

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN
GREEN BAY DIVISION

ONEIDA TRIBE OF INDIANS OF WISCONSIN,

Plaintiff,

v.

VILLAGE OF HOBART, WISCONSIN,

Defendant/Third-Party Plaintiff

v.

UNITED STATES OF AMERICA
U.S. DEPARTMENT OF JUSTICE
950 PENNSYLVANIA AVENUE, NW
WASHINGTON, D.C. 20530-0001,

CASE FILE NO. 10-CV-00137

UNITED STATES DEPARTMENT OF THE
INTERIOR
1849 C STREET, N.W.
WASHINGTON, DC 20240,

AND

KENNETH SALAZAR, SECRETARY,
UNITED STATES DEPARTMENT OF THE
INTERIOR
1849 C STREET, N.W.
WASHINGTON, DC 20240,

Third-Party Defendants.

**VILLAGE OF HOBART'S THIRD-PARTY COMPLAINT FOR
DECLARATORY, INJUNCTIVE, AND MONETARY RELIEF**

Defendant/Third-Party Plaintiff, the Village of Hobart ("Village"), files this action against the Third-Party Defendants, the United States of America ("U.S."), the

United States Department of the Interior (“Department”), and Kenneth Salazar, Secretary, United States Department of the Interior, (“Secretary”). The Village states and alleges as follows:

NATURE OF ACTION

1. The Village seeks a declaratory judgment against the U.S. that it may impose upon the property held in trust for the benefit of the Oneida Tribe of Indians of Wisconsin (“Tribe”), its storm water ordinances and assert fees and charges associated therewith, all pursuant to the Village’s storm water ordinances and the Clean Water Act, 33 U.S.C. § 1251, et seq. (CWA). The Tribe, as the occupant of the land, has refused to pay for these fees, alleging they are unenforceable against trust land and has further alleged that to the extent the fees are owed, they are owed by the U.S., as the titleholder to the land. In addition, the Village seeks a monetary judgment against the U.S. in an amount equal to the fees that are currently owed. The Village also seeks a declaratory judgment that the regulations promulgated by the Secretary of Interior, specifically 25 C.F.R. § 1.4, do not remove the Village’s jurisdiction for storm water purposes, and if they do, they are unconstitutional as applied to the Village’s storm water management ordinance, are manifestly contrary to the statute from which they are derived, and are in excess of the statutory authority granted to the Secretary. The Village also seeks an injunction requiring compliance with the Village’s storm water ordinances.

PARTIES

2. The Third-Party Plaintiff, the Village of Hobart, is an incorporated municipality in Brown County, State of Wisconsin. Its principal offices are located at 2990 South Pine Tree Road, Oneida, WI 54155.

3. The Third-Party Defendant, the U.S., is a governmental entity. The U.S. Department of Justice, Office of the Attorney General, is located at 950 Pennsylvania Avenue, NW, Washington, DC 20530-0001. The United States Attorney's Office for the Eastern District of Wisconsin is located at 517 E. Wisconsin Avenue, Suite 530, Milwaukee, WI 53202-4580.

4. The Third-Party Defendant, the U.S. Department of the Interior, is a federal agency ultimately responsible for implementing and administering regulations relating to Indians and Indian tribes. The U.S. Department of the Interior is located at 1849 C Street, N.W. Washington, DC 20240.

5. The Third-Party Defendant, Kenneth Salazar, U.S. Secretary of the Interior, is the highest ranking official within the U.S. Department of the Interior. Kenneth Salazar has an address of 1849 C Street, N.W. Washington, DC 20240. The Third-Party Defendant, Kenneth Salazar, is being sued in his official capacity.

6. The Plaintiff, the Tribe, purports to be a federally recognized Indian tribe with principal government offices at N7210 Seminary Road, Oneida, Wisconsin, 54155.

VENUE AND JURISDICTION

7. Subject matter jurisdiction is based upon 28 U.S.C. § 1331 (controversy arising under a federal statute), 28 U.S.C. § 2201(a) (action for a declaratory judgment), and 5 U.S.C. § 701, et seq. (Administrative Procedure Act) (APA). The Court further has authority to award injunctive relief under Rule 65 of the Federal Rules of Civil Procedure and 28 U.S.C. § 2202 (further necessary or proper relief based on a declaratory judgment).

