UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

ONEIDA TRIBE OF INDIANS OF WISCONSIN,

Plaintiff,

v.

VILLAGE OF HOBART, WISCONSIN,

Defendant/Third-Party Plaintiff, Case No. 10-CV-00137

v.

UNITED STATES OF AMERICA,
UNITES STATES DEPARTMENT OF JUSTICE,
UNITED STATES DEPARTMENT OF THE INTERIOR
and KENNETH SALAZAR, SECRETARY, UNITED
STATES DEPARTMENT OF THE INTERIOR,

Third-Party Defendants.

PLAINTIFF'S MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

ATTORNEYS FOR PLAINTIFF

Arlinda F. Locklear
Bar No. 962845
4113 Jenifer Street, NW
Washington, DC 20015
(202) 237-0933
Alocklearesq@verizon.net

James R. Bittorf, Deputy Chief Counsel
Wisconsin State Bar No. 1011794
jbittorf@oneidanation.org
Rebecca M. Webster, Senior Staff Attorney
Wisconsin State Bar No. 1046199
bwebster@oneidanation.org
Robert W. Orcutt, Staff Attorney
Wisconsin State Bar No. 1043266
rorcutt@oneidanation.org

ONEIDA LAW OFFICE
N7210 Seminary Road
Post Office Box 109
Oneida, WI 54155
(920) 869-4327

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INTRODUCTION

Plaintiff Oneida Tribe of Indians of Wisconsin ("Tribe") filed this action on February 19, 2010, seeking a declaratory judgment that the Village of Hobart ("Hobart") lacks authority to impose its Stormwater Management Utility Ordinance on parcels of land held in trust by the United States for the Tribe located on the Oneida Reservation and within Hobart ("subject trust lands"). *See Village of Hobart Code of Ordinances*, ch. 4.5. The Tribe asserts three claims: first, that Hobart's ordinance constitutes a prohibited tax upon the subject trust lands; second, that federal common and statutory law pre-empt the imposition of the ordinance on the subject trust lands, whether or not it constitutes a tax; and third, that imposition of the ordinance on the

subject trust lands impermissibly infringes upon the Tribe's inherent powers of self-government, whether or not it constitutes a tax. Complaint, ¶¶ 24-38. The Tribe moves for summary judgment under Fed. R. Civ. P. 56 and Civil L. R. 7 and 56 (b) on its first and second claims.[1]

STATEMENT OF THE CASE

On April 20, 2010, Hobart answered the Tribe's complaint and counter-claimed against the Tribe for both declaratory relief and money damages in the amount of the allegedly outstanding "charges," interest, and penalties under its ordinance. Dock. No. 4. On May 18, the Tribe moved to strike Hobart's affirmative defenses and to dismiss Hobart's counterclaims. Dock. No. 8. On June 17, the parties filed a Joint Rule 26(f) Report; the parties acknowledged in the report that the core facts were not in dispute, but they did dispute the legal consequences of those facts. Dock. No. 13, p. 1. The parties also agreed that the merits of the claims and counterclaims would be ripe for disposition on summary judgment at the close of proceedings on procedural motions, including the then pending motion to strike and dismiss and a possible third-party complaint by Hobart against the United States. *Id.,* p. 2.

On July 12, 2010, Hobart filed a third party complaint against the United States, claiming that the United States, as the property owner, was liable for the outstanding "charges," interest, and penalties. Dock. No. 15. The United States moved to dismiss the third party complaint on grounds of sovereign immunity, failure to state a claim, and failure to exhaust administrative remedies. Dock No. 25. On October 28, 2010, the Court denied the Tribe's motion to strike and dismiss, Dock. No. 28, and on April 18, 2011, the Court granted the United States' motion to

[1] The Tribe's third claim, infringement of tribal self-government, is dependent upon factual allegations regarding stormwater activities and programs relating to the subject trust lands that may not be susceptible to disposition on summary judgment. See, e.g., Complaint, ¶ 20. As set out below, however, the Tribe can obtain full relief by summary judgment on its first and second claims for relief.

dismiss for Hobart's failure to exhaust administrative remedies. Dock. No. 34. Upon joint motion by the parties, the Court granted a ninety (90) day stay of further proceedings while Hobart sought final agency action on its claim against the United States for payment of the "charges," interest, and penalties. Dock. No. 36.

By letter dated May 18, 2011, Hobart demanded that the United States pay the allegedly outstanding "charges," interest, and penalties as to the subject trust lands in the amount of $237,682.06. Stipulation of Facts by the Parties ("Stipulation"), ¶13. By letter dated October 20, 2011, and signed by the Assistant Secretary - Indian Affairs, the United States refused the demand for payment, on the grounds that federal regulation prohibited the imposition of the "charges" on the subject trust lands and that the Clean Water Act, 33 U.S.C. §313(a), did not waive the United States' immunity from suit. Village of Hobart's Amended Third-Party Complaint for Declaratory, Injunctive, and Monetary Relief, Dock. No. 43, Exh. D. On November 11, Hobart filed its amended third-party complaint against the United States, seeking a declaration that it may impose its stormwater ordinance on the subject trust lands and judgment in the amount of the allegedly outstanding "charges," interest, and penalties. *Id.*

Following a status conference with the parties, the Court ordered that dispositive motions be filed on or before January 23, 2012. Dock. No. 46. This motion is timely filed in accordance with the Court's Order.

SUMMARY OF UNDISPUTED MATERIAL FACTS

In accordance with Civil L. R. 56(b), the Tribe files with its motion a Stipulation of Facts ("Stipulation") and a Statement of Proposed Material Facts. The motion is also supported by an Affidavit of Rebecca M. Webster ("Webster Aff.").

