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2026 WI 21
Supreme Court of Wisconsin

LEGEND LAKE PROPERTY OWNERS ASSOCIATION, INC.,
Plaintiff-Appellant,
v.
GUY KESHENA, et al.,
Defendants-Respondents.

No. 2022AP937
Decided June 23, 2026

APPEAL from a judgment and order of the Menominee County Circuit Court (Katherine Sloma, J.)
No. 2018CV7

SUSAN M. CRAWFORD, J., delivered the majority opinion of the Court, in which JILL J. KAROFSKY, C.J., and REBECCA FRANK DALLET and JANET C. PROTASIEWICZ, JJ., joined. REBECCA GRASSL BRADLEY, J., filed a dissenting opinion, in which ANNETTE KINGSLAND ZIEGLER, J., joined. BRIAN K. HAGEDORN, J., filed a dissenting opinion in which ANNETTE KINGSLAND ZIEGLER and REBECCA GRASSL BRADLEY, JJ., joined.

¶1 SUSAN M. CRAWFORD, J. "Indian tribes are 'distinct, independent political communities, retaining their original natural rights' in matters of local self-government." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 55 (1978) (quoting *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 559 (1832)). Tribal

"sovereignty predates the formation of the United States and persists unless diminished by federal law." COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 1.01, at 2 (Nell Jessup Newton & Kevin K. Washburn, eds., 2024) [hereinafter COHEN'S HANDBOOK]. Tribes have sovereign immunity from suit as "a necessary corollary to Indian sovereignty and self-governance." *Lac du Flambeau Band of Lake Superior Chippewa Indians v. Coughlin*, 599 U.S. 382, 393 (2023) (citation modified).

¶2 This case requires this court to resolve a dispute about the scope of tribal sovereign immunity from suit in a Wisconsin state court. A group of private landowners—the Legend Lake Property Owners Association (the Association)—brought suit in Wisconsin state court against the Menominee Indian Tribe of Wisconsin (the Tribe) and one of its members, Guy Keshena, in an effort to restrict use of land historically inhabited by the Tribe and now held in trust by the federal government on the Tribe's behalf. The Tribe and Keshena assert that tribal sovereign immunity bars the suit.

¶3 This case comes before us on certification from the court of appeals. We hold that the Tribe is immune from suit and that its immunity likewise extends to Keshena. We conclude that nothing abrogates, waives, or otherwise precludes the Tribe's sovereign immunity in this case. Accordingly, we affirm the circuit court's judgment of dismissal.

I. BACKGROUND

¶4 The Menominee Indians "are the oldest known continuous residents in Wisconsin," *United States v. Long*, 324 F.3d 475, 482 (7th Cir. 2003) (quoting another source), once occupying over 10 million acres

of land in what is now Wisconsin and the Upper Peninsula of Michigan.[1] After ceding rights to most of its land in a series of treaties, the Tribe in 1854 entered the Treaty of Wolf River with the United States. *Van Camp v. Menominee Enters.*, 68 Wis. 2d 332, 334, 228 N.W.2d 664 (1975). The treaty established the Menominee Reservation of approximately 234,000 acres, comprised mostly of what is now Menominee County, *id.*, as a "permanent home" for the Tribe. Treaty of Wolf River, Menominee Indian Tribe of Wis.-U.S., May 12, 1854, 10 Stat. 1064. One hundred years later, in 1954, the federal government terminated its recognition of the Tribe's status through the Menominee Indian Termination Act "pursuant to a federal policy of assimilation that existed at the time." *Long*, 324 F.3d at 480; *see* Pub. L. No. 399, 68 Stat. 250 (1954) (formerly codified at 25 U.S.C. §§ 891-902) [hereinafter Termination Act]. "[T]he Termination Act caused the federal government to cede to the State of Wisconsin 'its power of supervision over the tribe and the reservation lands.'" *Long*, 324 F.3d at 481 (quoting *Menominee Tribe of Indians v. United States*, 391 U.S. 404, 412 (1968)). Terminating federal recognition meant, among other things, that the United States would no longer hold the reservation land in trust for the Tribe and that the property would be subject to taxation. Termination Act §§ 8, 9.

¶5 Pursuant to the Termination Act, the Tribe created Menominee Enterprises, Inc. (MEI) to take

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[1] *See generally* Brian Kowalkowski, *Menominee Indian Tribe of Wisconsin Facts and Figures Reference Book* 2, 47 (2004), https://www.menominee-nsn.gov/CulturePages/Documents/FactsFigureswithSupplement.pdf (providing estimate of land historically occupied by the Tribe).

title to tribal property formerly held in trust.[2] In the face of financial duress, MEI subsequently sold thousands of acres of its former reservation land to nontribal members, including the land purchased for the Legend Lake development.[3] The developer of Legend Lake established the Association in 1972. Membership in the Association was mandatory for all owners of lots in the Legend Lake development.

¶6 In 1973, Congress repealed the Termination Act and restored federal recognition of the Tribe through the Menominee Restoration Act. *See* Pub. L. No. 93-197, 87 Stat. 770 (1973) (formerly codified at 25 U.S.C. §§ 903-903g) [hereinafter Restoration Act]. The Restoration Act "reinstated all rights and privileges of the tribe or its members under Federal treaty, statute, or otherwise which may have been diminished or lost pursuant to [the Termination Act]." *Id.* § 3(b); *see also Long*, 324 F.3d at 482 (the Restoration Act "makes clear that Congress intended . . . to restore the Menominee Tribe to its pre-'termination' status"). The Restoration Act provided a mechanism for the Tribe to reacquire its lost reservation lands, directing the Secretary of the Interior to "accept the real property (. . . in or adjacent to . . . the county of Menominee, Wisconsin) of

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[2] *See* Termination Act § 8 ("[I]f the Tribe obtains a charter for a corporation . . . for the purpose . . . of taking title to all tribal lands and assets and enterprises owned by the tribe or held in trust by the United States for the tribe, and requests such transfer to be made to such corporation . . . the Secretary [of the Interior] shall make such transfer . . . .").

