UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 12-3419

ONEIDA TRIBE OF INDIANS OF WISCONSIN,
Plaintiff-Appellee,

v.

VILLAGE OF HOBART,
Defendant-Third/Party Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA, et al.,
Third/Party Defendants-Appellees.

On Appeal from the United States District Court for the Eastern District of Wisconsin, 1:10-cv-00137-WCG

RESPONSE BRIEF FOR THE UNITED STATES

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JURISDICTIONAL STATEMENT

The jurisdictional statement of the defendant-third/party plaintiff-appellant, the Village of Hobart, Wisconsin ("Village of Hobart" or "Hobart"), is not complete and correct. The district court had jurisdiction with respect to the complaint filed by the plaintiff-appellee, the Oneida Tribe of Indians of Wisconsin ("Oneida Tribe" or "Tribe"), against the Village of Hobart because the Tribe is a federally recognized Indian tribe and asserted claims under the Constitution and laws of the United States. *See* 28 U.S.C. §§ 1331, 1362; 74 Fed. Reg. 40,218, 40,220 (Aug. 11, 2009); SA49-53, 121-22. The district court had jurisdiction with respect to Hobart's amended third-party complaint against the United States, the U.S. Department of the Interior, and the Secretary of the Interior (collectively, "the United States"), which are appellees here and were third-party defendants in the court below, because the complaint asserted claims under the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701-706. *See* SA95-96, 98; 28 U.S.C. § 1331.[1]

[1] The district court concluded that subject matter jurisdiction was lacking because Hobart's claims do not unequivocally fall within the scope of Section 313 of the Clean Water Act. *See* SA32. However, under the reasoning of this Court in *United States v. Cnty. of Cook*, 167 F.3d 381 (7th Cir. 1999), and other decisions, the district court had subject matter jurisdiction. *See id.* at 389 ("[W]hat sovereign immunity means is that relief against the United States depends on a statute; the

On September 5, 2012, the district court entered final judgment in favor of the Oneida Tribe and the United States. SA34-35. Hobart's timely notice of appeal was filed on October 19, 2012. SA131. This Court's jurisdiction arises under 28 U.S.C. § 1291.

QUESTIONS PRESENTED

In 2007, the Village of Hobart issued a stormwater ordinance that authorizes the imposition of stormwater assessments on all of the lands within Hobart's borders, including 148 parcels of land held in trust by the United States for the federally recognized Oneida Tribe ("tribal trust lands"). SA12-19. The following questions are presented:

1. Whether the Clean Water Act ("CWA") provides Hobart with authority to impose its stormwater ordinance on the tribal trust lands where Hobart otherwise lacks authority pursuant to federal statute or common law to impose environmental regulations, or zoning or other land use regulations, on tribal activities on tribal trust lands.

2. If Hobart has authority to impose its stormwater ordinance on tribal trust lands, whether CWA Section 313 requires the

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question is not the competence of the court to render a binding judgment, but the propriety of interpreting a given statute to allow particular relief.").

Department of the Interior to pay stormwater assessments imposed on those lands.[2]

STATEMENT OF THE CASE

This case arose in response to the Village of Hobart's efforts to impose its stormwater ordinance and assessments on 148 parcels of land held in trust by the United States for the Oneida Tribe. SA14-19. The Oneida Tribe filed this civil action against Hobart seeking a declaration that Hobart lacks authority to impose its stormwater ordinance and assessments on the tribal trust lands. *See* SA12. Hobart filed an answer denying that the Tribe was entitled to such relief and asserted counterclaims for the unpaid assessments. *See* SA13. Hobart also ultimately filed an amended third-party complaint challenging the Department of the Interior's final agency decision not to pay the assessments for the Tribe. SA13-14, 95-108.

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[2] Section 313 of the CWA provides as follows:

> Each department, agency, or instrumentality of the executive, legislative, and judicial branches of the Federal Government . . . having jurisdiction over any property or facility . . . shall be subject to, and comply with, all . . . State . . . and local requirements . . . respecting the control and abatement of water pollution in the same manner and to the same extent as any nongovernmental entity including the payment of reasonable service charges.

33 U.S.C. § 1323(a).

The Oneida Tribe filed a motion for summary judgment making the following arguments: (1) Hobart lacked authority to impose the stormwater ordinance and assessments on tribal trust lands; and (2) the assessments are taxes and thus may not be imposed on tribal trust lands, which are immune from state and local taxation under 25 U.S.C. § 465. SA112-13. The United States filed a motion to dismiss, arguing that the court should dismiss the amended third-party complaint for failure to state a claim upon which relief may be granted pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. *See* SA125-26. The United States argued that Hobart lacked authority to impose its stormwater ordinance and assessments on the tribal trust lands and that, in any event, the limited waiver of sovereign immunity in CWA Section 313 did not require the United States to pay the assessments. *See id.* In opposing the United States' motion, Hobart primarily relied on the CWA, and CWA Section 313 in particular, in arguing that the United States should be held liable for the unpaid assessments. *See* SA19, 28-32.

In an opinion issued on September 5, 2012, the district court granted the Oneida Tribe's motion for summary judgment and the United

States' motion to dismiss. SA12-33. In granting the Tribe's motion, the court concluded that the assessments were taxes and that CWA Section 313 was "not the kind of clear statement of intent that is required to allow local taxation of Indian trust land." SA27. The district court reasoned that, while CWA Section 313 "establishes the Government's duty to comply with the substantive and procedural requirements of the CWA at federal facilities," it "says nothing about Indian tribes or property owned by Indian tribes." *Id.* In granting the United States' motion to dismiss, the district court held that subject matter jurisdiction was lacking as to the amended third-party complaint, because CWA Section 313 did not require the United States to pay the assessments. SA28-32.

BACKGROUND

I. Fundamental Principles of Federal Indian Law

"'Indian tribes are unique aggregations possessing attributes of sovereignty over both their members and their territory.'" *United States v. Wheeler*, 435 U.S. 313, 323 (1978) (quoting *United States v. Mazurie*, 419 U.S. 544, 557 (1975)). The Constitution provides Congress with exclusive authority over Indian affairs. U.S. Const. art I, § 8, cl. 3.

Absent a delegation of this authority, federal statutory and common law governs Indian relations. *See Oneida v. Oneida Indian Nation*, 470 U.S. 226, 233-36 (1985). As the Supreme Court has recognized, fundamental principles of federal Indian law reflect "a deeply rooted policy in our Nation's history of leaving Indians free from state jurisdiction and control." *Okla. Tax Comm'n v. Sac & Fox Nation*, 508 U.S. 114, 123 (1993) (internal quotations omitted).[3]

The touchstone for allocating authority among federal, state, and tribal governments has historically been "Indian country." *See, e.g.*, *id.* at 125 (citing Cohen's Handbook of Federal Indian Law 34 (1982 ed.)); *Alaska v. Native Vill. of Venetie Tribal Gov't*, 522 U.S. 520, 527 (1998); *Wash., Dep't of Ecology v. EPA*, 752 F.2d 1465, 1467 n.1 (9th Cir 1985) (accepting the definition of Indian country set forth in 18 U.S.C. § 1151 "as a reasonable marker of the geographic boundary between state authority and federal authority"). The term "Indian country" encompasses, among other things, the land within a reservation of a federally recognized tribe; it also includes land held in trust for the tribe

[3] The Supreme Court has recognized this principle since the days of Chief Justice Marshall. *See Worcester v. Georgia*, 31 U.S. 515, 557 (1832) (Marshall, C.J.) (Indian nations are "distinct political communities, having territorial boundaries, within which their authority is exclusive").

by the United States, whether or not within the current boundaries of an Indian reservation. *See* 18 U.S.C. § 1151; *Okla. Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 511 (1991) (Indian country includes land "validly set apart for the use of the Indians as such, under the superintendence of the Government" (internal quotation omitted)). The term "Indian country" is often used interchangeably with the term "Indian lands." *See, e.g.*, *Dep't of Ecology*, 752 F.2d at 1467 n.1 (noting that the U.S. Environmental Protection Agency viewed the terms as synonyms).[4]

Courts address assertions of state and local government authority in Indian country against the "crucial backdrop" of traditional notions of Indian sovereignty. *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 334-35 (1983) (internal quotation omitted); *McClanahan v. State Tax Comm'n of Ariz.*, 411 U.S. 164, 170-74 (1973). State and local governments generally lack jurisdiction over tribes and their members in Indian country, unless such jurisdiction is expressly authorized by Congress. *Wisconsin v. EPA*, 266 F.3d 741, 747 (7th Cir. 2001) ("state laws may usually be applied to Indians on their reservations only if

[4] The United States uses the terms "Indian lands" and "Indian country" interchangeably in this brief.

Congress so expressly provides") (citing *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 207 (1987)); *see McClanahan*, 411 U.S. at 170-71.[5] *See, e.g.*, *Gobin v. Snohomish Cnty.*, 304 F.3d 909, 912 (9th Cir. 2002) (the "dispositive question" is "[w]hether Congress expressly authorized the County to regulate reservation fee lands owned by tribal members").[6] Congress thus has "acted consistently upon the assumption that the States have no power to regulate the affairs of Indians on a reservation." *Williams v. Lee*, 358 U.S. 217, 220 (1959).[7]

The law is more complex when the activities of non-Indians are involved. *Compare Mescalero Apache Tribe*, 462 U.S. at 330 (state conceded that it lacked authority to regulate activities of Indians in Indian country), *McClanahan*, 411 U.S. at 170-71, *Wisconsin*, 266 F.3d at 747, *and Gobin*, 304 F.3d at 912, *with Mescalero Apache Tribe*, 462

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[5] In *McClanahan*, the Supreme Court explained that "[s]tate laws generally are not applicable to tribal Indians on an Indian reservation except where Congress has expressly provided that State laws shall apply" and that "[i]t follows that Indians and Indian property on an Indian reservation are not subject to State taxation except by virtue of express authority conferred upon the State by act of Congress." *McClanahan*, 411 U.S. at 170-71 (internal quotation omitted).

[6] *See also Shakopee Mdewakanton Sioux Cmty. v. City of Prior Lake*, 771 F.2d 1153, 1157 (8th Cir. 1985) ("It is true that Reservation residents are not subject to municipal civil regulatory control.").

[7] *See Bryan v. Itasca Cnty.*, 426 U.S. 373, 390 (1976) ("[I]f Congress in enacting Pub. L. 280 had intended to confer upon the States general civil regulatory powers, including taxation, over reservation Indians, it would have expressly said so.").

U.S. at 330, 338-44 (addressing state assertion of authority over non-Indians hunting in Indian country), *and Cabazon Band*, 480 U.S. at 216 (addressing a case that involved "a state burden on tribal Indians in the context of their dealings with non-Indians"). But "[g]enerally speaking, primary jurisdiction over land that is Indian country rests with the Federal Government and the Indian tribe inhabiting it, and not with the States." *Native Vill. of Venetie Tribal Gov't*, 522 U.S. at 527 n.1.

