13- 847

JAN 15 2014

No. _-____

IN THE

Supreme Court of the United States

VILLAGE OF HOBART, WISCONSIN,

Petitioner,

v.

ONEIDA TRIBE OF INDIANS OF WISCONSIN AND UNITED STATES OF AMERICA, UNITED STATES DEPARTMENT OF JUSTICE, UNITED STATES DEPARTMENT OF THE INTERIOR AND KENNETH SALAZAR, SECRETARY, UNITED STATES DEPARTMENT OF THE INTERIOR,

Respondents.

On Petition For A Writ of Certiorari
To The United States Court of Appeals
For the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Clean Water Act (CWA), 33 U.S.C. § 1323(a), states the federal government "having jurisdiction over any property...shall be subject to, and comply with all...State...and local requirements...respecting the control and abatement of water pollution," "notwithstanding any immunity...under any law or rule of law." Under the Act, this federal obligation includes the payment of "costs associated with any stormwater management program."

25 U.S.C. § 465, part of the Indian Reorganization Act of 1934, allows the Secretary to take land into trust for a qualifying tribe, but is silent as to the impact on state and local jurisdiction, when that occurs.

The questions presented are:

1) Whether Congress' waiver of the federal government's sovereign immunity, under § 313(a) of the CWA, for enforcement of local stormwater management ordinances, for "any property" over which it has "jurisdiction," applies to land taken into trust pursuant to 25 U.S.C. § 465.

2) Whether lands acquired by an Indian tribe pursuant to 25 U.S.C. § 465, within its former

reservation boundaries are, removed from state jurisdiction because, as the Seventh Circuit ruled, they are reclassified as "Indian Country."

PARTIES TO THE PROCEEDING

The Petitioner is the Village of Hobart, Defendant and Third-Party Plaintiff below. The Respondents are the Oneida Tribe of Indians of Wisconsin, Plaintiff below, and United States of America U.S. Department of Justice, United States Department of the Interior and Kenneth Salazar, Secretary, United States Department of the Interior, Third-Party Defendants below.

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JURISDICTION

The Judgment of the Seventh Circuit was entered on October 18, 2013. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Pertinent statutory provisions are set forth in an appendix to this petition. App., *infra*, 56-59.

INTRODUCTION

This case involves the important issue of abating pollution in this nation's waterways through the control of stormwater runoff and competing claims for jurisdictional authority when a stormwater management program is implemented on property under federal jurisdiction.

This Court's interpretation of § 313 of the Clean Water Act (CWA) will determine whether general

jurisdiction over rainfall and storm water runoff on restored lands under 25 U.S.C. § 465, will be primarily regulated under state and local authority, pursuant to federal law, or will instead be regulated by local Indian tribes, as a result of the interpretation of that section by the Assistant Secretary-Indian Affairs and by the federal courts.

A. Statutory Framework

Congress passed the CWA in 1972 with the objective of restoring and maintaining the chemical, physical, and biological integrity of the Nation's waters. 33 U.S.C. § 1251. Congress specified that it is the "national goal" to eliminate the discharge of pollutants into the navigable waters by 1985, and it is the "national policy that programs for the control of nonpoint sources of pollution be developed and implemented in an expeditious manner so as to enable the goals of this chapter to be met through the control of both point and nonpoint sources of pollution." *Id.* As part of its declaration of goals and policy, Congress included a section on Congressional recognition, preservation, and protection of primary responsibilities and rights of states, which provides, in relevant part, that "[i]t is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources, and to consult with the Administrator in the exercise of his authority under this chapter." *Id.*

Congress also declared its policy on the authority of states over water: "It is the policy of Congress that the authority of each State to allocate quantities of water within its jurisdiction shall not be superseded, abrogated or otherwise impaired by this chapter. It is the further policy of Congress that nothing in this chapter shall be construed to supersede or abrogate rights to quantities of water which have been established by any State. Federal agencies shall co-operate with State and local agencies to develop comprehensive solutions to prevent, reduce and eliminate pollution in concert with programs for managing water resources." *Id.* The section of the CWA governing state authority provides that "[e]xcept as expressly provided in this chapter, nothing in this chapter shall (1) preclude or deny the right of any State or political subdivision thereof or interstate agency to adopt or enforce (A) any standard or limitation respecting discharges of pollutants, or (B) any requirement respecting control or abatement of pollution...or (2) be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters (including boundary waters) of such States." 33 U.S.C. § 1370

The federal regulations definition of "states" does not include Indian tribes but indicates they may be treated as states only if EPA determines them to be eligible for purposes of water quality standards program." 40 C.F.R. § 131.3(j). The federal regulations provide that after a determination of eligibility for treatment as a state, an Indian Tribe may be authorized to operate an NPDES program,

including a storm water program. 40 C.F.R. § 122.31(a).

33 U.S.C. § 1323(a) (§ 313(a)) governs "Compliance with pollution control requirements by Federal entities" and provides that "[e]ach 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 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." It further provides that this section applies "to the exercise of any Federal, State, or local administrative authority." *Id.* Section 313 contains a broad waiver of sovereign immunity: "This subsection shall apply notwithstanding any immunity of such agencies, officers, agents, or employees under any law or rule of law." *Id.*

On January 4, 2011, Congress passed "An Act to amend the Federal Water Pollution Control Act to clarify Federal responsibility for stormwater pollution." Pub. L. No. 111-378, 124 Stat. 4128 (2011). Section 1 of the Act, entitled "Federal Responsibility to Pay for Stormwater Programs," confirmed that reasonable service charges are owed "regardless of whether that reasonable fee, charge, or

assessment is denominated a tax." *Id.* In addition, the 2011 Amendment confirmed that § 313 applies to properties and facilities over which the Federal Government has jurisdiction. See § 313(c)(1)(A).