8. Venue in this action is proper pursuant to 28 U.S.C. § 1391(b), and 28 U.S.C. § 1391(e) because the Village, the Tribe and the land titled in the name of the U.S. are all located in this district, and a substantial part of the events or omissions giving rise to the claim occurred in this district. In addition, the Village has named the United States, a federal agency, and an agency official as Third-Party Defendants.

ALLEGATIONS COMMON TO ALL COUNTS

9. The Village incorporates paragraphs 1-8 as though fully set forth herein.

10. There is an actual, existing, and justiciable controversy between the Village and the Third-Party Defendants for each and every count alleged herein, and the parties have genuine and opposing interests, which are direct and substantial, relating to the Third-Party Defendants' liability and responsibility for past and future fees related to the proper abatement of storm water for lands that the U.S. holds in trust for the benefit of the Tribe, and the constitutionality of certain regulations promulgated by the Secretary of the Interior.

11. The Village has suffered legal wrong due to its inability to implement its storm water management plans on the trust property which is the subject matter of this litigation. Additionally, the Village has a monetary interest in this litigation and has suffered and continues to suffer a monetary loss as a result of the Tribe's and federal government's refusal to pay the storm water fees associated with the Village's storm water management plan which are necessary to enable it to perform its storm water management functions. It is likely that harm will also result to the environment to the extent that the Village lacks adequate funds to support its storm water management program.

12. The Village has an interest in protecting its jurisdictional control over the property within its boundaries, including but not limited to, those related to storm water management.

13. Section 402, 33 U.S.C. § 1342, of the CWA governs the National Pollutant Discharge Elimination System (NPDES), and includes subsection (p) on municipal storm water discharges.

14. Under 40 C.F.R. § 122.32(a)(1), the Village is located in an urbanized area, and as an operator of a Municipal Separate Storm Sewer System (MS4), is required to obtain NPDES permit coverage.

15. The CWA mandates, under 33 U.S.C. 1342(p), that the Village's NPDES permit "require controls to reduce the discharge of pollutants to the maximum extent practicable, including management practices,...and such other provisions as the Administrator or the State determines appropriate for the control of such pollutants."

16. Federal regulations, pursuant to 40 C.F.R. § 122.34(a), "require at a minimum that [the operator of a regulated small MS4] develop, implement, and enforce a storm water management program designed to reduce the discharge of pollutants from [the] MS4 to the maximum extent practicable (MEP), to protect water quality, and to satisfy the appropriate water quality requirements of the Clean Water Act."

17. Wis. Stat. § 283.33(1)(c) requires that the Village obtain an NPDES permit.

18. Pursuant to federal and state law, the Village created a storm water management program under Chapter 4.5 of the Village of Hobart Ordinances.

19. Pursuant to the Village's ordinances, the rules, regulations, and rates under the storm water management program apply to all real property within the boundaries of the Village.

20. In enacting the storm water ordinances, the Village found 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.

21. The Village also made findings that the development of land increases impervious surfaces and results in increased storm water runoff, and failure to effectively manage this increased storm water runoff affects the sanitary sewer operations of the Village Sanitary District by, among other things, increasing the likelihood of infiltration and inflow into the sanitary sewer.

22. The Village further found that surface water runoff may cause erosion of lands, threaten businesses and residences with water damage and create sedimentation and other environmental damage in surrounding areas.

23. The Wisconsin Department of Natural Resources Regulations require the Village to improve the quality of storm water discharged to the waters of the state.

24. To remain in compliance with federal and state laws on storm water management, the Village must collect fees to finance planning, design, construction, maintenance, administration, and other storm water measures. The fees are determined as set forth in the Village's storm water ordinance, and used solely for purposes of the storm water management program.

25. On or about July 2007, and thereafter, the Village charged storm water fees for all of the land within the Village, including land currently held in trust by the U.S. for the Tribe. The Tribe refused to pay the fees.

26. On or about March 25, 2009, the Village and Tribe entered into an Escrow Agreement. Under the Escrow Agreement, the Village and Tribe agreed that the Village would issue a liquor license to the Tribe, which the Village normally could not issue without payment of all past due fees, in exchange for the Tribe placing the disputed monies into an escrow account. The Escrow Agreement is attached as Exhibit “A,” and is incorporated herein.