Controversy between the parties

The Tribe is a federally recognized Indian tribe in possession of the Oneida Reservation, set aside by treaty in 1838. Treaty with the Oneida, 7 Stat. 566; Stipulation, ¶¶ 1 and 2; Webster Aff., ¶ 4. The Tribe adopted a Constitution under the Indian Reorganization Act ("IRA"), which authorizes tribes to organize and authorizes the Secretary of the Interior to acquire and hold land in trust for tribes. 25 U.S.C. §§ 465 and 476. On December 21, 1936, the Secretary of the Interior approved the Tribe's IRA Constitution. Webster Aff., ¶ 3.

Hobart, located within the exterior boundaries of the Reservation, adopted its Stormwater Management Utility Ordinance in 2007. Stipulation, ¶¶ 4 and 7: Webster Aff., ¶¶ 4 and 5. Each year thereafter, Hobart has billed the Tribe for "charges" allegedly due under its ordinance as to the subject trust lands. Stipulation, ¶¶ 8, 9, 10 and 11. The Tribe refused to pay the "charges," advising Hobart that it believed the "charges" to be invalid under federal law. *Id.,* ¶¶ 8 and 9. The Tribe requested the assistance of the Regional Director, Bureau of Indian Affairs, Midwest Region, regarding Hobart's demand. The Regional Director responded in a letter to the Tribe and Hobart, dated March 24, 2009, that the "charge is clearly a tax that may not be imposed on land held in trust by the United States." Complaint, Exh. D, Dock. No. 1.

Even though Hobart has since sued the United States for collection of the same "charges," Hobart persists in it effort to collect the charges from the Tribe. *See* Hobart demand for declaratory relief and judgment for the allegedly outstanding "charges" against "the U.S. and/or Tribe," Village of Hobart's Amended Third-Party Complaint for Declaratory, Injunctive, and Monetary Relief, Dock. No. 43, ¶¶ 50 and 58.[2]

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[2] There is divided title in the subject trust lands between the United States, which holds the fee, and the Tribe, which holds beneficial ownership. Nonetheless, tribes hold "a legal as

The Hobart ordinance

The Hobart ordinance identifies its purpose as protecting the general public welfare: "The Village of Hobart finds that the management of storm water and other surface water discharges within and beyond its borders is a matter that affects the public health, safety, and welfare of the Village, its citizens, businesses, and others in the surrounding area." *Village of Hobart Code of Ordinances,* § 4.501(1). To accomplish this purpose, the ordinance creates a stormwater management utility, which is placed under the supervision of Hobart's legislative body, the Board. *Id.,* § 4.592(1) and (2). The ordinance also creates a Storm Water Enterprise Fund, into which excess revenues in any given year are deposited to be used "exclusively for purposes consistent with this ordinance." *Id.,* § 4.503(4).[3]

The ordinance legislates "a uniform system of storm water service charges that shall apply to each and every lot or parcel within the Village." *Id.,* § 4.505(1). The stated purpose of the mandatory charges is to raise revenues "in such amount in order to pay for all or a part of operation and maintenance, administrative fees, debt service, and other costs related to the operation of the storm water management utility." *Id.* A secondary purpose is to allocate all

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well as just claim to retain possession of [tribal lands.]" *Johnson v. McIntosh,* 21 U.S. 543, 585 (1823). Possessory rights to tribal property are enforceable under federal law. *Oneida County v. Oneida Indian Nation,* 470 U.S. 226 (1985).

[3] Since the ordinance was adopted, Hobart has collected far more in stormwater "charges" than it has expended on stormwater management projects and these excess funds have been deposited into this account. The total difference between "charges" collected and expenditures for stormwater management since 2007 through 2012 is projected at more than three-quarters of a million dollars. *See* Village of Hobart, WI, 2012 Operating Budget, p. 37, at www.hobart-wi.org/vertical/Sites/%7B354A483F-042E-45E-A570-720BFEDE46D9%7D/uploads/2012_ADOPTED_BUDGET.pdf, accessed January 19, 2012. Apparently, Hobart is accumulating its "charges" in anticipation of unspecified stormwater management projects in the future. *See* www.hobart-wi.org/index.asp?Type=B_BASIC&SEC={55D05A77-FD45-4B23-8E80-3C7116BA}Village Storm Water Utility, accessed January 19, 2012.

costs "fairly and proportionately to all parcels in the Village." *Id.* Consequently, every parcel in Hobart is subject to some type or level of charges imposed by the ordinance, regardless of the level or even existence of stormwater management services provided by Hobart.

Two types of "charges" are imposed across the board: first, a "base charge" that is imposed on all developed property "to reflect the fact that all developed properties benefit from storm water management activities of the Village and that all developed properties contribute in some way..."[4]; second, an "equivalent runoff unit charge" based upon the amount of impervious area as determined by Hobart's Administrator. *Id.,* § 4.505(4)(a) and (b); Stipulation, ¶ 6. In addition, a flat "equivalent runoff unit charge" is imposed even on undeveloped parcels at the rate of two-tenths of one unit per parcel up to 100 acres. *Id.,* § 4.507(4)(g). The ordinance authorizes offsets against the "equivalent runoff charge" but offsets against the "base charge" are specifically prohibited. *Id.,* § 4.506(1). There are also percentage caps on the allowable credits which insure that some amount of the "equivalent runoff unit charge" will always be assessed. The owner of every parcel, whether developed or not, must pay some amount of one or both of the "charges." Thus, the "charges" are neither voluntary nor in exchange for specified services.

The ordinance also authorizes an additional special charge that is linked to the delivery of stormwater services, i.e., for those parcels "in a specific area benefited [sic] by a particular storm water management facility," and a one-time connection charge when a parcel converts from undeveloped to developed or otherwise connects to Hobart's system. *Id.,* § 4.505(4)(c) and (d).

[4] The ordinance defines developed property as real property that "has been altered from its natural state by the addition of any improvements that may include a building, structure, impervious surface, and change in grade or landscaping." *Id.,* § 4.504(3).

Offsets against the special charges are authorized, again subject to a percentage cap. *Id.,* § 4.506(1).