B. Factual Background

The Village of Hobart ("Hobart") is an incorporated municipality in Brown County, Wisconsin, first organized as the Town of Hobart on March 4, 1908. (Stipulation of Facts, E.D. Dkt. No. 50, p. 2). The Oneida Tribe ("Tribe") received its federal charter of recognition on May 1, 1937, and appears on the list of Indian Entities Recognized and Eligible to Receive Services From the United States Bureau of Indian Affairs. (Stipulation of Facts, E.D. Dkt No. 50, p. 1).

Since the Tribe's dramatic increase in revenue after the enactment of the Indian Gaming Regulatory Act in 1988, the Tribe has been reacquiring land within its historic reservation, some of which has been taken back into trust for the benefit of the Tribe, by the Secretary of Interior. App. 17. The United States now holds 148 parcels of land in trust for the Tribe located within the boundaries of Hobart which comprises only 6.6% of Hobart's total land. App. 3 and 17. The parcels at issue are not contiguous, but rather are interspersed throughout Hobart in a checkerboard pattern. *Id.* The map found at App. 70 illustrates the checkerboard pattern of trust parcels.

Several of the trust parcels are open to the public, or are occupied by businesses or buildings which are open to the public, regardless of tribal membership, including a driving range, auto body shop, apple orchard, park, library, Parish Hall, Oneida Police Department, and a day care center that accepts non-tribal children as space allows. (Vickers Aff., E.D. Dkt. No. 60, pp. 3-4).

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

In 2007, Hobart adopted its Stormwater Management Utility Ordinance pursuant to its independent police power to protect and maintain water within its jurisdiction, and in accordance with the CWA. App. 18. As an operator of a Municipal Separate Storm Sewer System (MS4), Hobart is required to "develop, implement, and enforce a stormwater management program designed to reduce the discharge of pollutants from [the] MS4 to

the maximum extent practicable (MEP), to protect water quality, and to satisfy the appropriate water quality requirements of the Clean Water Act." 40 C.F.R. § 122.34(a). After creation of its ordinance, Hobart implemented its program for all property within its boundaries.

Consistent with the direction of the CWA, the ordinance authorizes Hobart through its Stormwater Management Utility to "acquire, construct, lease, own, and operate . . . such facilities as are deemed by the Village to be proper and reasonably necessary for a system of storm and surface water management," including "surface and underground drainage facilities, sewers, watercourses, retaining walls and ponds and such other facilities as will support a stormwater management system." Hobart Municipal Code (HMC) § 4.503(1). App. 19. The ordinance also authorizes Hobart through the Stormwater Management Utility to "establish such rates and charges as are necessary to finance planning, design construction, maintenance, administration, and operation of the facilities in accordance with the procedures set forth in this ordinance." *Id.* § 4.503(2). App. 19.

Two basic types of "charges" are authorized under the ordinance. First, a "base charge" may be imposed on developed property. *Id.* § 4.505(4)(a). (Vickers Aff., E.D. Dkt. No. 60, p. 3). Hobart has never imposed base charges and such charges are not the subject of this appeal. (Vickers Aff., E.D. Dkt. No. 60, p. 3). Additionally, an "equivalent runoff unit charge" (ERU) may be imposed based upon the

amount of impervious area a parcel contains. *Id.* § 4.505(4)(b). App. 20. The ordinance authorizes a landowner to obtain offsets or credits against the "equivalent runoff charge" but not the "base charge." *Id.* § 4.506(1). App. 20.

Each year since its enactment, Hobart has billed all owners or occupants of property, including the Tribe, the corresponding ERU fee, for charges due under the ordinance. (Stipulation of Facts, E.D. Dkt. No. 50, pp. 2-3). The Tribe has annually and promptly paid storm water charges on tribal lands owned in fee, but has refused to pay the charges for federal trust parcels, as it believes its trust land is immune from the ordinance. (*Id.*)

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

C. Proceedings Below

On February 9, 2010, the Tribe sued Hobart in district court seeking a declaratory judgment that Hobart's stormwater fees could not be asserted against the Tribe for the property owned by the federal government but held in trust for the Tribe's benefit. The Tribe argued, among other things, that

the fees were in reality taxes which could not be asserted against trust parcels. (Compl., E.D. Dkt. No. 1, p. 9). Additionally, the Tribe claimed that if anyone owed the fees it was the government, because it was the party that actually owns the land. (Br. of Oneida Tribe, E.D. Dkt. No. 8, p. 21).

On April 20, 2010, Hobart filed its answer and asserted a counterclaim seeking a declaration its stormwater management system, including the obligation to pay fees, was enforceable against the trust land. (Answer to Compl., E.D. Dkt. No. 4, p. 6). On July 20, 2010, Hobart also filed a third-party complaint against the United States and its departments and agencies claiming it owed the fees pursuant to § 313 of the CWA. (3rd Party Compl., E.D. Dkt. No. 15).

On April 18, 2011, in response to the government's motion to dismiss, the district court found the land in question was under the jurisdiction of the federal government and that § 313 of the CWA waived the government's immunity from suit but dismissed the cause of action because the requisite final agency action, necessary to assert a claim under the Administrative Procedure Act (APA), was lacking. App. 48-51.

As a result of later obtaining final agency action, the stay on the underlying proceeding was lifted. Hobart then re-filed its third-party complaint against the government on November 23, 2011. (Amended 3rd Party Compl., E.D. Dkt. No. 43). Hobart also claimed that to the extent 25 C.F.R. § 1.4

was the mechanism through which the government or the Tribe was attempting to avoid its stormwater obligations, that regulation was unconstitutional, as applied in this case. (Amended 3rd Party Compl., E.D. Dkt. No. 43, p. 15).