II. Statutory and Regulatory Background

A. The Indian Reorganization Act

In 1934, Congress enacted the Indian Reorganization Act ("IRA") to "establish machinery whereby Indian tribes would be able to assume a greater degree of self-government, both politically and economically." *Morton v. Mancari*, 417 U.S. 535, 542 (1974); *see Hearings Before the H. Comm. on Indian Affairs*, 73rd Cong. 15-29 (1934) (memorandum of explanation on S. 2755/H.R. 7902 from John Collier, Commissioner of Indian Affairs). From the 1870s until passage of the IRA, the United States had generally followed an allotment policy that resulted in a large-scale transfer of Indian lands out of Indian ownership, which undermined tribal communities and impoverished the tribes and their

members. Cohen's Handbook of Federal Indian Law §§ 1.04, 1.05 (2012 ed.) ("Cohen's Handbook"); *see Hodel v. Irving*, 481 U.S. 704, 706-08 (1987) (describing allotment policy as "disastrous for the Indians").

The IRA, among other things, expressly discontinued the allotment program. *See* 25 U.S.C. § 461. In addition, and of relevance here, IRA Section 5 authorizes the Secretary of the Interior "to acquire . . . any interest in lands . . . within or without existing reservations . . . for the purpose of providing land for Indians." 25 U.S.C. § 465. Section 5 further provides that title to such lands "shall be taken in the name of the United States in trust for the Indian tribe or individual Indian for which the land is acquired, and such lands or rights shall be exempt from State and local taxation." *Id.*

Regulations promulgated by the Department of the Interior's Bureau of Indian Affairs specify the factors that Interior considers when deciding whether to approve a land-into-trust application. When the land is located on a reservation and owned in fee by an Indian or a tribe, Interior considers, among other factors: (1) the tribe's need for the additional land; (2) the purposes for which the land will be used; (3) the impact on the State and its political subdivisions resulting from the

removal of the land from the tax rolls; and (4) jurisdictional problems and potential conflicts of land use which may arise. 25 C.F.R. §§ 151.4, 151.10; *see also id.* § 151.11 (criteria for acquisitions of lands located "outside of and noncontiguous to" a reservation). The mechanism for the acquisition of lands for tribal communities thus "takes account of the interests of others with stakes in the area's governance and well-being." *City of Sherrill v. Oneida Indian Nation*, 544 U.S. 197, 220-21 (2005).

Tribes generally control the use and development of land held by the United States in trust for them. Tribes, for example, may decide whether and to whom to lease tribal trust lands, subject in most instances to Interior approval. *See* 25 U.S.C. § 415.[8] Tribes also have the power to exclude non-members from tribal trust land. *See Montana v. United States*, 450 U.S. 544, 557 (1981); *see also Kahawaiolaa v. Norton*, 386 F.3d 1271, 1273 (9th Cir. 2004) (federally recognized tribes control tribal trust lands). The power to exclude is accompanied by "the lesser power to place conditions on entry, on continued presence, or on

[8] Interior's regulations concerning non-agricultural surface leasing of trust and restricted lands were recently updated. Interior replaced a general subpart addressing all non-agricultural surface leases with new subparts addressing residential leases, business leases, and leases for the development of wind and solar resources. 77 Fed. Reg. 72,440, 72,440 (Dec. 5, 2012). The new regulations provide greater deference to tribes and Indians in leasing decisions. *Id.*

reservation conduct." *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 144 (1982); *see Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 335 (2008). Tribal powers, such as the power to tax transactions occurring on trust lands, also flow from a tribe's general authority as a sovereign. *Merrion*, 455 U.S. at 137-38 (noting that such taxation power is a "necessary instrument of self-government and territorial management").

B. The Clean Water Act

1. The National Pollutant Discharge Elimination System

The Federal Water Pollution Control Act Amendments of 1972, as amended ("the Clean Water Act" or "CWA"), establishes a National Pollutant Discharge Elimination System ("NPDES") permitting program that is "designed to prevent harmful discharges into the Nation's waters." *Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 650 (2007). Section 301(a) of the CWA prohibits the unauthorized discharge of a pollutant into waters of the United States. 33 U.S.C. § 1311(a). To avoid civil and/or criminal liability under the CWA, an individual or entity proposing to discharge pollutants into waters of the United States may apply for a NPDES permit authorizing

the discharge, as provided for in CWA Section 402. *See id.*; 33 U.S.C. § 1342(a). The NPDES permits specify limitations on the type and quantity of pollutants that can be discharged. *See* 33 U.S.C. § 1342(a); *S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95, 102 (2004).

The Environmental Protection Agency ("EPA") implements the NPDES permitting system for each state unless a state seeks and receives authorization from EPA to administer the program under state law. *See* 33 U.S.C. §§ 1319, 1342(a), (b); *Nat'l Ass'n of Home Builders*, 551 U.S. at 650. A state seeking to administer the NPDES program submits a program description to EPA for approval, as well as a statement from the attorney general of the state (or equivalent official) that the laws of the state "provide adequate authority to carry out the described program." 33 U.S.C. § 1342(b); 40 C.F.R. §§ 123.21-123.23. EPA regulations recognize that states may "lack authority to regulate activities on Indian lands" and thus require that a state affirmatively request authority from EPA to administer a NPDES program on Indian lands. 40 C.F.R. § 123.1(h); 40 C.F.R. § 123.23(b). In doing so, the state must demonstrate to EPA that it has adequate authority to carry out its

proposed program on those lands. 40 C.F.R. § 123.23(b) ("If a State . . . seeks authority over activities on Indian lands, the statement shall contain an appropriate analysis of the State's authority.").

In 1987, Congress amended the CWA to allow EPA to treat federally recognized Indian tribes in a manner similar to states for a number of purposes, including in approving tribes to administer NPDES permitting programs to manage and protect water resources on Indian reservations. 33 U.S.C. § 1377(e); *see* 40 C.F.R. § 123.31. This amendment was consistent with an existing policy of the federal government to encourage tribal self-government in environmental matters. *Wash., Dep't of Ecology v. EPA*, 752 F.2d 1465, 1471 (9th Cir. 1985); *see* President's Statement on Indian Policy, 19 Weekly Comp. Pres. Doc. 98, 99 (Jan. 24, 1983); 25 U.S.C. § 450a(b) (congressional declaration of policy); EPA Policy for the Administration of Environmental Programs on Indian Reservations (Nov. 8, 1984), *available at* http://www.epa.gov/tp/pdf/indian-policy-84.pdf ("Until Tribal Governments are willing and able to assume full responsibility for delegable programs, the Agency will retain responsibility for managing programs for reservations"). On Indian lands, EPA thus

administers the NPDES program in the absence of a state or tribal program expressly approved by EPA for those lands. Treatment of Indian Tribes as States, 58 Fed. Reg. 67,966, 67,974 (Dec. 22, 1993); *see* 40 C.F.R. § 123.32(d).

In Wisconsin, the State has administered an EPA-approved NPDES permitting program since 1974, but has specifically requested that EPA retain NPDES authority for discharges on Indian lands within the state. *See* Discharges of Pollutants to Navigable Waters: Approval of State Programs, 39 Fed. Reg. 26,061, 26,061 (July 16, 1974).[9] EPA thus administers the NPDES program on Indian lands in Wisconsin. EPA, NPDES Profile: Wisconsin and Indian Country, *available at* http://www.epa.gov/npdes/pubs/wisconsin_final_profile.pdf. Wisconsin does not have authority to do so. *Id.*; *see Wisconsin v. EPA*, 266 F.3d 741, 747 (7th Cir. 2001) ("EPA and not the state of Wisconsin might

[9] *See* SA78 (EPA letter) (providing that the state's NPDES program must be implemented in accordance with the memorandum of agreement ("MOA")); SA79 (same letter) (indicating that the state would lack enforcement authority with respect to Indian activities on Indian lands); SA89 (MOA) (same); *see also* SA91-92 (letter from Wisconsin Department of Natural Resources to EPA) (state not willing to accept NPDES authority with respect to discharges by tribes on Indian lands); SA94 (modification to MOA) (stating that the state was not assuming authority for permits issued to Indian tribes or tribal organizations for discharges on Indian lands).

well be the proper authority to administer [CWA] programs for the reservation.").

2. NPDES Regulations for Stormwater and Storm Sewers

Because stormwater runoff collects debris, chemicals, and other pollutants as it flows over land, the discharge of collected runoff into receiving waters, such as streams, lakes, and rivers, poses a serious environmental challenge. Regulations for Revision of the Program Addressing Storm Water Discharges, 64 Fed. Reg. 68,722, 68,723 (Dec. 8, 1999). Amendments to the CWA in 1987 directed EPA to address this problem, including by issuing regulations requiring NPDES permits for certain kinds of discharges, including discharges from certain municipal separate storm sewer systems. *See* Pub. L. No. 100-4, tit. iv, § 405, 101 Stat. 7, 69-71 (1987); 33 U.S.C. § 1342(p)(3)(B); 40 C.F.R. § 122.26(b)(8) (defining "municipal separate storm sewer"). The amendments require that a permit for a municipal separate storm sewer "shall require controls to reduce the discharge of pollutants to the maximum extent practicable, including management practices, control techniques and system, design and engineering methods, and such

other provisions as . . . determine[d] appropriate for the control of such pollutants." 33 U.S.C. § 1342(p)(3)(B)(iii).

In 1999, EPA issued a rule addressing discharges into waters of the United States from municipal separate storm sewer systems serving fewer than 100,000 persons. 64 Fed. Reg. at 68,722.[10] Such systems are referred to as "small" municipal separate storm sewer systems and are only required to obtain NPDES permit authorization for discharges from the portions of the municipal separate storm sewer located within an "urbanized area" or designated by the permitting authority for regulation. 40 C.F.R. § 122.32.

Under EPA regulations, the NPDES permit for a small municipal separate storm sewer system requires the operator of such system to ensure that its "stormwater management program" minimizes the discharge of pollution from stormwater into the Nation's waters "to the maximum extent practicable." 40 C.F.R. § 122.34(a). A tribe that owns or operates a municipal separate storm sewer system that is in an urbanized area (or is designated for regulation by EPA) must obtain a

[10] EPA issued regulations for large and medium municipal separate storm sewer systems in 1990. NPDES Permit Application Regulations for Storm Water Discharges, 55 Fed. Reg. 47,990, 47,990 (Nov. 16, 1990).

permit authorizing discharges from its system. 33 U.S.C. § 1362(4) (defining "municipality" to include "an Indian tribe").

While not provided for in the federal municipal separate storm sewer system program, to fund the operation and maintenance of separate storm sewer systems, including pollution control measures implemented under NPDES permits, many states have enacted laws enabling a municipality to pass ordinances establishing a "stormwater utility." *See, e.g.*, EPA, Funding Stormwater Programs (2008), *available at* http://www.epa.gov/npdes/pubs/region3_factsheet_funding.pdf. Such utilities have authority, among other things, to raise funds via stormwater assessments on the properties within their jurisdiction that contribute stormwater through their sewer systems. *Id.*

3. The CWA "Federal Facilities" Provision

In 1972, Congress addressed the responsibility of "federal installations to comply with general measures to abate water pollution" in CWA Section 313. *EPA v. California*, 426 U.S. 200, 211 (1976). As originally enacted, Section 313 provided, in relevant part, as follows:

> 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 shall comply with Federal, State, interstate, and local requirements respecting control and abatement of pollution to the same extent that any person is subject to such requirements, including the payment of reasonable service charges.

California, 426 U.S. at 211-12 (quoting 33 U.S.C. § 1323 (1970 ed., Supp. IV)). Section 313 was intended to ensure that "federal facilities" comply with the same pollution control requirements "as private sources of pollution." *Id.* at 215 n.28 (internal quotation omitted).