The final major provision of the ordinance relates to collection and penalties. It provides that the property owner is responsible for the stormwater charges on real property "that he/she or it owns." *Id.,* § 4.508(2). Unpaid delinquent charges "shall be a lien upon the property served and shall be enforced as provided in § 66.0809(3)." *Id.,* § 4.508(3). The statutory provision adopted by the ordinance for enforcement is that set out in state law for the collection of municipal public utility charges. This process requires delinquency notice; it further provides that unpaid charges become a lien upon the property and "the clerk shall insert the delinquent amount and penalty as a tax against the lot or parcel of real estate." WIS. STAT. § 66.0809(3). Finally, the statute directs, "All proceedings in relation to the collection of general property taxes and to the return and sale of property for delinquent taxes apply to the tax if it is not paid within the time required by law for payment of taxes upon real estate." *Id.*

The subject trust lands

The subject trust lands include 148 parcels, approximately 1400 acres in total, that are held in trust by the United States for the Tribe and located in Hobart; all these parcels were held in trust at the time Hobart adopted its ordinance in 2007. Stipulation, ¶¶ 4 and 5; Webster Aff., ¶ 10. Because of its refusal to pay the allegedly outstanding "charges," the Tribe has received tax foreclosure notices from Brown County as to 143 of the subject trust lands. Webster Aff., ¶ 11. These notices state that, unless payment is made, the Tribe will incur "foreclosure costs and the publication of delinquent taxes in the newspaper." *Id.*

The subject trust lands include, among others, the following parcels, as identified in the county tax records: HB-1295, the site of the Oneida Police Department; HB-97, the site of the

Oneida Community Health Center; HB-1317, the site of the Tribe's Oneida Elder Services Complex and the Tribe's Airport Road Child Care; HB-753, the site of the Oneida Cultural Heritage Department; HB-753-2, the site of the Tribe's Oneida Language House; HB-753-2 and HB-746, the site of a tribal, five-acre stormwater retention pond known as Osnusha Lake; and HB-1313-1, the site of the Tribe's community building known as Parish Hall. Webster Aff., ¶¶ 18, 19, 20, 21, 22, 23, and 24. The Tribe has received tax foreclosure notices from Brown County as to all these parcels for failure to pay Hobart's stormwater "charges." *Id.*

SUMMARY OF ARGUMENT

Nothing less than the Tribe's continued possession of the subject trust lands is at stake in this suit. There is no question that the Tribe is the beneficial owner of the subject trust lands and, as such, is protected by federal law against taxation, regulation, and dispossession of its lands. Nonetheless, Hobart persists in billing the Tribe for its stormwater "charges" and invoking the enforcement provisions of its ordinance, which expressly adopt foreclosure proceedings just as though the Tribe had failed to pay property taxes. Under its first and second claims for relief, the Tribe asserts federal law barriers to the imposition of the "charges" on the subject trust lands. These claims present disputes regarding the parties' respective legal rights, not triable issues of fact, and are appropriate for disposition by summary judgment. *See* Part I, *below.*[5]

[5] Hobart asserts seven affirmative defenses, but none of these provides any legal basis for denying the Tribe's motion for summary judgment. Most merely restate Hobart's denial of the Tribe's claims. Dock. No. 4, Affirmative Defenses, ¶¶ 1 through 7. Only one, ¶ 5, appears to present an affirmative defense in the traditional sense, that is, to raise a bar to the Tribe's claims. There, Hobart asserts that the Secretary lacks authority to remove the subject trust lands from state jurisdiction. In the event Hobart renews this or other affirmative defenses in opposition to this motion, the Tribe will reply thereto. However, the Tribe notes that courts have in a number of contexts rejected the notion that the United States lacks authority to displace state and local jurisdiction by placing land into trust for tribes. *See Antoine v. Washington,* 420 U.S.

The first federal law barrier to Hobart's ordinance is the categorical rule that states and local governments cannot tax Indian tribes and their property on Indian reservations. "Absent cession of jurisdiction or other federal statutes permitting it...a State is without power to tax reservation lands and reservation Indians." *Oklahoma Tax Commission v. Chickasaw Nation,* 515 U.S. 450, 458 (1995), and cases cited therein. The IRA explicitly extends this categorical immunity to lands held in trust by the United States. *See* 25 U.S.C. § 465. The mandatory Hobart "charges" are imposed across the board on all property in the Village, even if no stormwater management services are provided. *Village of Hobart Code of Ordinances,* §§ 4.501, 4.505. Most telling, unpaid "charges" constitute a lien upon the property which is enforced in the same manner as delinquent property taxes through tax foreclosure proceedings. *Id.,* § 4.508(3); WIS. STAT. § 66.0809(3). The "charges" plainly constitute an impermissible tax upon the subject trust lands and the Tribe's beneficial ownership thereof. *See Empress Casino Joliet Corporation v. Blagojevich,* 651 F.3d 722 (7th Cir. 2011); *Schneider Transport, Inc. v. Cattanach*, 657 F.2d 128 (7th Cir. 1981). *See* Part II, *below*.

The second federal law barrier applies to Hobart's ordinance, even if the "charges" are deemed to be fees, not taxes. This barrier is the broadly pre-emptive effect of federal laws that protect and regulate tribal lands. Under the federal common law, federal and tribal regulation of the subject trust lands is generally comprehensive and precludes state and local regulatory authority. *See White Mountain Apache Tribe v. Bracker,* 448 U.S. 136 (1980). Through the IRA, Congress authorized the United States to hold land in trust for tribes, reflecting the intent to

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194 (1975) (state consent not necessary to limit state regulatory authority over tribes); *State of New York v. Salazar,* 2009 WL 3165591 (NDNY 2009) (trust lands do not constitute a federal enclave requiring state consent*)*; *City of Roseville v. Norton,* 219 F. Supp.2d 130 (DDC 2002) (limitation on state jurisdiction on tribal trust lands does not violate Tenth Amendment).

