

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN
GREEN BAY DIVISION

ONEIDA TRIBE OF INDIANS OF WISCONSIN,

Plaintiff,

Case No. 10-CV-00137-WCG

v.

VILLAGE OF HOBART, WISCONSIN,

Defendant.

**VILLAGE OF HOBART'S ANSWER, AFFIRMATIVE DEFENSES
AND COUNTERCLAIM**

Defendant, Village of Hobart (the Village), by and through its undersigned counsel, answers the complaint of Oneida Tribe of Indians of Wisconsin (the Tribe) as follows:

NATURE OF ACTION

1. In answering paragraph 1, admits the complaint asserts a claim for declaratory and injunctive relief and; lacks knowledge and information sufficient to form a belief as to the truth of the remaining allegations and therefore denies the same.

JURISDICTION

2. In answering paragraph 2, admits that this court has jurisdiction over this action and; lacks knowledge and information sufficient to form a belief as to the truth of the remaining allegations and therefore denies the same.

VENUE

3. In answering paragraph 3, admits.

PARTIES

4. In answering paragraph 4, denies that the Tribe is a successor in interest to the Oneida Nation; admits that the Tribe's principal offices are located at N7210 Seminary Road, Oneida, Wisconsin and; lacks knowledge and information sufficient to form a belief as to the truth of the remaining allegations and therefore denies the same.

5. In answering paragraph 5, admits.

ALLEGATIONS COMMON TO ALL CLAIMS

6. In answering paragraph 6, admits that on February 3, 1838 the United States executed the treaty referenced and affirmatively alleges that the treaty speaks for itself and denies any allegations inconsistent with the express language of that treaty and; lacks knowledge and information sufficient to form a belief as to the truth of the remaining allegations and therefore denies the same.

7. In answering paragraph 7, admits that on June 18, 1934 Congress enacted the Indian Reorganization Act ("IRA") and affirmatively alleges that the IRA speaks for itself and denies any allegations inconsistent with the express language of the IRA; admits that the Tribe has from time to time applied to have land placed into trust for their benefit but denies this was properly done in accordance with the IRA and governing regulations.

8. In answering paragraph 8, admits that United States holds land in trust for the Tribe; denies the property was properly placed into trust; lacks knowledge or information sufficient to form a belief as to the acreage held in trust; denies that the trust lands are immune from the Village's Stormwater Management Utility fees and; lacks knowledge or information sufficient to form a belief as to the remaining allegations contained therein and therefore denies the same.

9. In answering paragraph 9, admits.

10. In answering paragraph 10, denies that the fees or monetary charges are not for services rendered and states that the Village Ordinances, § 4.505, § 4.508, Wis. Stats. § 66.0821 and Wis. Stats. § 66.0809, speak for themselves and deny any allegations inconsistent with their express language.

11. In answering paragraph 11, admits.

12. In answering paragraph 12, admits.

13. In answering paragraph 13 denies the Tribe paid \$37,748.59 in that Exhibit B references a payment of \$34,427.07 and; admits the remaining allegations.

14. In answering paragraph 14, admits the Tribe and the Village executed an Escrow Agreement; admits OEGC also signed that Agreement; lacks knowledge and information sufficient to form a belief as to the truth of the remaining allegations and therefore denies the same and; affirmatively alleges that the Escrow Agreement speaks for itself and denies any allegations inconsistent with the express language of that document.

15. In answering paragraph 15 affirmatively alleges that the Escrow Agreement speaks for itself and denies any allegations inconsistent with the express language of that document.

16. In answering paragraph 16, admits an Escrow Agreement was executed and that following the execution of the Escrow Agreement, representatives of the Tribe and Village met and; denies that there was ever a meeting that had to do with the Escrow Agreement, or payment of fees or charges relating to the Village's Stormwater Management Utility.

17. In answering paragraph 17, admits that the Village received a copy of the letter attached to the plaintiff's complaint as Exhibit D. A copy of the Village's written response to the

Midwest Regional Office of the Bureau of Indian Affairs is attached hereto as Exhibit A and incorporated herein.

