

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 RESPONSE TO PLAINTIFF'S MOTION TO STRIKE
AFFIRMATIVE DEFENSES AND DISMISS COUNTERCLAIMS**

Table of Contents

| | <u>Page</u> |
|---|-------------|
| I. INTRODUCTION..... | 1 |
| II. LEGAL STANDARDS..... | 1 |
| A. Motion to Strike Affirmative Defenses..... | 1 |
| B. Motion to Dismiss Counterclaims. | 3 |
| III. ARGUMENT..... | 3 |
| A. The Village’s Affirmative Defenses should not be Stricken. | 3 |
| 1. First Affirmative Defense: The Land is not Properly Held in Trust. | 4 |
| 2. Second Affirmative Defense: Applicable Laws Mandate the Ordinance. | 5 |
| 3. Third Affirmative Defense: The Charges are a Fee and not a Tax..... | 7 |
| 4. Fourth Affirmative Defense: The Tribe has Failed to Name all Necessary and Indispensible Parties. | 8 |
| 5. Fifth Affirmative Defense: The Secretary of Interior Lacks Authority to Remove Trust Land from State Jurisdiction. | 9 |
| 6 The Tribe is not Entitled to the Benefits of the IRA and Regulations Promulgated Thereunder..... | 10 |
| 7. 25 C.F.R. § 1.4 does not Prohibit the Village’s Regulation of Storm Water. | 12 |
| 8. 25 C.F.R. § 1.4 is Unconstitutional as Applied to Storm Water Regulation to the Extent it Prohibits such Regulation on Trust Lands..... | 14 |
| 9. Sixth and Seventh Affirmative Defenses: The Fees are not Preempted and do not Violate The Tribe’s Inherent Powers of Self-Government..... | 16 |
| B. The Village’s Counterclaims should not be Dismissed. | 17 |
| 1. Indispensability of The United States does not Bar The Village’s First Counterclaim for Declaratory Relief..... | 17 |
| 2. The Tribe Waived its Sovereign Immunity..... | 18 |

Table of Contents
(continued)

| | <u>Page</u> |
|--|-------------|
| a. The Tribe Expressly Waived its Sovereign Immunity for both Counterclaims Pursuant to the Express Terms of the Escrow Agreement. | 19 |
| b. The Tribe Waived its Sovereign Immunity to the Village’s First Counterclaim for Declaratory Relief by Initiating Suit Against the Village and Under the Doctrine of Recoupment. | 22 |
| c. The Tribe Waived its Sovereign Immunity to the Village’s Second Counterclaim Seeking a Monetary Judgment by Initiating Suit Against the Village and Under the Doctrine of Recoupment. | 24 |
| IV. CONCLUSION..... | 27 |

TABLE OF AUTHORITIES

Cases

Armstrong v. Snyder,
103 F.R.D. 96 (E.D. Wis. 1984) 2

Berrey v. Asarco, Inc.,
439 F.3d 636 (10th Cir. 2006) 19, 22, 25, 26

Bobbitt v. Victorian House, Inc.,
532 F.Supp. 734 (N.D.Ill. 1982) 2, 16

Bull v. United States,
295 U.S. 247 (1935)..... 22, 26

*C & L Enters., Inc. v. Citizen Band Potawatomi Indian Tribe of,
Okla.*, 532 U.S. 411 (2001)..... 19

Carcieri v. Kempthorne,
497 F.3d 15 (1st Cir. 2007),..... 15

Carcieri v. Salazar,
129 S.Ct. 1058 (2009)..... 4, 11

Chevron USA, Inc. v. Nat. Resources Def. Counsel,
467 U.S. 837 (1984)..... 14

City of Roseville v. Norton,
219 F.Supp. 2d 130 (D.D.C. 2002) 13, 15

Hawaii v. Office of Hawaiian Affairs,
129 S.Ct. 1436 (2009)..... 11, 14

Heller Fin., Inc. v. Midwhey Powder Co.,
883 F.2d 1286 (7th Cir.1989) 1

Henry v. First Nat. Bank of Clarksdale,
595 F.2d 291 n.1 (5th Cir. 1979) 2, 16

Jicarilla Apache Tribe v. Andrus,
687 F.2d 1324 (10th Cir. 1982) 19, 25

Leas v. General Motors Corp.,
278 F. Supp. 661 (E.D. Wis. 1968)..... 2

Loss v. Blankenship,
673 F.2d 942 (7th Cir. 1982) 3

Maryland Staffing Servs., Inc. v. Manpower, Inc.,
936 F. Supp. 1494 (E.D. Wis. 1996)..... 2, 17

Nevada v. Hicks,
533 U.S. 353 (2001)..... 13

Nevada v. United States,
221 F.Supp.2d 1241 (D. Nev. 2002)..... 15

New York v. Salazar,
No. 6:08-CV-644, 2009 WL 3165591 (N.D.N.Y., Sept. 29, 2009)..... 15

*Oklahoma Tax Comm'n v. Citizen Band of Potawatomi Tribe,
of Okla.*, 498 U.S. 505 (1991)..... 19

Oneida Tribe of Indians of Wis. v. Village of Hobart,
500 F. Supp.2d 1143 (E.D. Wis. 2007)..... *Passim*

| | |
|---|---------------|
| <i>Rosebud Sioux Tribe v. Val-U Constr. Co. of S.D., Inc.</i> , 50 F.3d 560 (8th Cir. 1995) | 22 |
| <i>Rupp v. Omaha Indian Tribe</i> , 45 F.3d 1241 (8th Cir. 1995) | 22 |
| <i>Santa Clara Pueblo v. Martinez</i> , 436 U.S. 49 (1978)..... | 19 |
| <i>Sentry Ins. v. Novelty, Inc.</i> , No. 09-CV-355-SLC, 2009 WL 5087688 (W.D. Wis., Dec. 17, 2009) | 3 |
| <i>South Dakota v. United States Dept. of the Interior</i> , 69 F.3d 878 (8th Cir. 1995), | 15 |
| <i>Thompson v. Illinois Dept. of Prof'l Regulation</i> , 300 F.3d 750 (7th Cir. 2002) | 3 |
| <i>U.S. Bank Nat. Ass'n v. Alliant Energy Res., Inc.</i> , No. 09-cv-078-BBC, 2009 WL 1850813 (W.D. Wis. June 26, 2009)..... | 1 |
| <i>United States v. Roberts</i> , 185 F.3d 1125 (10th Cir. 1999) | 15 |
| <i>White Mountain Apache Tribe v. Bracker</i> , 448 U.S. 136 (1980)..... | 13 |
| <i>Williams v. Jader Fuel Co., Inc.</i> , 944 F.2d 1388 (7th Cir. 1991) | 2 |
| Statutes | |
| 25 U.S.C. § 479..... | 10 |
| 33 U.S.C. § 1323..... | 18 |
| 5 U.S.C. § 706..... | 14 |
| 5 U.S.C. § 706(2)(A),(C) | 14 |
| Wis. Stat. § 283.33(1)(c)..... | 5 |
| Rules | |
| Fed. R. Civ. P. 19(a)(1)..... | 9 |
| Fed. R. Civ. P. 8(c) | 2, 16 |
| Regulations | |
| 25 C.F.R. § 1.3 | 11 |
| 25 C.F.R. § 1.4..... | <i>Passim</i> |
| 40 C.F.R. § 122.33(a)..... | 5 |
| 40 C.F.R. § 122.34(a)..... | 6 |
| 40 C.F.R. § 122.34(b) | 6 |
| Wis. Admin. Code § NR 216.02(3) | 5 |
| Wis. Admin. Code § NR 216.07 | 6 |
| Other | |
| Baicker-McKee, et al, <i>Federal Rules of Civil Procedure Handbook</i> Rule 12 Commentary (2010) | 2-3 |