27. Within the Escrow Agreement, the Village “contend[ed] that the Tribe and/or the United States of America [is] obligated to pay the SWMUO charges.”

28. The Tribe initiated suit against the Village on February 19, 2010 in the above-titled action in the U.S. District Court, Eastern District of Wisconsin, seeking declaratory and injunctive relief that the trust land is immune from the Village’s storm water ordinances, and the Village lacks authority to charge fees on the trust land. The Tribe also sought an injunction to prevent the Village from collecting fees under its storm water management program for the trust land. The Tribe’s complaint is attached hereto as Exhibit “B.”

29. The Tribe's complaint, among other things, claims that the Village's enforcement of its storm water ordinances, including but not limited to, the collection of storm water fees associated with the storm water program, are unenforceable.

30. Among other things, the Tribe has claimed that 25 C.F.R. § 1.4 preempts state and local law, including the Village's storm water ordinances and fees associated therewith.

31. On April 20, 2010, the Village filed an answer, affirmative defenses and counterclaims, alleging, among other things, that it maintained jurisdiction to enforce its storm water ordinances and collect its storm water fees. A copy of the answer is attached hereto as Exhibit "C," and incorporated herein.

32. On May 18, 2010, the Tribe filed a motion to strike affirmative defenses and a motion to dismiss counterclaims, claiming, among other things, that even if the fees are owed, they are owed by the United States of America as the titleholder to the land. The Tribe further claims that it is "not the party responsible for the charges under the Ordinance."

**FIRST CLAIM FOR RELIEF – DECLARATORY JUDGMENT–
STORM WATER ORDINANCES**

33. The Village incorporates paragraphs 1-32 as though fully set forth herein.

34. As a requirement of its NPDES permit, pursuant to 33 U.S.C. § 1342(p), the Village is required to establish "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 of the State determines appropriate for the control of such pollutants." These controls and practices constitute requirements under the CWA.

35. Federal regulations, pursuant to 40 C.F.R. § 122.34(a), require "at a minimum" that an operator of a regulated small MS4 "develop, implement, and enforce a storm water management program designed to reduce the discharge of pollutants from

[the] MS4 to the maximum extent practicable (MEP), to protect water quality, and to satisfy the appropriate water quality requirements of the Clean Water Act.”

36. To maintain compliance with federal and state laws, the Village created a storm water management program, which is funded by fees that the Village charges to properties located within the boundaries of the Village. The property owner in each case is responsible for the fees. The U.S. is the title holder of the land at issue in this case, and various non-point sources on these lands impact the environment, including, but not limited to, storm water abatement. All property owners within the boundaries of the Village are required to pay the storm water fees.

37. The storm water fees are reasonable and do not constitute a tax from which the U.S. and/or Tribe is immune.

38. The U.S. and/or Tribe currently benefits from the storm water management program, and benefits to the extent that such services are available to the U.S. and/or Tribe if the same are needed by it in the future.

39. The Village’s method of calculating storm water management fees results in a fair approximation of the cost of the program.

40. By failing to pay the storm water fees and otherwise adhere to the storm water ordinances, the U.S. and/or Tribe has violated the Village of Hobart’s ordinances, including those requiring payment; thus, a controversy has arisen as to the validity of the Village’s storm water ordinances and fees.

41. To the extent that the Village has fewer funds available for storm water management, the Village cannot maintain compliance with the requirements of its

NPDES permit, other requirements under the CWA, and also threatens the health and welfare of the citizens and the environment.

42. The Village is entitled to a declaratory judgment that the U.S. and/or Tribe is required to abide by the Village's storm water ordinances and pay certain past due fees, and a declaration that the U.S. and/or Tribe may no longer withhold payment of such charges to the Village.

**SECOND CLAIM FOR RELIEF – DECLARATORY JUDGMENT–
CLEAN WATER ACT**

43. The Village incorporates paragraphs 1-42 as though fully set forth herein.

44. Under the CWA, 33 U.S.C. § 1323(a), “[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.**” (Emphasis added)

45. The CWA expressly directs the U.S. to comply with all local requirements relating to the control of water pollution, including reasonable service charges. The Village is required to establish a program to maintain water quality standards in accordance with federal and state laws. In order to fund this program, the Village must charge fees to the properties within its boundaries.