18. In answering paragraph 18, admits.

19. In answering paragraph 19, lacks knowledge and information sufficient to form a belief as to the truth of the allegations and therefore denies the same.

20. In answering paragraph 20, lacks knowledge and information sufficient to form a belief as to the truth of the allegations and therefore denies the same.

21. In answering paragraph 21, lacks knowledge and information sufficient to form a belief as to the truth of the allegations and therefore denies the same.

22. In answering paragraph 22, states that the allegations contained therein are legal conclusions for which no answer is required. To the extent an answer is required, denies knowledge or information sufficient to form a belief as to the allegations contained therein and therefore denies the same.

23. In answering paragraph 23, admits.

FIRST CLAIM FOR RELIEF
(Claim under the IRA and implementing regulations)

24. In answering paragraph 24, the Village reasserts and realleges its answers and allegations contained in paragraphs 1 through 23.

25. In answering paragraph 25, states that the allegations call for legal conclusions for which no answer is required. To the extent an answer is required, denies knowledge or information sufficient to form a belief as to the allegations contained therein and therefore denies the same.

26. In answering paragraph 26, states that the allegations call for legal conclusions for which no answer is necessary. To the extent an answer is required, denies knowledge or

information sufficient to form a belief as to the allegations contained therein and therefore denies the same.

27. In answering paragraph 27, admits that the United States holds some property within the Village in trust for the Tribe; denies that the property was properly placed into trust and; lacks knowledge and information sufficient to form a belief as to the truth of the remaining allegations and therefore denies the same.

28. In answering paragraph 28, denies.

SECOND CLAIM FOR RELIEF
(Federal pre-emption)

29. In answering paragraph 29, the Village reasserts and realleges its answers and allegations contained in paragraphs 1 through 28.

30. In answering paragraph 30, states that the allegations contained therein call for legal conclusions for which no answer is necessary. To the extent an answer is required, denies knowledge or information sufficient to form a belief as to the allegations contained therein and therefore denies the same.

31. In answering paragraph 31, denies.

32. In answering paragraph 32, denies.

THIRD CLAIM FOR RELIEF
(Infringement of tribal self-government)

33. In answering paragraph 33, the Village reasserts and realleges its answers and allegations contained in paragraphs 1 through 32.

34. In answering paragraph 34, states that the allegations contained therein call for legal conclusions for which no answer is necessary. To the extent an answer is required, denies

knowledge or information sufficient to form a belief as to the allegations contained therein and therefore denies the same.

35. In answering paragraph 35, lacks knowledge and information sufficient to form a belief as to the truth of the allegations and therefore denies the same.

36. In answering paragraph 36, denies.

37. In answering paragraph 37, states that the allegations contained therein call for legal conclusions for which no answer is necessary and to the extent an answer is required, denies knowledge or information sufficient to form a belief as to the allegations contained therein and therefore denies the same and; denies that federal interests outweigh the Village's interests.

38. In answering paragraph 38, denies.

AFFIRMATIVE DEFENSES

1. The property at issue is not properly held in trust because the Tribe was not under federal jurisdiction and the land was not within the present boundaries of an Indian reservation when the IRA was enacted. These as well as other issues are the subject of the Village's April 16, 2010 appeal to the Board of Indian Appeals of a Bureau of Indian Affairs decision to accept into trust, the first six parcels of the Tribe's request to place 133 additional parcels into trust.

2. The Village was mandated under applicable laws to implement its Stormwater Runoff and Stormwater Management Utility Ordinances (Stormwater Ordinances) on all property within the Village, including the property the Tribe alleges is properly held in trust.

3. Alternatively, if it is determined that the property is properly held in trust, the fees and charges asserted by the Village relating to its Stormwater Ordinances are not taxes and are owed by the Tribe.

4. The Tribe has failed to name all necessary and indispensable parties.

5. The Secretary of Interior has no authority under any statute to remove lands from state jurisdiction. Once land has ceased to be territorial land by Congressional cession or act and is under state jurisdiction there is no federal authority to nullify state jurisdiction. Therefore, the Village has authority to implement its Stormwater Ordinances and impose related charges and fees on the property at issue.