I. INTRODUCTION

The Tribe's motion to strike the Village's affirmative defenses and dismiss the Village's counterclaims should be denied. Motions to strike are generally disfavored, and the Tribe has failed to demonstrate that any of the Village's defenses are patently defective or present any risk of prejudice to the Tribe that would allow for the defenses to be stricken. The Village's affirmative defenses demonstrate the bases of the Village's denials of the Tribe's allegations against it and, as illustrated below, are supported by fact and law.

In moving to dismiss the Village's two counterclaims, the Tribe unjustifiably seeks to have its day in court while foreclosing the Village's right to do the same. The Tribe waived its sovereign immunity to the Village's counterclaims expressly in its Escrow Agreement with the Village and by filing suit against the Village. This Court has previously ruled against the Tribe on these same issues in a different case and held that a counterclaim that is the reverse image of the Tribe's claim (as it is here) should not be dismissed. To hold otherwise would "transmogrify the doctrine of tribal immunity" and undermine ordinary logic.

The Tribe's motion to strike the Village's affirmative defenses and dismiss its counterclaims should be denied in its entirety.

II. LEGAL STANDARDS

A. Motion to Strike Affirmative Defenses.

Affirmative defenses may be stricken "only when they are insufficient on the face of the pleadings." *Heller Fin., Inc. v. Midwhey Powder Co.*, 883 F.2d 1286, 1294 (7th Cir.1989). Motions to strike are disfavored generally; they are often used only as a dilatory tactic and "waste time by requiring judges to engage in busywork and judicial editing without addressing the merits of a party's claim." *Id.*; *U.S. Bank Nat. Ass'n v. Alliant Energy Res., Inc.*, No. 09-cv-

078-BBC, 2009 WL 1850813, at *3 (W.D. Wis. June 26, 2009). Thus, motions to strike affirmative defenses are typically granted only if the challenged matter clearly has no bearing upon the subject matter of the litigation, *Armstrong v. Snyder*, 103 F.R.D. 96, 100 (E.D. Wis. 1984), and it is certain that the plaintiff would succeed despite any state of the facts which could be proved in support of the defense, *Williams v. Jader Fuel Co., Inc.*, 944 F.2d 1388, 1400 (7th Cir. 1991).

In analyzing a motion to strike an affirmative defense, courts should be mindful of the requirement under Rule 8(c) of the Federal Rules of Civil Procedure that a party must set forth any affirmative defenses in a responsive pleading. Because the failure to set forth an affirmative defense may waive the right to present the evidence at trial on that defense, a motion to strike should not be granted unless the defense is patently defective. *Bobbitt v. Victorian House, Inc.*, 532 F.Supp. 734, 736 (N.D.Ill. 1982)(citing *Henry v. First Nat. Bank of Clarksdale*, 595 F.2d 291, 298 n.1 (5th Cir. 1979).

Further, a motion to strike a portion of a pleading is regarded as so drastic a remedy that one is seldom granted absent a showing of real prejudicial harm to the moving party. *Armstrong*, 103 F.R.D. at 100. In particular, motions to strike for redundancy should not be granted in the absence of a clear showing of prejudice to the movant. *Maryland Staffing Servs., Inc. v. Manpower, Inc.* 936 F. Supp. 1494, 1509 (E.D. Wis. 1996); *Leas v. General Motors Corp.*, 278 F. Supp. 661, 663 (E.D. Wis. 1968). The *Federal Rules of Civil Procedure Handbook* summarizes the law relating to motions to strike as follows:

The burden lies with the party moving to strike. Given the disfavored nature of the relief, the burden on the moving party is “formidable.” The moving party must generally make at least two showings: first, the challenged allegations must be clearly unrelated to the pleader's claims, *and*, second, the moving party must be prejudiced by permitting those allegations to remain in the pleading.

Baicker-McKee, Janssen, Corr, Authors' Commentary on Rule 12 at 463 (2010) (citations omitted) (emphasis in original).

B. Motion to Dismiss Counterclaims.

A counterclaim should not be dismissed unless it appears beyond doubt that the defendant “can prove no set of facts in support of his claim which would entitle him to relief.” *See Loss v. Blankenship*, 673 F.2d 942, 945-6 (7th Cir. 1982). In assessing a plaintiff’s motion to dismiss, a court must accept all well-pled facts in the counterclaim as true and view the defendant’s allegations in the light most favorable to the defendant. *Sentry Ins. v. Novelty, Inc.*, No. 09-CV-355-SLC, 2009 WL 5087688, *1 (W.D. Wis., Dec. 17, 2009) (citing *Thompson v. Illinois Dept. of Prof'l Regulation*, 300 F.3d 750, 753 (7th Cir. 2002)). It is premature to dismiss a viable and plausible claim at an early stage of litigation with limited facts on the record. *Id.* at *3. A court’s safest course is to deny the motion unless there is no doubt that it will be rendered moot by the adjudication of the main action. *Id.* Moreover, if a counterclaim is repetitious, little time will be expended on additional discovery or briefing. *Id.*

III. ARGUMENT

A. The Village’s Affirmative Defenses should not be Stricken.

In its answer, the Village asserted seven affirmative defenses: (1) The property at issue is not properly held in trust; (2) the Village was mandated to implement its storm water ordinances; (3) the fees and charges asserted by the Village are not taxes but are permissible fees; (4) the Tribe failed to name all necessary and indispensable parties; (5) the Secretary of the Interior did not have the authority to remove the lands from state jurisdiction; (6) the Village’s fees are not preempted by federal law; and (7) the fees and charges asserted by the Village do not violate the Tribe’s inherent powers of self-government. (Def. Answer at 6-7.) In response, the Tribe moved

to strike all of the Village's affirmative defenses. (Pl. Br. at 4.) The Village will address each affirmative defense individually.

1. First Affirmative Defense: The Land is not Properly Held in Trust.

The Tribe moves to strike the Village's first affirmative defense that the land was not properly placed into trust. This affirmative defense is not meant to be a direct challenge to the United States' title to the property. Rather, this defense is designed to preserve any claim that this Tribe is not eligible for the benefits of the Indian Reorganization Act of 1934, 25 U.S.C. § 461 et. seq. (IRA), relevant to the Court's ultimate determination of the Village's ability to enforce its storm water ordinances and related fees. In *Carciari v. Salazar*, 129 S.Ct. 1058 (2009), the Supreme Court held that only recognized tribes under federal jurisdiction in 1934 are eligible to use the IRA. The Village maintains that the Tribe was not a recognized tribe under federal jurisdiction in 1934.