[3] This history is recounted in detail in Joseph F. Preloznik & Steven Felsenthal, *The Menominee Struggle to Maintain Their Tribal Assets and Protect Their Treaty Rights following Termination*, 51 N.D. L. REV. 53, 64-68 (1974).

members of the Menominee Tribe, but only if transferred to him by the Menominee owner or owners." Restoration Act § 6(c). It directed that real property transferred to the Secretary "shall be taken in the name of the United States in trust for the Menominee Tribe of Wisconsin and shall be part of their reservation," and "exempt from all local, State, and Federal taxation." *Id.*

¶7 In 1998, the Menominee Tribal Legislature passed a resolution allowing the Tribal Chairman to designate a tribal member to acquire title to real property for the purpose of placing it in trust with the United States; the Tribal Chairman designated Keshena as that member. The Association amended its bylaws that same year, and again in 2001 and 2009, adding additional restrictive covenants to the Legend Lake parcels. These restrictions were plainly aimed at preventing the Tribe from reacquiring its former reservation lands that were now part of the Legend Lake development. In addition to prohibiting any transfer to a "sovereign or dependent sovereign nation" or the placement of any property into federal trust, the 2009 amendments prohibited transfers that would remove any property from the county tax rolls, exempt property from real estate taxes, or remove property from county zoning authority or the jurisdiction of the state, among other restrictions. The amendments specified the venue for actions to enforce the restrictive covenants as the Menominee County Circuit Court and purported to waive any sovereign immunity defense by a purchaser or transferee of land in such an action.

¶8 In 2017, Keshena acquired title to more than 30 lots within the Legend Lake development (the Keshena lots) for and on behalf of the Tribe. Two

separate legal proceedings commenced. In March and May of 2018, Keshena submitted an application to the federal Bureau of Indian Affairs (BIA) requesting the United States to take title to the Keshena lots and hold the land in trust for the Tribe. In October 2018, the Association filed this lawsuit in the Menominee County Circuit Court, seeking a declaration that: (1) the 2009 restrictive covenants were valid and legally enforceable, (2) the 2009 restrictive covenants applied to the Keshena lots, and (3) any transfers in violation of the 2009 restrictive covenants were null and void. A few weeks later, the BIA determined that the Restoration Act mandated the United States' acquisition of the Keshena lots and published a notice of intent to accept the Keshena lots into trust. The Association notified the Interior Board of Indian Appeals (IBIA) of its intent to appeal the BIA decision.

¶9 In March 2019, the Menominee County Circuit Court denied the Tribe's motion to dismiss the present action. Later, in April 2022, the circuit court granted the Tribe's motion for reconsideration and dismissed the case because the Restoration Act preempted the restrictive covenants or, alternatively, because tribal sovereign immunity barred the suit. The Association appealed.

¶10 While the Association's state court appeal was pending, its appeal of the BIA's decision to place the Keshena lots in trust continued. In March 2023, the IBIA affirmed the BIA's decision and found that the 2009 restrictive covenants were preempted by the Restoration Act. *Legend Lake Prop. Owners Ass'n v. Midwest Reg'l Dir., Bureau of Indian Affs.*, 68 Interior Dec. 284 (IBIA 2023). The Association sought judicial review of the IBIA decision in federal district court. The United States District Court for the Eastern

District of Wisconsin granted the Tribe's motion to dismiss, also on grounds that "the Association's restrictive covenants that purport to bar the trust acquisitions" were preempted by the Restoration Act. *Legend Lake Prop. Owners Ass'n v. U.S. Dep't of the Interior*, No. 23-C-480, 2024 WL 449287, at *5 (E.D. Wis. Feb. 6, 2024). The district court declined to address the Association's claims that the remaining restrictive covenants are not preempted and are valid and enforceable. *Id.* at *6. The Keshena lots were conveyed to the United States in March and April of 2023.

¶11 The court of appeals ordered the parties to file supplemental briefs addressing the effect of the federal litigation on this case. The Association clarified that it still sought a declaration of the enforceability of certain provisions of the 2009 restrictive covenants. The Association argued that the so-called "non-transfer" provisions in article (1)(D) of the 2009 restrictive covenants require the Keshena lots to remain subject to "municipal and Association laws, rules, regulations and obligations, in rem, notwithstanding a transfer to an owner not otherwise subject to them."[4] Through this provision, the

[4] As part of its supplemental briefing to the court of appeals, the Association argued that parts of article (1)(B) of the 2009 restrictive covenants are also "non-transfer" provisions. In response, the Tribe argued that article (1)(B) specifically prohibits the transfer of lands into trust. Likewise, in the federal litigation, the IBIA specifically identified article (1)(B) as a provision restricting transfer. As such, the court of appeals correctly narrowed the inquiry to article (1)(D) in its certification. The Association also stated that it no longer sought to enforce the provisions of the 2009 restrictive covenants "related to future taxation of the parcels." The federal district court ruled that the

Association argues that its bylaws—which include extensive use restrictions and provide for the collection of Association dues and assessments—are also binding on the Tribe.[5]

¶12 On January 22, 2025, the court of appeals certified the Association's appeal to this court, pursuant to WIS. STAT. § (Rule) 809.61 (2023-24).[6] In its certification, the court of appeals noted that this case raises novel questions regarding tribal sovereign immunity and federal preemption.