6. The fees and charges asserted by the Village relating to its Stormwater Ordinances are not preempted by federal law.

7. The fees and charges asserted by the Village related to its Stormwater Ordinances do not violate the Tribe's inherent powers of self-government.

WHEREFORE, the Village of Hobart requests that the Court:

1. Enter judgment against the plaintiff dismissing its claims and in favor of the defendant declaring that the lands the Tribe alleges are properly held in trust are subject to all fees and charges imposed by the Village pursuant to its Stormwater Runoff and Stormwater Management Utility Ordinances.

2. Award the Village all attorney's fees and costs incurred in defending this action.

3. Award all other relief the Court deems appropriate.

COUNTERCLAIM
(Allegations Common to All Counterclaims)

1. The Village of Hobart (the Village) is an incorporated municipality in Brown County, Wisconsin with a principal office at 2990 South Pine Tree Road, Hobart, Wisconsin 54155.

2. The Oneida Tribe of Indians of Wisconsin (the Tribe) purports to be a federally recognized Indian Tribe with principal government offices at N7210 Seminary Road, Oneida, Wisconsin 54155.

3. Pursuant to requirements placed on the Village by the Wisconsin Department of Natural Resources and other governmental entities to manage stormwater runoff, the Village enacted the Stormwater Ordinances, which authorized the Village Board to establish a stormwater management utility and set rates for stormwater management services for the purposes of protecting the health, safety, welfare of the public, Village Assets, and natural resources.

4. Under the Stormwater Ordinances, the Village established stormwater service charges that applied to all parcels within the Village. (Village of Hobart Code of Ordinances § 4.505)

5. The primary purpose of the charges is to cover the expenses of providing services related to stormwater runoff management, including financing, planning, design construction, maintenance, administration, enforcement and operation of the stormwater management facilities.

6. The Village has imposed charges under the Stormwater Ordinances on Tribal land held in fee and land the Tribe alleges is properly held in trust by the United States Government.

7. The Tribe refuses to pay the charges relating to the land it alleges is properly held in trust.

FIRST CAUSE OF ACTION
(Declaratory Judgment)

8. The Village realleges and incorporates by reference paragraphs 1 through 7 of the Counterclaim.

9. The Tribe alleges that the property at issue was placed into trust via the Indian Reorganization Act of 1934 (IRA), 25 U.S.C. § 465.

10. The Tribe was not federally recognized or under federal jurisdiction on June 18, 1934 and is therefore not eligible to use the IRA to obtain trust status for real property it owns.

11. Some or all of the property at issue was not within an existing reservation or within the present boundaries of a reservation at the time the IRA was enacted and the Tribe was therefore not eligible to use the IRA to obtain trust status for real property it owns.

12. The Tribe is subject to the Village's Stormwater Ordinances and is required to pay any fees or charges associated with the Village's Stormwater Ordinances for the real property at issue in this case.

13. In the event it is determined that the property is properly held in trust, the IRA does not remove land from the jurisdiction of the state and the Secretary of the Interior does not have such authority and the property therefore remains subject to the Village's Stormwater Ordinances including the charges relating thereto.

14. Because the charges assessed under the Stormwater Ordinances are fees for services and not taxes, the Tribe is obligated to pay the charges even if it is determined that the property is properly held in trust.

15. Because the Village's interest in complying with the state and federal requirements which resulted in the Village's Stormwater Ordinances outweighs the Tribe's interest in not paying the charges associated therewith, the Tribe is obligated to pay the charges even if it is determined that the property is properly held in trust.

SECOND CAUSE OF ACTION
(Money Judgment)

16. The Village realleges and incorporates by reference paragraphs 1 through 15 of the Counterclaim.

17. The Village was authorized to assess the Tribe for the property at issue, fees and charges under the Village's Stormwater Ordinances.

18. The Village has not received payment from the Tribe for the fees and charges.

19. The Village is entitled to payment from the Tribe for all charges and fees now due and owing under the Stormwater Ordinances.

WHEREFORE, the Village of Hobart requests the following relief:

1. A declaration that the Village may impose on the property the Tribe alleges is trust land, its Stormwater Ordinances and assert all fees and charges associated therewith.