From the beginning and consistently thereafter, courts have interpreted Section 313 narrowly. In *EPA v. California*, the Supreme Court addressed an argument that Section 313 and other CWA provisions required federal facilities to obtain state-issued NPDES permits (rather than permits issued by EPA). *Id.* at 201-02. Construing Section 313 narrowly, the Supreme Court concluded that the CWA did not subject federal facilities to state permit requirements with the requisite degree of clarity. *Id.* at 227.

In 1977, following the Supreme Court's decision, Congress amended Section 313 to provide, in relevant part, as follows:

> 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. . . . This subsection shall apply notwithstanding any immunity of such agencies, officers, agents, or employees under any law or rule of law.

33 U.S.C. § 1323(a). The amendment expanded the obligations of federal facilities to obtain state permits, but Section 313 nonetheless remained focused on federal facilities. *See* H.R. Rep. No. 95-830, at 303 (1977) ("This section clarifies section 313 of the Act to provide that all *Federal facilities* must comply with all substantive and procedural requirements of Federal, State, or local water pollution control laws." (emphasis added)); S. Rep. No. 95-370 (1977) (referring to "federal facilities" and "federal facilities and activities").

In January 2011, Congress amended the CWA to specify, in a new Section 313(c), that the "reasonable service charges" payable by federal facilities under Section 313(a) include any stormwater assessment that is reasonable, nondiscriminatory, and meets certain other criteria, regardless of whether the assessment is denominated a tax. *See* 33

U.S.C. § 1323(c); *see also* Reimbursement or Payment Obligation of the Federal Government under CWA Section 313(c)(2)(B), Op. Off. Legal Counsel (Feb. 25, 2011), *available at* 2011 WL 1085035. Under Section 313(c), the term "reasonable service charges" includes "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.

33 U.S.C. § 1323(c).

Litigation arising in federal courts before January 2011 raised the issue of whether, for purposes of federal law, municipal stormwater assessments are unconstitutional taxes as applied to federal agencies. *See City of Cincinnati v. United States*, 153 F.3d 1375, 1376-78 (Fed. Cir. 1998). Litigation arising since January 2011 primarily has raised

the issues of whether stormwater assessments imposed prior to January 2011 are taxes and whether the amendment requires federal agencies to pay assessments imposed prior to that date. *DeKalb Cnty. v. United States*, 108 Fed. Cl. 681, 696 (Fed. Cl. 2013).[11] In addition, in state courts, numerous categories of assessed entities, including non-governmental ones, have challenged municipal stormwater assessments as impermissible taxes under state law.[12]

III. Factual Background

A. Facts of Public Record and Other Undisputed Facts

1. Hobart's Stormwater Ordinance

In 2007, the Village, which is located entirely within the Tribe's Reservation, enacted a stormwater ordinance that established rules and regulations purporting to apply "to all real property within the

[11] The instant case represents the only litigation to date arising from the imposition of stormwater assessments on tribal trust lands. Hobart has imposed assessments on tribal trust lands both before and after the January 2011 amendment. *See* SA18.

[12] The question of whether municipal stormwater assessments are taxes under federal law is distinct from the question of whether such assessments are taxes under state law. *See DeKalb Cnty.*, 108 Fed. Cl. at 685 ("[I]t matters little that the Georgia Supreme Court has determined that the type of stormwater utility assessments at issue in this case are fees rather than taxes."); SA21; *Mcleod v. Columbia Cnty.*, 599 S.E.2d 152, 155 (Ga. 2004); *see also El Paso Apartment Ass'n v. City of El Paso*, 415 F. App'x 574, 576 (5th Cir. 2011) (applying state law); *City of Lewiston v. Gladu*, 40 A.3d 964, 965 (Me. 2012) (same).

boundaries of the Village of Hobart." Hobart Municipal Code, ch. 4.5 ("HMC"); SA15-19, 122. The ordinance is primarily focused on the imposition and collection of several kinds of charges to fund a "stormwater management utility" established under the ordinance. *See* HMC § 4.502(1). The stormwater management utility is authorized to "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." HMC § 4.503(1). The ordinance explains that the stormwater facilities covered and funded by the ordinance "may" include sewers. HMC § 4.503(1), (2).

The ordinance authorizes several types of charges, including an equivalent runoff unit ("ERU") charge. HMC § 4.505(4)(b). The ERU charge generally is proportional to the amount of impervious area on a particular property. *Id.* The ordinance authorizes offsets against the ERU charge under specified conditions, including when stormwater runoff does not drain from a property into "any stormwater system" and when controls are implemented on a property to address stormwater

pollution. HMC § 4.506(3). Applications for offsets require a review fee and documentation from a professional engineer demonstrating that the conditions specified in the stormwater ordinance are met. HMC § 4.506(2). Finally, the ordinance explains that unpaid delinquent charges "shall be a lien upon the property served and shall be enforced as provided [under state law]." HMC § 4.508(3).

2. Hobart's and the Oneida Tribe's NPDES Permit Applications

As a regulated entity, Hobart has applied for, and EPA has proposed to issue, a NPDES permit for discharges from Hobart's small municipal separate storm sewer system. SA59-67; *see also supra* Part II.B.1 (explaining that EPA, rather than Wisconsin, administers the NPDES program in Indian country within the state); SA15 (Hobart is entirely within the Tribe's Reservation). The Oneida Tribe also has applied for, and EPA has proposed to issue, a NPDES permit for discharges from the Tribe's small municipal separate storm sewer system. SA68-76. EPA has not taken final action on the permit applications submitted by Hobart and the Tribe. *See* SA59-76. The draft permits did not identify the geographic scope of the respective permits, and the scope of the two sewer systems is not otherwise established in the district court record,

except that it is undisputed that a tribal stormwater retention pond is located on two of the parcels of tribal trust land upon which Hobart has levied stormwater assessments. *See id.*; SA15, 119.

3. Hobart's Attempt to Enforce Its Ordinance on Trust Lands

This case arose in response to Hobart's efforts to impose its stormwater ordinance and assessments on 148 parcels of land held in trust by the United States for the Oneida Tribe. SA12, 16-19. Each of the 148 parcels of tribal trust land was acquired in trust by the United States prior to 2007. SA122.

Since 2007, Hobart assessed the ERU charge on each of the 148 parcels of tribal trust lands, as well as on land the Oneida Tribe owns in fee. *See id.* In 2008, the Oneida Tribe began paying stormwater assessments under protest for the parcels held in fee. SA123. The Tribe refused, however, to pay assessments for the tribal trust lands. *Id.* Hobart subsequently demanded payment from the Department of the Interior, which likewise refused to pay. *Id.* Interior ultimately explained in a letter sent to Hobart that the Village lacked authority to impose its stormwater ordinance and assessments on tribal trust lands and that,

in any event, CWA Section 313 did not require the United States to pay the assessments levied on those lands. *See id.*; SA109-11.

B. Allegations in Hobart's Amended Third-Party Complaint

Hobart's amended third-party complaint against the United States alleges that because Hobart operates a municipal separate storm sewer system in an urbanized area, federal and state law requires it to obtain a NPDES permit, which in turn will require a stormwater management program to reduce the discharge of pollutants. SA99-100. Consistent with Hobart's permit application and draft permit, however, the amended third-party complaint does not allege any facts that demonstrate the location and extent of Hobart's sewer system. *Id.*; *see* HMC § 4.501-4.512; SA127-30. The amended third-party complaint also alleges that to remain in compliance with federal and state laws on stormwater management, the Village must impose and collect charges "to finance planning, design, construction, maintenance, administration, and other storm water measures" and that the charges are used solely "for purposes of the stormwater management program." SA101. Hobart does not, however, allege any facts that describe the particulars of its stormwater management program that allegedly is

financed by Hobart's stormwater assessments. *See id.*; HMC § 4.501-4.512; SA127-30.

Finally, Hobart alleges that the Tribe and United States benefit from Hobart's stormwater management program. *See* SA104; *see also* SA128. Hobart does not allege that Interior has engaged in any activity that results in discharges of stormwater runoff into its sewer system.[13]

SUMMARY OF ARGUMENT

This Court should affirm the district court's decision to dismiss Hobart's amended complaint because Hobart lacks authority to impose its stormwater ordinance on tribal trust lands. States and their political subdivisions may only impose environmental regulations, or zoning or other land use regulations, on a tribe's activities on tribal trust lands when authorized by an express Act of Congress. Here, the CWA does not authorize Hobart to impose its stormwater ordinance on tribal trust lands. No other federal statute or other source of federal law provides the requisite authorization. Hobart therefore may not impose its ordinance on those lands.

[13] Nor does Hobart allege that stormwater runoff from any of the 148 trust land parcels drains into Hobart's sewer system.

Hobart primarily focuses its arguments on whether CWA Section 313 obligates the United States to pay the assessments imposed on tribal trust lands – an argument that presumes that Hobart has authority to impose its stormwater ordinance and assessments on those lands in the first place. The Court, however, must first address whether Hobart has authority to impose its ordinance and assessments on tribal trust lands. Because Hobart lacks such authority, this Court should affirm the district court judgment in favor of the United States (and the Oneida Tribe) without reaching the other issues raised in Hobart's brief.

Assuming for the sake of argument that Hobart has authority to impose its ordinance on tribal trust lands, the Court nonetheless should affirm the judgment in favor of the United States. As CWA Section 313 addresses the sovereign immunity of the United States, it must be strictly construed in favor of the federal government. Had Congress intended Section 313 to authorize state and local governments to impose assessments on tribal trust lands and then collect them from the United States (rather than a tribe), it would have said so. The absence of any reference to tribal trust lands in the text of Section 313 or its legislative history is particularly significant given the unique status of

tribal trust lands and the unique purpose such lands serve in enabling tribes to assume a greater degree of self government. For all of these reasons, the district court's judgment in favor of the United States should be affirmed.

STANDARD OF REVIEW

This Court reviews de novo a district court's dismissal of a complaint for failure to state a claim upon which relief may be granted pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. *Adkins v. VIM Recycling, Inc.*, 644 F.3d 483, 492 (7th Cir. 2011). A complaint must contain sufficient factual allegations "to raise a right to relief above the speculative level." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). Dismissal under Rule 12(b)(6) is appropriate if the complaint does not contain "enough facts to state a claim to relief that is plausible on its face." *Bell Atlantic Corp.*, 550 U.S. at 570.

In conducting its de novo review, this Court construes a complaint "in the light most favorable to the plaintiffs, accepting as true all well-pled facts alleged, taking judicial notice of matter within the public record, and drawing all reasonable inferences in the plaintiffs' favor." *Adkins*, 644 F.3d at 492-93. This Court may consider documents

referred to in the plaintiff's complaint that are central to its claims and that are attached to the defendant's motion to dismiss. *Duferco Steel Inc. v. M/V Kalisti*, 121 F.3d 321, 324 n.3 (7th Cir. 1997); *Venture Assocs. Corp. v. Zenith Data Sys. Corp.*, 987 F.2d 429, 431-32 (7th Cir. 1993); *see also* 5A Wright & Miller § 1357, at 299 (3d ed.). The Court also may consider facts agreed upon by the parties. *Duferco Steel Inc.*, 121 F.3d at 324.