II. ANALYSIS

¶13 We independently review the circuit court's order dismissing this case. *See Pool v. City of Sheboygan*, 2007 WI 38, ¶9, 300 Wis. 2d 74, 729 N.W.2d 415; *see also DNR v. Timber & Wood Prods. Located in Sawyer Cnty.*, 2018 WI App 6, ¶17, 379 Wis. 2d 690, 906 N.W.2d 707 (Ct. App. 2017).

¶14 The parties dispute whether tribal sovereign immunity bars this suit and whether the United

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Restoration Act precluded enforcement of the provisions that prohibited the removal of the parcels from the county tax rolls. *See Legend Lake Prop. Owners Ass'n v. U.S. Dep't of the Interior*, No. 23-C-480, 2024 WL 449287, at *5 (E.D. Wis. Feb. 6, 2024).

[5] The Association's bylaws restrict use to "single family residential and for the sole use of the owner" and largely prohibit use for commercial purposes. The bylaws include detailed requirements for the size, height, and design of residential structures and restrict the alteration of lot lines, construction of non-residential structures, cutting of trees, camping, and erecting of fencing, among other limitations.

[6] All subsequent references to the Wisconsin Statutes are to the 2023-24 version unless otherwise indicated.

States is an indispensable party.[7] The Tribe and Keshena raised tribal sovereign immunity in their first responsive pleading in the circuit court and reassert that argument in this court. They argue for the first time here that the United States is an indispensable party, given that the United States now holds title to the Keshena lots. At bottom, the Tribe and Keshena want this lawsuit dismissed. For its part, the Association argues that neither sovereign immunity nor the United States' absence prevent this suit from proceeding.

¶15 Courts have discretion "to choose among threshold grounds for denying audience to a case on the merits." *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 585 (1999); *see Gross v. Hoffman*, 227 Wis. 296, 300, 277 N.W. 663 (1938) ("As one sufficient ground for support of the judgment has been declared, there is no need to discuss the others urged."). Because it is a jurisdictional bar, sovereign immunity is one such ground that prevents review of the merits. *See Lister v. Bd. of Regents of Univ. of Wis. Sys.*, 72 Wis. 2d 282, 296, 240 N.W.2d 610 (1976) ("This court has held that sovereign immunity is a matter of personal jurisdiction . . . ."); *see also Douglas Indian Ass'n v. Cent. Council of Tlingit and Haida Indian Tribes of Alaska*, 403 P.3d 1172, 1177 n.16 (Alaska 2017) (collecting federal cases in which tribal sovereign immunity was properly invoked as a jurisdictional bar). We conclude that this lawsuit is

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[7] The parties also dispute whether the Restoration Act preempts the 2009 restrictive covenants, whether the controversy is ripe for review, whether the "non-transfer" provisions of the 2009 restrictive covenants are severable from the transfer provisions, and whether the restrictive covenants are valid under WIS. STAT. § 706.02(1).

jurisdictionally barred on grounds of tribal sovereign immunity. Accordingly, we need not address the parties' remaining arguments.[8]

¶16 We turn first to our analysis of why sovereign immunity protects the Tribe from the Association's lawsuit, then address why the Association cannot maintain its lawsuit against Keshena either.

A. TRIBAL SOVEREIGN IMMUNITY

¶17 "Indian tribes are 'domestic dependent nations' that exercise inherent sovereign authority over their members and territories." *Okla. Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Okla.*, 498 U.S. 505, 509 (1991) (quoting *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831)); *see*

[8] The dissenting justices would not reach this threshold jurisdictional issue, but would instead remand this case to the circuit court to address whether the United States is an indispensable party. That approach presents two problems. First, this court "has not viewed the requirement of joinder of indispensable parties as jurisdictional." *Heifetz v. Johnson*, 61 Wis. 2d 111, 122, 211 N.W.2d 834 (1973). Jurisdictional matters take priority. "In order for a court to exercise its power over a case, it must have both subject matter jurisdiction and personal jurisdiction." *In re Int. of A.E.H.*, 161 Wis. 2d 277, 297, 468 N.W.2d 190 (1991); *see also* WIS. STAT. § 801.04(2) (stating that a court may render judgment against a party personally only if personal jurisdiction exists); WIS. STAT. § 801.08(1) ("All issues of fact and law raised by an objection to the court's jurisdiction over the person or property . . . shall be heard by the court . . . in advance of any issue going to the merits of the case."). Second, the circuit court has already ruled that it lacks jurisdiction over the Tribe on grounds of sovereign immunity. Remanding this case to the circuit court without addressing this jurisdictional question would generate uncertainty as to the circuit court's jurisdiction on remand, needlessly prolong litigation that has already lasted more than seven years, and delay the inevitable result this court reaches today.

also Teague v. Bad River Band of Lake Superior Tribe of Chippewa Indians, 2000 WI 79, ¶21, 236 Wis. 2d 384, 612 N.W.2d 709 ("Indian tribes are separate sovereigns under federal law."). "Among the core aspects of sovereignty that tribes possess . . . is the 'common-law immunity from suit traditionally enjoyed by sovereign powers.'" *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 788 (2014) (quoting *Santa Clara Pueblo*, 436 U.S. at 58). "[T]ribal immunity is a matter of federal law." *Kiowa Tribe of Okla. v. Mfg. Techs., Inc.*, 523 U.S. 751, 759 (1998). Its scope is broad: "Tribes enjoy immunity whether they act within or outside tribal lands, for commercial or classically governmental purposes, and without regard to whether their actions are otherwise subject to state jurisdiction." COHEN'S HANDBOOK § 8.04[2][a], at 542. Nonetheless, Congress may abrogate a tribe's immunity, and a tribe may waive its own immunity. *Bay Mills Indian Cmty.*, 572 U.S. at 788-89.