2. Judgment against the Tribe for the amount currently owed under the Stormwater Ordinances.

3. Attorney's fees and costs of this action.

4. All other relief the Court deems appropriate.

Dated this 20th day of April, 2010

Respectfully Submitted,
Attorneys for Defendant, Village of Hobart

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April 14, 2009

Mr. Terrence Virden
BIA-Midwest Regional Office
One Federal Drive, Room 550
Minneapolis, MN 55111-4007

Dear Mr. Virden:

I am counsel for the Village of Hobart. I am writing in response to your March 24, 2009 correspondence to the Village. You assert that the Village's storm water charge is a tax rather than a fee and, as such, cannot be asserted against property held in trust.

As an initial matter, there is a dispute as to whether or not the property in question is properly held in trust. The land was placed into trust via the Indian Reorganization Act of 1934, 25 U.S.C. § 465. On February 24, 2009, the United States Supreme Court ruled in *Carcieri, Governor of Rhode Island, et al. v. Salazar, Secretary of the Interior, et al.*, Supreme Court Case No. 07-526, that "now under federal jurisdiction" as found in U.S.C. § 479 of the IRA, limited the power of the BIA to take land into trust to "any recognized Indian Tribe now under Federal jurisdiction." "Now" was held to mean 1934, the year the IRA was enacted. The Oneida Tribe of Indians of Wisconsin was not federally recognized or under Federal jurisdiction in 1934 and therefore is not eligible to use the IRA to obtain trust status for real estate they own. Consequently, the Village does not concede that what we are dealing with is trust property not subject to taxation.

Moreover, even if we assume the property is legally held in trust, the storm water charge is still owed. This conclusion is based upon the fact the storm water charge is a fee, which can be charged to property that is otherwise exempt from real estate taxes.

In support of your opinion that the storm water charge is an impermissible tax, you cite *Nation Cable Television Association, Inc. v. United States*, 415 U.S. 336 (1974) and *City of Cincinnati v. United States*, 39 Fed. Cl. 271 (1997). *Nation Cable Television* is distinguishable. First, that holding is linked to the wording in the Independent Offices Appropriation Act, 1952.



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Mr. Terrence Virden
April 14, 2009
Page 2

National Cable Television was an analysis of what could be charged under 31 U.S.C. 483(a). That case did not address storm water charges generally, nor any facts relevant to the storm water fee being asserted by the Village of Hobart. Additionally, the court allowed for the charges to be made but indicated that under 31 U.S.C. 483(a) they could not exceed the "value to the recipient." Although the court did discuss the distinction between a fee and a tax, it was in a very narrow context not germane to the dispute at hand.

City of Cincinnati discusses the distinction between a tax and a fee in analyzing a storm water fee. However, your correspondence fails to mention that case was appealed. On appeal, the federal court affirmed the dismissal by the federal claims court, but on a jurisdictional basis. On appeal, the court stated that "while that question (whether a charge is a tax or a fee) is often difficult to answer, we do not reach it in this case, because the city's complaint runs aground on a preliminary matter (jurisdiction)." *Id.* at 1376.

The court of appeals further held as follows:

We part company with the trial court's analysis in one respect, however. The court regarded the question whether there was an implied in fact contract between the city and the United States to be essentially the same question as whether the storm drainage service charge was a permissible fee for services or an impermissible tax. We disagree that the two inquiries are necessarily the same. As we have stated above, the involuntary nature of the storm drainage service charge is dispositive of the former inquiry: there can be no implied in fact contract without voluntary acceptance of the city's services. **The involuntary nature of the charge, however, is not dispositive of the latter inquiry. There may be some instances in which a municipal assessment is involuntarily imposed but would nonetheless be considered a permissible fee for services rather than an impermissible tax. Our decision in this case does not answer that question and thus we do not hold that Cincinnati's storm drainage service charge is a tax that cannot constitutionally be imposed on a federal entity.** What we do hold is that the complaint, which was based on a theory of implied in fact contract, fails to provide any basis for conducting that there was an implied in fact contract between the city and the United States. The complaint therefore fails to state a claim upon which the court of federal claims is empowered to grant relief. *Id.* at 1378.