preclude state or local regulatory authority. *Santa Rosa Band of Indians v. Kings County,* 532 F.2d 655, 658-659 (9th Cir. 1975); *see also* 25 C.F.R. § 1.4. In addition, the Nonintercourse Act, which prohibits the extinguishment of tribal property rights, either directly or by indirection, precludes the application of the ordinance and its provisions that threaten extinguishment of the Tribe's beneficial ownership. *Oneida County v. Oneida Indian Nation,* 470 U.S. 226 (1985). Viewed against the backdrop of tribal authority to manage the subject trust lands, Hobart's attempted imposition of its ordinance and "charges" on those lands, whether or not deemed to constitute a tax, is plainly pre-empted by federal law. *See* Part III, *below.*

There is no construction of Hobart's ordinance under which it can be imposed upon the subject trust lands. On its face, the "charges" under the ordinance are imposed upon the property owner, not the Tribe. For that reason alone, the Tribe is entitled to judgment on its claims and Hobart's counterclaim for payment. Further, the ordinance purports to tax the subject trust lands, to the point of jeopardizing the Tribe's continued possession thereof, which is categorically and explicitly prohibited under federal law. Finally, even were the ordinance construed as an attempt to regulate the subject trust lands through mandatory fees for services, not taxes, it is pre-empted by protective federal statutes and regulation. There are no disputed material facts and the Tribe is entitled to judgment as a matter of law that Hobart's ordinance does not apply to either the Tribe or the subject trust lands.

ARGUMENT

I. THE TRIBE'S CLAIMS PRESENT ONLY ISSUES OF LAW AND ARE APPROPRIATE FOR SUMMARY JUDGMENT.

By express provision of the governing rule, summary judgment is available on some or all of a party's claims where "there is no genuine dispute as to any material fact and the movant

is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *Deere & Co. v. Ohio Gear,* 462 F.3d 701, 706 (7th Cir. 2006). The Supreme Court has emphasized the utility of summary judgment in such cases. *Celotex Corp. v. Catrett,* 477 U.S. 317, 327 (1986) ("Summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole.") The Tribe, as the moving party, bears the initial burden of demonstrating the absence of a genuine issue of fact, by reference to the pleadings and supporting affidavits. *Scaife v. Cook Co.,* 446 F.3d 735, 739 (7th Cir. 2006). At that point, the opposing party must set forth specific facts showing that there is a genuine issue for trial. *Id.; Scott v. Edinburg,* 346 F.3d 752, 756 (7th Cir. 2003). Mere conclusions and allegations are insufficient to raise genuine, material issues for trial; "the mere existence of some alleged factual dispute will not defeat an otherwise properly supported motion for summary judgment." *Id.,* quoting *Balderston v. Fairbanks Morse Engine Div. of Coltec Indus.,* 328 F.3d 308, 320 (7th Cir. 2003).

The core facts that form the basis of the Tribe's claims, summarized above, are not disputed by the parties. The parties do, however, vigorously dispute their respective legal rights and obligations flowing from these facts. Hobart persists in its efforts to impose and enforce its ordinance that levies the "charges" against the subject trust lands, including in its counterclaim here against the Tribe and the alternative demands made in its third-party complaint against the United States. The Tribe establishes below that these "charges," whether they constitute a tax or mandatory fees, are prohibited under federal law. Thus, summary judgment is appropriate here. *Scott v. Harris,* 550 U.S. 372 (2007).

II. HOBART'S ORDINANCE AND THE "CHARGES" THEREUNDER CONSTITUTE AN IMPERMISSIBLE TAX UPON THE SUBJECT TRUST LANDS.

States and local governments lack authority to tax tribes and reservation lands, absent special authority from Congress. Under the governing federal rule, the "charges" Hobart seeks to impose upon the subject trust lands constitute such a tax. Because Hobart has not and cannot identify congressional authorization to impose its "charges" on the Tribe or the subject trust lands, the "charges" are prohibited.[6]

A. There is a categorical rule that states and local governments lack authority to tax Indian tribes and reservation lands.

The Supreme Court long ago determined that tribal lands, held by Indians with whom the United States maintains a formal trust relationship, cannot be taxed by states wherein they are located. *The Kansas Indians,* 72 U.S. 737 (1866). In the view of the Court, such Indians are "to be governed exclusively by the government of the Union. If under control of Congress, from necessity there can be no divided authority." *Id.* at 755; *see also The New York Indians,* 72 U.S. 761 (1867). The Supreme Court had little difficulty in extending this rule against taxation of Indian land to include income taxation of reservation Indians in *McClanahan v. Arizona Tax Commission,* 411 U.S. 164 (1973). There, the Court pointedly noted what was not at stake:

> We are not here dealing with Indians who have left or never inhabited reservations set aside for their exclusive use or who do not possess the usual accoutrements of tribal self-government. Nor are we concerned with exertions of state sovereignty over non-Indians who undertake activity on Indian reservations.

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[6] Hobart claims to have found congressional authority to impose its "charges" against the United States as to the subject trust lands. *See* Village of Hobart's Amended Third-Party Complaint for Declaratory, Injunctive, and Monetary Relief, Second Claim for Relief, Dock. No. 43. The Tribe leaves the defense of that claim to the United States. Significantly, however, Hobart has claimed no congressional authority to tax the Tribe or the Tribe's beneficial interest in the subject trust lands.

> Nor, finally is this a case where the State seeks to reach activity undertaken by reservation Indians on non-reservation lands.

Id., at 168-169 (citations omitted). The Court concluded that the State was "totally lacking in jurisdiction over both the people and the lands it seeks to tax." *Id.,* at 181; *see also Mescalero Apache Tribe v. Jones,* 411 U.S. 145, 148 (1973) (States have "no satisfactory authority for taxing Indian reservation lands or Indian income from activities carried on within the boundaries of the reservation").