ARGUMENT

I. Hobart cannot impose its stormwater ordinance on lands held by the United States in trust for the Oneida Tribe.

This Court should affirm the district court's decision in favor of the Oneida Tribe and the United States. Hobart may not impose its stormwater ordinance on the 148 parcels of tribal trust land without express authorization from Congress. Because the Clean Water Act does not provide the requisite authorization, and Hobart has not claimed that any other federal statute provides authority for its ordinance, Hobart may not impose its ordinance on the tribal trust lands and that is true regardless of whether the stormwater assessments are taxes or fees.

A. Hobart may not impose its stormwater ordinance on tribal trust lands without the authorization of Congress.

While tribes have jurisdiction over, and generally control the use and development of, several different types of land that are considered "Indian country," this case concerns only the parcels of land that the United States acquired in trust for the Oneida Tribe under Section 5 of the IRA and which the tribe currently occupies. SA12, 15, 18-19, 122. When the IRA was enacted in 1934, it was settled that state and local governments lacked authority to impose environmental regulations, zoning ordinances, or other land use regulations on tribal trust lands. *See City of Sherrill v. Oneida Indian Nation*, 544 U.S. 197, 200 (2005) (when the United States accepts land into trust for a tribe under IRA Section 5, it "reestablish[es] sovereign authority over territory" for that tribe); *Chase v. McMasters*, 573 F.2d 1011, 1018 (8th Cir. 1978) ("When Congress provided in [IRA Section 5] for the legal condition in which land acquired for Indians would be held, it doubtless intended and understood that the Indians for whom the land was acquired would be able to use the land free from state or local regulation or interference as well as free from taxation."); *Santa Rosa Band of Indians v. Kings Cnty.*, 532 F.2d 655, 666 (9th Cir. 1976) (same); *see also Connecticut ex*

rel. Blumenthal v. U.S. Dep't of Interior, 228 F.3d 82, 85-86 (2d Cir. 2000). In 1965, Interior promulgated 25 C.F.R. § 1.4, a regulation that barred state and local regulation of the use or development of tribal trust lands that had been leased by tribes. *See* State and Local Regulation of the Use of Indian Property, 30 Fed. Reg. 7520, 7520 (June 9, 1965).[14] Interior explained that the regulation reflected Interior's "sense of existing law" concerning the applicability of state and local law on trust lands. *Id.*[15]

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[14] In rare "exceptional circumstances," a state may assert civil regulatory jurisdiction over the activities of tribes or tribal members on fee lands (as opposed to tribal trust lands) within the exterior boundaries of an Indian reservation notwithstanding the lack of express congressional intent to allow the state to do so. *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 215 (1987); *Gobin v. Snohomish Cnty.*, 304 F.3d 909, 917 (9th Cir. 2002). "The asserted exceptional circumstances are weighed against traditional notions of Indian sovereignty and the congressional goal of encouraging tribal self-determination, self-sufficiency and economic development." *Gobin*, 304 F.3d at 917. Hobart has not argued that "exceptional circumstances" exist in this case, and it would have had the burden to demonstrate "exceptional circumstances" in the district court. *See id.* at 912-13, 917. In any event, because Hobart is seeking to impose its stormwater ordinance on tribal trust lands, it may not impose its ordinance on those lands in the absence of express congressional authorization, even if it could demonstrate "exceptional circumstances." *See* 25 C.F.R. § 1.4(a).

[15] Interior repeatedly has reaffirmed its views. *See* Morongo Band of Mission Indians, 7 I.B.I.A. 299, 312 (1979), *available at* 1979 WL21375; Applicability of Health and Sanitation Laws on California Indian Reservations, 79 Interior Dec. 27 (1969), *available at* 1971 WL18465; Applicability of the Wholesome Meat Act of 1967 on Indian Reservations, 78 Interior Dec. 18 (1971), *available at* 1971 WL18464. Also notable is the fact that while subsection (b) of 25 C.F.R. § 1.4 authorizes Interior to make state and local regulations covered by subsection (a) applicable to trust lands when that is in the best interests of the Indian owners, such action does not authorize state and local *enforcement* of such regulations on

Against this backdrop, and applying the fundamental principles of federal Indian law that govern the allocation of federal, state, and tribal authority in Indian country, *see supra* at 5-9, judicial decisions addressing whether local governments may impose environmental regulations, zoning ordinances, or other land use regulations on a tribe occupying tribal trust lands have focused on the issue of whether Congress has expressly authorized the regulation asserted. *United States v. Cnty. of Humboldt*, 615 F.2d 1260, 1261 (9th Cir. 1980) (county may not enforce zoning, sewage, and road ordinances on trust land without congressional authorization); *Santa Rosa Band of Indians*, 532 F.2d at 657 (addressing the "extent of the civil jurisdiction over Indian reservation trust lands conferred upon state and local governments by P.L. 280, 28 U.S.C. § 1360"); *City of Sault Ste. Marie v. Andrus*, 532 F. Supp. 157, 165-67 (D.D.C.), *aff'd* 672 F.2d 893 (D.C. Cir. 1981); *see also Shivwits Band of Paiute Indians v. Utah*, 428 F.3d 966, 980 (10th Cir. 2005) (addressing and rejecting an argument that the Highway Beautification Act provided a state with authority to enforce regulation of outdoor advertising on trust lands against non-Indians);

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trust lands. *See* 25 C.F.R. § 1.4(b); Morongo Band of Mission Indians, 7 I.B.I.A. at 317-18; Town of Charlestown, Rhode Island, 35 I.B.I.A. 93, 101-02 (2000), *available at* 2000 WL 949337.

Segundo v. City of Rancho Mirage, 813 F.2d 1387, 1390-94 (9th Cir. 1987) (local regulation of non-Indian lessees of trust lands barred in the absence of congressional authorization); *South Dakota v. U.S. Dep't of Interior*, 401 F. Supp. 2d 1000, 1010 (D.S.D. 2005).[16]

In this case, the only federal statute or other source of federal law that Hobart has identified that purportedly authorizes it to impose its stormwater ordinance and assessments on the tribal trust lands is the CWA. *See, e.g.*, Br. at 28. The threshold issue for this Court to resolve in this appeal therefore is whether the CWA provides the requisite authorization.

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[16] The United States has noted in other cases that acquiring land in trust does not remove the land from *all* forms of state jurisdiction. *See* Br. at 16; United States Mem. of Law in Supp. of Summ. J., *Cent. N.Y. Bus. Ass'n v. Ken Salazar*, No. 6:08-cv-00660, 24-25 (N.D.N.Y.) (citing *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 331-32 (1983), and *Nevada v. Hicks*, 533 U.S. 353, 361 (2001)). The cases cited by the United States in the brief referenced by Hobart discuss the same fundamental principles of federal Indian law that are discussed at the outset of this brief. *Compare Mescalero Apache Tribe*, 462 U.S. at 331-32, *with supra* at 5-9. This case, unlike many other cases arising in Indian country, involves the assertion of a stormwater ordinance on the activities of a *tribe* on tribal trust lands, rather than an assertion of regulatory authority over non-Indians or over Indians in the context of their dealings with non-Indians. Hobart Municipal Code, ch. 4.5; SA15-19, 122. Nor does this case involve a question of the scope of tribal court jurisdiction over state officials or the service of process by state officers related to off-reservation criminal conduct. *See Hicks*, 533 U.S. at 355 (addressing whether a tribal court may assert jurisdiction over civil claims against state officials); *see also Nevada v. Hicks*, 196 F.3d 1020, 1022 (9th Cir. 1999) (involving service of process by state officer on a tribal member living on allotted land). The position taken in this brief that Hobart may not impose its ordinance on the activities of the Oneida Tribe on tribal trust lands without the express authorization of Congress is perfectly consistent with the position taken by the United States in the district court brief identified by Hobart.

B. The Clean Water Act does not authorize Hobart to impose its stormwater ordinance on tribal trust lands.

Hobart presumes that the CWA authorizes it to impose its ordinance and assessments on tribal trust lands. Br. at 7-22. However, neither the core provisions of the CWA, the CWA's stormwater-related provisions, nor CWA Section 313 provide Hobart with such authority. This conclusion finds strong support in two decisions of other courts of appeals that addressed whether states could assume authority to administer environmental programs on Indian lands under federal environmental statutes.

1. The core provisions of the Clean Water Act do not authorize Hobart to impose its ordinance on tribal trust lands.

The core provisions of the CWA do not authorize Hobart to impose its stormwater ordinance on tribal trust lands. These provisions, including the provision prohibiting the discharge of pollutants into waters of the United States without a NPDES permit or other authorization, apply to discharges throughout Indian lands, including on tribal trust lands. *See* 33 U.S.C. §§ 1311(a), 1319, 1342(a), (b), 1362(5). But like the core provisions of other environmental laws, these provisions do not authorize states or their political subdivisions to administer pollution

control programs on tribal trust lands or other Indian lands. *See id.*; 23 C.F.R. § 123.1(h); *see also* Cohen's Handbook § 10.01(2)(a) (nothing in federal environmental laws provides a grant of jurisdiction to states). In fact, the CWA and EPA's implementing regulations recognize that, absent express congressional authorization in some other federal statute, states lack authority to administer NPDES programs on Indian lands. *See* 40 C.F.R. § 123.23(b); *see also* 40 C.F.R. § 123.31; Cohen's Handbook § 10.01(2)(a).[17]

Hobart repeatedly fails to acknowledge that states generally lack authority to administer programs on Indian lands under the CWA and other environmental statutes. Hobart, for example, relies on *Phillips Petroleum Co. v. EPA*, 803 F.2d 545 (10th Cir. 1986), in arguing that CWA Section 313 requires the United States to pay the stormwater assessments imposed by Hobart on tribal trust lands. Br. at 28. But *Phillips* did not involve a *state's* assertion of authority; rather, in that case, the Tenth Circuit merely held that "EPA is empowered by the [Safe Drinking Water Act] to implement underground injection control

[17] The State of Wisconsin does not have authority to administer a NPDES program on Indian lands. *See* EPA, NPDES Profile: Wisconsin and Indian Country, *available at* http://www.epa.gov/npdes/pubs/wisconsin_final_profile.pdf. Accordingly, there is no CWA authority that has been transferred or delegated to Hobart by the State of Wisconsin.

programs" on the Osage Indian Reserve in Oklahoma (in Indian country). *Phillips Petroleum*, 803 F.2d at 563. In fact, the opinion explains that while Oklahoma administered an EPA-approved program in the state, it was not authorized to administer the program on the Indian Reserve. *Id.* at 549.

2. The Clean Water Act's provisions relating to municipal stormwater programs do not authorize Hobart to impose its ordinance on tribal trust lands.

Like the core provisions of the CWA, the CWA's provisions relating to municipal stormwater programs do not authorize Hobart to impose its ordinance on tribal trust lands. Rather, the CWA and NPDES regulations merely require municipalities that discharge stormwater into waters of the United States to obtain a NPDES permit authorizing the discharges. *See* 33 U.S.C. § 1342(p)(3)(B). A NPDES permit, in turn, would only require implementation of a stormwater management program "to the maximum extent practicable." 33 U.S.C. § 1342(p)(3)(B); 40 C.F.R. § 122.34(a).[18] The NPDES program does not require municipalities to impose stormwater assessments, let alone in

[18] A municipality also may pursue permitting options that do not require it to implement a stormwater management program involving the regulation of third parties. *See City of Abilene v. EPA*, 325 F.3d 657, 662-63 (5th Cir. 2003); *Envtl. Def. Ctr., Inc. v. EPA*, 344 F.3d 832, 848 (9th Cir. 2003).

particular geographic areas. Nor does it specify that any particular mechanism be used to raise funds.