On January 23, 2012, the government again moved to have the third-party complaint dismissed, again claiming the government had not waived its immunity from suit. (U.S. Mot. to Dismiss, E.D. Dkt. No. 53). On September 5, 2012, contrary to its initial ruling, the district court dismissed the second third-party complaint on the grounds that the government did not waive its sovereign immunity from suit. App. 13-42.

In its second decision, the district court also ruled that, as far as the Tribe was concerned, the fees were actually taxes. App. 35. The court concluded that since land held in trust for Indians, like other governmental land, is not subject to taxation, the Tribe's request for summary judgment should be granted. App. 41[1].

The Tribe's summary judgment motion was limited to its first and second claims for relief: "Claim under the IRA and implementing regulations" and "Federal pre-emption". (Compl., pp. 8-9, E.D. Dkt. No. 1). It did not move for summary judgment on its third claim for relief, "Infringement

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

of tribal self-government," because it acknowledged that its third claim "is dependent upon factual allegations regarding stormwater activities and programs relating to the subject trust lands that may not be susceptible to disposition on summary judgment." (*Id.*) Thus, these issues, including the extent of tribal activities, infringement on tribal activities, if any, and whether those activities involved tribal members, non-tribal members, or both, were never considered or addressed by the district court or the Seventh Circuit.

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

The Seventh Circuit did not follow the district court's inconsistent reasoning, from either of its decisions, but instead granted the United States' motion to dismiss because § 313 "contains no mention of Indians." App. 8. The Seventh Circuit also held that the service charges were impermissible taxes and therefore not owed by the Tribe.

REASONS FOR GRANTING THE PETITION

I. THIS CASE PROVIDES AN IDEAL VEHICLE TO RESOLVE WHETHER THE FEDERAL

GOVERNMENT CAN AVOID ITS CLEAR WAIVER OF SOVEREIGN IMMUNITY UNDER § 313 OF THE CLEAN WATER ACT, FOR LOCAL ENFORCEMENT OF STORMWATER MANAGEMENT PROGRAMS, FOR "ANY PROPERTY" UNDER FEDERAL "JURISDICTION."

A. The Seventh Circuit decision is in conflict with the Ninth and Tenth Circuits and ignores this Court's precedent.

The Seventh Circuit held that "[a]lthough section 313(a) does waive federal immunity from local regulation of stormwater runoff, it does not address the underlying authority of local governments to regulate that runoff on Indian lands." App. 7. It based its decision primarily on the fact that although § 313 expressly applies to "any property" over which the federal government has "jurisdiction," it "contains no mention of Indians." App. 8.

The Seventh Circuit confirmed that "[o]ther federal properties in a state – post offices, for example" are subject to § 313, even though "post offices" are not mentioned anywhere in § 313. App. 8. Thus, according to the logic of the Seventh Circuit, absent the words "Indian lands" appearing in § 313, the federal government is relieved of its obligations under federal law, despite Congress' express authorization of local regulation over *any* property and express waiver of immunity contained within the statute itself. This elevates tribal sovereign

immunity over the immunity of the federal government itself, and expands the doctrine of sovereign immunity at the expense of state and local communities.

The Seventh Circuit's decision is in direct conflict with the Ninth Circuit which also addressed the issue of whether silence in a federal law of general applicability means it applies equally to Indian Tribes. In *Donovan v. Coeur d'Alene Tribal Farm*, 751 F.2d 1113 (9th Cir. 1985), the court considered the application of the Occupational Safety and Health Act. The Ninth Circuit applied the principle "'now well settled by many decisions of this Court that a general statute in terms applying to all persons includes Indians and their property interests.'" *Id.* at 1115, citing *FPC v. Tuscarora Indian Nation,* 362 U.S. 99 (1960).

In addition, the Ninth Circuit confirmed that "[m]any of our decisions have upheld the application of general federal laws to Indian tribes; *not one has held that an otherwise applicable statute should be interpreted to exclude Indians.*" *Id.* at 1115-16 (emphasis added) (citation omitted). The Ninth Circuit concluded as follows: "In short, *we have not adopted the proposition that Indian tribes are subject only to those laws of the United States expressly made applicable to them. Nor do we do so here.*" *Id.* at 1116 (emphasis added). See also *Solis v. Matheson*, 563 F.3d 425, 428 (9th Cir. 2009) (holding that the overtime requirements of the Fair Labor Standards Act (FLSA), a statute that is silent on the issue of applicability to Indian tribes, applied to a retail

business owned by a tribal member and located on trust land).[2]

Like the Ninth Circuit, the Tenth Circuit considered this same issue and upheld the "presumption that Congress intends a general statute applying to all persons to include Indians and their property interests." *Phillips Petroleum Co. v. EPA*, 803 F.2d 545, 556 (10th Cir. 1986). In *Philips Petroleum Co.*, the Court held that the Safe Drinking Water Act (SDWA) applied to the Osage Reservation because Congress intended to protect against groundwater contamination nationwide and because nothing in the statute conflicted with tribal treaty or statutory rights. *Id.* at 555-56. This was found to be the law, despite the fact the relevant portion of the SDWA did not expressly mention Indians or Indian lands. In particular, the Tenth Circuit held as follows: "We conclude, therefore, that there is no sound policy reason to exclude Indian lands from the SDWA's application, and every reason to include them. As indicated above, the SDWA clearly establishes national policy with respect to clean water, including sources of underground water. To