¶18 In this case, the Association argues that Congress abrogated the Tribe's sovereign immunity by passing the Restoration Act and that the Tribe waived its immunity in a number of different ways. Alternatively, the Association posits that either an "in rem" exception or a common law "immovable property" exception to tribal sovereign immunity provides a basis for state court jurisdiction over its claims. For the reasons articulated below, the Tribe's sovereign immunity was neither abrogated by Congress nor waived by the Tribe. We also decline to recognize that either of the proposed exceptions to tribal sovereign immunity provides a basis for jurisdiction.

1. Abrogation

¶19 The Association first argues that the Restoration Act abrogates the Tribe's sovereign immunity for the purpose of adjudicating "valid existing rights" with respect to the Keshena lots transferred to the United States. The Association relies primarily on Section 6(c),[9] which permits tribal members to transfer land to the United States to hold in trust as part of the Tribe's reservation. That section reads in part:

> Such property shall be subject to all valid existing rights including, but not limited to, liens, outstanding taxes (local, State, and Federal), mortgages, and any other obligations. The land transferred to the Secretary [of the Interior] pursuant to this subsection shall be subject to foreclosure or sale pursuant to the terms of any valid existing obligation in accordance with the laws of the State of Wisconsin.

Restoration Act § 6(c). The Tribe and Keshena argue that Congress did not abrogate the Tribe's sovereign immunity because the Restoration Act contains no clear statement doing so and abrogation may not be implied. We agree with the Tribe and Keshena, and

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[9] In its briefs, the Association also cites Restoration Act § 3(d), which provides "[e]xcept as specifically provided in this Act, nothing contained in this Act shall alter any property rights or obligations, any contractual rights or obligations, including existing fishing rights, or any obligations for taxes already levied." The Association makes no independent argument as to why § 3(d) abrogates the Tribe's sovereign immunity. Accordingly, we assume its argument mirrors the argument it makes under § 6(c): that preserving a right implies a right to sue.

we reject the Association's invitation to disregard established legal principles relating to abrogation.

¶20 "To abrogate sovereign immunity, Congress must make its intent unmistakably clear in the language of the statute." *Lac du Flambeau*, 599 U.S. at 387 (citation modified). This "standard for finding a congressional abrogation is stringent." *Fin. Oversight & Mgmt. Bd. for P.R. v. Centro de Periodismo Investigativo, Inc.*, 598 U.S. 339, 346 (2023). The U.S. Supreme Court has "repeatedly emphasized that tribal sovereign immunity, absent a clear statement of congressional intent to the contrary, is the 'baseline position.'" *Lac du Flambeau*, 599 U.S. at 387 (quoting *Bay Mills Indian Cmty.*, 572 U.S. at 790). There "is not a magic-words requirement, however." *Id.* at 388. Rather, "[t]he clear-statement question is simply whether, upon applying 'traditional' tools of statutory interpretation, Congress's abrogation of tribal sovereign immunity is 'clearly discernable' from the statute itself." *Id.* (quoting *FAA v. Cooper*, 566 U.S. 284, 291 (2012)).

¶21 The United States Supreme Court most recently considered a claim of Congressional abrogation of tribal sovereign immunity in *Lac du Flambeau*. There, the Court considered whether a provision in the Bankruptcy Code, which states that "sovereign immunity is abrogated as to a *governmental unit*" for certain purposes, applies to federally recognized Indian tribes. *Lac du Flambeau*, 599 U.S. at 387 (emphasis added) (quoting 11 U.S.C. § 106(a)). Given that the statute expressly provides for the abrogation of sovereign immunity, the case hinged on whether the tribe was a "governmental unit" as defined by 11 U.S.C. § 101(27). *Id.* at 388-93. The Court ultimately held that "[f]ederally recognized

tribes undeniably fit that description; therefore the [Bankruptcy] Code's abrogation provision plainly applies to them as well." *Id.* at 388.

¶22 Generally, "[i]t is a tall order for a court to conclude that Congress abrogated tribal sovereign immunity." *Mestek v. LAC Courte Oreilles Cmty. Health Center*, 72 F.4th 255, 258 (7th Cir. 2023) (False Claims Act's anti-retaliation provision does not abrogate sovereign immunity); *see also Williams v. Poarch Band of Creek Indians*, 839 F.3d 1312 (11th Cir. 2016) (definition of "employers" under the Age Discrimination in Employment Act of 1967 does not abrogate sovereign immunity); *Memphis Biofuels, LLC v. Chickasaw Nation Indus.*, 585 F.3d 917 (6th Cir. 2009) (Indian Reorganization Act Section 17 does not abrogate sovereign immunity). The Sixth Circuit's decision in *Memphis Biofuels* provides a potent example of a court's refusal to read abrogation into a statute. In that case, the parties disagreed over whether Section 17 of the Indian Reorganization Act (IRA) abrogated the sovereign immunity of a tribe that elected to incorporate under the provision. *Memphis Biofuels*, 585 F.3d at 920. The provision reads:

> The Secretary of the Interior may, upon petition by any tribe, issue a charter of incorporation to such tribe . . . . Such charter may convey to the incorporated tribe the power to purchase, take by gift, or bequest, or otherwise, own, hold, manage, operate, and dispose of property of every description, real and personal, including the power to purchase restricted Indian lands and to issue in exchange therefor interests in corporate property, and such further

> powers as may be incidental to the conduct of business, not inconsistent with law . . . .

Id. (quoting 25 U.S.C. § 477). The court recognized that this section was silent as to whether an incorporated tribe retains sovereign immunity. *Id.* The court concluded "that it is more appropriate to interpret this silence as *not* abrogating sovereign immunity." *Id.* (emphasis added). It reasoned that, first, abrogation may not be implied, and second, any statutory ambiguity should be construed in favor of tribes. *Id.* at 921.