Consistent with the CWA and EPA's regulations, the draft permit proposed by EPA to Hobart does not suggest, let alone establish, that any final permit would purport to authorize Hobart to impose its stormwater ordinance on tribal trust lands. *See* SA59-67. The draft permit, for example, does not mention tribal trust lands and does not outline the geographic jurisdiction within which the permit requirements would apply. *See id.* Moreover, that the draft permit provides no support for Hobart's position in this case is further evidenced by the fact that EPA also proposed to issue a draft NPDES permit to the Oneida Tribe, which administers other environmental programs on the Oneida Reservation. SA68-76, 117-18.[19]

3. Section 313 of the CWA does not authorize Hobart to impose its stormwater ordinance on tribal trust lands.

Hobart suggests in its opening brief that CWA Section 313 authorizes Hobart to impose its stormwater ordinance on tribal trust

[19] Political subdivisions of states may (and do) address stormwater pollution on Indian lands under cooperative agreements with tribes. *See* SA143-45; *see also* SA137, 139-40, 151-52.

lands. *See, e.g.*, Br. at 28. Hobart's reliance on Section 313 is misplaced for several reasons.

First, Section 313 only imposes requirements on a "department, agency, or instrumentality of the executive, legislative, and judicial branches of the Federal Government." 33 U.S.C. § 1323(a). The provision does not mention Indians, tribes, Indian lands, or tribal lands, let alone tribal trust lands. *See id.* Likewise, the 1972, 1977, and 2011 legislative histories relating to Section 313 do not indicate that Congress intended this provision to authorize state and local regulation of tribal trust lands. Instead, the legislative histories explain that the purpose of Section 313 was to require federal facilities, not tribes or Indians, to comply with state and local laws and regulations respecting the abatement and control of water pollution to the same extent that private citizens do. *See EPA v. California*, 426 U.S. 200, 215 n.28 (1976) (discussing 1972 legislative history); H.R. Rep. No. 95-830, at 303 (1977) ("This section clarifies . . . that all Federal facilities must comply with all substantive and procedural requirements of Federal, State, or local water pollution control laws."); S. Rep. No. 95-370 (1977) (referring to "federal facilities and activities"); 156 Cong. Rec. H8978 (daily ed.

Dec. 22, 2010) (statement of Rep. Oberstar) ("Federal agencies have seemingly rejected local efforts to assess service fees to curb stormwater pollution originating or emanating from Federal facilities."); 156 Cong. Rec. H8979 (daily ed. Dec. 22, 2010) (statement of Rep. Norton) ("No exemption [from liability for stormwater assessments] has been granted to Federal facilities."); 156 Cong. Rec. E2259 (daily ed. Dec. 29, 2010) (statement of Rep. Johnson) (the "Federal Government bears a proportional responsibility for addressing pollution originating from its facilities"); *see also* 156 Cong. Rec. H8979 (daily ed. Dec. 22, 2010) (statement of Rep. Johnson) (noting amendment's focus on requiring payment of fees assessed to address "stormwater pollution that emanates from Federal property.").

Second, Section 313 states that it applies "notwithstanding any immunity of such [federal] agencies, officers, agents, or employees under any law or rule of law." 33 U.S.C. § 1323(a). But in merely waiving the immunities of federal agencies, officers, agents, and employees, Section 313 does not authorize Hobart to impose its

stormwater ordinance on tribal trust lands.[20] When Congress has intended to make state and local laws or regulations applicable to tribal trust lands, it has expressly stated in statutory text that the laws and regulations in question apply on such lands. *See, e.g.*, 25 U.S.C. § 1725 ("land and natural resources owned by, or held in trust for the benefit of the tribe, nation, or their members, shall be subject to the jurisdiction of the State of Maine"). In no instance has Congress made state and local regulations applicable to tribal activities on tribal trust lands merely by waiving the immunities of "[federal] agencies, officers, agents, or employees" and directing federal facilities to comply with the regulations.[21]

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[20] Section 313 does not waive tribal sovereign immunity. *See Okla. Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 506 (1991) (tribal activities on trust land protected by tribal sovereign immunity); *see also Kiowa Tribe v. Mfg. Techs., Inc.*, 523 U.S. 751, 754-55 (1998) (tribal activities protected by tribal sovereign immunity).

[21] In *Colorado River Water Conservation District v. United States*, 424 U.S. 800 (1976), the Supreme Court held that the McCarran Amendment, in making state laws applicable to the "United States" as an "owner" of "water rights" in connection with comprehensive water rights adjudications in state courts, provided consent for state courts "to determine federal reserved rights held on behalf of Indians." *Id.* at 809; 43 U.S.C. § 666(a). The McCarran Amendment, however, is narrowly focused on comprehensive adjudications of water rights, and is not an example of a federal law that makes state or local environmental regulations, zoning ordinances, or other land use regulations applicable to tribal activities on tribal trust lands. Further, the language of Section 313 does not impose obligations on "the United States" and is otherwise markedly different than the language of the McCarran Amendment. *Compare* 43 U.S.C. § 666, *with* 33 U.S.C. § 1323(a). Also, Congress'

Third, Section 313 requires federal agencies to comply with local requirements respecting abatement and control of pollution "in the same manner, and to the same extent as any nongovernmental entity." 33 U.S.C. § 1323(a). This language makes clear that if nongovernmental entities are not subject to local regulation in a particular area (here, tribal trust lands), then federal agencies likewise are not subject to the regulation there. Hobart, for example, could not impose a stormwater ordinance against federal agencies outside of Hobart's borders because the Village would lack regulatory authority over nongovernmental entities in that area.[22] In this case, the tribal trust lands technically are geographically located within Hobart's boundaries, but Hobart lacks authority to impose its ordinance and assessments on tribal activities under bedrock principles of federal Indian law. The restrictive language of Section 313 that requires federal agency compliance only "in the same manner, and to the same extent as any nongovernmental entity"

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intent to reach water rights held on behalf of Indians in 43 U.S.C. § 666(a) was clear in light of the statute's purpose and the legislative history. *Colo. River Water Conservation Dist.*, 424 U.S. at 809-13.

[22] As a further example, a Wisconsin municipality located near Wisconsin's border with Illinois would lack authority to impose stormwater assessments on nongovernmental entities in Illinois. Section 313 thus would not authorize the Wisconsin municipality to impose stormwater assessments on federal facilities in Illinois.

confirms that Congress did not intend Section 313 to authorize a municipality like Hobart to impose stormwater assessments on tribal trust lands, where Hobart would otherwise not have such authority in the first place.

Moreover, it is a cardinal rule of statutory construction that a court must "interpret the statute as a symmetrical and coherent regulatory scheme and fit, if possible, all parts into an harmonious whole." *Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132-33 (2000) (internal quotations omitted). Here, interpreting Section 313 as extending state and local regulation to tribal trust lands would place that provision in direct conflict with the provisions of the CWA and implementing regulations that require a state seeking to administer a NPDES permit program for discharges on Indian lands to demonstrate its authority to do so and obtain express approval from EPA. *See supra* Part I.B.1. Indeed, interpreting Section 313 as not expressly authorizing state and local regulation of tribal trust lands (or of other Indian lands) is necessary to avoid construing Section 313 as granting authority that other CWA provisions necessarily presume the CWA does not grant.

Hobart argues incorrectly that the United States takes the position in this case that Section 313 does not reach "the local post office, federal office buildings, or the Pentagon." Br. at 10. Under Section 313, federal laws and regulations respecting the abatement and control of water pollution, such as the core provisions of the CWA, apply to federal facilities across the country. For example, federal facilities may not discharge pollutants without a NPDES permit (or other authorization) into waters of the United States on tribal trust lands or elsewhere in the United States. Further, under Section 313, state and local regulations respecting the abatement and control of water pollution apply to federal facilities when states and local governments have authority to impose such regulations. But as explained, Section 313 does not provide authority to a state or political subdivision thereof to impose regulations and otherwise administer environmental programs in areas where it otherwise would lack authority to do so. For example, Section 313 would not authorize Hobart to impose an assessment on a federal postal facility in the City of Green Bay, if Hobart otherwise lacked authority to impose assessments on nongovernmental entities in that city.

Hobart also suggests that the 2011 amendment to Section 313 authorizes Hobart to enforce its stormwater ordinance on tribal trust lands. Br. at 28-29. The 2011 amendment is irrelevant because Hobart lacks authority to impose its ordinance on those lands and the amendment merely defined the "reasonable service charges" payable under Section 313(a) to include stormwater assessments meeting certain criteria. *See* 33 U.S.C. § 1323(a), (c).[23] The amendment does not otherwise expand the scope or reach of Section 313 and therefore does not provide any support for Hobart's position in this case that it may impose its ordinance on tribal trust lands.[24]

[23] The issue of whether Hobart's assessments satisfy the criteria set forth in CWA Section 313(c) is not raised in this appeal. If Hobart were to prevail in this appeal, that issue could be raised in further proceedings before the district court. SA15 (noting that Hobart is imposing stormwater assessments on the parcels of tribal trust land on which a tribal stormwater pond is located).

[24] Similarly, the district court decision interpreting the 2011 amendment that is cited by Hobart did not address an assertion of municipal authority on Indian lands. *See* Br. at 11 (citing *United States v. City of Renton*, No. 11–1156 (W.D. Wash.), *available* at 2012 WL 1903429). That case addresses the issue of whether the amendment required a federal facility owned and operated by the Bonneville Power Administration to pay stormwater assessments imposed prior to the date of the amendment. *See Renton*, 2012 WL 1903429, at *1. While the *Renton* court held that the amendment does require payment of such assessments, the Court of Federal Claims reached the opposite conclusion, agreeing with the position of the United States that the amendment is not retroactive. *See id.*; *DeKalb Cnty. v. United States*, 108 Fed. Cl. 681, 709-10 (Fed. Cl. 2013).

4. Two decisions of other courts of appeals strongly support the conclusion that the CWA does not authorize Hobart to impose its ordinance on tribal trust lands.

The conclusion that the CWA does not authorize Hobart to impose its stormwater ordinance and assessments on tribal trust lands finds strong support in two decisions of other courts of appeals. The decisions address state efforts to assume authority under federal environmental laws to administer regulatory programs on Indian lands. Among other things, the decisions illustrate the important principle of federal Indian law that congressional intent to authorize state and local jurisdiction in Indian country must be clear.

In *Washington, Department of Ecology v. EPA*, 752 F.2d 1465 (9th Cir. 1985), the Ninth Circuit upheld EPA's determination that the Resource Conservation and Recovery Act ("RCRA") did not clearly authorize the state to administer its hazardous waste management program on Indian lands. *Id.* at 1466. Like the core provisions of the CWA, the core provisions of RCRA apply throughout Indian country, including on tribal trust lands, and are federally enforceable against all persons, including Indians and tribes. *Id.*; *see* 42 U.S.C. §§ 6928, 6903(13), (15). Also, while RCRA generally requires EPA to administer

a federal program regulating hazardous waste management in a state, it allows a state to apply to EPA for approval to run its own program. *Dep't of Ecology*, 752 F.2d at 1466 (citing 42 U.S.C. § 6926). RCRA also contains a "federal facilities" provision that is substantially similar to CWA Section 313(a). *Compare* 42 U.S.C. § 6961(a), *with* 33 U.S.C. § 1323(a).