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[2] The Ninth Circuit did note three very limited exceptions to the principle that federal laws apply with equal force to Indians and their land. The exceptions are if: "(1) the law touches exclusive rights of self-governance in purely intramural matters; (2) the application of the law to the tribe would abrogate rights guaranteed by Indian treaties; or (3) there is proof by legislative history or some other means that Congress intended the law not to apply to Indians on their reservations." *Id.* at 430. (citation, quotation marks, brackets, and ellipses omitted). None of these exceptions were advanced, or considered by the Seventh Circuit in this case.

hold, as Phillips suggests, that the EPA did not have authority to promulgate underground injection control programs for Indian lands would contradict the clear meaning and purpose of the SDWA by creating, prior to 1986, a vacuum of authority over underground injections on Indian lands, leaving vast areas of the nation devoid of protection from groundwater contamination. Indeed, it is a well-established canon of statutory construction that a court should go beyond the literal language of a statute if reliance on that language would defeat the plain purpose of the statute." *Id.*, citing *Bob Jones University v. United States*, 461 U.S. 574, 586 (1983).

The Tenth Circuit noted that the "presumption" that Congress intends a general statute applying to all persons to include Indians and their property interests "has been used to apply general statutes to Indian lands in many situations." *Id.* at 556 n.14. For instance, in *Davis v. Morton*, the Tenth Circuit held that [t]he fact Indian lands are held in trust does not take it out of NEPA's jurisdiction." 469 F.2d 593, 597 (10th Cir. 1972), citing *Fed. Power Comm'n v. Tuscarora*, 362 U.S. 99, 116 (1960). The 10th Circuit stated:

> All public lands of the United States are held by it in trust for the people of the United States. *Utah Power & Light v. United States*, 243 U.S. 389, 409 (1916). To accept appellees' contention would preclude all federal lands from NEPA jurisdiction, something clearly not intended by Congress in passing the Act.

Davis, 469 F.2d at 597 (emphasis added).

Furthermore, in *Manygoats v. Kleppe*, 558 F.2d 556, 559 (10th Cir. 1977), the Tenth Circuit held that "NEPA is concerned with national environmental interests. Tribal interests may not coincide with national interests. We find *nothing in NEPA which excepts Indian lands* from national environmental policy." (emphasis added). Therefore, the Seventh Circuit's decision, which found that the absence of language in § 313 referencing Indian lands meant that the federal law did not apply, is at odds with opinions of both the Ninth and Tenth Circuits and this Court.

Even the district court, in this very case, originally ruled that § 313(a) does contain an unambiguous waiver of the United States' immunity from Hobart's suit. In its decision relating to the government's first motion to dismiss, the district court held:

> The federal government does have jurisdiction over the property at issue here, which is land owned by the government and held in trust for the Tribe. *The text of § 313 governs the dispute because the Department of the Interior is an agency of the federal government having jurisdiction over the property* and thus § 313 makes it subject to local requirements "respecting the control and abatement of water pollution. . . including the payment of reasonable service charges." App. 48. (emphasis added).

> Accordingly, because the Village is attempting to obtain payment of services charges from the government for property in the government's jurisdiction, *§ 313 and its waiver of immunity apply.* I am thus unable to conclude that the government is immune from suit.
>
> App. 48. (emphasis added).[3]

Although taking the opposite position in this case, the United States seemed to agree with the general applicability rule in a brief it filed in *Central New York Business Ass'n, et al. v. Ken Salazar, et al.*, Civil Action No. 6:08-cv-00660-LEK-DEP, District of New York, arguing "state and local authority over federal land is only curtailed to the extent necessary to ensure that the national purpose for which such land is used is not subject to interference by state and local officials." (Document 91-1, filed Nov. 15, 2011, Page 25 of 31, citing *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 331-32 (1983)). According to the United States, "[t]his is the case whenever the federal government holds land within a state, not just when the land is held on behalf of Indians." *Id.*, citing *United States v. Matherson*, 367 F. Supp. 779, 781 (E.D.N.Y. 1973).

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[3] The court then granted the motion to dismiss only "because there is no final agency action to review...." App. 55. The district court then stayed the rest of the action, allowing Hobart to obtain a final agency denial of the claim. Once final agency action was obtained, Hobart re-filed its third-party claim against the government.

According to the Seventh Circuit and the government's position in this case, § 313 would never apply. Nothing in § 313 expressly references the local post office, federal office buildings, or the Pentagon. The reason each and every type of property, over which the federal government has jurisdiction, is not expressly named, is because § 313 unequivocally applies to them all. Its application to "*any* property" or "*any* activity" and "*any* requirement," enforced in "*any* ...manner," "notwithstanding *any* immunity ... under *any* law or rule of law" could not be more clear. As this Court recently explained "five 'anys' in one sentence and it becomes to seem Congress meant the statute (being applied) to have expansive reach." *U.S. v. Clintwood Elkhorn Mining Co.*, 553 U.S. 1, 7 (2008). (emphasis added).

B. The Seventh Circuit's interpretation of the scope of the United States' waiver of sovereign immunity when trust land is involved is in conflict with Congress' recognition that an express exemption of trust land is required for a waiver to not apply, as demonstrated in the Quiet Title Act, and is also in conflict with Congress' definition of Indian Country.

Congress has shown that it knows exactly how to exempt trust land from a waiver of the United States' immunity. Congress did so in enacting the Quiet Title Act (QTA), which states, in pertinent part, as follows:

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

28 U.S.C. § 2409a. (emphasis added).

The original draft legislation of the QTA did not contain the italicized language above that the waiver "does not apply to trust or restricted Indian lands." (117 Cong. Rec. 46380 (1971)). Knowing that Indian trust land is undisputedly the type of property in which the United States has an interest, and not wanting the clear waiver of immunity from suit to apply to trust land, the original draft of the QTA was rewritten to add the exemption for trust land.