For the purpose of this litigation it is admitted the U.S. holds title in some form of trust for the Tribe with some level of corresponding restrictions. For example, alienation without the federal government's approval may be prohibited. However, the fact the Tribe was not a recognized Tribe under federal jurisdiction in 1934, limits the benefits the Tribe receives from the U.S. taking title. In other words, the fact the U.S. holds title does not necessarily mean an ineligible Tribe receives all the benefits of the IRA that an eligible Tribe would enjoy.

It is premature at this stage of the litigation to conclude that under no circumstances, issues relating to the legal status of the land could have no bearing on this case. The Village is obligated to state its defenses or the Village risks losing them. Likewise, the Village is obligated to notify the Tribe of potential defenses. That is exactly what this affirmative defense does and therefore it should not be stricken.

2. Second Affirmative Defense: Applicable Laws Mandate the Ordinance.

The Tribe moves to strike the Village's second affirmative defense that federal and state law mandates the Village's imposition of a storm water runoff ordinance on all property within the Village, including the Trust Lands at issue in the instant case. Specifically, the Tribe claims the mandate, under federal law, is only to "the maximum extent practicable" and to "the extent allowable under State, Tribal or local law." (Pl. Br. at 11.) The Tribe similarly claims that the state requirements are limited "to the extent authorized by law." *Id.*

A review of the applicable laws shows there is no exception for trust land. Federal law requires an operator of a small municipal separate storm sewer systems (MS4) located in an urbanized area, as determined by the latest decennial census, to apply for a National Pollutant Discharge Elimination System (NPDES) permit for their storm water discharge. 40 C.F.R. § 122.33(a) ("If you operate a regulated small MS4 under § 122.32, you must seek coverage under an NPDES permit issued by your NPDES permitting authority.") (emphasis added). The Village is located within the Green Bay urbanized area and is a regulated small MS4 community. *See* Note to Wis. Admin. Code § NR 216.02(3) (listing "Hobart town" as a municipality within a 2000 decennial census urbanized area).¹

Similarly, state law requires the Village, as an owner or operator of a MS4, to obtain a permit regarding storm water discharge. *See* Wis. Stat. § 283.33(1)(c) ("An owner or operator shall obtain a permit under this section for . . . [a] discharge of storm water from a municipal separate storm sewer system serving an area located in an urbanized area, as determined by the U.S. bureau of the census based on the latest decennial federal census.") (emphasis added).

¹ The Town of Hobart was incorporated as the Village of Hobart in 2002.

An NPDES permit requires at a minimum that the operator of an 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, to protect water quality, and to satisfy the appropriate water quality requirements of the Clean Water Act (CWA). 40 C.F.R. § 122.34(a). Both a national and state permit require an MS4 operator to develop and implement certain minimum control measures. 40 C.F.R. § 122.34(b); Wis. Admin. Code § NR 216.07.

Neither the federal nor state regulations provide that a permit need not include storm water management over trust land within a municipality's boundaries. There is simply no exception for tribal trust land. The Village is mandated to impose its storm water ordinances over all land within its boundaries.

The Tribe uses circular reasoning to argue that federal and state laws do not require the imposition of the storm water ordinance on trust land. While the Tribe concedes that the Village is required to implement a storm water management program, it claims that the requirement does not apply to trust land because the federal and state regulations limit an operator's regulation "to the extent allowable under State, Tribal or local law" and "to the extent authorized by law." (Pl. Br. at 11-12.) However, the Tribe fails to identify any federal or state law that specifically limits the Village's authority to establish its stormwater ordinances. Instead, the Tribe assumes that the storm water charges at issue are a tax or somehow preempted by federal law that does not specifically address stormwater and therefore concludes that the charges are prohibited.

The Village adamantly opposes the Tribe's assumption that the charge is a tax or is otherwise preempted; this is the very issue that must be resolved in this litigation. The Village's second affirmative defense is not insufficient on the face of the pleadings, and it would be inappropriate to strike the defense based on the Tribe's untested conclusions of law.

Moreover, practical considerations advocate for implementation of the ordinance over the trust land within the Village's boundaries. The trust land constitutes 1,420 acres within the Village and is scattered like a checkerboard throughout its boundaries. (*See* Compl. ¶ 8.) The Village's storm water management program would be rendered inefficient if it did not include the trust land in its regulation; water does not direct its flow according to lines on a map.

3. Third Affirmative Defense: The Charges are a Fee and not a Tax.

The Tribe moves to strike the Village's third affirmative defense that the storm water charges associated with the Village's ordinance are a permissible fee and not a tax on the grounds that it merely restates the Village's denial of the Tribe's claim and that even if it is a permissible fee, it runs against the United States as the property owner, who is not a party to the litigation.

The allegation in the Tribe's complaint relevant to this defense is: "[t]he charges authorized and imposed by the Village...constitute a tax on the Tribe's trust land and, as such, violate the tax immunity provided for those lands by federal law and regulation." (Compl. ¶ 28.) The Village's answer "denies" this allegation and nothing more. (Def. Answer ¶ 28.) Consequently, asserting an affirmative defense which specifically states that the charges are permissible fees, rather than taxes, does more than merely restate the Village's denial as the Tribe suggests, and it can hardly be considered as cluttering the litigation. This defense does exactly what affirmative defenses are designed to do - alert the Plaintiff as to the nature of the defense - in addition to simply denying the allegations in the complaint without explanation.

The Tribe also asserts that even if the charge is a permissible fee, it is owed by the United States as title-holder to the Trust Lands. The United States has now been made a party to this litigation by virtue of the Village's Third Party Complaint. Therefore, its absence from this litigation is no longer a proper basis to strike this defense.

Additionally, pursuant to an agreement between the Tribe and the United States, the Tribe has agreed to be responsible for any costs the United States might have to pay as titleholder to trust land. In its Notice of Decision on accepting land into trust status, dated March 17, 2010, the Acting Regional Director of the United States Department of the Interior, Bureau of Indian Affairs stated the following:

Pursuant to public law 93-638, as amended, the Oneida Tribe has negotiated an agreement to assume responsibilities of various programs, services, functions, and activities that normally are funded and/or flow through the BIA...The Tribe has stated in this application that they are prepared to pay for whatever municipal services that may be required in connection with the newly acquired property, if any.

(BIA Notice of Decision, March 17, 2010.) The Village has submitted a Freedom of Information Act request for a copy of this agreement, but to date has not received a response. By virtue of this agreement, any amount owed by the United States passes through to the Tribe, which makes any dispute over whether the charges are a tax or a fee relevant to this litigation, even if the United States was not a party.