In *Department of Ecology*, the state sought authority from EPA to implement its program on all lands within the state, including in Indian country. *Dep't of Ecology*, 752 F.2d at 1467. EPA denied its application with respect to Indian country because "the state had not adequately demonstrated its legal authority to exercise jurisdiction" over such lands. *Id.* The Ninth Circuit reasoned that "[v]ague or ambiguous federal statutes must be measured 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." *Id.* at 1470. It then noted and discussed the significance of the federal government's policy of promoting tribal self-government in environmental matters. *Id.* at 1470-72. In upholding EPA's decision, the

Ninth Circuit agreed with EPA's conclusion that, while RCRA provides states with an opportunity to run their own programs, it does not expressly authorize states to assert regulatory authority over Indians on Indian lands. *Id.* at 1469, 1472.[25]

In another case, *Maine v. Johnson*, 498 F.3d 37 (1st Cir. 2007), the First Circuit addressed whether and to what extent the State of Maine could administer a CWA NPDES program in Indian country within the State. *Id.* at 40-41. Because the CWA does not authorize state NPDES programs in Indian country, the court examined whether the Maine Settlement Acts (federal statutes) expressly authorized such programs. *Id.* at 42-47. The Maine Settlement Acts provided that Indian tribes within the state "would be 'subject to' Maine law" and that "'any lands or natural resources owned by them [or] held in trust for them . . . shall be subject to the laws of the State and to the civil and criminal jurisdiction of the courts of the State . . . to the same extent as any other person . . . or natural resources therein.'" *Id.* at 42 (quoting Me. Rev. Stat. Ann. § 6204) (alterations in original); *see* 25 U.S.C. § 1725. The court reasoned that this clear language "extended state authority well

[25] The court noted that it was not addressing whether Washington could administer a program in Indian country if the program's reach was limited to non-Indians. *Id.* at 1468.

beyond what is customary for Indian tribes elsewhere in the United States" and "greatly narrow[ed] ordinary tribal sovereignty vis-a-vis state law." *Id.* Because of this unusual and explicit grant of power to the State, the court overturned EPA's decision to deny Maine authority to administer its NPDES program with respect to tribally owned facilities on tribal lands. *Id.* at 45-47.[26]

In this case, just as RCRA and the CWA provided no express and clear authorization for the assertion of state authority in Indian country in *Department of Ecology* and *Maine*, respectively, the CWA provides no express and clear authorization for Hobart to impose its stormwater ordinance and assessments on tribal trust lands. The decisions in *Department of Ecology* and *Maine* thus strongly support the conclusion that Hobart lacks authority to impose its stormwater ordinance and assessments on tribal trust lands.

5. **Hobart's argument that the Indian law canon of construction does not apply in interpreting CWA Section 313 is irrelevant.**

Hobart's appellate brief does not discuss *Department of Ecology* and *Maine* and the rule that congressional intent to authorize state and

[26] The court also upheld EPA's decision to grant Maine authority to administer its program with respect to certain discharges from non-Indians. *Id.* at 45.

local regulation of tribal activities in Indian country must be clear. However, Hobart suggests that the rule does not apply in this case in arguing that this Court should not apply the Indian law canon of construction when construing CWA Section 313. *See* Br. at 24-25. Hobart's argument concerning the Indian law canon of construction is irrelevant.

The Indian law canon of construction provides that "ambiguities in a federal statute must be resolved in favor of Indians." *San Manuel Indian Bingo & Casino v. N.L.R.B.*, 475 F.3d 1306, 1311 (D.C. Cir. 2007). Hobart argues that this canon does not apply in this case. Br. at 24-25. Hobart's argument relies on a D.C. Circuit case addressing a challenge by a tribe to a decision of the federal National Labor Relations Board to construe the term "employer" in the National Labor Relations Act as encompassing the tribe as an employer of workers at a casino it operated on its reservation. *See id.*; *San Manuel*, 475 F.3d at 1307-08, 1315-16. In addressing the issue of whether the agency's decision impermissibly impinged upon protected tribal sovereignty, the D.C. Circuit stated that the cases cited by a tribe to support application of the Indian law canon of construction involved construction of a

statute or a provision thereof that Congress enacted specifically for the benefit of Indians or for the regulation of Indian affairs. *Id.* at 1312. It further noted that none of the cited cases involved a statute of general application. *Id.*

As an initial matter, the United States is not relying on the Indian law canon of construction. For this reason, and because the CWA clearly does not authorize Hobart to enforce its ordinance and assessments on tribal trust lands, *supra* Part I.B.1-3, the Court need not consider whether and how the Indian law canon of construction applies to the facts of this case.

Moreover, any reliance by Hobart on *San Manuel* for any other purpose in this appeal is misplaced. The issue raised in *San Manuel* was whether a federal agency correctly declined to graft an exemption onto a federal statute by construing the term "employer" to exclude a tribe employing casino workers. *See San Manuel*, 475 F.3d at 1307-08, 1313. In this case, this Court must address whether, in waiving immunities of federal "agencies, officers, agents, or employees" and requiring federal facilities to comply with certain state and local regulations "in the same manner, and to the same extent as any

nongovernmental entity," 33 U.S.C. § 1323(a), Congress intended to affirmatively authorize state and local regulation of tribal activities on tribal trust lands, when the provision and its legislative history make no mention of extending the authority of state and local governments either to tribes or to tribal trust lands. The two issues are markedly different.

Also, as the D.C. Circuit was not addressing an assertion of regulatory authority in Indian country by a state or political subdivision thereof, the court had no occasion to apply the rule, reflected in *Department of Ecology* and *Maine*, that congressional authorization of state and local jurisdiction in Indian country must be clear. This rule of statutory construction has been applied in a number of cases, as well as by EPA. *Supra* Part I.B.4 (discussing *Maine*, *Dep't of Ecology*, and the underlying EPA decisions); *see Indian Country, U.S.A. Inc. v. Oklahoma ex rel. Okla. Tax Comm'n*, 829 F.2d 967, 981 (10th Cir. 1987) (concluding that "series of federal laws" did not "evince a clear intent by Congress to permit the State to assert jurisdiction"). Requiring express and clear authorization is particularly appropriate here because Congress must have recognized when enacting and amending CWA

Section 313 that tribal trust lands are generally exempt from state and local regulation. *See* 25 C.F.R. § 1.4; *Williams v. Lee*, 358 U.S. 217, 220 (1959) (Congress has "acted consistently upon the assumption that the States have no power to regulate the affairs of Indians on a reservation."); *supra* at 5-9 (discussing fundamental principles of Indian law and explaining that assertions of state and local government authority in Indian country must be viewed against the "crucial backdrop" of tribal sovereignty). If Congress had intended Section 313 to cause a departure from this status quo, it would have used explicit statutory language to make its intent clear. *Cf. Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 534 (1994) ("Such a bold departure from traditional practice would have surely drawn more explicit statutory language and legislative comment."). Requiring express and clear authorization also is warranted in light of the strong federal policy of encouraging tribal sovereignty in the management of environmental programs. *See Dep't of Ecology*, 752 F.2d at 1471-72; President's Statement on Indian Policy, 19 Weekly Comp. Pres. Doc. 98, 99 (Jan. 24, 1983); 25 U.S.C. § 450(b); EPA Policy for the Administration of Environmental Programs on Indian Reservations (Nov. 8, 1984), *available at* http://www.epa.gov/tp/

pdf/indian-policy-84.pdf. Allowing a municipality like Hobart to enforce a stormwater ordinance on tribal trust lands would frustrate that policy and impinge on tribal sovereignty.

For all of these reasons, Hobart's arguments concerning the Indian law canon of construction are irrelevant.[27]

II. Even if Hobart may impose its stormwater ordinance on tribal trust lands, Section 313 of the Clean Water Act does not require Interior to pay the stormwater assessments imposed on those lands.

Because Congress has not authorized Hobart to impose its stormwater ordinance on tribal trust lands, this Court should not reach the other issues addressed in Hobart's brief. In light of Hobart's lack of authority to apply the ordinance to tribal trust lands, it is simply irrelevant whether Section 313 would require the United States to pay stormwater assessments imposed on tribal trust lands, Br. at 7-22, or whether stormwater assessments under Hobart's ordinance are taxes or fees, *id.* at 31-39. However, if this Court were to conclude that Hobart may enforce its ordinance on tribal trust lands, it nonetheless should affirm the district court's judgment in favor of the United States.

[27] While there is no need to address whether CWA Section 313 is properly characterized as a statute of general application, Section 313 applies only to, and describes only the obligations of, federal agencies. *See* 33 U.S.C. § 1323(a).

A. Section 313 must be strictly construed in favor of the United States.

A waiver of the sovereign immunity of the United States must be "unequivocally expressed in the statutory text" and cannot be implied. *Dep't of Army v. Blue Fox, Inc.*, 525 U.S. 255, 261 (1999) (internal quotation omitted). Such a provision must be strictly construed in favor of the United States and "not enlarged beyond what the language of the statute requires." *United States v. Idaho ex rel. Dir., Idaho Dep't of Water Res.*, 508 U.S. 1, 7 (1993) (citing *Ruckelshaus v. Sierra Club*, 463 U.S. 680, 685-86 (1983)). The Supreme Court has explained that cases "dealing with waivers of sovereign immunity as to monetary exactions from the United States in litigation show that we have been particularly alert to require a specific waiver of sovereign immunity before the United States may be held liable for them." *Idaho*, 508 U.S. 1 at 8-9; *see also Library of Congress v. Shaw*, 478 U.S. 310, 319 (1986) (provision in Title VII making the United States "liable 'the same as a private person'" does not waive sovereign immunity from interest on fees because statute "contains no reference to interest").

For example, the McCarran Amendment waives the sovereign immunity of the United States, requiring the United States'

participation in comprehensive water rights adjudications in state court. 43 U.S.C. § 666(a). It states that the United States shall be "deemed to have waived any right to plead that the State laws are inapplicable or that the United States is not amenable thereto by reason of its sovereignty." *Id.* It also specifies that no judgment for "costs" shall be entered against the United States. *Id.* The Supreme Court held that although the statute uses only the word "costs," and "submits the United States generally to state adjective law, as well as to state substantive law of water rights," states may not impose filing fees on the United States, because there is no specific statutory language requiring the United States to pay "fees." *Idaho*, 508 U.S. at 8-9.

In Hobart's brief, it repeatedly ignores the fact that Section 313 must be construed narrowly, notwithstanding the fact that the Supreme Court has twice done so, in *EPA v. California*, 426 U.S. 200 (1976), and *U.S. Dep't of Energy v. Ohio*, 503 U.S. 607 (1992). Hobart argues that these cases are factually distinguishable from the instant case. Br. at 20-22. That, however, is not the point. Those cases are relevant because they demonstrate how the sovereign immunity canon should be applied

to Section 313 and that Section 313 must be construed narrowly. *See, e.g.*, *Dep't of Energy*, 503 U.S. at 615, 620-27.

Hobart's other arguments all suffer from essentially the same flaw. In arguing for a broad interpretation of Section 313, Hobart relies on the fact that Congress made broad findings and pronouncements concerning the need for water pollution control in 1972 and in other years, Br. at 12, and on the fact that Section 313 provides a mechanism for the President to exempt agencies from otherwise applicable requirements for a limited amount of time upon a finding that the exemption is in the paramount interests of the United States, Br. at 14-15, 26-27. Finally, Hobart claims that the sovereign immunity canon should not apply, or should apply with less force, because Congress amended the statute in 1977 to expand its reach, including by inserting the word "any" before certain terms. *Id.* at 10.

