsection. In addition to the requirements of section 1329 of this title, an Indian tribe shall be required to meet the requirements of paragraphs (1), (2), and (3) of subsection (d) [1] of this section in order to receive such a grant.

(g) Alaska Native organizations

No provision of this chapter shall be construed to—

(1) grant, enlarge, or diminish, or in any way affect the scope of the governmental authority, if any, of any Alaska Native organization, including any federally-recognized tribe, traditional Alaska Native council, or Native council organized pursuant to the Act of June 18, 1934 (48 Stat. 987), over lands or persons in Alaska;

(2) create or validate any assertion by such organization or any form of governmental authority over lands or persons in Alaska; or

(3) in any way affect any assertion that Indian country, as defined in section 1151 of title 18, exists or does not exist in Alaska.

(h) Definitions

For purposes of this section, the term—

(1) "Federal Indian reservation" means all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and including rights-of-way running through the reservation; and

(2) "Indian tribe" means any Indian tribe, band, group, or community recognized by the Secretary of the Interior and exercising governmental authority over a Federal Indian reservation.

40 CFR 122.31(a) provides:

As a Tribe you may:
(a) Be authorized to operate the NPDES program including the storm water program, after EPA determines that you are eligible for treatment in the same manner as a State under §§ 123.31 through 123.34 of this chapter. (If you do not have an authorized NPDES program, EPA implements the program for discharges on your reservation as well as other Indian country, generally.);

40 CFR 123.1 (h) provides:

(h) In many cases, States (other than Indian Tribes) will lack authority to regulate activities on Indian lands. This lack of authority does not impair that State's ability to obtain full program approval in accordance with this part, i.e., inability of a State to regulate activities on Indian lands does not constitute a partial program. EPA will administer the program on Indian lands if a State (or Indian Tribe) does not seek or have authority to regulate activities on Indian lands.

40 CFR 123.23(b) provides:

(b) If a State (which is not an Indian Tribe) seeks authority over activities on Indian lands, the statement shall contain an appropriate analysis of the State's authority.