¶23 Here, Section 6(c) of the Restoration Act does not contain a clear statement of congressional intent to abrogate the Tribe's immunity. The Association argues that the provision's reference to "valid existing rights" implies a right to enforce those rights by bringing suit against the Tribe in state or federal court. There are two problems with that argument. First, an abrogation of immunity must be explicit and will not be implied. Section 6(c) provides that land transferred to the United States by a *tribal member* remains "subject to . . . valid existing rights," such as a mortgage or lien. The provision does not expressly recognize or establish any rights of third parties vis-à-vis the *Tribe*, nor does it expressly authorize third parties to enforce a legal right or obligation in property transferred by a tribal member to the United States by bringing suit against the *Tribe* in state or federal court.

¶24 Second, even when Congress enacts legislation establishing a party's legal right vis-à-vis a tribe, the Supreme Court has held that such a legal right does not, by itself, demonstrate that Congress intended to abrogate the tribe's sovereign immunity

from suit. *Okla. Tax Comm'n*, 498 U.S. 505. In *Oklahoma Tax Commission*, the Court recognized Oklahoma's authority to tax a tribe's sales of cigarettes to nontribal members. *Id.* at 512. Nonetheless, the Court held the tribe was immune from Oklahoma's suit to enforce the sales tax, rejecting the state's contention that this result gave it "a right without any remedy." *Id.* at 512, 514.

¶25 The Association in effect argues that Congress, by preserving the valid existing rights of third parties in reservation land, must have intended also to authorize third parties to sue the Tribe in state or federal court to enforce those rights, abrogating the Tribe's sovereign immunity. This court will not interpret the Restoration Act's references to "valid existing rights" and "valid existing obligations" in property transferred to trust by a tribal member more broadly than Congress intended. *See Bay Mills Indian Cmty.*, 572 U.S. at 794 (declining to find that Congress implicitly authorized a state to sue a tribe for illegal gaming *off* reservation lands when it authorized the state to sue the tribe for illegal gaming *on* Indian lands, observing that the Court had "no roving license . . . to disregard clear language simply on the view that . . . Congress 'must have intended' something broader").

¶26 Accordingly, given the absence of "unmistakably clear" language that abrogates immunity, we hold that the Restoration Act did not abrogate the Tribe's sovereign immunity.

2. Waiver

¶27 The Association argues that the Tribe waived its sovereign immunity by authorizing its member, Keshena, to acquire parcels whose deeds contain the

restrictive covenants the Association adopted in 2009. The Association directs our attention to paragraphs 4(F) and (G) of the 2009 restrictive covenants, which provide:

> F. Applicable Law; Jurisdiction and Venue. Any and all actions or proceedings seeking to enforce any provision of, or based upon any right arising out of, these Restrictive Covenants running with the land shall be brought against a party in the Circuit Court of Menominee County, State of Wisconsin (sitting in Shawano, Wisconsin) where the land is situated, and any purchaser and/or transferee of the land that is a party to any such action, by accepting the deed thereto, consents to the exclusive jurisdiction and venue of such court (and the appropriate appellate courts therefrom) in any such action or proceeding and waives any objection to jurisdiction and venue laid therein.
>
> G. Waiver of Defense. By acceptance of a deed transferring title ownership of any portion of the Subject Real Estate, the title owner hereby waives any defense to an action filed with respect to these Restrictive Covenants by the Association based on sovereign immunity, and expressly consents to suit as provided for in Paragraph 4F above, and enforcement of any judgment rendered therein.

The Association argues that the Tribe is bound by these restrictive covenants, including the provision waiving sovereign immunity. In response, the Tribe

and Keshena argue that the Association unilaterally imposed the restrictive covenants, that the Tribe never agreed to the restrictions, and that Keshena did not have any authority to waive the Tribe's immunity.

¶28 A tribe may elect to waive its sovereign immunity by contract, but much like abrogation, a waiver must be clear and unequivocal. *C&L Enters. v. Citizen Band Potawatomi Indian Tribe of Okla.*, 532 U.S. 411, 418 (2001); *Santa Clara Pueblo*, 436 U.S. at 58. Moreover, there is a strong presumption against waiver of tribal sovereign immunity. *Timber & Wood Prods.*, 379 Wis. 2d 690, ¶19.

¶29 The U.S. Supreme Court addressed a tribe's contractual waiver of immunity in *C&L Enterprises*. 532 U.S. at 414. There, a tribe entered a contract—which the tribe had proposed and drafted—with a construction company to replace a roof on a building owned by the tribe. *Id.* at 414-15. When a dispute arose under the contract, the company submitted an arbitration demand pursuant to the contract's arbitration clause, which provided that "all claims or disputes between the Contractor [C&L] and the Owner [the Tribe] arising out of or relating to the contract, or the breach thereof, shall be decided by arbitration." *Id.* at 415. The tribe refused to participate in the arbitration on grounds of sovereign immunity. *Id.* at 416. When the company later filed a lawsuit in state court to enforce the arbitration award, the tribe again asserted sovereign immunity. *Id.* The Court held that the tribe had waived its sovereign immunity from the lawsuit because it "agreed, by express contract, to adhere to certain dispute resolution procedures. In fact, the Tribe itself tendered the contract calling for those procedures." *Id.* at 420. It emphasized that the tribe did not "find

itself holding the short end of an adhesion contract stick," and the company had "foisted no form on a quiescent Tribe." *Id.* at 423. More recently, in *Bay Mills Indian Community*, the Court reiterated that a party who wants to sue a tribe "need only bargain for a waiver of immunity." 572 U.S. at 796.