4. Fourth Affirmative Defense: The Tribe has Failed to Name all Necessary and Indispensible Parties.

The Tribe seeks to strike the Village's fourth affirmative defense that the Tribe has failed to name all necessary and indispensable parties (namely, the United States) because "Indians can sue on their own behalf to protect their rights in real property without the participation of the United States as plaintiff." (Pl. Br. at 14.) As stated above, the United States is now a party. However, because the United States has not yet had an opportunity to respond, addressing this affirmative defense at this juncture is premature.

A party is required where, in that party's absence, the court cannot accord complete relief among existing parties, or that party claims an interest relating to the subject of the action and is so situated that disposing of the action in its absence may impair its ability to protect its interest

or will leave an existing party subject to a substantial risk of incurring multiple or inconsistent obligations because of the interest. Fed. R. Civ. P. 19(a)(1). Prior to the United States having an opportunity to respond, it is impossible to determine if this defense remains applicable. The United States may or may not contest the Village's ability to sue it, and if it does, the Court may or may not agree. Additionally, it is unknown what claims the United States may assert on its own behalf and how additional claims will impact the present litigation. The Village respectfully requests that the Court withhold consideration of this issue until all parties have had an opportunity to be heard.

5. Fifth Affirmative Defense: The Secretary of Interior Lacks Authority to Remove Trust Land from State Jurisdiction.

The Tribe moves to strike the Village's fifth affirmative defense that the Secretary of Interior (Secretary) lacks authority to remove the land from state jurisdiction, and therefore the Village has authority to implement its storm water ordinances over the land. This is not a challenge to the status of the land. This defense asserts that regardless of the status, the Village maintains authority to regulate storm water. This defense is now one of the specific causes of action in the Village's Third Party Complaint against the United States and the Secretary (collectively, the federal government).

The Village's jurisdictional defense is threefold. The Village contends it maintains jurisdiction for storm water purposes because: (1) The Tribe is not eligible for the benefits of the IRA, despite the fact the U.S. admittedly now holds title; (2) 25 C.F.R. § 1.4 cannot be construed to eliminate the Village's authority for storm water management; and (3) if it is construed that way, the Secretary is acting outside of his authority by taking away the jurisdiction the Village previously enjoyed.

6. The Tribe is not Entitled to the Benefits of the IRA and Regulations Promulgated Thereunder.

This is a case of first impression in that to determine whether the Village or the Tribe has jurisdiction over the storm water it will be necessary to determine whether the Oneida Tribe of Wisconsin was eligible under 25 U.S.C. § 479 for the benefits of the IRA as Section 479 was interpreted by the Supreme Court in *Carcieri*. This affirmative defense is related to the first affirmative defense that the Oneida Tribe of Wisconsin was not eligible for the benefits of the IRA under *Carcieri*. Until last year, the Secretary's interpretation of the phrase "now under federal jurisdiction" in 25 U.S.C. § 479 incorrectly allowed every tribe recognized as eligible for services by the Department of the Interior to receive the same benefits, including those of the IRA, as the few tribes that were "now under federal jurisdiction" in June 1934. The approximately 125 tribes that were eligible for the IRA in 1934 were all situated on public domain lands reserved for them by the United States where they retained not only Indian title but also their inherent sovereignty.

The fact that the IRA was intended by Congress to only apply to Indian tribes "now under federal jurisdiction" as of June 1934 effectively meant that the IRA applied only to tribes remaining on actual federal Indian reservations on federal public land.² Only tribes physically located on federal public land upon which the United States' retains primary territorial sovereignty could be separately governed as contemplated in the IRA.

There is no question that the Property Clause, Art. IV, Sec. 3, Cl. 2, allows the Congress to create government entities on federal public land that retains its territorial status. Restoring land to an Indian tribe on an actual federal reservation usually means transferring other federal lands like surplus unallotted land back to the tribe. These additional federal public lands could

² A specific treaty provisions might bring a tribe under federal jurisdiction but that is not applicable to this tribe.

then be subject to tribal jurisdiction because they had never lost their territorial status. Never losing their territorial status meant that the restored land had never been under primary state jurisdiction. In passing the IRA, Congress did not intend to re-create or restore tribal rights that had long ago grown cold.

The fact that the IRA was intended to apply only to federal public lands gives rise to the question of whether the Secretary had the authority to remove state jurisdiction when those lands were acquired in trust by the United States for an Indian tribe under 25 U.S.C. § 465 of the IRA. This jurisdictional question is a separate but related question from whether the lands could be acquired at all pursuant to the IRA. Whether the lands were acquired properly under the IRA or not does not change the fact that they are now owned by the United States. However, if the acquisition of the land did not convert it back into federal public domain land in “territorial status” then the primary jurisdiction still lies in the State of Wisconsin and the Village of Hobart.³ According to the decision of the United States Supreme Court just two weeks after the *Carciere* decision in *Hawaii v. Office of Hawaiian Affairs*, 129 S.Ct. 1436 (2009), not even Congress itself has the constitutional authority to restore territorial land status to property that has passed to fee title under state jurisdiction. *Id.* at 1443.

This long explanation for this affirmative defense and claim against the federal government comes down to one express question: Can the Oneida tribe properly claim that they, and not the Village, have jurisdiction over the stormwater on trust land pursuant to 25 C.F.R. § 1.4 as claimed in their complaint?

According to 25 C.F.R. § 1.3 which defines the scope of the Secretary’s regulatory authority “Chapters I and II of this title contain the bulk of the regulations of the Department of

³ If the status of the state lands can be converted back into federal public domain land in “territorial status” and thereby removed from state jurisdiction then a tribe and the United States have restored primary federal jurisdiction. This may indeed be the case for some tribes, but not for the Oneida Tribe.

the Interior of general application relating to Indian affairs. Subtitle B, Chapter I, Title 43 of the Code of Federal Regulations contains rules relating to the relationship of Indians to public lands and townsites.” Title 43 of the code and federal regulations is the public lands section. This means that 25 C.F.R. § 1.4 does not apply to the Oneida trust lands unless they have been restored as federal public domain. This could not have occurred for the Oneida Tribe because it was not a recognized Tribe under federal jurisdiction in 1934.

It is the position of the Village that if Congress has no authority to remove state jurisdiction once conferred, that the Secretary of Interior and the Executive branch certainly have no authority to do so for this Tribe and that the trust lands, although now owned by the United States, remain under primary state jurisdiction.

7. 25 C.F.R. § 1.4 does not Prohibit the Village’s Regulation of Storm Water.

The IRA does address the process for taking land into trust. However, it does not indicate that land taken into trust results in the state or local governments losing jurisdiction. 25 C.F.R. § 1.4, a regulation promulgated by the Secretary, addresses jurisdictional issues for trust land.⁴

⁴ 25 C.F.R. § 1.4 provides:

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

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

25 C.F.R. § 1.4 does not expressly prohibit the Village's regulation of storm water. Additionally, the CWA does not except trust land from its mandates or in any way reference 25 C.F.R. § 1.4. If it is the Tribe's and the federal government's position that 25 C.F.R. § 1.4 does eliminate the Village's jurisdiction for storm water, they are certainly free to make that argument. However, that argument is at the very heart of the case and the Village should not be precluded at this stage from arguing the reverse, especially when nothing in the CWA, which the Village is obligated to obey, indicates it is not applicable to trust land.