Additionally, even if the federal claims court's decision you cite was not called into question by the appellate court, it would nonetheless still be non-binding precedent. On the other hand, contrary to your assertions, there is ample case law which supports the Village's position that the storm water charge is a permissible fee.

In *City of River Falls v. St. Bridget's Catholic Church of River Falls*, 182 Wis. 2d. 436, 513 N.W. 2d. 673, the court analyzed the distinction between a fee and a tax. In that case, St. Bridget's Catholic Church was an entity exempt from taxes. The city provides water service as a public utility which includes water production, storage and transmission for public fire protection. The city elected to collect charges for the cost associated with storing water for fire protection

purposes. The city calculated the amount of the charge each customer pays according to the customer's property value. *Id.* at 439.

The church refused to pay the charges claiming that the state statute controlling this matter was unconstitutional. The church contended that the statute was unconstitutional because it authorized a tax on tax exempt organizations. The church's argument was that the charge was not based on services rendered to utility customers but a mechanism for collecting revenue to pay for the cost of providing public fire protection. *Id.* at 442. The church noted that the charge was assessed regardless of whether the utility customer actually used water to fight a fire. Thus, the church concluded that the charge could not be a fee for services rendered but was in actuality a tax. *Id.* at 441.

The court ruled that "[t]he church's argument incorrectly assumes that to be a fee, a charge must be assessed for commodities actually consumed. As we previously stated, if the primary purpose of a charge is to cover the expense of providing services, supervision or regulation, the charge is a fee and not a tax." *Id.* at 442 citing *State v. Jackman*, 60 Wis. 2d. 700, 707, 211 N.W. 2d. 480.

In *El Paso Apartment Association v. City of El Paso*, No. EP-08-CA-145-DB, a federal court specifically addressed the issue of storm water management fees. In that case, the City of El Paso formed a drainage utility and levied a storm water fee upon all water consumers in El Paso, calculated upon the square footage of impervious land.

The plaintiff alleged that the storm water drainage fee was not intended to finance the cost of a storm water utility but was a means of raising general revenue for the city. The court noted that "[t]he storm water fee is imposed upon the entire population of El Paso, from private homeowners to commercial businesses. Although there is a disparity between the amount charged, all are taxed their share based on the size of their lot. Second, a review of the record fails to reveal evidence suggesting that the monies generated from the fee significantly exceeded the cost to build the storm water drainage utility." *Id.* The court then ruled that the plaintiff failed to establish a likelihood of success on the merits. See also *Vandergriff v. City of Chattanooga*, 44 F.Supp.2d 927, (E.D. TN 1998) (charges collected under city's storm water ordinance were "fees" rather than "taxes").

The fees charged by the Village of Hobart are charged by a separate water utility created solely for the purpose of managing storm water. A separate and distinct budget is created for storm water management. All money collected is put in a segregated account and is not deposited into the Village's general revenue fund. The money collected is not used to pay for the general operating cost of the Village. The fee is designed to equal the cost of the services, supervision and regulation.

Therefore, the Village respectfully disagrees with your analysis that the storm water charge is an impermissible tax. It is a fee used exclusively for providing services, supervision and regulation relating to storm water. As such, it would be inappropriate for the Village to discontinue asserting this fee on the trust property or any other property within the Village which is arguably exempt from property taxes.

Mr. Terrence Virden
April 14, 2009
Page 4

As a final matter, I note you instruct the Village and County to take immediate action to delete the property from the tax list and terminate further collection action. If it is your position you have the ability to mandate such action, please provide me with all relevant law that supports that position.

Very truly yours,

Davis & Kuelthau, s.c.



Frank W. Kowalkowski

FWK:kam

cc: Village of Hobart
Guy Zima, Chairman
John Luetscher, Corporate Counsel

CERTIFICATE OF SERVICE

I hereby certify that on April 20, 2010, I electronically filed the Village of Hobart's Answer, Affirmative Defenses and Counterclaim, and this Certificate of Service, 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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