46. The U.S. is the title holder of the land at issue, and to the extent the Tribe is not the responsible party, the U.S. is obligated to pay the storm water fees pursuant to the Clean Water Act, 33 U.S.C. § 1323(a).

47. The lands at issue in this case contain various non-point sources that impact the environment, including, but not limited to, storm water abatement.

48. The CWA, pursuant to 33 U.S.C. § 1323, contains a waiver of sovereign immunity.

49. The Tribe has claimed that to the extent that the storm water fees are owed to the Village, the U.S. is the responsible party. Because the Tribe has failed to pay the fees, and asserts that the U.S. is the responsible party, a controversy has arisen.

50. The Village is entitled, under the CWA, to a declaratory judgment that the U.S. and/or Tribe is required to pay past due fees, and a declaration that the U.S. and/or Tribe may no longer withhold payment of such charges to the Village.

THIRD CLAIM FOR RELIEF – VIOLATION OF THE IRA AND APA

51. The Village incorporates paragraphs 1-50 as though fully set forth herein.

52. Under governing United States Supreme Court precedent, federal agencies only have authority to adopt regulations that are based on a permissible and reasonable construction of the governing statute, in this case, the Indian Reorganization Act (IRA), 25 U.S.C § 461, et seq. *Chevron USA, Inc. v. Natural Resources Defense Counsel*, 467 U.S. 837, 842-43 (1984); *see also* 5 U.S.C. § 706(2). Regulations that are manifestly contrary to the statute are beyond the agency's authority to adopt and will be found "in excess of statutory authority jurisdiction, authority, or limitations, or short of statutory right" and arbitrary, capricious and contrary to law, in violation of the APA. *Chevron*,

467 U.S. at 844; 5 U.S.C. § 706(2)(A), (B). For purposes of this litigation, the Village's challenge is limited to the scope of and the constitutionality of 25 C.F.R. § 1.4, as it applies to the Village's storm water program; however, the Village does not concede the constitutionality of the IRA.

53. In creating 25 C.F.R. § 1.4, the Third-Party Defendant, the Secretary of the Interior, exceeded the scope of his authority under the IRA and other laws, and adopted regulations that are manifestly contrary to the statute. 25 C.F.R. § 1.4 is contrary to the substantive and procedural requirements of 25 U.S.C. § 465 of the IRA.

54. 25 C.F.R. § 1.4 purports to take away state and local jurisdiction for storm water management purposes, although state and local governments are mandated to establish such programs, as further alleged in the Village's answer, affirmative defenses and counterclaims.

55. For decades prior to the land being taken into trust it was within the jurisdiction of the Town and now the Village of Hobart.

56. The scope of 25 C.F.R. § 1.4 as stated in 25 C.F.R. § 1.3 is based on tribal jurisdiction over federal public land and townsites under Title 43 of the U.S. Code. Title 43 only applies to federal public domain land that has retained its territorial land status by never coming under state jurisdiction.

57. For 25 C.F.R. § 1.4 to apply to prevent the application of the Village's storm water ordinances the U.S. by taking title to the fee lands under 25 U.S.C. § 465, that are the subject of this suit, had to convert the fee title back into federal public land territory.

58. 25 C.F.R. § 1.4 is inconsistent with the United States Supreme Court ruling in *Hawaii v. Office of Hawaiian Affairs*, 556 U.S. ____, 129 S. Ct. 1436 (2009), which limits the federal government's ability to remove land from state or local jurisdiction.

59. For the forgoing reasons, 25 C.F.R. § 1.4 exceeds the Secretary's jurisdiction, authority, or limitations, and is arbitrary, capricious, an abuse of discretion and otherwise not in accordance with law.

FOURTH CLAIM FOR RELIEF – VIOLATION OF THE APA: FAILURE TO PROVIDE REASONED ANALYSIS OF AND JURISDICTION FOR REGULATION

60. The Village incorporates paragraphs 1-59 as though fully set forth herein.

61. Pursuant to 5 U.S.C. § 706(2) of the APA and controlling case law, a federal agency must supply a reasoned analysis and justification for proposed regulatory changes, based on the evidence before the agency. An agency's failure to do so renders its action arbitrary, capricious and an abuse of discretion, and is therefore invalid.