The Tribe itself recognizes that states and municipalities retain some jurisdiction over federal trust lands. The Tribe admits in its principal brief that "trust lands do not oust state jurisdiction altogether." (Pl. Br. at 18.) Although tribes retain "attributes of sovereignty over both their members and their territory," the Supreme Court long ago departed from the view that state laws have no force within reservation boundaries. *See White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 142 (1980). The cases the Tribe cites in its brief confirm that "state sovereignty does not end at a reservation's border, and that states have inherent jurisdiction on reservations." *City of Roseville v. Norton*, 219 F.Supp. 2d 130, 150 (D.D.C. 2002) (quoting *Nevada v. Hicks*, 533 U.S. 353, 365 (2001)) (internal quotations omitted). Jurisdiction over tribal land is not exclusive to the federal government and requires "an accommodation between the interests of the Tribes and the Federal Government, on the one hand, and those of the State, on the other." *Id.* (quoting *Hicks*, 533 U.S. at 362).

It is the Village's position that Section 313 of the CWA, 33 U.S.C. § 1323, requires the Tribe (as the occupant of the land) and/or the United States (as the titleholder) to abide by the Village's storm water ordinances. In other words, this is a situation where, just like in the cases

consider the use of, and restrictions or limitations on the use of, other property in the vicinity, and such other factors as he shall deem appropriate.

cited by the Tribe, the Village's jurisdiction was not ousted altogether. It would be premature at this point in the litigation to make the determination that this is not such a case and strike the Village's fifth affirmative defense.

8. 25 C.F.R. § 1.4 is Unconstitutional as Applied to Storm Water Regulation to the Extent it Prohibits such Regulation on Trust Lands.

To the extent the Court finds that 25 C.F.R. § 1.4 prohibits the Village's regulation of storm water, the Village challenges the constitutionality of 25 C.F.R. § 1.4 as applied to storm water regulation.

Federal agencies only have authority to adopt regulations that are based on a permissible and reasonable construction of a governing statute. *Chevron USA, Inc. v. Nat. Resources Def. Counsel*, 467 U.S. 837, 843 (1984); *see also* 5 U.S.C. § 706. Regulations manifestly contrary to a statute are beyond an 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 Administrative Procedure Act. 5 U.S.C. § 706(2)(A),(C); *Chevron*, 467 U.S. at 844.

In creating 25 C.F.R. § 1.4, the Secretary exceeded his authority under the IRA and other laws and adopted regulations manifestly contrary to the substantive and procedural requirements of IRA section 465 as applied to storm water regulation. It is contended by the Tribe that 25 C.F.R. § 1.4 takes away state and local jurisdiction over storm water management, which such governments are mandated to implement. If that is the case, 25 C.F.R. § 1.4 is inconsistent with United States Supreme Court precedent, namely *Hawaii v. Office of Hawaiian Affairs*, 129 S.Ct. 1436 (2009), which limits the federal government's ability to remove land from state or local jurisdiction.

The cases cited by the Tribe in support of its motion to strike this defense do not demonstrate that the Village's defense is patently defective, as required to grant the Tribe's motion. The Village's challenge of 25 C.F.R. § 1.4 as an unconstitutional restriction on its authority to regulate storm water is a much narrower challenge than the subject of the cases cited by the Tribe, which involve a challenge to the Secretary's authority to take land into trust. *See Roseville*, 219 F.Supp.2d at 134; *United States v. Roberts*, 185 F.3d 1125, 1129 (10th Cir. 1999) (challenging the constitutionality of the IRA, 25 U.S.C. § 465); *South Dakota v. United States Dept. of the Interior*, 69 F.3d 878, 880 (8th Cir. 1995), vacated and remanded, 519 U.S. 919 (1996), rev'd, 423 F.3d 790 (8th Cir. 2005) (challenging the Secretary's authority to take land into trust under 25 U.S.C. § 465 as an unlawful delegation of legislative power); *Carciari v. Kempthorne*, 497 F.3d 15, 21 (1st Cir. 2007), rev'd on other grounds, 129 S.Ct. 1058 (2009) (challenging the Secretary's authority to take land into trust under the IRA, the 1978 Rhode Island Indian Claims Settlement Act, 25 U.S.C. § 1701 *et seq.*, and the Constitution); *New York v. Salazar*, No. 6:08-CV-644, 2009 WL 3165591, *2 (N.D.N.Y., Sept. 29, 2009) (challenging the Secretary's authority to take land into trust under, *inter alia*, the non-delegation doctrine, the Tenth Amendment, and the Indian Gaming Regulatory Act); *Nevada v. United States*, 221 F.Supp.2d 1241, 1244 (D. Nev. 2002).

As stated above, the Village is not challenging the trust status of the Trust Lands. The Village is challenging the scope of and constitutionality of 25 C.F.R. § 1.4 to the extent it limits the Village's jurisdiction over storm water on trust land. It is the Village's contention that 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 the law. The Tribe has

not demonstrated that the Village's fifth affirmative defense is patently defective, and the defense should not be stricken.

Finally, the fact the federal government has now been sued on this exact issue, in and of itself, warrants denial of the Tribe's motion to strike this affirmative defense. The unique history of this Tribe, the past allotment of this land, the history surrounding the creation of this Village and the provisions of the CWA will establish that 25 CFR § 1.4 cannot be the basis for eliminating the Village's jurisdiction for stormwater purposes. Great confusion would be added to this litigation if the Village successfully pursued this argument against the federal government, only to thereafter be barred from utilizing that result as an affirmative defense against the Tribe's claims.

9. Sixth and Seventh Affirmative Defenses: The Fees are not Preempted and do not Violate The Tribe's Inherent Powers of Self-Government.

The Tribe moves to strike the Village's sixth and seventh affirmative defenses that the fees and charges asserted by the Village are not preempted by federal law and do not violate the Tribe's inherent powers of self-government. The Tribe's sole justification for striking these defenses is that they are duplicative of the Village's denials in its answer to the Tribe's complaint.

These issues present questions of law at the heart of this litigation. Under Rule 8(c), Federal Rules of Civil Procedure, a party must set forth any affirmative defense in a responsive pleading, and failure to do so may waive the right to present the evidence at trial on that defense. *Bobbitt v. Victorian House, Inc.*, 532 F.Supp. 734, 736 (N.D.Ill. 1982)(citing *Henry v. First Nat. Bank of Clarksdale*, 595 F.2d 291, 298 n.1 (5th Cir. 1979)). The Village opposes the Tribe's motion to strike to the extent doing so would endanger its ability to fully adjudicate these issues.

Additionally, motions to strike for redundancy should not be granted in the absence of a clear showing of prejudice to the movant. *Maryland Staffing Servs., Inc. v. Manpower, Inc.*, 936 F.Supp. 1494, 1509 (E.D.Wis. 1996). The Tribe has showed no prejudice and their motion must therefore be denied.

