

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

CIVIL ACTION FILE NO. 11-761C
Senior Judge B. Futey

DEKALB COUNTY, GEORGIA,
a political subdivision of the
State of Georgia,

Plaintiff,

v.

**UNITED STATES OF AMERICA and
UNITED STATES POSTAL SERVICE,**

Defendants.

**PLAINTIFF'S REPLY TO DEFENDANTS' RESPONSE TO PLAINTIFF'S MOTION
FOR PARTIAL SUMMARY JUDGMENT**

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Code of DeKalb County, as Revised 1988

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INTRODUCTION

DeKalb County is entitled to entry of partial summary judgment in its favor finding that: (a) the sovereign immunity of the United States has been waived for reasonable service charges pursuant to the Clean Water Act, 33 U.S.C. § 1323(a), and the Tucker Act, 28 U.S.C. § 1491; and (b) DeKalb County's stormwater utility fees are reasonable service charges under 33 U.S.C. § 1323 for which Defendants are liable. When all the facts and circumstances of record are examined, it becomes apparent the "essential nature" of DeKalb County's stormwater charge is that of a "reasonable service charge" under 33 U.S.C. § 1323(a). It is not an enforced contribution to provide for the general support of government, and does not raise money that is contributed to a general fund to be spent for the benefit of the entire community. *Cf. United States v. LaFranca*, 282 U.S. 568, 572 (1931) (a tax is an "enforced contribution to provide for the support of government"); *National Cable Television Association v. United States*, 415 U.S. 336, 340-41 (1974) (a classic tax "raises money, contributed to a general fund, and spent for the benefit of the entire community").

Alternatively, the 2011 Stormwater Amendment, S. 3841, 11TH Cong. (Dec. 21, 2010), P.L. 11-378, § 1, 124 Stat. 4128, 33 U.S.C. § 1323(c), may properly be given retroactive effect as a clarification of the 1977 version of 33 U.S.C. § 1323. The 2011 Stormwater Amendment was enacted for the specific purpose of remediating the United States' refusal to pay stormwater utility charges. *See* Brief of Amicus Curiae, pp. 7-12. As a clarifying amendment that makes the United States liable for stormwater utility charges regardless of whether such charges are construed to be a tax or a fee, the 2011 Stormwater Amendment provides an additional ground for the entry of partial summary judgment in favor of DeKalb County.

ARGUMENT AND CITATION TO AUTHORITY

I. Construing the material facts in the light most favorable to the United States, DeKalb County is entitled to entry of partial summary judgment in its favor finding that the sovereign immunity of the United States has been waived for reasonable service charges such as DeKalb County's stormwater utility charge.

The United States' Reply to Defendant's Motion for Partial Summary Judgment fails to create a genuine issue of material fact that would preclude the relief sought by DeKalb County. DeKalb County argues that its stormwater utility fee constitutes a "reasonable service charge" for which the United States is liable under the version of § 313 of the Clean Water Act ("CWA") enacted in 1977. *See* P.L. 95-217, §§ 60, 61(a), 91 Stat. 1597, 1598, 33 U.S.C. § 1323(a). Most recently, the United States District Court for the Western District of Washington agreed, holding that since 1977, Section 313(a) of the CWA has contained "an unequivocal and unambiguous waiver of sovereign immunity" from the "payment of reasonable services charges for the control and abatement of water pollution." *United States v. City of Renton, et al.*, 2012 WL 1903429 at *5; *See City of Cincinnati v. United States*, 2007 WL 956432, 2007 U.S. Dist. LEXIS 26991, 5 (S.D. Oh. 2007) (holding a stormwater system charge "fell squarely within the waiver of sovereign immunity contained in the 1977 text of § 313 of the CWA). The United States does not appear to contend otherwise. Instead, the United States argues this Court should find DeKalb County's fee to be a "tax" for which sovereign immunity was not waived until the 2011 Stormwater Amendment was enacted.

As set forth in its moving brief, this Court should conclude that the language of § 313 of the CWA contains a waiver of the United States' sovereign immunity from the payment of reasonable service charges for the control and abatement of water pollution. Next, this Court

should consider whether DeKalb County's stormwater utility fee constitutes such a "reasonable service charge." DeKalb County argues the *Massachusetts v. United States*, 435 U.S. 444 (1978), test should be applied to evaluate whether DeKalb County's stormwater utility fee constitutes a "reasonable service charge" for which sovereign immunity has been waived. Notably, Congress adopted the *Massachusetts* test as the appropriate analysis to be applied when it enacted the Stormwater Amendment, S. 3841, 11th Cong. (Dec. 21, 2010), P.L. 11-378, ¶ 1, codified at 33 U.S.C. § 1323(c), subtitled "An Act to amend the Federal Water Pollution Control Act to clarify Federal responsibility for stormwater pollution," which became effective January 4, 2011. As demonstrated in its moving brief, DeKalb County's stormwater utility charge satisfies the *Massachusetts* test.

The United States has not identified a different test for evaluating whether DeKalb County's stormwater utility fee constitutes a "reasonable service charge." Instead, in its Motion to Dismiss and Response to DeKalb County's Motion for Partial Summary Judgment, the United States argued this Court should apply the fee versus tax analysis from *National Cable Television Assoc., Inc. v. United States*, 415 U.S. 336, 340-341 (1974), to throw out DeKalb's stormwater utility charge as a "tax." The *National Cable* analysis the United States points to defines a "fee" as "incident to a voluntary act" or request for services that "bestows a benefit on the applicant . . . not shared by other members of society." 415 U.S. at 340-314.