McClanahan is now cited by the Court for the categorical rule that "a State is without power to tax reservation lands and reservation Indians," absent some federal statute permitting it. *Oklahoma Tax Commission v. Chickasaw Nation,* 515 U.S. at 458, quoting *County of Yakima v. Confederated Tribes and Bands of Yakima Nation,* 502 U.S. 251, 258 (1992). Further, the Court has declined to find a grant of such authority in federal statutes without a clear intent by Congress indicating such authority. *See Bryan v. Itasca County,* 426 U.S. 373, 380-387 (1976) (construing P.L. 280, 28 U.S.C. § 1360); *Moe v. Confederated Salish & Kootenai Tribes,* 425 U.S. 463, 376 (1976) (construing the General Allotment Act (GAA), 25 U.S.C. § 349).[7]

There is no federal statute authorizing taxation of the subject trust lands. To the contrary, Congress explicitly preserved the traditional immunity of trust lands from state taxation when it enacted the IRA. The act authorizes the Secretary of the Interior to acquire land for Indians and provides that such lands "shall be taken in the name of the United States in trust for the Indian tribe or individual Indian for which the land is acquired, *and such lands or rights shall be exempt*

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[7] The GAA has been construed to authorize the taxation of reservation lands, once those lands are released from restrictions against alienation. *County of Yakima v. Confederated Tribes and Bands of Yakima Nation*, 502 U.S. 251 (1992). But there is no question that, where Congress has re-imposed the restraint against alienation by placing reservation lands into trust, the traditional immunity from taxation re-attaches as well.

from State and local taxation." 25 U.S.C. § 465 (italics supplied). This plain language of the IRA concludes the matter -- Hobart cannot tax the subject trust lands or the Tribe's beneficial ownership of those lands. *Connecticut v. U.S. Dept. of Interior,* 228 F.3d 82 (2d Cir. 2000); *Chase v. McMasters,* 573 F.2d 1011 (8th Cir. 1978).

B. The "charges" under Hobart's ordinance constitute impermissible taxes upon the subject trust lands.

The determination of whether a given charge upon Indian property constitutes an impermissible tax is determined by federal law, not by the characterization given the charge by the state or local authority. *Carpenter v. Shaw,* 280 U.S. 363, 368-369 (1930) ("Where a federal right is concerned we are not bound by the characterization given to a state tax by the state courts or legislatures, or relieved by it from the duty of considering the real nature of the tax and its effect upon the federal right asserted.")[8] As a general proposition, federal law deems a charge to constitute a tax if it is imposed as a legislative function on the public at large, and deems a charge to constitute a fee if it is imposed by administrators upon some segment of the public for a voluntary act and in exchange for some particular benefit. *National Cable Television Association, Inc. v. United States,* 415 U.S. 336, 340-341 (1974). Moreover, in making this determination respecting Indian property, the tax exemption for such proper is to be liberally construed with doubtful expressions resolved in favor of the immunity. *Carpenter v. Shaw* at 367. Under this framework and rule of construction, it is clear that Hobart's "charges" constitute an impermissible tax.

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[8] As a result, Hobart's recent and emphatic characterization of the "charges" as "*user charges* versus a *tax or levy*" does not determine the question. Compare www.hobart-wi.org/, above (italics in original) *with* Village of Hobart, WI, 2011 Operating Budget, pp. 94-95, www.hobart-wi.org/vertical/Sites/%7B354A483F-042#-45E-A570-720BFEDE46D9%D/uploads/%7BEC058A52-2487-4D1#-8C38-F9C5AaC07FD%, accessed August 26, 2011.

Particularized inquiry of whether a given charge constitutes a tax frequently arises in the context of the federal Anti-Injunction Act, 28 U.S.C. § 1341, which prohibits federal district courts from enjoining state taxes under stated conditions.[9] In such cases, courts have generally distinguished between exactions imposed on the general public or property to generate revenues and exactions voluntarily paid by a narrower group in exchange for a given service or to offset the costs of a regulatory scheme. *Empress Casino Joliet Corp*., 2100 WL 710467, at 11. A number of features or structures have been identified as relevant to the inquiry: whether the charge is mandatory and is imposed upon all taxpayers, based on property or income, or is incident to a voluntary act; *National Cable Television Assn.*, at 340-341; *Valero Terrestrial Corp.*; *U.S. v. Huntington, W.Va.,* 999 F.2d 71, 74 (4th Cir. 1993); *City of Cincinatti v. U.S.*, 39 Fed.Cl. 271, *aff'd on other grounds*, 153 F.3d 1375 (D.C. Cir 1998); whether the charge funds a traditional government function or a specialized service, *Schneider Transport*; *McLeod v. Columbia County,* 254 F. Supp.2d 1340 (S.D. Ga 2003); whether the charge is imposed by a legislative body, or is levied by an agency with a regulatory mandate, *San Juan Cellular Telephone Co. v. Public Service Comm'n of Puerto Rico,* 967 F.2d 683 (1st Cir. 1992); whether the charge is a flat fee or determined approximately by actual cost of services, *Novato Fire Protection District v. U.S.,* 181 F.3d 435 (9th Cir. 1999); and whether the charge goes into general revenues or into a separate fund, *Schneider Transport; McLeod*.

Some courts have broken the inquiry down into three parts: 1) who imposes the charge - a legislative body in the case of a tax and a regulatory agency in the case of a fee; 2) who is

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[9] Taxes are broadly construed for purposes of the Anti-Injunction Act so as to avoid disruption of state taxation schemes. *Valero Terrestrial Corp. v. Caffrey*, 205 F.3d 130, 134 (4th Cir. 2000). This does not distinguish this line of cases from the present inquiry. As noted above, the immunity of tribes and their property from state taxation is also construed broadly. Thus, the analysis in these cases construing the Anti-Injunction Act is applicable here as well.

assessed for the charge - the general public in the case of a tax and a more narrow group in the case of a fee; and 3) who benefits from the charge - the general public in the case of a tax or those upon whom the charge is imposed in the case of a fee. *San Juan Cellular Telephone Company v. Public Service Commission of Puerto Rico*, 967 F2d 683, 685 (1st Cir. 1992); *McLeod,* at 1345. In close cases, though, the determinative factor is "whether [the use of the disputed revenue] provides a *general benefit to the public* of a sort *often financed by a general tax,* or whether it provides more narrow benefits to regulated companies or defrays [an] agency's cost of regulation.'" *McLeod,* at 1347-1348, quoting *San Juan Cellular Telephone Co.* (italics in original).