Without the exemption for trust land, the QTA's waiver of immunity would clearly apply. The United States, in its brief to the Seventh Circuit, agreed: The QTA "applies 'to real property in which the United States claims an interest' *and without the exemption [for trust land], the statutory text would clearly apply to trust lands.*" (United States' Br., p. 64, 7th Cir. Dkt. No. 21). (emphasis added). Thus, the United States admits that without the express exemption, the QTA would apply to trust land because it is part of real property in which the United States "claims an interest." This is no more expansive than § 313(a) of the CWA, which says it

applies to all property over which the United States has jurisdiction.

In addition, the Seventh Circuit's holding regarding the scope of § 313 cannot be reconciled with 18 U.S.C. § 1151, which defines "Indian country" as land "*under the jurisdiction* of the United States Government."[4] Section 313 expressly applies to "any property" over which the federal government "*has jurisdiction.*" Given the § 1151 definition, this necessarily includes "Indian country." (emphasis added).

Furthermore, the CWA defines "Federal Indian reservation" as "all land within the limits of any Indian reservation *under the jurisdiction of the United States Government...*" 33 U.S.C. 1377(h)(1) (emphasis added). The inclusion of land "under the jurisdiction of the United States Government," confirms that § 313 applies. Thus, the Seventh Circuit's decision is in conflict with the plain language of the CWA.

C. The Petition should be granted to prevent Indian tribes from unilaterally reasserting sovereign control over fee parcels purchased in the open market, contrary to this Court's holding in *City of Sherrill v.*

[4] Although this definition appears in the criminal code, "it applies in the civil context as well." *Cohen's Handbook of Federal Indian Law*, § 3.04[1] (2012 Ed.), citing *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 208, n.5 (1987).

***Oneida Nation of New York,* 544 U.S. 197 (2005).**

Although the parcels directly involved in this litigation were those owned by the United States and held in trust for the benefit of the Oneida Tribe, the Seventh Circuit's decision reaches far beyond the regulation of trust land. In concluding that Hobart had no cause of action pursuant to § 313, the Seventh Circuit made several sweeping statements about tribal sovereignty.

The Seventh Circuit identified the question in this case not as being limited to trust land, but instead "whether the federal government has authorized the Village of Hobart to assess fees on *Indian lands* in the village." App. 5. (emphasis added.) It then declared that the understanding has been that "states and their subdivisions are not authorized to regulate stormwater or other pollution *on Indian lands, including trust lands.*" App. 8. (emphasis added). The Seventh Circuit also stated that the Oneida Tribe has "exclusive authority over *Indian land,*" which it earlier defined as being more than just trust land. App. 10. (emphasis added). Most surprising is the Seventh Circuit's statement that "...with immaterial exceptions the tribe governs trust lands *just as it does lands to which it holds title.*" App. 3. (emphasis added). The Seventh Circuit also stated that as far as federal regulation of water pollution is concerned, "*tribes equal states—they are not subservient to them.*" App. 8. (citation omitted). (emphasis added).

The Seventh Circuit's statements would mean that any land that comes back into the possession of an Indian tribe is automatically subject to being under primary tribal jurisdiction, even though the land was not taken into trust pursuant to 25 U.S.C. § 465. This is the same unification theory rejected in *City of Sherrill.*

In *City of Sherrill,* such a result is untenable:

> If OIN may unilaterally reassert sovereign control and remove these parcels from the local tax rolls, little would prevent the Tribe from initiating a new generation of litigation to free the parcels from local zoning or other regulatory controls that protect all landowners in the area.

City of Sherrill, 544 U.S. at 220.

Although the Seventh Circuit's expansion of tribal authority over fee land is contrary to this Court's holding in *City of Sherrill,* the Oneida Tribe, as well as tribes throughout the country, will be emboldened by the Seventh Circuit's decision and claim jurisdiction even over fee land. At the very least they will make this argument relating to stormwater management.

D. If the Seventh Circuit's decision is that 25 U.S.C. § 465 creates Indian Country territory not subject to the clear wording of § 313, it will result in a breakdown of the Constitutional structure.

The question of whether taking fee lands, that were previously under state jurisdiction, into trust status removes them from state jurisdiction, and makes them into Indian territory again or "Indian Country," is a significant constitutional question with major federalism implications. This Court has already ruled that Congress has no authority to alter grants of territorial land made to states and warned about the significant constitutional issues raised by such a claim of power. In *Hawaii v. Office of Hawaiian Affairs,* 556 U.S. 163, 176 (2009), this Court stated the Congressional Act at issue "would raise grave constitutional concerns if it purported to 'cloud' Hawaii's title to its sovereign lands more than three decades after the State's admission to the Union." Similarly, the Secretary cannot have the power to take lands into federal trust status pursuant to § 465, if that results in nullifying state jurisdiction. Such a power could destroy the states. If the Seventh Circuit's reasoning is correct, then Hobart has no choice but to argue that § 465 is unconstitutional because of the resulting removal of state jurisdiction.

There is a simpler solution. This Court can reverse the Seventh Circuit's conclusion that lands taken into trust under § 465 are "Indian Country," that even the clear wording of § 313 cannot reach, and conclude that fee lands taken into trust status are not removed from state jurisdiction. Section 465 contains no language even suggesting that placing fee land into trust removes it from state jurisdiction—state jurisdiction, that in this case, has

existed for over a century. Restoring land to an Indian tribe and making it tax exempt does not require that the land be removed from state jurisdiction. In fact, this result is more in keeping with the original limited intent of Congress in passing the very downsized Indian Reorganization Act (IRA) of 1934. In fact, there was no federal regulation claiming that Indian lands were not under state jurisdiction until 1965.