In its recent Notice of Supplemental Authority, the United States argues this Court should apply the fee versus tax analysis in *San Juan Cellular Telephone Co. v. Public Service Commission of Puerto Rico*, 967 F.2d 683 (1st Cir. 1992), a case analyzing whether the Butler Act, 48 U.S.C. § 872, a statute similar to the Tax Injunction Act, precluded the District Court from exercising jurisdiction over the case. There, the District Court found the challenged charge

was a legitimate regulatory fee, not a tax, because the charge was imposed by the regulatory agency against entities engaged in activities subject to its oversight (as opposed to being imposed against the general public) and the monies collected were placed in a segregated fund used “not for a general purpose but rather to defray the expenses” of the regulatory activity. 967 F.2d 685-686; *see McLeod v. Columbia County*, 254 F.Supp.2d 1340, 1345 (S.D. Ga. 2002).

Although DeKalb County does not believe the *National Cable* and *San Juan Cellular* tests are controlling,¹ applying either demonstrates that DeKalb County’s stormwater utility charge is a permissible fee, and not a tax, because DeKalb County’s stormwater utility charge is imposed only against voluntary users of the system (who could avoid the charge if they provided their own stormwater services and facilities instead of using those provided by DeKalb County), and the monies collected are segregated in an enterprise fund used solely to pay the expenses of providing stormwater services and facilities to such users. *See* Code of DeKalb County, as Revised 1988, § 25-360 *et seq.*; Gottlieb Affidavit, ¶¶ 6-7; Rhinehart Affidavit, ¶¶ 3-7; Booth Affidavit, ¶ 8.

Thus, whether the *Massachusetts* test, the *National Cable* test or the *San Juan Cellular* test is applied, each demonstrates that DeKalb County’s stormwater utility charge is a reasonable service charge for the abatement of water pollution the United States is liable to pay. This Court

¹ The *National Cable* and *San Juan Cellular* decisions involved regulatory charges that were analyzed under a broad standard designed to impede federal court interference with state tax systems. Such a broad standard is simply not applicable here. In fact, the text of the *San Juan Cellular* decision noted that several courts have read the Supreme Court’s language in *National Cable* as “limited to its specific statutory context.” *See San Juan Cellular*, 967 F.2d 683, 687; *Union Pacific Railroad Co. v. Public Utility Commission of the State of Oregon*, 899 F.2d 854, 861 (9th Cir. 1990) (*National Cable* was “not announcing universal definitions of “tax” and “fee,” but simply determining the meaning of the terms in a particular context” not applicable in the case at bar); *See Head Money Cases (Edye v. Robertson, et al.)*, 112 U.S. 580, 590 (1884) (rejecting an attempt to characterize a charge deposited in a special fund and used to defray the expenses of regulating immigration as an impermissible tax).

should reject the United States' attempt to avoid its responsibilities under the CWA and enter partial summary judgment in favor of DeKalb County finding that the sovereign immunity of the United States was waived with respect to reasonable service charges such as DeKalb County's stormwater utility charge.

II. Construing the material facts in the light most favorable to the United States, DeKalb County is entitled to entry of partial summary judgment in its favor finding that the 2011 Stormwater Amendment was a clarifying amendment with retroactive effect.

As argued in depth by *amici*, the 2011 Stormwater Amendment codified in 33 U.S.C. § 1323(c) should be given retroactive effect as a clarification of the 1977 version of 33 U.S.C. § 1323. DeKalb County has not waived this argument and, in any event, the Court has before it *amici's* brief demonstrating that the statutory text, and the legislative history thereto, require the 2011 Stormwater Amendment be given retroactive effect as a clarifying amendment. The 2011 Stormwater Amendment requires the United States to pay DeKalb County's stormwater utility charge regardless of whether it is classified as a fee or a tax. 33 U.S.C. § 1323(c).

As the *City of Renton* court recognized when it concluded the 2011 Stormwater Amendment applied retroactively, the Amendment was enacted precisely because Federal agencies were refusing to pay reasonable service charges for stormwater services and facilities, instead attempting to classify them as a tax. *City of Renton*, 2012 WL 1903429 at *6; Brief of Amicus Curiae, pp. 7-12. It is the United States' persistent, unwarranted and stubbornly litigious attempt to characterize DeKalb County's reasonable service charge for the control and abatement of water pollution as a tax that has resulted in this litigation. This Court should reject the United States' attempt to avoid its responsibilities under the Clean Water Act and enter partial summary

judgment in DeKalb County's favor finding that the 2011 Stormwater Amendment was a clarifying amendment with retroactive effect.

CONCLUSION

The undisputed material facts, construed in the light most favorable to the United States, demonstrate that no genuine issue exists as to whether DeKalb County's stormwater utility fee is a reasonable service charge the United States must pay. DeKalb County's stormwater utility fee is structured as a reasonable fee for services provided to the United States that satisfies each of the three prongs of the *Massachusetts* test, and the essential nature of the stormwater charge is that of a "reasonable service charge" under the CWA. For all of the reasons set forth herein, DeKalb County's stormwater utility fee cannot properly be characterized as a tax. DeKalb County is entitled to entry of partial summary judgment in its favor finding that: (a) the sovereign immunity of the United States has been waived for reasonable service charges; and (b) DeKalb County's stormwater utility fees are reasonable service charges under 33 U.S.C. § 1323 for which Defendants are liable. Alternatively, DeKalb County is entitled to entry of partial summary judgment in its favor finding that the 2011 Stormwater Amendment was a clarifying amendment with retroactive effect.

[Signatures of counsel on following page]

Respectfully submitted this 25th day of September, 2012.

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CERTIFICATE OF SERVICE

I hereby certify that on the date provided below, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all counsel by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

This 25th day of September, 2012.

/s/ Sam L. Brannen, Jr.

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