On this determinative factor, two cases are particularly important here. The first, *Schneider Transport,* involved a motor fuels tax used to finance highway construction. Even though the revenue was placed into a separate fund, the Seventh Circuit deemed highway construction a traditional government function and, largely on that basis, concluded that the charge constituted a tax. *Id.,* at 132. Similarly, the district court in *McLeod*[10] considered whether a county's stormwater management ordinance constituted a tax or a fee. The stormwater charge there was imposed by the legislative body upon all property owners and for the benefit of the public at large. On that basis, the district court held the charge to be a tax for purposes of the Anti-Injunction Act. The county maintained that the charge was a fee rather than a tax because the revenues generated were sequestered in a separate account. But the court held

[10] This federal district court decision is different from the Georgia Supreme Court decision with the same caption. The Georgia Supreme Court held that, for purposes of the Georgia constitutional provision requiring that taxes be assessed uniformly, the county's stormwater charge constituted a fee, not a tax. *McLeod v. Columbia County,* 599 S.E. 2d 152, 278 Ga. 242 (2004). The issue of whether the stormwater charge constitutes a tax for purposes of federal law is an issue of federal law, and the Georgia Supreme Court decision therefore is not instructive on this point.

that this feature alone did not alter its conclusion that the charge constituted a tax, particularly since stormwater management was deemed by the court to be a traditional government function. *McLeod,* at 1348.[11]

The General Accounting Office ("GAO")[12] made this same inquiry with regard to the availability of federal appropriated funds to pay surface water management fees assessed by King County, Washington, against national forest lands. *See* B-306666, June 5, 2006, GAO Decision, Matter of Forest Service - Surface Water Management Fees (available at http://www.gao.gov/decisions/appro/30666.htm).[13] GAO surveyed the case law and concluded that the most important factor in distinguishing a tax (to which the United States held sovereign immunity) and a fee (which the federal official would be authorized to pay from appropriated funds) was the purpose behind the statute or regulation that imposes the charge. *Id.,* p. 6. If the use of the revenue funded a government function for the general public, then the charge is a tax; if the benefits are more narrowly circumscribed, then the charge will more likely constitute a fee. *Id.* The King County ordinance was imposed by the county on all owners of developed parcels of land in the county to generate revenues that were expended to benefit the entire community.

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[11] The *McLeod* analysis on this point is also instructive here. The court did not undertake a survey of government regulation of stormwater runoff. Instead, it concluded that it was a traditional government function largely on the fact that the county had regulated stormwater before it imposed the fee under its new ordinance. *Id.,* at 1348. According to the court, governments would otherwise be free to convert any previously performed government function, such as fire protection, into a fee by the simple act of imposing a charge paid into a separate fund. *Id.*

[12] The GAO is authorized by statute to advise federal officers of their liability or authority for expenditures of federal appropriated funds. 31 U.S.C. § 3529; *see also* GAO-06-1064SPl Office of General Counsel, Procedures and Practices for Legal Decision and Opinions (available at http://www.gao.gov/legal/pdfs/d061064sp-web.pd).

[13] Although titled surface water management, the annual service charge imposed by the county's ordinance was for the stated purpose of providing surface and stormwater management services. King County, Wash., Code, Title 9, §§ 9.08.050 (A), 9.08.070 (C).

Even though the fees were deposited into a special fund, the use of the funds to benefit the general public as a government function satisfied GAO that the fees constituted a tax. *Id.,* p. 9; *see also* B-320795, September 29, 2010, GAO Decision, Use of GAO's Appropriations to Pay the District of Columbia Stormwater Fee (District of Columbia stormwater fee is a tax because "[t]he stormwater fee (1) has been imposed pursuant to legislation against each property in the District (2) to raise revenue that (3) is to be spent for the public benefit.")[14]

The Hobart ordinance includes every feature identified in the case law as associated with a tax, not a fee for services. The ordinance states on its face that its primary purpose is to collect revenues for the "welfare of the Village, its citizens, businesses, and others," i.e., to fund a government service for the public at large. *See* p. 6, above; *San Juan Cellular Telephone Co.; McLeod.* To accomplish this purpose, the ordinance imposes mandatory, flat charges of some type on every parcel located within Hobart.[15] Every property owner is subject to some level of "charge," without regard to services provided by Hobart or stormwater mitigation efforts by the property owner. *See* pp. 6-7, above. Thus, the "charges" are plainly not paid voluntarily in exchange for the delivery of services. *National Cable Television Association*; *U.S. v. Huntington, W. Va.*; *Valero Terrestrial Corp*. The "charges" are sequestered under the Hobart ordinance into a separate account, but this alone does not distinguish it from other charges held

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[14] The District of Columbia stormwater management act imposed a fee against every property located in the District, legislated the calculation of the fee, and is enforced through the imposition of lien as in the same manner as failure to pay delinquent real property taxes. B-320795, pp. 5-6. Hobart's stormwater ordinance has these same features, all of which led the GAO to conclude that the District's act is a tax, not a fee for services.

[15] As in both *Schneider Transport, Inc.* and *McLeod,* it appears that Hobart provided essentially the same stormwater services before it adopted its ordinance that it has since 2007. There is the promise of large capital projects to come, but the difference between past and future services appears to be in the extent, not the nature, of the service provided. This demonstrates that the charges are taxes for government functions, not fees for services.

to constitute a tax, not a regulatory fee. *See Schneider Transport,* above; *McLeod,* above. The ordinance creates a utility, but authority for the rates and enforcement resides in Hobart's legislative body, not the administrative agency. Thus, the "charge" operates like a tax imposed by a government, not a fee levied by an administrative agency for services provided. *San Juan Cellular Telephone Co;* B-306666, GAO Decision. Finally, the ordinance explicitly adopts the same mechanism for enforcement as that used to collect real property taxes, i.e., through the imposition of a lien leading to possible foreclosure for failure to pay. B-320795, GAO Decision.