¶30 This case is readily distinguishable from *C&L Enterprises*. The Tribe did not draft the restrictive covenants or negotiate the restrictions with the Association. The Association unilaterally imposed the restrictive covenants on the Legend Lake parcels in 2009, in an effort to prevent the Tribe from restoring any of the property to its reservation. The Tribe did not purchase or acquire title to the lots. Thus, in the language of the covenants, it is not a "purchaser," did not "accept[] the deed[s]," and did not thereby "consent[] to the exclusive jurisdiction and venue" of the state court or "waive[] any objection to jurisdiction and venue laid therein." The Tribe never affirmatively agreed to waive its sovereign immunity in state court actions regarding the restrictive covenants.

¶31 The Association argues that the Tribe waived its sovereign immunity by authorizing Keshena to act as its agent in purchasing lots subject to the restrictive covenants. It posits that Keshena had both the actual and apparent authority to accept the waiver conditions in the restrictive covenants and that the Tribe is now bound by his actions. A review of Wisconsin's law on agency defeats the Association's position.

¶32 An agent can bind its principal via actual authority or apparent authority. "Actual authority is the power of the agent to do an act on account of the

principal which, with respect to the principal, he is privileged to do because of the principal's manifestations to him." *Mared Indus. v. Mansfield*, 2005 WI 5, ¶23, 277 Wis. 2d 350, 690 N.W.2d 835 (citation modified). On the other hand, "apparent authority binds a principal to acts of another who reasonably appears to a third person to be authorized to act as the principal's agent, because of acts of the principal or agent if the principal had knowledge of those acts and acquiesced to them." *Id.*, ¶22.

¶33 Keshena had neither actual nor apparent authority to waive the Tribe's sovereign immunity. First, Keshena was not granted the actual authority to waive the Tribe's sovereign immunity. The tribal resolution providing for the appointment of a tribal member to acquire title to real property to be placed in trust with the United States did not authorize that member to waive tribal immunity.[10] The Association

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[10] The Tribe also asserts that not only did the Tribal Legislature not authorize Keshena to waive its tribal sovereign immunity, but it could not have done so because the tribal constitution does not permit the Tribal Legislature to waive its sovereign immunity. *See* CONST. AND BYLAWS OF THE MENOMINEE INDIAN TRIBE OF WISCONSIN art. XVIII, §§ 1, 2. We note that the prevailing view among federal circuit courts is that a waiver of tribal sovereign immunity must comply with tribal law to be binding on the Tribe. *See, e.g.*, *Memphis Biofuels, LLC v. Chickasaw Nation Indus.*, 585 F.3d 917, 921-22 (6th Cir. 2009); *Amerind Risk Mgmt. Corp. v. Malaterre*, 633 F.3d 680, 687-88 (8th Cir. 2011); *Caremark, LLC v. Choctaw Nation*, 104 F.4th 81, 90-92 (9th Cir. 2024); *Native American Distrib. v. Seneca-Cayuga Tobacco Co.*, 546 F.3d 1288, 1293 (10th Cir. 2008); *Sanderlin v. Seminole Tribe of Fla.*, 243 F.3d 1282, 1287 (11th Cir. 2001). Several state supreme courts have reached the same conclusion. *See, e.g.*, *Dilliner v. Seneca-Cayuga Tribe*, 258 P.3d 516, 520 (Okla. 2011) ("[T]ribal law controls the way sovereign immunity

points to no acts or statements of the Tribe manifesting an intent to authorize Keshena to waive the Tribe's sovereign immunity in connection with his purchases of land.

¶34 Keshena also did not have apparent authority to waive the Tribe's sovereign immunity. Apparent authority requires three elements to be present: (1) acts by the agent or principal justifying belief in the agency, (2) knowledge of those acts by the principal, and (3) reliance on those acts by the party asserting that apparent authority exists. *See Hansche v. A. J. Conroy, Inc.*, 222 Wis. 553, 560, 269 N.W. 309 (1936); Wis. JI—Civil 4005 (1994). Keshena could not have reasonably appeared to the Association to be authorized to waive the Tribe's sovereign immunity because the Association never dealt with Keshena in connection with his purchases of the lots. Nor can the Association point to anything it did in reliance on Keshena's authority. Without actual or apparent authority, Keshena could not bind the Tribe; thus, his purchase of lots subject to restrictive covenants cannot be deemed to have waived the Tribe's sovereign immunity.

¶35 Accordingly, we hold that neither the Tribe, nor Keshena as the Tribe's agent, waived tribal sovereign immunity over actions relating to the

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can be waived by the Tribe."); *Calvello v. Yankton Sioux Tribe*, 584 N.W.2d 108, 113 (S.D. 1998) ("A waiver . . . must issue from a tribe's governing body, not from unapproved acts of tribal officials."); *Chance v. Coquille Indian Tribe*, 963 P.2d 638, 641 (Or. 1998) (acknowledging that a designation under a tribal resolution did not provide authority to unilaterally waive a tribe's sovereign immunity). Because we resolve the issue of whether Keshena waived the Tribe's sovereign immunity by applying agency law, we need not address this argument.

restrictive covenants. The Tribe did not purchase the lots and never accepted any deeds containing the immunity waiver the Association seeks to enforce against it. The Association identifies no other agreement or statements by the Tribe expressly waiving its sovereign immunity. Nor did Keshena have the actual authority or apparent authority to waive the Tribe's sovereign immunity.

3. In Rem Exception

¶36 The Association next asks this court to recognize a broad "in rem" exception to tribal sovereign immunity. It argues that a tribe's sovereign immunity does not bar an action in rem that does not seek to take possession of property. In other words, it asks this court to conclude that the Tribe has no sovereign immunity from lawsuits brought in Wisconsin courts seeking a judgment against real property within the state's boundaries. *See* WIS. STAT. § 801.07 (in rem actions).[11] In the Tribe's view, an act of Congress is necessary to create an in rem exception to tribal sovereign immunity, and Congress has not so acted. We agree with the Tribe.