The federal regulation to remove Indian land from concurrent jurisdiction, 25 C.F.R. § 1.4, was put forth just over a year after this Court's decision in *Arizona v. California,* 373 U.S. 546 (1963). In his dissenting opinion in that case, Justice Harlan, joined by two others, warned:

> The Court's conclusions respecting the Secretary's apportionment powers, particularly those in times of shortage, result in a single appointed federal official being vested with the absolute control, unrestrained by adequate standards, over the fate of a substantial segment of the life and economy of three States. Such restraint upon his actions as may follow from judicial review are as will be shown, at best illusory.

Id. at 603.

He went on to state:

> The delegation of such unrestrained authority to an executive official raises, to

> say the least, the gravest constitutional doubts.

Id. at 626.

Thereafter, the Secretary promulgated 25 C.F.R. § 1.4 to purportedly give primary jurisdiction to Indian tribes over all trust lands within reservation boundaries claiming it removes state jurisdiction. How this regulation, that is supposed to apply to only tribally leased land, applies to all Indian lands according to the Secretary, has never been explained. Hobart has argued in this case that if § 1.4 is applied to eliminate state and local authority, it is unconstitutional. But after the ruling in *Arizona v. California,* very few limitations have been placed on the Secretary by this Court, or otherwise, just as Justice Harlan warned.

As a matter of federal public land law, fee lands that had been under state jurisdiction prior to being placed into trust pursuant to § 465, must be treated differently than federal public domain lands that were reserved to an Indian tribe before a state was created. This distinction also clarifies the interpretation of § 518 of the CWA. Inherent tribal sovereignty applying to public domain lands reserved before statehood, that have been historically preserved, should be regulated either by the EPA directly or if the tribe meets the requirements of § 518 by the tribe with EPA oversight. Those lands have never been under primary state jurisdiction. It is a very different issue to allow the Secretary and EPA to grant regulatory authority to an Indian tribe

over lands accepted into trust status under 25 U.S.C. § 465. If that is allowed, they have the power to convert lands that have been under state jurisdiction back into federal territory as Indian country.

This issue has major ramifications to the Indian trust relationship versus other federal trust responsibilities as well. All federal public domain lands are held in trust for the benefit of all of the people of the United States. The Secretary of the Interior is supposed to be the trustee for all of these "trusts." How can equal protection of the law apply if the Secretary and the federal courts can decide that the Indian trust relationship always comes first?

Judge Posner made his position on the federal trust responsibility clear in the following paragraph of the opinion:

> Federal trusteeship underscores the fact that land acquired by the federal government in trust for Indians is, *like original tribal land*, for the most part not subject to state jurisdiction. Although the Supreme Court no longer believes that "the treaties and laws of the United States contemplate the Indian territory as completely separated from that of the states," *Worcester v. Georgia*, 31 U.S. 515, 557 (1832) (Marshall, C.J.); see *Nevada v. Hicks*, 533 U.S. 353, 361 (2001), it remains true that "Indian treaties, executive orders, and statutes preempt state laws that would otherwise apply by virtue of the states' residual jurisdiction over persons and

> property within their borders. Federal preemption of state law in the field of Indian affairs has persisted as a major doctrine in the Supreme Court's modern Indian law jurisprudence." *Cohen's Handbook*, *supra*, § 2.01[2], p. 112. So when the federal government acquires land in trust for Indians, the consequence is to "reestablish [the Indians'] sovereign authority" over that land. *City of Sherrill*, 544 U.S. at 221.

App. 4. (emphasis added).

This Seventh Circuit ruling has made the decision this Court did not have to reach in *City of Sherrill.* Namely, whether state and local justifiable expectations can be ignored when land is placed into trust under § 465. The result of this decision is that a law Congress passed to protect all waters from pollution is unenforceable on the historical Oneida Indian reservation. In short, the Seventh Circuit refused to apply the express waiver of federal sovereign immunity in § 313 by redefining the government's status as trustee over the Indian lands.

> The government's status as trustee rather than merely donor of tribal lands is designed to preserve tribal sovereignty, not to make the federal government pay tribal debts. Anyway there are no tribal debts to Hobart. App. 12.

The Seventh Circuit's decision has forced this Court to either accept its new assertions of super

tribal sovereignty under the complete control of the Secretary of the Interior or to take this case and render its own conclusions.

II. THE ISSUES PRESENTED ARE OF NATIONAL IMPORTANCE IMPACTING THE RESTORATION AND MAINTENANCE OF THE CHEMICAL, PHYSICAL AND BIOLOGICAL INTEGRITY OF THIS NATION'S WATER.

The expansive application Congress intended, for every aspect of the CWA, is demonstrated by the Act's declaration that "the objective of this chapter is to restore and maintain the chemical, physical and biological integrity of the *Nation's* water." 33 U.S.C. 1251(a) (emphasis added). The Act goes on to state that its implementation and objectives are a "*national* goal" to be implemented by "*national* policy," applicable to the "*nation's* waters." *Id.* (emphasis added). Congress' repeated reference to the elimination of pollution in the entire nation leaves no room for the carve out the government now seeks. The stated Congressional intent is totally at odds with the government's position § 313 does not apply to more than 56 million acres over which the federal government has jurisdiction. (www.bia.gov/FAQs, last accessed Jan. 14, 2014).