The only possible construction of the Hobart ordinance is that it purports to impose taxes upon the subject trust lands and/or the Tribe's beneficial interest therein, an imposition for which Hobart lacks authority. Before it initiated this action, the Tribe sought the assistance of the Bureau of Indian Affairs to protect its possession of the subject trust lands. In response, the Regional Director advised Hobart that its ordinance constituted an impermissible tax upon the subject trust lands. *See* Complaint, Exh. D, Dock. No. 1**.** The Tribe is entitled to summary judgment in its favor for the same reason.

III. HOBART'S ORDINANCE PURPORTS TO REGULATE THE SUBJECT TRUST LANDS AND IS PRE-EMPTED BY FEDERAL LAW.

As demonstrated above, Hobart's ordinance purports to regulate stormwater runoff throughout Hobart by the imposition of mandatory "charges" on the subject trust lands. No matter what stormwater mitigation efforts the Tribe may undertake, it cannot remove the subject trust lands from Hobart's regulatory scheme and the Tribe's failure to pay the "charges" will ultimately result in its dispossession of the subject trust lands. Thus, whether or not the "charges" under the ordinance are deemed taxes, the ordinance would impose "charges" in support of a stormwater regulatory scheme on the subject trust lands. Federal law pre-empts the

imposition of state and local regulatory authority over the subject trust lands, leaving them to the Tribe's regulatory authority. In addition, a federal regulation explicitly prohibits the extension of local regulatory authority over the subject trust lands. The Tribe is entitled to summary judgment against Hobart's claimed authority to regulate the subject trust lands on this independent basis, regardless of whether Hobart's ordinance seeks to tax those lands.

A. Federal statutes pre-empt Hobart's attempt to impose its civil regulatory authority over the subject trust lands.

The rule regarding civil regulatory authority over reservation lands and tribes is similar to that regarding taxation discussed above, i.e., reservation lands and tribes are generally beyond the civil regulatory reach of states and local governments. Such authority is pre-empted by federal law. *White Mountain Apache Tribe,* 448 U.S. at 142. The Supreme Court explained the rule as follows:

> The tradition of Indian sovereignty over the reservation and tribal members must inform the determination whether the exercise of state authority has been pre-empted by operation of federal law. (Citation omitted). As we have repeatedly recognized, this tradition is reflected and encouraged in a number of congressional enactments demonstrating a firm federal policy of promoting tribal self-sufficiency and economic development... We have thus rejected the proposition that in order to find a particular state law to have been pre-empted by operation of federal law, an express congressional statement to that effect is required.... *When on-reservation conduct involving only Indians is at issue, state law is generally inapplicable, for the State's regulatory interest is likely to be minimal and federal interest in encouraging tribal self-government is at its strongest.*

Id., at 143-144 (italics supplied); *See also California v. Cabazon Band of Mission Indians,* 480 U.S. 202, 208 (1987).

The IRA has been construed to have precisely this pre-emptive effect as to civil regulatory authority of local governments. In *Santa Rosa Band of Indians v. Kings County,* 532 F.2d 655 (9th Cir. 1975), the court considered whether a county could impose its zoning

ordinance on trust lands. The Santa Rosa Band, like the Tribe, was organized under an IRA constitution and was in occupation of lands held in trust by the United States under the IRA. The court construed the IRA to pre-empt local regulatory authority over the Band's trust lands:

> Congress, by the Indian Reorganization Act, authorized the government to purchase the lands involved here, and to hold the title in trust; it also authorized adoption of a tribal constitution for the exercise of tribal self-government over the area. 25 U.S.C. § 476. Against the historical backdrop of tribal sovereignty (subject only to the paramount power of the United States) over the reservation lands, we have little doubt that Congress assumed and intended that states had no power to regulate the Indian use or governance of the reservation provided, except as Congress chose to grant that power.

Id., at 658. Similarly, in *Segundo v. City of Rancho Mirage,* 813 F.2d 1387 (9th Cir. 1987), the Ninth Circuit relied upon the IRA to pre-empt a municipality's rent control ordinance:

> It is beyond question that land use regulation is within the Tribe's legitimate sovereign authority over its lands.... To permit concurrent jurisdiction by [municipalities] in this area 'not only would threaten to disrupt the federal and tribal regulatory scheme, but would also threaten Congress' overriding objective of encouraging tribal self-government and economic development.'

Id., at 1393 (citation omitted).

Even though the IRA is construed to have broad pre-emptive effect, in part, to preserve tribal authority, it is not necessary that a tribe have put into place a conflicting regulatory scheme for the IRA to pre-empt local regulation of trust lands. As the court observed in *Segundo,* a tribe does not relinquish its authority to regulate by its failure to regulate in a particular area - in that case, rent control over trust lands. *Id.,* at 1393. In this case, however, the Tribe enacted tribal laws to regulate the waters on the Reservation in general and stormwater runoff in particular, well before Hobart adopted its ordinance in 2007. These laws include: regulation of ground and surface water pollution such as wells, sewage treatment systems, and non-metallic mining; and preservation of all shorelands on the Reservation. Webster Aff., ¶¶ 12, 13, 14, 15, 16 and 17.

Most pertinent here, the Tribe adopted its Water Resources Ordinance in 1996, which regulates all point source and non-point source pollution, including stormwater runoff, on the Reservation. *Id.,* ¶ 16. Clearly, Hobart's attempt to impose its mandatory system on the subject trust lands would undermine the Tribe's ability to enforce its own laws on its own lands. *Segundo,* 813 F.2d at 1393.