¶37 In rem jurisdiction, like personal jurisdiction, provides a basis for a court's exercise of its jurisdiction:

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[11] We note that the complaint in this case was captioned as an in personam action against the Menominee Tribe and Guy Keshena, not as an in rem action naming as its subject a parcel of real property. *See* WIS. STAT. § 801.07; *see also DNR v. Timber & Wood Prods. Located in Sawyer Cnty.*, 2018 WI App 6, 379 Wis. 2d 690, 906 N.W.2d 707 (Ct. App. 2017) (action brought against "timber and wood products located in Sawyer County"). Because the Tribe does not raise the issue, we address the merits of the Association's argument despite this procedural discrepancy.

> If a court's jurisdiction is based on its authority over the defendant's person, the action and judgment are denominated "in personam" and can impose a personal obligation on the defendant in favor of the plaintiff. If jurisdiction is based on the court's power over property within its territory, the action is called "in rem" or "quasi in rem." The effect of a judgment in such a case is limited to the property that supports jurisdiction and does not impose a personal liability on the property owner, since he is not before the court.

Timber & Wood Prods., 379 Wis. 2d 690, ¶30 (quoting *Shaffer v. Heitner*, 433 U.S. 186, 199 (1977)).

¶38 The Supreme Court has recognized that the exercise of in rem jurisdiction by federal admiralty and bankruptcy courts prevails over a state's assertion of sovereign immunity under the Eleventh Amendment. *See, e.g.*, *California v. Deep Sea Rsch.*, 523 U.S. 491 (1998) (where state was not in possession of shipwreck, claims to shipwreck were within exclusive admiralty jurisdiction of federal court under Article III, Section 2, Clause 1, overriding state's assertion of sovereign immunity and claim of title); *Cent. Va. Cmty. Coll. v. Katz*, 546 U.S. 356 (2006) (Bankruptcy Clause authorizes Congress to treat states like other creditors in actions to recover preferential transfers). In *Deep Sea Research* and *Katz*, the Court did not recognize a broad in rem exception to sovereign immunity, but rather resolved an apparent conflict between the Eleventh Amendment and a constitutional provision conferring exclusive federal jurisdiction over a particular subject

matter. No such conflict is present here to warrant a similar limitation on tribal sovereign immunity.

¶39 The U.S. Supreme Court has not addressed whether in rem jurisdiction provides an exception to tribal sovereign immunity. The Court granted certiorari to consider the issue in *Upper Skagit Indian Tribe v. Lundgren*, 584 U.S. 554, 556 (2018). The Court ultimately did not answer that question, however, and instead clarified the scope of its prior decision in *County of Yakima v. Confederated Tribes and Bands of Yakima Indian Nation*, 502 U.S. 251 (1992). *Yakima* addressed whether a state could tax "'fee patented' land [i.e., land not held in trust by the federal government] located within the Yakima Indian Reservation." 502 U.S. at 253. The Court held that federal law allowed the state to impose property taxes on fee patented land in the reservation, but not to impose excise taxes on sales of such land. *Id.* at 270. Lower courts subsequently interpreted *Yakima* broadly to "mean[] Indian tribes lack sovereign immunity in in rem lawsuits." *Upper Skagit*, 584 U.S. at 556. The Court clarified in *Upper Skagit* that "*Yakima* did not address the scope of tribal sovereign immunity" and "resolved nothing about the law of sovereign immunity," but addressed only a "much more prosaic question of statutory interpretation." *Id.* at 558-59. It vacated the Washington Supreme Court's decision misapplying *Yakima* and remanded the case for further proceedings to resolve the parties' dispute as to whether tribal sovereign immunity barred the in rem lawsuit. *Id.* at 559-61.[12]

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[12] The case did not result in a published decision by the Washington Supreme Court on remand.

¶40 Since *Upper Skagit*, the Washington Supreme Court is the only court that has addressed whether sovereign immunity protects tribes against in rem actions. *See Flying T Ranch, Inc. v. Stillaguamish Tribe of Indians*, 577 P.3d 382 (Wash. 2025). In *Flying T Ranch*, a corporation that owned land adjacent to tribal land filed a complaint against the tribe seeking title to a strip of land via adverse possession. *Id.* at 385. The court found that "jurisdiction over real property does not waive tribal sovereign immunity." *Id.* at 390. It thus upheld the tribe's assertion of sovereign immunity, holding that "case law does not support finding in rem jurisdiction over land owned by tribes to determine if there is a viable adverse possession claim." *Id.*

¶41 While this court has not had an opportunity to address this issue, the court of appeals did prior to *Upper Skagit* in *Timber & Wood Products*. *See* 379 Wis. 2d 690. There, the court of appeals considered whether the Department of Natural Resources (DNR) could recover taxes it alleged a tribe owed under Wisconsin's Forest Croplands Law. *Id.*, ¶1. The DNR argued that, notwithstanding the tribe's sovereign immunity, it could assert an in rem claim against the timber and wood products located on the tribal property. *Id.*, ¶30. The circuit court granted the tribe's motion to dismiss, concluding that tribal sovereign immunity barred the suit. *Id.*, ¶1. The court of appeals affirmed, holding that "the Tribe's sovereign immunity prevents the DNR from filing suit against the Tribe or its 'Timber and Wood Products' to collect [] taxes." *Id.*, ¶39. The court, foreshadowing *Upper Skagit*, distinguished *Yakima* on grounds that it resolved a question of the tribe's sovereign *authority*, not sovereign immunity. *Id.*, ¶¶37-39. The

court also cited cases addressing the sovereign immunity of states as persuasive authority that counseled against allowing the DNR's in rem claim to proceed. *See id.*, ¶¶40-46. Lastly, the court reasoned that allowing in rem claims to proceed against tribal property would permit the taking of that property, and "[s]uch a result would be contrary to one of the primary purposes of sovereign immunity—protecting tribal treasuries." *Id.*, ¶47.