The national importance of the issue presented by this case is also demonstrated by the Congressional record relating to the major amendment of the CWA. Following are excerpts from the Congressional Record:

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

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

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

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

Congress re-emphasized the critical importance of allowing local municipalities to enforce their ordinances again in 2011. Several federal departments had attempted to side-step their obligations under § 313 of the Clean Water Act,

claiming reliance on an opinion from the Acting General Counsel, U.S. Government Accountability Office. (Letter for Avis Marie Russell, General Counsel, District of Columbia Water and Sewer Authority, from Lynn Gibson, Acting General Counsel, Government Accountability Office, B-319556 (April 13, 2010)). They claimed that, despite the clear application of § 313 to any property, and the incredibly broad waiver of sovereign immunity, they did not need to pay any local fees or service charges relating thereto, because they were in reality taxes. Congress was so outraged by this attempt that it only took until January 4, 2011 for § 313 to be amended to clarify its original intent. The Congressional Record notes the following comment:

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

156 Cong. Rec. S4855 (June 10, 2010)(Statement of Mr. Cardin).

The amendment again reiterated that the federal government must pay reasonable service charges and that those charges "include any reasonable nondiscriminatory fee, charge, or assessment...used to pay or reimburse the cost associated with any stormwater management program...regardless of whether that reasonable fee, charge or assessment is denominated a tax."

Undaunted, the federal government has now come up with yet another excuse why it can ignore

§ 313. In this case, the decision to refuse to pay charges, related to stormwater management, was made by the Assistant Secretary – Indian Affairs.

However, the expressly stated Congressional intent demands nationwide uniformity, finality and enforceability, to combat the cancer of water pollution. Those essential elements are not consistent with a piecemeal application, which excludes the checkerboard group of parcels found in so many historic reservations.

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

As more and more land is put into trust, as a result of the successful gaming operations of Indian tribes, conflicts relating to local stormwater management will continue to occur. Confirmation that the local municipality stormwater management system cannot be derailed as a result of a few checkerboard trust parcels is critical to the creation of an uninterrupted and effective abatement of storm water runoff in this country.

Ironically, the Seventh Circuit recognized the practical problem with its own decision. As the

Seventh Circuit noted, the land held in the name of the United States, in trust for the Oneida Tribe, comprises only 6.6% of Hobart's total land. App. 3 and 70. The Seventh Circuit went on to acknowledge that "[i]t is awkward for parcels of land subject to one sovereignty to be scattered throughout a territory subject to another." App. 5. The Seventh Circuit also noted:

> It does seem odd . . . that there should be two separate stormwater management programs in tiny Hobart, administered by different sovereigns. Indeed, given the checkerboard pattern of Indian and non-Indian land ownership in the village, it's difficult to see how there *can* be separate programs...It's difficult to visualize that; the Village presumably owns all the streets, and storm sewers run under streets. But storm sewers are not the only devices for regulating stormwater runoff; alternatives include retention ponds, and apparently there is one or more of them on Indian land in Hobart.
>
> Nevertheless, we can imagine an argument, built on our earlier example of the Village's authority to deploy its firefighters on Indian parcels, for an exception of necessity – a common law graft onto the Clean Water Act – to the Oneida tribe's exclusive authority over Indian land." App. 9-10. (emphasis in original).

Despite the lower court's recognition that the position taken by the federal government was "awkward," "odd" and "difficult to see" and that even a judicial modification of the Congressional Act, via a "common law graft," seemed in order, it refused to enforce § 313 as written.

Finally, the question of a state and local municipalities' authority to implement local stormwater management programs under § 313(a) of the CWA extends far beyond the issue of stormwater management. The requirement of the word "Indian" to be expressly included in every Congressional Act in order to be applicable to Indians or in Indian country will raise the specter of tribal sovereignty being elevated well beyond its normal confines. This is especially true for Acts such as the CWA which expressly state that state and local municipalities' authority may be limited only to the extent that limitation is "expressly provided" within the Act. This re-occurring dispute warrants this Court's review.

III. THE SEVENTH CIRCUIT'S OPINION IS WRONG.

The Seventh Circuit's interpretation of § 313 of the Clean Water Act is fatally flawed for several reasons. First, the entire decision ignores the well-founded principle that this Court articulated as follows: "We have long understood that as sovereign entities in our federal system, the States possess an 'absolute right to all their navigable waters and the soils under them for their own common use.'"

Tarrant Reg'l Water Dist. v. Herrmann, 133 S.Ct. 2120, 2132 (2013), citing *Martin v. Lessee of Waddell*, 16 Pet. 367, 410 (1842); see also *California v. United States*, 438 U.S. 645, 653 (1978) (holding that "[t]he history of the relationship between the Federal Government and the States in the reclamation of the arid lands of the Western States is both long and involved, but through it runs the consistent thread of purposeful and continued deference to state water law by Congress.") Furthermore, this Court ruled almost two centuries ago that the primary authority over water was reserved to the states. *Martin*, 16 Pet. at 410. Congress respected this principle when building protections of state and local authority into the text of the CWA.

With the concept of federalism well in hand, the Act reads as follows:

> It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution....

33 U.S.C. § 1251(b); § 101(b).

The Seventh Circuit's decision also ignores that part of the Act which indicates that a local government's authority with respect to its waters cannot easily be abrogated. Section 510 of the CWA, which governs "state authority" provides as follows:

> *Except as expressly provided* in this chapter, nothing in this chapter shall (1) preclude or

> deny the right of any State or political subdivision thereof or interstate agency to adopt or enforce (A) any standard or limitation respecting discharges of pollutants, or (B) any requirement respecting control or abatement of pollution . . . or (2) be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters (including boundary waters) of such States.
>
> 33 U.S.C. § 1370 (emphasis added).

What § 313 does expressly state is that it applies, without exception, to "any property" over which the federal government has "jurisdiction." The federal government now honors that obligation on all other property over which it has jurisdiction, including the very building in which this Court resides, the Whitehouse, all Congressional buildings and this nation's most crucial military facilities. The federal government cannot shirk its responsibilities by claiming that § 313 must include the word "Indian lands" in order for the federal law to apply to it.