Because of the particular terms of Hobart's ordinance, a second federal statute is relevant to the federal pre-emption analysis. Hobart claims authority to foreclose upon the subject trust lands for failure to pay the "charges" imposed by its ordinance. *Village of Hobart Code of Ordinances,* § 4.508(3). This Hobart absolutely cannot do. Foreclosure on the subject trust lands is not only pre-empted by federal occupation of the field, it is flatly prohibited by the Indian Nonintercourse Act, 25 U.S.C. § 177.[16] The Nonintercourse Act prohibits the conveyance of tribal lands by any means without the consent of Congress. *Tonkawa Tribe of Oklahoma v. Richards,* 75 F.3d 1039, 1046 (5th Cir. 1996) ("the Act reaches not only conveyance by a tribe, but also any action by a state which purports to divest a tribe of an interest in land"). Moreover, the possible loss of the subject trust lands would seriously impair important tribal services. The subject trust lands include the Oneida Police Department, the Oneida Community Health Center, the Oneida Elderly Service Complex, Oneida Day Care, and even a tribal stormwater retention pond. *See* Webster Aff., ¶¶ 18, 19, 20, 21, 22, 23 and 24. It is inconceivable that Hobart has

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[16] The applicability of the Nonintercourse Act to the subject trust lands is, of course, a distinct question from applicability of the Nonintercourse Act to the Tribe's fee lands, considered by this Court in *Oneida Tribe v. Village of Hobart,* 542 F.Supp. 908 (E.D. Wis. 2008). There, the Court relied upon the release of the Tribe's fee lands from federal protection and restrictions against alienation during the allotment period. By placing the subject trust lands into trust, the United States re-imposed its federal protection and restrictions against alienation. *See* 25 C.F.R. § 152.22(b) ("*Tribal lands.* Lands held in trust by the United States for an Indian tribe...may only be conveyed where specific statutory authority exists and then only with the approval of the Secretary unless the Act of Congress authorizing sales provides that approval is unnecessary.")

civil regulatory authority to regulate, and even foreclose upon, these parcels of trust lands. *See Bryan,* 426 U.S. at 391 (construing the restraint against alienation found in Public Law 280: "the express prohibition of any 'alienation, encumbrance, or taxation' of any trust property can be read as prohibiting state courts, acquiring jurisdiction over civil controversies involving reservation Indians pursuant to § 4, from applying state laws or enforcing judgments in ways that would effectively result in the 'alienation, encumbrance, or taxation' of trust property").

Hobart denies that its ordinance has been pre-empted by federal law but fails to identify any federal statute that authorizes its asserted regulatory authority over the subject trust lands. Answer, Affirmative Defenses, ¶ 6, Dock. No. 4. Certainly no generally applicable federal statute has bestowed such authority. *See Bryan; Segundo; Santa Rosa Band of Indians;* and *U.S. v. Humboldt,* 615 F.2d 1260 (9th Cir. 1980) (reaffirming the *Santa Rosa* ruling), all construing P.L. 280. As a result, the general rule applies and Hobart lacks authority to regulate the subject trust lands.

B. By express regulation, the Secretary of the Interior has prohibited the application of Hobart's regulatory scheme to the subject trust lands.

Under authority of the IRA, the Secretary of the Interior adopted regulations, including the following prohibition against local regulatory control over trust lands:

> [N]one 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, 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.

25 C.F.R. § 1.4. Hobart's ordinance plainly purports to regulate (if not tax) all parcels of land in Hobart and the subject trust lands are plainly held in trust subject to a restriction against

alienation. On its face, then, section 1.4 prohibits the application of Hobart's ordinance to the subject trust lands.

Moreover, section 1.4 has been upheld as a valid exercise of the Secretary's authority under the IRA. In fact, the regulation has been construed to simply codify what Congress and the Secretary assumed the rule to be regarding local regulatory authority over tribal trust land. *Santa Rosa Band of Indians,* 532 F.2d at 666; *City of Sault Ste. Marie v. Andrus,* 532 F. Supp. 157, 165 (D. D.C.), *aff'd* 672 F.2d 893 (D.C. Cir. 1981).[17] Because the Hobart ordinance is prohibited by the Secretary's valid regulation, Hobart cannot impose the ordinance and the "charges" authorized therein on the subject trust lands.

[17] Two district courts have reached the opposite conclusion, but both were reversed on other grounds in the court of appeals. *Norvell v. Sangre de Cristo Development Co., Inc.,* 372 F. Supp. 348 (D. N.M.), *rev'd on other grounds,* 519 F.2d 370 (10th Cir. 1995); *Rincon Band of Mission Indians v. County of San Diego,* 324 F. Supp. 371 (S.D. Calif.), *rev'd on other grounds,* 495 F.2d 1 (9th Cir. 1974). The Ninth Circuit considered both these district court decisions in *Santa Rosa* and deemed them unpersuasive.

CONCLUSION

Federal protection is at its highest and federal pre-emptive scope at its broadest when the issue involves taxation or regulation of tribal trust lands. As the Supreme Court has repeatedly observed, there can be no justification for either, absent an act of Congress. Yet, Hobart persists in its effort to do just that, assessing charges against the subject trust lands, effectively billing the Tribe for "charges" that bear all the hallmarks of a tax, and threatening foreclosure proceedings for the Tribe's failure to pay. The Tribe is entitled to summary judgment that Hobart's ordinance, whether deemed a tax or a regulatory fee, is precluded by federal law.

Respectfully submitted this 23rd day of January, 2012.

ATTORNEYS FOR PLAINTIFF

s/ Arlinda F. Locklear
Arlinda F. Locklear
Bar No. 962845
4113 Jenifer Street, NW
Washington, DC 20015
Alocklearesq@verizon.net
(202) 237-0933

James R. Bittorf, Deputy Chief Counsel
Wisconsin State Bar No. 1011794
jbittorf@oneidanation.org
Rebecca M. Webster, Senior Staff Attorney
Wisconsin State Bar No. 1046199
bwebster@oneidanation.org
Robert W. Orcutt, Staff Attorney
Wisconsin State Bar No. 1043266
rorcutt@oneidanation.org

ONEIDA LAW OFFICE
N7210 Seminary Road
Post Office Box 109
Oneida, WI 54155
(920) 869-4327