Each of these arguments ignores the principle that statutory obligations of the United States may not be enlarged beyond what the express language of a waiver unequivocally requires. The Supreme Court has twice construed Section 313 narrowly, notwithstanding the existence of limited presidential exemption authority. *See California*,

426 U.S. at 212 n.23 (noting exemption mechanism). Following the 1977 amendment to Section 313, for example, the Supreme Court applied the sovereign immunity canon in interpreting the amended language of the provision. *Dep't of Energy*, 503 U.S. at 615, 620-27.

In sum, this Court must construe Section 313 narrowly and ask whether the language of the provision unequivocally requires Interior to pay the stormwater assessments imposed by Hobart. It does not.

B. The language of Section 313 does not unequivocally require Interior to pay stormwater assessments imposed on tribal trust lands.

In this case, Section 313 does not unequivocally require the United States to pay stormwater assessments imposed on tribal trust lands, particularly given the lack of any reference in Section 313 to Indians, tribes, Indian lands, or tribal lands, let alone tribal trust lands. *Supra* Part I.B.3. Further, as explained, in merely waiving immunities of federal "agencies, officers, agents, or employees" and requiring federal facilities to comply with certain state and local regulations "in the same manner, and to the same extent as any nongovernmental entity," 33 U.S.C. § 1323(a), Congress did not authorize states or subdivisions thereof to impose those regulations on tribal trust lands.

Had Congress intended Section 313 to authorize state and local governments to impose assessments on tribal trust lands and then collect them from the United States (rather than a tribe or Indians), it would have said so.[28] The absence of any reference to tribal trust lands in the text of Section 313 or its legislative history is particularly significant given the unique status of tribal trust lands and the unique purpose such lands serve. The IRA's land-into-trust mechanism, for example, is part of "machinery whereby Indian tribes would be able to assume a greater degree of self-government, both politically and economically." *Morton v. Mancari*, 417 U.S. 535, 542 (1974). Tribes exercise attributes of sovereignty over tribal trust lands, possessing the power to exclude and other regulatory powers. *Supra* at 11-12. Tribal trust lands therefore are markedly different than lands that are commonly referred to as "federal properties." *See United States v. Shoshone Tribe of Indians*, 304 U.S. 111, 116 (1938) ("For all practical purposes, the tribe owned the land" held in trust for the tribe by the United States); *id.* (the United States "had only the naked fee," while

[28] The district court recognized this in reasoning that CWA Section 313 "does not reasonably support a construction that would, in essence, substitute the immunity of Indian tribes from taxation of their trust property for liability on the part of the federal government." SA31.

the tribe had the "right of perpetual and exclusive occupancy of the land"); *Missouri, K. & T. Ry. v. Roberts*, 152 U.S. 114, 118 (1894) ("And the setting apart by statute or treaty with [Indians] of lands for their occupancy is held to be, of itself, a withdrawal of their character as public lands . . . .").[29]

That Congress did not intend Section 313 to require the United States to pay charges imposed on this unique category of property is reflected in the language of Section 313 that requires compliance with requirements, and the payment of reasonable service charges, "in the same manner, and to the same extent as any nongovernmental entity." 33 U.S.C. § 1323(a). Private citizens do not acquire land in trust for tribes, and imposing liability on Interior for assessments imposed on these unique lands would therefore subject Interior to a kind of liability to which nongovernmental entities are not subject. The language "in the same manner, and to the same extent as any nongovernmental entity,"

[29] While there are only approximately 1400 acres of tribal trust land at issue in this particular case, the United States holds approximately 60 million acres of land in trust for tribes and Indians. *See* SA15, 122. No federal statute requires the United States to pay utility bills (for example, water or sewer bills) for tribes and Indians who occupy those lands. *See Chase v. McMasters*, 573 F.2d 1011, 1015 (8th Cir. 1978) (noting that member of tribe paid utility bills).

33 U.S.C. § 1323(a), confirms that Congress did not intend to require Interior to pay charges imposed on tribal trust lands.

C. Hobart's argument that Section 313 unequivocally requires Interior to pay the stormwater assessments is without merit.

Hobart's argument that Section 313 unequivocally requires Interior to pay the stormwater assessments is without merit. As an initial matter, Hobart's interpretation of Section 313 primarily relies on its view that the term "jurisdiction over any property" implicitly includes tribal trust lands. Br. at 18-19. Hobart's argument fails to take account of other language in Section 313 that expressly limits its scope. *Supra* Part I.B.3. The argument also ignores the unique status and purpose of tribal trust lands and the fact that Indians and tribes have jurisdiction over, and control the use and development of, lands acquired in trust by the United States. *See supra* at 11-12.

But while Hobart acknowledges that the United States merely holds bare legal title to land acquired in trust under IRA Section 5, Br. at 18, it argues that Interior is an agency having "jurisdiction over any property" for purposes of Section 313 because Interior administers federal programs and exercises regulatory authority on tribal trust lands at the direction of Congress, Br. at 19-20. However, the mere fact

that Interior engages in activities of a regulatory nature does not provide a basis for imposing liability for municipal charges. *Supra* Part II.B. Section 313 does not impose obligations on a federal agency simply because it engages in regulation of a parcel, and no court has interpreted Section 313 to do so. Federal agencies exercise regulatory authority and administer federal programs throughout the United States. Congress could not have intended for the mere exercise of regulatory authority on public and private lands, without more, to trigger federal liability for municipal assessments under Section 313.[30]

Hobart's other arguments concerning Section 313 also are without merit. Hobart, for example, relies on a district court ruling issued in April 2011 granting a motion to dismiss filed by the United States. Br. at 10-11. The United States had argued that Hobart's original third-party complaint should be dismissed for lack for subject matter jurisdiction because the APA provided the only avenue for review of the issues presented therein and there had been no "final agency action" to

[30] Section 313 also applies to agencies "engaged in any activity resulting, or which may result, in the discharge or runoff of pollutants." 33 U.S.C. § 1323(a). Hobart's third-party complaint did not allege that Interior was such an agency, and Hobart did not argue in the district court or in its opening brief that Interior is such an agency. The issue is therefore waived. Hobart in any event has not identified any specific activities that Interior has engaged in that have resulted in discharges of stormwater on or from the tribal trust lands.

review at that time. SA7-10; *see* SA54-58 (original third-party complaint). The United States also argued that CWA Section 313 did not apply because Hobart lacked authority to impose its stormwater ordinance and assessments on tribal trust lands. SA3. In dismissing the third-party complaint, the district court agreed with the United States' APA argument. SA10. Hobart claims that in addition, the district court ruled that Section 313 unambiguously waived the United States' immunity from Hobart's suit. *See* Br. at 10.

Hobart's contention is incorrect because the district court simply viewed the United States' argument concerning Section 313 as an argument that the Village's claim was "a loser on the merits" and declined to address the argument. SA4-5. The district court noted that "it *appears* that § 313 is applicable here" and that "the government *may* have waived immunity." *Id.* (emphasis added). The district court, however, did not issue any definitive ruling. Indeed, such a determination would have been inconsistent with its later opinion.

Hobart also cites the Quiet Title Act ("QTA"). It notes that when Congress enacted the QTA in 1972, it provided an express exemption for land held in trust by the United States. Br. at 13-14. It claims that if

Congress has intended to exclude tribal trust lands from the scope of Section 313, it would have placed a similar exemption in the text of Section 313. *Id.*

Hobart reads too much significance into the QTA exemption for trust lands. The QTA applies "to real property in which the United States claims an interest" and without the exemption, the statutory text would clearly apply to trust lands. 28 U.S.C. § 2409a. Section 313, by contrast, does not similarly apply to "real property in which the United States claims an interest" and contains other language restricting its reach. The presence of an exemption for trust lands in the QTA thus is irrelevant.

In addition, Hobart purports to rely on a section of a 1995 Department of the Interior manual. Br. at 19. That document, however, merely acknowledges the potential applicability of certain federal statutes on land acquired by the Department generally and lands acquired in trust by the United States. Department of the Interior, Department Manual, part 602, ch. 2 (Sept. 1995), *available at* http://elips.doi.gov/elips/browse.aspx. It does not have anything to do

with federal liability for stormwater assessments (or any other charges) imposed on tribal trust lands. *Id.*

CONCLUSION

For the aforementioned reasons, this Court should affirm the district court.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 13,963 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2007 in 14-point Century font.

/s/ Peter J. McVeigh
Attorney for the United States

Dated: May 29, 2013

CERTIFICATE OF SERVICE

I hereby certify that on May 29, 2013, I electronically filed the foregoing 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.

/s/ Peter J. McVeigh

STATUTORY AND REGULATORY ADDENDUM

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Statutes

Regulations

Hobart Municipal Code

25 U.S.C. § 465. Acquisition of lands, water rights or surface rights; appropriation; title to lands; tax exemption.

The Secretary of the Interior is authorized, in his discretion, to acquire, through purchase, relinquishment, gift, exchange, or assignment, any interest in lands, water rights, or surface rights to lands, within or without existing reservations, including trust or otherwise restricted allotments, whether the allottee be living or deceased, for the purpose of providing land for Indians.

For the acquisition of such lands, interests in lands, water rights, and surface rights, and for expenses incident to such acquisition, there is authorized to be appropriated, out of any funds in the Treasury not otherwise appropriated, a sum not to exceed $2,000,000 in any one fiscal year: Provided, That no part of such funds shall be used to acquire additional land outside of the exterior boundaries of Navajo Indian Reservation for the Navajo Indians in Arizona, nor in New Mexico, in the event that legislation to define the exterior boundaries of the Navajo Indian Reservation in New Mexico, and for other purposes, or similar legislation, becomes law.

The unexpended balances of any appropriations made pursuant to this section shall remain available until expended.

Title to any lands or rights acquired pursuant to this Act or the Act of July 28, 1955 (69 Stat. 392), as amended (25 U.S.C. 608 et seq.) shall be taken in the name of the United States in trust for the Indian tribe or individual Indian for which the land is acquired, and such lands or rights shall be exempt from State and local taxation.

33 U.S.C. § 1311. Effluent limitations

(a) Illegality of pollutant discharges except in compliance with law

Except as in compliance with this section and sections 1312, 1316, 1317, 1328, 1342, and 1344 of this title, the discharge of any pollutant by any person shall be unlawful.

33 U.S.C. § 1323. Federal facilities pollution control

(a) Each department, agency, or instrumentality of the executive, legislative, and judicial branches of the Federal Government (1) having jurisdiction over any property or facility, or (2) engaged in any activity resulting, or which may result, in the discharge or runoff of pollutants, and each officer, agent, or employee thereof in the performance of his official duties, shall be subject to, and comply with, all Federal, State, interstate, and local requirements, administrative authority, and process and sanctions respecting the control and abatement of water pollution in the same manner, and to the same extent as any nongovernmental entity including the payment of reasonable service charges. The preceding sentence shall apply (A) to any requirement whether substantive or procedural (including any recordkeeping or reporting requirement, any requirement respecting permits and any other requirement, whatsoever), (B) to the exercise of any Federal, State, or local administrative authority, and (C) to any process and sanction, whether enforced in Federal, State, or local courts or in any other manner. This subsection shall apply notwithstanding any immunity of such agencies, officers, agents, or employees under any law or rule of law. 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.