The Seventh Circuit got it wrong for another reason. It held:

> Other federal properties in a state – post offices, for example – are subject to delegated state administration of the Clean Water Act, *but not Indian reservations, which for purposes of the Act are equated to states.* 33

> U.S.C. § 1377(e); 40 C.F.R. § 131.3(j). (emphasis added).

App. 8.

Indian reservations do not equate to states, as that word is defined by the applicable federal regulations:

> **(j)** *States* include: The 50 States, the District of Columbia, Guam, the Commonwealth of Puerto Rico, Virgin Islands, American Samoa, the Trust Territory of the Pacific Islands, the Commonwealth of the Northern Mariana Islands, and *Indian Tribes that EPA determines to be eligible* for purposes of water quality standards program.

40 C.F.R. § 131.3(j) (emphasis added).

This definition expressly carves Indian Tribes out of the general definition of "States" and requires a specific determination of eligibility for tribes to fall within that definition. The Oneida Tribe of Indians does not have that determination. In fact, its previous attempt to obtain treatment as a state for Clean Water Act purposes failed after the exposure of fraudulent conduct in the processing of that application.[5]

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[5] "TAS approval for the Oneida Tribe of Indians (WI) was withdrawn 5/16/97 by EPA because of uncertainty about the administrative record." U.S. EPA Office of Science and Technology Standards and Health Protection Division, October 3, 2006 (located at:

The federal regulations relating to NPDES permitting, also illustrates the inappropriateness of the court of appeal's unqualified conclusion that "[s]o far as federal regulation of water pollution is concerned, tribes equal states...." App. 8.

The pertinent part of that regulation indicates:

> As a Tribe you *may*: (a) Be authorized to operate the NPDES program including the storm water program, *after* EPA determines that you are eligible for treatment in the same manner as a State under §§ 123.31 through 123.34 of this chapter...

40 C.F.R. § 122.31(a) (emphasis added).

The Seventh Circuit's statement that Indian reservations are equated to states is the foundation of its decision. The fact the Oneida Tribe's application to obtain treatment as a state was rejected fatally undermines the court of appeal's decision.

Even if this Tribe would have qualified for treatment as a state, that would not support the court of appeal's decision. Treatment of a state under the CWA is for limited purposes and does not necessarily negate all local jurisdiction. 33 U.S.C. § 1377(e). Congress cannot delegate power it does not

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http://www.waterboards.ca.gov/academy/courses/wqstandards/materials/mod21/21apptribes.pdf).

have to an Executive Department. Congress is expressly limited by Article IV, sec. 2 of the Constitution as to how it can make a state. It could not have delegated to the EPA the authority to make any federal territory a state.

The CWA is a federally mandated program that relies on the sovereign status of the states to enforce their supervision against the Executive departments and agencies. The EPA itself cannot enforce the CWA or its regulations against other federal departments or agencies. What can be delegated to the Indian tribes is nothing more than federal permitting authority on land that would be subject to permitting by the EPA.

This case must be reversed because of the unworkable result the Seventh Circuit's decision creates as to the enforcement of § 313. Nothing in the court of appeal's ruling makes § 313 inapplicable to land titled in the name of or under the jurisdiction of the United States. If the decision stands, the Oneida Tribe, as well as all tribes, purportedly acting as states, will have the ability to assess fees against the Department of the Interior which is the owner of the trust land. This empowers tribes to assess a fee against its trustee for the land held in the trust for it, an absurd result.

Equally as important, the Seventh Circuit missed the fact that Hobart is not only enforcing the federally mandated requirements of the CWA but also exercising its state police power authority. Even the Seventh Circuit acknowledged "section 313(a)

does waive federal immunity from local regulation of stormwater runoff...." App. 7. In other words, § 313(a) applies to allow a state or local municipality to enforce stormwater ordinances it enacts, regardless of whether they originated as the result of CWA mandates or through local police powers. If the Executive Departments do not appreciate how Congress has waived federal immunity to allow municipal enforcement of the stormwater requirements their recourse is with Congress.

The Bureau of Indian Affairs contends, and the Seventh Circuit has held, however, that the federal government may ignore the stormwater obligations imposed upon it by Congress if that property is considered Indian lands. They would strip away local authority in favor of granting the tribe the authority to exercise control over the parcels. In this case, a very small percentage of Hobart, 6.6%, is held as tribal trust land and that land is spread throughout Hobart's boundaries. The map of trust parcels within the boundaries of Hobart demonstrating the extreme checkerboard affect, is found at App. 70. The map also illustrates that the runoff of water in Hobart, regardless of ownership, flows into Duck Creek and Trout Creek and then into the state's and nation's other waterways.

Allowing the Tribe to regulate these noncontiguous widely dispersed trust parcels is either completely unrealistic or would mean granting the Tribe authority over the non-Indian lands so that a unified stormwater program would exist. Granting the Tribe jurisdiction over non-Indian property

owners, on fee land, would violate this Court's precedent. See *Montana v. United States*, 450 U.S. 544, 557-67 (1981) (holding that the Tribe "has no power to regulate non-Indian fishing and hunting on reservation land owned in fee by nonmembers of the Tribe.")

Whether it is to simply apply an all-encompassing wavier of sovereign immunity as written; to analyze § 313 with sections 101(b) and section 510 protecting state and local authority in mind; or applying the statute with the correct fact that the Oneida Tribe is not eligible for treatment as a state, this petition should be granted. Lower courts should no longer be able to put blinders on when making their decisions, once they learn any type of Indian trust land is involved.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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