62. The Third-Party Defendants' stated justifications for, and analysis of, 25 C.F.R. § 1.4, were not reasonable, not supported by, and are contrary to, the evidence in the record.

63. An example of the Third-Party Defendants' failure to adequately justify and support the reasoning behind the adoption of 25 C.F.R. § 1.4 is that it does not adequately state the legal bases for the regulation, nor the purported bases for removal of state and local jurisdiction.

**FIFTH CLAIM FOR RELIEF – UNCONSTITUTIONALITY -
ARTICLE IV**

64. The Village incorporates paragraphs 1-63 as though fully set forth herein.

65. Article IV, Section 4 of the United States Constitution requires that the United States "guarantee to every State in this Union a Republican Form of Government."

66. In a republican form of government, the residents of the state or local municipality must be able to fully participate in its governance.

67. The application of 25 C.F.R. § 1.4 in a manner that deprives the state and the Village of the authority to implement its storm water management ordinances, including fees associated therewith, wrongfully deprives the state and Village the right to fully participate in their governance.

68. 25 C.F.R. § 1.4 is unconstitutional as applied in this case, as it operates to deprive the state and the Village of a republican form of government.

SIXTH CLAIM FOR RELIEF - 10TH AMENDMENT

69. The Village incorporates paragraphs 1-68 as though fully set forth herein.

70. The jurisdiction over the land has been reserved to the states by the 10th Amendment to the United States Constitution.

71. 25 C.F.R. § 1.4 is unconstitutional as applied in this case, as it operates to deprive the state and the Village of jurisdiction over this land.

SEVENTH CLAIM FOR RELIEF - 14TH AMENDMENT

72. The Village incorporates paragraphs 1-71 as though fully set forth herein.

73. The 14th Amendment constitutes an affirmative limit on the authority of the federal government.

74. Pursuant to the 14th Amendment, the United States is foreclosed from enacting legislation which has the effect of abridging the privileges and immunities of any citizen of the United States, or of denying to any person the equal protection of the laws.

75. By applying 25 C.F.R. § 1.4, as the Tribe suggests, the Third-Party Defendants effectively eliminate the privileges and immunities of non-Indians who are impacted by storm water management throughout the Village.

76. This also denies such citizens equal protection, because they cannot participate in the storm water management of the area and may be subject to and or impacted by the jurisdiction of tribal storm water management in which they do not have any opportunity to participate.

77. 25 C.F.R. § 1.4 is therefore unconstitutional under the 14th Amendment.

RELIEF SOUGHT

WHEREFORE, the Village respectfully requests the Court render judgment in its favor and grant the following relief:

(a) Issue a declaratory judgment that the U.S. is obligated to pay all storm water related fees;

(b) Issue a monetary judgment for all fees currently due and owing;

(c) Issue a declaratory judgment that the Village has jurisdiction to enforce its storm water ordinances, including fees related thereto, on the trust land which is the subject matter of this litigation;

(d) Issue a declaratory judgment that the Third-Party Defendants' actions were arbitrary, capricious and contrary to law, constituted an abuse of discretion, and the

Third-Party Defendants failed to follow the procedure required by law under the IRA and APA in adopting 25 C.F.R. § 1.4;

(e) Issue a declaratory judgment that, to the extent 25 C.F.R § 1.4 eliminates the Village's jurisdiction to enforce its storm water ordinances, it is unconstitutional;

(f) An injunction requiring compliance with the Village's storm water program and all associated fees;

(g) An injunction preventing the Third-Party Defendants from eliminating the Village's jurisdiction to enforce its storm water ordinances by utilizing 25 C.F.R. § 1.4;

(h) Award the Village its costs, expenses and reasonable attorneys' fees; and

(i) Award such other relief as the court deems just and proper.

Dated this 12th day of July, 2010.

Respectfully Submitted,
Attorneys for Defendant, Village of Hobart

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CERTIFICATE OF SERVICE

I hereby certify that on July 12, 2010, I electronically filed the Village of Hobart's Third-Party Complaint for Declaratory, Injunctive and Monetary Relief, with the Clerk of the Court using the ECF system, which will send notification of such filing to all parties listed on the Court's ECF service list:

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