B. The Village's Counterclaims should not be Dismissed.

The Village asserts two counterclaims against the Tribe: (1) a declaration that the Village may impose on the property its storm water ordinances and assert all fees and charges associated therewith; and (2) judgment against the Tribe for the amount currently owed under the storm water ordinance. (Def. Answer at 10.) The Tribe claims that the Village's first counterclaim must be dismissed because, to the extent the Village challenges title to the Trust Lands, the United States is an indispensable party (Pl. Br. at 22), and because the Tribe's sovereign immunity bars the claim. (*Id.* at 23). The Tribe asserts that the second counterclaim should be dismissed solely because of the Tribe's sovereign immunity. (*Id.*) The Tribe is incorrect on both counts.

1. Indispensability of The United States does not Bar The Village's First Counterclaim for Declaratory Relief.

The Village's first counterclaim seeks a declaration that the Village may enforce its storm water ordinances and assert the fees associated therewith on the land which is the subject of this dispute. (Def. Answer at 10.) However, in its brief, the Tribe mischaracterizes and broadens the Village's counterclaim as one that is mainly challenging the title to the land. (*See* Pl. Br. at 21-22.) The Tribe then summarily concludes that the United States is indispensable to a counterclaim of that nature, but nevertheless immune. (*Id.*)

Admittedly, the Village does allege that the property at issue is not properly held in trust because of the Tribe's ineligibility to utilize the IRA. This was necessary to avoid the

appearance of any concessions regarding the status of the land. Additionally, an allegation calling into question the appropriateness of the land's placement into trust is not grounds to dismiss a counterclaim which in reality seeks a declaratory judgment that the Village may enforce its storm water ordinances, **regardless of** the current title status of the land.

What the current title status really means to this particular Tribe, in this particular Village for stormwater purposes is what is at issue. The United States need not be a party to make that determination. See Village's response regarding the fifth affirmative defense.

Therefore, the Tribe's assertion that the first counterclaim must be dismissed, because the United States is an indispensable party to a determination relating to title, is without merit. Without challenging the title of the land the Village may still seek a declaratory judgment that it may enforce its storm water ordinances and related fees.

2. The Tribe Waived its Sovereign Immunity.

The Tribe asserts that it possesses sovereign immunity to the Village's counterclaims for both declaratory relief and monetary relief. (Pl. Br. at 23.) However, the Tribe's position is without merit. The Tribe expressly waived its sovereign immunity in the Escrow Agreement to both of the Village's counterclaims.

The Tribe also waived its sovereign immunity to the counterclaims by initiating this suit against the Village. Under the principles established by this Court in *Oneida Tribe of Indians of Wis. v. Village of Hobart*, 500 F. Supp.2d 1143 (E.D. Wis. 2007), the Village's counterclaim for declaratory relief is the reverse image of the Tribe's claim for declaratory relief, and therefore falls squarely within the doctrine of recoupment. Also, if the Tribe receives a declaratory judgment in its favor, the effect of such a judgment under the Escrow Agreement is the

immediate release of the Escrow funds, (*see* Compl., Ex. C. at 3, sec. 3.1). Thus, the Tribe is, in essence, seeking a monetary judgment just like the Village.⁵

a. The Tribe Expressly Waived its Sovereign Immunity for both Counterclaims Pursuant to the Express Terms of the Escrow Agreement.

The Tribe contends that both counterclaims must be dismissed because the Tribe enjoys sovereign immunity. Admittedly, Indian tribes generally possess sovereign immunity against suits. *Berrey v. Asarco, Inc.*, 439 F.3d 636, 643 (10th Cir. 2006) (citing *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978)). However, a tribe may waive its immunity and consent to be sued. *Id.* (citing *Jicarilla Apache Tribe v. Andrus*, 687 F.2d 1324, 1344 (10th Cir. 1982)). Such consent must be “clear.” *C & L Enters., Inc. v. Citizen Band Potawatomi Indian Tribe of Okla.*, 532 U.S. 411, 418 (2001) (citing *Oklahoma Tax Comm’n v. Citizen Band of Potawatomi Tribe of Okla.*, 498 U.S. 505, 509 (1991)). In addition, where a tribe executes a written agreement in which it expressly consents to binding dispute resolution for claims arising out of that agreement, it cannot later rely on sovereign immunity with regard to those claims. *See id.* at 418, 420. Thus, a written agreement evidencing a clear intent to waive sovereign immunity will not block claims stemming from that agreement. *See Id.*

In this case, the Tribe expressly waived its sovereign immunity in the Escrow Agreement entered into with the Village on March 26, 2009, which was attached to the Tribe’s Complaint. (Compl., Ex. C at 4-5, sec. 5.1.) In exchange for issuing a liquor license to the Tribe, the Tribe and Village agreed that the Tribe would deposit into an escrow account the amount of money it owed the Village for storm water fees on trust property. (*Id.* at 1.) In the event that the Tribe and Village did not reach an agreement on the validity of the fees, the Escrow Agreement

⁵ In order to secure the release of the funds currently in escrow, the prevailing party in this case will need a declaratory judgment in its favor. (*See* Compl., Ex. C at 3, sec. 3.1.)

provided that either party could “file an action for declaratory and/or injunctive relief...seeking a [d]ecision.” (*Id.* at 4, sec. 3.3.) The Tribe expressly waived its sovereign and governmental immunity for the purpose of “[c]laims by a party for declaratory and/or injunctive relief and the distribution of the Escrow Amount” on the issue of the validity of the storm water fees. (*Id.* at 4-5, sec. 5.1.) The Tribe also consented to suit under the Escrow Agreement for “[c]laims by a party for enforcement of all other terms of [the] Agreement.” (*Id.*) In the event of a suit, the Escrow Agreement provides that a final decision by a court of proper jurisdiction on the validity of the fees will trigger the release of the escrow funds. (*Id.* at 3, sec. 3.1.) Thus, seeking a declaratory judgment is the exact thing for which both parties waived sovereign immunity.

The Tribe concedes that it agreed to a waiver of sovereign immunity in the Escrow Agreement, but nevertheless asserts that this waiver was limited only to “[c]laims by a party for declaratory and/or injunctive relief and the distribution of the Escrow Amount.” (Pl. Br. at 25.) First, that is exactly what is being done here by both parties. Because this suit asks the Court to determine the validity of the storm water fees and both parties are seeking declaratory relief on that very issue, this suit falls squarely within the Tribe’s express waiver of sovereign immunity. To argue that “[n]either the Tribe nor the Village makes any claim for or distribution of the escrow account,” (Pl. Br. at 25), is misleading. The party that receives a declaratory judgment in its favor, as to the validity of the storm water fees, will undoubtedly seek the immediate release of the funds under the Escrow Agreement. Section 3.1 of that agreement reads in pertinent part as follows:

The following shall be the events that would give rise to a claim by the Village or the Tribe upon all or part of the Escrow Amount:...A Decision of a court of competent jurisdiction determining whether the Village possesses authority to impose the SWMUO Charges, in which event the Escrow Amount shall be delivered to the Tribe or the Village in accordance with said Decision.

(Compl., Ex. C at 3, sec. 3.1.)