* * *

(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.

33 U.S.C. § 1342. National pollutant discharge elimination system

(a) Permits for discharge of pollutants

(1) Except as provided in sections 1328 and 1344 of this title, the Administrator may, after opportunity for public hearing issue a permit for the discharge of any pollutant, or combination of pollutants, notwithstanding section 1311(a) of this title, upon condition that such discharge will meet either (A) all applicable requirements under sections 1311, 1312, 1316, 1317, 1318, and 1343 of this title, or (B) prior to the taking of necessary implementing actions relating to all such requirements, such conditions as the Administrator determines are necessary to carry out the provisions of this chapter.

* * *

(b) State permit programs

At any time after the promulgation of the guidelines required by subsection (i)(2) of section 1314 of this title, the Governor of each State desiring to administer its own permit program for discharges into navigable waters within its jurisdiction may submit to the Administrator a full and complete description of the program it proposes to establish and administer under State law or under an interstate compact. In addition, such State shall submit a statement from the attorney general (or the attorney for those State water pollution control agencies which have independent legal counsel), or from the chief legal officer in the case of an interstate agency, that the laws of such State, or the interstate compact, as the case may be, provide adequate authority to carry out the described program. The Administrator shall approve each submitted program unless he determines that adequate authority does not exist:

(1) To issue permits which—
(A) apply, and insure compliance with, any applicable requirements of sections 1311, 1312, 1316, 1317, and 1343 of this title;
(B) are for fixed terms not exceeding five years; and
(C) can be terminated or modified for cause including, but not limited to, the following:
(i) violation of any condition of the permit;
(ii) obtaining a permit by misrepresentation, or failure to disclose fully all relevant facts;

(iii) change in any condition that requires either a temporary or permanent reduction or elimination of the permitted discharge;
(D) control the disposal of pollutants into wells;
(2)(A) To issue permits which apply, and insure compliance with, all applicable requirements of section 1318 of this title; or
(B) To inspect, monitor, enter, and require reports to at least the same extent as required in section 1318 of this title;
(3) To insure that the public, and any other State the waters of which may be affected, receive notice of each application for a permit and to provide an opportunity for public hearing before a ruling on each such application;
(4) To insure that the Administrator receives notice of each application (including a copy thereof) for a permit;
(5) To insure that any State (other than the permitting State), whose waters may be affected by the issuance of a permit may submit written recommendations to the permitting State (and the Administrator) with respect to any permit application and, if any part of such written recommendations are not accepted by the permitting State, that the permitting State will notify such affected State (and the Administrator) in writing of its failure to so accept such recommendations together with its reasons for so doing;
(6) To insure that no permit will be issued if, in the judgment of the Secretary of the Army acting through the Chief of Engineers, after consultation with the Secretary of the department in which the Coast Guard is operating, anchorage and navigation of any of the navigable waters would be substantially impaired thereby;
(7) To abate violations of the permit or the permit program, including civil and criminal penalties and other ways and means of enforcement;
(8) To insure that any permit for a discharge from a publicly owned treatment works includes conditions to require the identification in terms of character and volume of pollutants of any significant source introducing pollutants subject to pretreatment standards under section 1317(b) of this title into such works and a program to assure compliance with such pretreatment standards by each such source, in addition to adequate notice to the permitting agency of (A) new introductions into such works of pollutants from any source which would be a new source as defined in section 1316 of this title if such source were discharging pollutants, (B) new introductions of pollutants into such works from a source which would be subject to section 1311 of this title if it were discharging such pollutants, or (C) a substantial change in volume or character of pollutants being introduced into such works by a source introducing pollutants into such works at the time of issuance of the permit. Such notice shall include information on the quality and quantity of effluent to be introduced into such treatment works and any anticipated

impact of such change in the quantity or quality of effluent to be discharged from such publicly owned treatment works; and
(9) To insure that any industrial user of any publicly owned treatment works will comply with sections 1284(b), 1317, and 1318 of this title.

* * *

(p) Municipal and industrial stormwater discharges

(1) General rule
Prior to October 1, 1994, the Administrator or the State (in the case of a permit program approved under this section) shall not require a permit under this section for discharges composed entirely of stormwater.

(2) Exceptions
Paragraph (1) shall not apply with respect to the following stormwater discharges:
(A) A discharge with respect to which a permit has been issued under this section before February 4, 1987.
(B) A discharge associated with industrial activity.
(C) A discharge from a municipal separate storm sewer system serving a population of 250,000 or more.
(D) A discharge from a municipal separate storm sewer system serving a population of 100,000 or more but less than 250,000.
(E) A discharge for which the Administrator or the State, as the case may be, determines that the stormwater discharge contributes to a violation of a water quality standard or is a significant contributor of pollutants to waters of the United States.

(3) Permit requirements

* * *

(B) Municipal discharge
Permits for discharges from municipal storm sewers--
(i) may be issued on a system- or jurisdiction-wide basis;
(ii) shall include a requirement to effectively prohibit non-stormwater discharges into the storm sewers; and
(iii) shall require controls to reduce the discharge of pollutants to the maximum extent practicable, including management practices, control techniques and system,

design and engineering methods, and such other provisions as the Administrator or the State determines appropriate for the control of such pollutants.

* * *

33 U.S.C. § 1377. Indian Tribes

(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.

25 C.F.R. § 1.4. State and local regulation of the use of Indian property.

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

(b) The Secretary of the Interior or his authorized representative may in specific cases or in specific geographic areas adopt or make applicable to Indian lands all or any part of such laws, ordinances, codes, resolutions, rules or other regulations referred to in paragraph (a) of this section as he shall determine to be in the best interest of the Indian owner or owners in achieving the highest and best use of such property. In determining whether, or to what extent, such laws, ordinances, codes, resolutions, rules or other regulations shall be adopted or made applicable, the Secretary or his authorized representative may consult with the Indian owner or owners and may consider the use of, and restrictions or limitations on the use of, other property in the vicinity, and such other factors as he shall deem appropriate.

40 C.F.R. § 122.32. As an operator of a small MS4, am I regulated under the NPDES storm water program?

(a) Unless you qualify for a waiver under paragraph (c) of this section, you are regulated if you operate a small MS4, including but not limited to systems operated by federal, State, Tribal, and local governments, including State departments of transportation; and:

(1) Your small MS4 is located in an urbanized area as determined by the latest Decennial Census by the Bureau of the Census. (If your small MS4 is not located entirely within an urbanized area, only the portion that is within the urbanized area is regulated); or

(2) You are designated by the NPDES permitting authority, including where the designation is pursuant to §§ 123.35(b)(3) and (b)(4) of this chapter, or is based upon a petition under § 122.26(f).

* * *

(c) The NPDES permitting authority may waive the requirements otherwise applicable to you if you meet the criteria of paragraph (d) or (e) of this section. If you receive a waiver under this section, you may subsequently be required to seek coverage under an NPDES permit in accordance with § 122.33(a) if circumstances change. (See also § 123.35(b) of this chapter.)

40 C.F.R. § 122.34. As an operator of a regulated small MS4, what will my NPDES MS4 storm water permit require?

(a) Your NPDES MS4 permit will require at a minimum that you develop, implement, and enforce a storm water management program designed to reduce the discharge of pollutants from your MS4 to the maximum extent practicable (MEP), to protect water quality, and to satisfy the appropriate water quality requirements of the Clean Water Act. Your storm water management program must include the minimum control measures described in paragraph (b) of this section unless you apply for a permit under § 122.26(d). For purposes of this section, narrative effluent limitations requiring implementation of best management practices (BMPs) are generally the most appropriate form of effluent limitations when designed to satisfy technology requirements (including reductions of pollutants to the maximum extent practicable) and to protect water quality. Implementation of best management practices consistent with the provisions of the storm water management program required pursuant to this section and the provisions of the permit required pursuant to § 122.33 constitutes compliance with the standard of reducing pollutants to the "maximum extent practicable." Your NPDES permitting authority will specify a time period of up to 5 years from the date of permit issuance for you to develop and implement your program.

* * *

40 C.F.R. § 123.1. Purpose and Scope.

(a) This part specifies the procedures EPA will follow in approving, revising, and withdrawing State programs and the requirements State programs must meet to be approved by the Administrator under sections 318, 402, and 405(a) (National

Pollutant Discharge Elimination System--NPDES) of the CWA. This part also specifies the procedures EPA will follow in approving, revising, and withdrawing State programs under section 405(f) (sludge management programs) of the CWA. The requirements that a State sewage sludge management program must meet for approval by the Administrator under section 405(f) are set out at 40 CFR part 501.

* * *

(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.

Note: States are advised to contact the United States Department of the Interior, Bureau of Indian Affairs, concerning authority over Indian lands.

* * *

40 C.F.R. § 123.21. Elements of a program submission.

(a) Any State that seeks to administer a program under this part shall submit to the Administrator at least three copies of a program submission. The submission shall contain the following:

(1) A letter from the Governor of the State (or in the case of an Indian Tribe in accordance with § 123.33(b), the Tribal authority exercising powers substantially similar to those of a State Governor) requesting program approval;
(2) A complete program description, as required by § 123.22, describing how the State intends to carry out its responsibilities under this part;
(3) An Attorney General's statement as required by § 123.23;
(4) A Memorandum of Agreement with the Regional Administrator as required by § 123.24;
(5) Copies of all applicable State statutes and regulations, including those governing State administrative procedures;

(b)(1) Within 30 days of receipt by EPA of a State program submission, EPA will notify the State whether its submission is complete. If EPA finds that a State's

submission is complete, the statutory review period (i.e., the period of time allotted for formal EPA review of a proposed State program under CWA) shall be deemed to have begun on the date of receipt of the State's submission. If EPA finds that a State's submission is incomplete, the statutory review period shall not begin until all the necessary information is received by EPA.
(2) In the case of an Indian Tribe eligible under § 123.33(b), EPA shall take into consideration the contents of the Tribe's request submitted under § 123.32, in determining if the program submission required by § 123.21(a) is complete.

(c) If the State's submission is materially changed during the statutory review period, the statutory review period shall begin again upon receipt of the revised submission.

(d) The State and EPA may extend the statutory review period by agreement.

40 C.F.R. § 123.23. Attorney General's statement.

(a) Any State that seeks to administer a program under this part shall submit a statement from the State Attorney General (or the attorney for those State or interstate agencies which have independent legal counsel) that the laws of the State, or an interstate compact, provide adequate authority to carry out the program described under § 123.22 and to meet the requirements of this part. This statement shall include citations to the specific statutes, administrative regulations, and, where appropriate, judicial decisions which demonstrate adequate authority. State statutes and regulations cited by the State Attorney General or independent legal counsel shall be in the form of lawfully adopted State statutes and regulations at the time the statement is signed and shall be fully effective by the time the program is approved. To qualify as "independent legal counsel" the attorney signing the statement required by this section must have full authority to independently represent the State agency in court on all matters pertaining to the State program.

Note: EPA will supply States with an Attorney General's statement format on request.

(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.

(c) The Attorney General's statement shall certify that the State has adequate legal authority to issue and enforce general permits if the State seeks to implement the general permit program under § 122.28.

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.:

$$\frac{\text{Impervious area in square feet}}{\textbf{4000} \text{ square feet}} = \_\_\_1\_\_\_\_\text{ERU Rate}$$

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

(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.