Additionally, Article 5, section 5.1 of the Escrow Agreement further reads that this waiver applies “with respect to i) the Village’s contention that it possesses authority to impose the SWMUO Charges.” (Compl., Ex. C at 4-5, sec. 5.1.) Moreover, the declaratory judgment for all intents and purposes is a monetary judgment as a result of Section 3.1 of the Escrow Agreement. Therefore, this waiver is broad enough to encompass both counterclaims.

Both parties clearly agreed that in exchange for the liquor license, which the Village normally could not issue without payment of outstanding fees, charges or taxes owed by the applicant, the Tribe would place the disputed fees into an escrow account. The parties also agreed to waive sovereign immunity so that thereafter either party could sue for a declaratory judgment regarding the appropriateness of the fees in general and for the money itself. Despite receiving exactly what it wanted - a liquor license - the Tribe is now attempting to avoid its end of the bargain - a waiver of sovereign immunity.

The Tribe’s position on the waiver is even more questionable considering the fact that the Tribe took full advantage of that portion of the Escrow Agreement under which the Village waived governmental immunity, including the statutory requirement of a notice of claim when it sued the Village. Just like the Village’s waiver, the Tribe’s waiver goes to the very heart of both of the Village’s counterclaims and cannot be disregarded. Furthermore, pursuant to the Escrow Agreement, the Village could have initiated suit to the same extent as the Tribe. It just so happens the Tribe filed first. The Tribe simply cannot argue that the Escrow Agreement and waiver provisions have no application here.

b. The Tribe Waived its Sovereign Immunity to the Village's First Counterclaim for Declaratory Relief by Initiating Suit Against the Village and Under the Doctrine of Recoupment.

Even if the waiver in the Escrow Agreement did not exist, the Tribe waived its immunity as to the Village's counterclaim for declaratory judgment by initiating this suit. In addition to its express waiver, the Tribe waived its sovereign immunity under the principals established by this Court in *Oneida Tribe of Indians of Wis. v. Village of Hobart*, 500 F. Supp.2d 1143. Under the doctrine of recoupment, a sovereign waives its immunity as to counterclaims when those claims "aris[e] out of some feature of the transaction upon which the plaintiff's action is grounded." *Bull v. United States*, 295 U.S. 247, 262 (1935). In order to rely on the doctrine of recoupment, the defendant's counterclaims must "(1) arise from the same transaction or occurrence as the plaintiff's suit; (2) seek relief of the same kind or nature as the plaintiff's suit; and (3) seek an amount not in excess of the plaintiff's claim." *Oneida Tribe*, 500 F.Supp.2d at 1146 (citing *Berrey v. Asarco, Inc.*, 439 F.3d 636, 645 (10th Cir. 2006)). If the defendant's counterclaims satisfy these elements, the counterclaims will "overcome the defense of tribal sovereign immunity." *Id.* at 1147 (citing *Rosebud Sioux Tribe v. Val-U Constr. Co. of S.D., Inc.*, 50 F.3d 560 (8th Cir. 1995)). The purpose of permitting recoupment claims is to avoid the result of "transmogrify[ing] the doctrine of tribal immunity into one which dictates that the tribe never loses a lawsuit." *Id.* at 1149 (citing *Rupp v. Omaha Indian Tribe*, 45 F.3d 1241 (8th Cir. 1995)). Thus, tribal sovereign immunity will not serve as a bar to counterclaims that sound in recoupment. *Id.* at 1147.

A counterclaim seeking declaratory relief is not barred by sovereign immunity when the sovereign has initiated suit for declaratory relief. *Id.* For instance, in *Oneida*, this Court held that tribal sovereign immunity was not a bar to a counterclaim seeking declaratory relief where the tribe had initiated suit for declaratory relief. *Id.* at 1149. In *Oneida*, the Tribe filed suit

against the Village seeking a declaratory judgment that its recently acquired property was not subject to local taxation and special assessments. *Id.* at 1144. The Tribe also sought injunctive relief prohibiting the Village from imposing additional assessments and for the return of monies already paid. *Id.* The Village filed a counterclaim seeking a declaratory judgment that the property was subject to local regulation, including taxation and special assessments. *Id.* The Village also sought injunctive relief to collect for taxes and special assessments that were then due and owing. *Id.* The Tribe thereafter moved to dismiss the Village’s counterclaims by asserting tribal sovereign immunity. *Id.* Relying on the doctrine of recoupment, this Court denied the Tribe’s motion to dismiss the Village’s counterclaim for declaratory judgment. *Id.* at 1149.

In denying the Tribe’s motion to dismiss the Village’s counterclaim for declaratory relief, this Court found that the Tribe’s claim and Village’s counterclaim were essentially “mirror image[s].” *Id.* This Court noted that while the Tribe sought a declaration that it was not subject to the laws at issue, the Village sought a declaration that the Tribe was subject to those laws. *Id.* Because the Tribe had “invoke[d] the jurisdiction of the Court to determine the rights of the respective parties over the land in question, the Tribe ha[d] expressly waived its immunity from the Village’s claim for a determination in its favor on the same issue.” *Id.* at 1150. This Court justified its decision by stating that it would be inconsistent with logical principles and applicable law to disallow the Village’s counterclaim for declaratory relief based on tribal sovereign immunity. *Id.* Thus, tribal sovereign immunity did not serve as a bar to the Village’s counterclaim for declaratory relief. *Id.*

In the present case, the Tribe’s claim for declaratory relief and the Village’s counterclaim for declaratory relief are “mirror image[s].” *See Id.* at 1149. Like the respective claims for

declaratory relief in *Oneida*, that sought a determination on the same issue, the same parties here seek a determination on the same issue of the validity of the storm water fees. The Tribe does not contend that the Village's declaratory judgment counterclaim differs with respect to the storm water fees; it claims only that the counterclaim is essentially too broad in that it brings into play "not just the applicability of the stormwater charges but the very title of trust lands." (Pl. Br. at 26.) As explained *supra*, the Village is not challenging title. Nowhere in the counterclaims or "wherefore" clause does the Village ask for a declaratory judgment that this land is not owned by the U.S. in trust for the Tribe.

Thus, the Village's counterclaim for declaratory judgment is not too broad. Title itself is not being challenged. Both parties are asking for the same thing, a determination as to the applicability of the stormwater ordinances. Consequently, the Village's declaratory judgment counterclaim is the reverse image of the Tribe's claim, such that the Court should dismiss the Tribe's motion. In light of the Court's resources and parties' common interest in resolving this dispute, "the better policy is to allow [the] counterclaim[s] to proceed." *See Oneida*, 500 F.Supp.2d at 1150, fn. 3. To hold otherwise would "transmogrify the doctrine of tribal immunity" and undermine ordinary logic. *See Id.* at 1149-50.

c. The Tribe Waived its Sovereign Immunity to the Village's Second Counterclaim Seeking a Monetary Judgment by Initiating Suit Against the Village and Under the Doctrine of Recoupment.

Even if the Tribe's express waiver in the Escrow Agreement did not exist, the Tribe waived its sovereign immunity to the Village's second counterclaim for a money judgment; a declaratory judgment in the Tribe's favor is akin to a money judgment when one examines the Tribe's purpose in seeking declaratory relief. Whether a sovereign has previously waived its immunity or Congress has previously abrogated the sovereign's immunity has no bearing on a

defendant's ability to counterclaim based on recoupment. *See Berrey*, 439 F.3d at 644. If an express waiver or abrogation of sovereign immunity were required, the recoupment doctrine would be completely unnecessary. *Id.* So long as a counterclaim satisfies the three elements of the recoupment doctrine, the counterclaim will not be barred by sovereign immunity. *Id.* at 644-45. Thus, if the relief sought in the counterclaim is similar in "kind or nature," and the amount is not in excess of that claimed by the plaintiff, the counterclaim will not be defeated by sovereign immunity. *Id.* at 644 (quoting *Jicarilla Apache Tribe*, 687 F.2d at 1344). However, if the counterclaim seeks affirmative relief that is "separate from, and in excess of, the plaintiff's claim," the counterclaim will be barred by sovereign immunity. *Oneida*, 500 F.Supp.2d at 1148-49. Thus, where the party filing suit seeks reimbursement for payments already made, and the opposing party counterclaims for additional monies, this will not qualify as a "set-off" under the doctrine of recoupment. *See Id.*

In determining whether a counterclaim requests relief in excess of that requested by the plaintiff in its complaint, a court should look to the result when one party or the other prevails. *See Id.* at 1148. For instance, in *Oneida*, this Court held that the Village's claim for injunctive relief, "which [was] really a claim for money damages," requested relief over and above that of the Tribe, as a judgment in favor of the Tribe would require the Village to merely reimburse it for monies already paid, but injunctive relief in favor of the Village would grant it relief in excess of \$200,000. *Id.* Consequently, this would not have qualified as a "set-off." *Id.* Thus, in analyzing the larger picture, this Court determined that the claim for injunctive relief was in reality a monetary determination, and the Village's counterclaim, under the facts of the *Oneida* case, sought relief in excess of that sought by the Tribe. *Id.* at 1148-49.

In the present case, the Tribe is essentially seeking a money judgment. As explained *supra*, under the terms of the Escrow Agreement, a final decision by a court of proper jurisdiction on the validity of the storm water fees will immediately lead to the release of the escrowed money to the party that receives a judgment in its favor. (*See* Compl., Ex. C at 3, sec. 3.1.) Unlike the facts of *Oneida*, where the Tribe sought reimbursement for monies that it had already paid to the Village, and the Village counterclaimed for additional monies beyond those already in its possession, here, both the Tribe and Village seek the release of the same escrowed money. In that sense, the money that the Village seeks pursuant to its second counterclaim is a “set-off” to the money that the Tribe seeks under the title of a declaratory relief action, “which is really a claim for money damages.” *See Oneida*, 500 F.Supp.2d at 1148.

Additionally, unlike the Village’s counterclaim for injunctive relief in *Oneida*, in which the Village sought a broad injunction requiring the Tribe “to pay all unpaid taxes and assessments relating to the property,” *see Oneida*, 500 F.Supp.2d at 1144-45, here, the Village’s second counterclaim is limited to the escrow money and charges currently due “under the Stormwater Ordinances,” (Def. Answer at 10.) For these reasons, the facts of the present litigation, specific to the issue of a monetary judgment, are sufficiently different than the facts in *Oneida*, such that the Village’s second counterclaim seeking a money judgment is not defeated by tribal sovereign immunity.

In summary, the Village’s counterclaims cannot be defeated by a claim of sovereign immunity. By virtue of filing suit against the Village, the Tribe “impliedly waive[d] its immunity....” *Berrey*, 439 F.3d at 643 (citing *Bull*, 295 U.S. at 260-63). Neither the waiver caused by the Tribe’s initiation of this suit nor the express waiver in the Escrow Agreement, should be construed so narrowly as to leave the larger questions unanswered. This would only

result in additional and unnecessary litigation. Thus, reason dictates that the parties resolve this dispute in the present forum, and neither of the Village's counterclaims should be dismissed.⁶

IV. CONCLUSION

For all of the foregoing reasons, the Village requests that the Tribe's motion to strike the Village's affirmative defenses and dismiss the Village's counterclaims be dismissed in its entirety.

Dated this 12th day of July, 2010

Respectfully Submitted,
Attorneys for Defendant, Village of Hobart

/s/Frank W. Kowalkowski
Frank W. Kowalkowski (WI Bar No. 1018119)
Davis & Kuelthau, s.c.
318 S. Washington Street, Suite 300
Green Bay, WI 54301
Telephone: 920.435.9378
Facsimile: 920.431.2270
Email: fkowalkowski@dkattorneys.com

William J. Mulligan (WI Bar No. 1008465)
Kevin J. Lyons (WI Bar No. 1013826)
Davis & Kuelthau, s.c.
111 E. Kilbourn Avenue, Suite 1400
Milwaukee, WI 53202
Telephone: 414.276.0200
Facsimile: 414.276.9369
Email: wmulligan@dkattorneys.com
klyons@dkattorneys.com

Direct contact information:

Frank W. Kowalkowski 920.431.2221 direct dial
 920.431.2261 direct fax
 fkowalkowski@dkattorneys.com

⁶ Moreover, the Tribe cannot rely on an argument that the Village's counterclaims should be dismissed because they are "virtually identical" to the Tribe's claims and therefore redundant, *see Oneida*, 500 F.Supp.2d at 1150, fn. 3, as a dismissal of the Tribe's claims will not afford any relief to the Village. The parties will be left with the status quo, and the disputed monies will remain in escrow.

William J. Mulligan

414.225.1429 direct dial
414.278.3629 direct fax
wmulligan@dkattorneys.com

Kevin J. Lyons

414.225.1402 direct dial
414.278.3602 direct fax
klyons@dkattorneys.com

CERTIFICATE OF SERVICE

I hereby certify that on July 12, 2010, I electronically filed the Village of Hobart's Response to Plaintiff's Motion to Strike Affirmative Defenses and Dismiss Counterclaims, 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:

Arlinda F. Locklear
James R. Bittorf
Rebecca M. Webster

alockesq@comcast.net
jbittorf@oneidanation.org
bwebster@oneidanation.org

s/Frank W. Kowalkowski
Frank W. Kowalkowski (WI Bar No. 1018119)
Davis & Kuelthau, s.c.
318 S. Washington Street, Suite 300
Green Bay, WI 54301
Telephone: 920.435.9378
Facsimile: 920.431.2270
Email: fkowalkowski@dkattorneys.com

William J. Mulligan (WI Bar No. 1008465)
Kevin J. Lyons (WI Bar No. 1013826)
Davis & Kuelthau, s.c.
111 E. Kilbourn Avenue, Suite 1400
Milwaukee, WI 53202
Telephone: 414.276.0200
Facsimile: 414.276.9369
Email: wmulligan@dkattorneys.com
klyons@dkattorneys.com