¶42 We agree with the reasoning set forth in *Timber & Wood Products* and hold that in rem claims do not operate as an exception to tribal sovereign immunity. Contrary to the Association's argument, the court's analysis in *Timber & Wood Products* did not turn on whether a claim asserted against a tribe seeks possession of property. Rather, the court of appeals correctly read *Yakima* as addressing the scope of a tribe's sovereign authority, not sovereign immunity. This reasoning was borne out by the U.S. Supreme Court's decision in *Upper Skagit*, which clarified that *Yakima* was not intended to defeat tribal immunity in cases brought in rem. Our decision is also consistent with *Flying T Ranch*, the only other decision by a state high court on this issue, and with cases addressing the sovereign immunity of states in actions brought in rem. *See Timber & Wood Prods.*, 379 Wis. 2d 690, ¶¶40-41. And as a practical matter, the Association's claims potentially have significant financial consequences for the Tribe: the restrictive covenants it seeks to enforce would largely block the Tribe from generating income from the land and subject the Tribe to associational dues and assessments, among other things. Allowing such claims to proceed would be fundamentally at odds with protecting tribal treasury, one of the primary

aims of sovereign immunity. Accordingly, we hold that there is no in rem exception to tribal sovereign immunity.

4. Immovable Property Exception

¶43 The Association's final argument is that the common law "immovable property" exception applies to defeat the Tribe's assertion of sovereign immunity because the Keshena lots are "within the territory of another sovereign (the State of Wisconsin)." "Generally speaking, [the immovable property] exception refers to a common law doctrine that curtails sovereign immunity in legal actions contesting a sovereign's rights or interests in real property located within another sovereign's territory." *Cayuga Indian Nation of N.Y. v. Seneca County*, 978 F.3d 829, 834 (2d Cir. 2020). By way of example, "[a] prince, by acquiring private property in a foreign country, may possibly be considered as subjecting that property to the territorial jurisdiction; he may be considered as so far laying down the prince, and assuming the character of a private individual." *Schooner Exch. v. McFaddon*, 11 U.S. (7 Cranch) 116, 145 (1812). Indeed, the exception "developed primarily in the context of international law," premised on the ideas that property ownership is not strictly a sovereign function and that states have an interest in resolving disputes over real property within their territory. *Cayuga Indian Nation*, 978 F.3d at 836.[13]

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[13] The Second Circuit ultimately declined to decide whether the exception limits tribal sovereign immunity, concluding instead that the exception does not apply in foreclosure actions. *Cayuga Indian Nation of N.Y. v. Seneca County*, 978 F.3d 829, 835-40 (2d Cir. 2020).

¶44 The Association argues that tribal sovereign immunity is subject to a common law immovable property exception unless Congress says otherwise, and that Congress has not affirmatively exempted tribal sovereign immunity from the immovable property exception. The Tribe and Keshena counter that Congress has codified an immovable property exception to sovereign immunity applicable to foreign states[14] but has not authorized such an exception to tribal sovereign immunity. Further, they argue that an immovable property exception should not apply here because the Keshena lots are part of the Menominee Reservation and thus within the Tribe's jurisdiction.

¶45 The Association cites no case in which a court has recognized a common law immovable property exception to tribal sovereign immunity.[15] In *Upper Skagit*, even though the plaintiff raised the immovable property exception as an alternate ground to affirm the Washington Supreme Court, the U.S. Supreme Court declined to decide the question. 584 U.S. at 559-61. We note, however, that the land at issue in *Upper Skagit* was not part of the tribe's reservation, but was a parcel purchased by the tribe

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[14] The Foreign Sovereign Immunities Act codified this exception with respect to foreign sovereigns, expressly providing that "[a] foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case . . . in which . . . rights in immovable property situated in the United States are in issue." 28 U.S.C. § 1605(a)(4).

[15] Likewise, Justice Bradley's dissent, although long on invective, identifies no case in which a court has held that the common law immovable property exception applies to limit the sovereign immunity of tribes, relying instead on case law discussing the exception as it applies to states and foreign nations.

in a market transaction. *Id.* at 556-57. This distinction appears to undergird Justice Thomas's dissent, which argued that our nation's founders "would be shocked to learn that an Indian tribe could acquire property in a State and then claim immunity from that State's jurisdiction." *Id.* at 574 (Thomas, J., dissenting).

¶46 Since *Upper Skagit*, two other courts have considered whether an immovable property exception applies to tribal sovereign immunity. The Washington Supreme Court recently declined to recognize a common law immovable property exception to tribal sovereign immunity. *See Flying T Ranch*, 577 P.3d at 391-94. The court rejected the plaintiff's argument that the exception applies because "Congress has taken no action to remove" it, reasoning that, to the contrary, "[t]ribal sovereign immunity applies unless Congress takes action stating otherwise," and Congress has not enacted an immovable property exception to tribal sovereign immunity. *Id.* at 391. The court acknowledged that the exception "primarily emerged in the context of *foreign* sovereign immunity. But tribes are not foreign nations." *Id.* at 392. Rather, "the United States Supreme Court has described tribes as 'domestic dependent nations' with a unique relationship to the federal government." *Id.* (quoting *Cherokee Nation*, 30 U.S. (5 Pet.) at 17). The court recognized, accordingly, that "when Congress enacted the [Foreign Sovereign Immunities Act (FSIA)], it did not expressly include the tribes, suggesting it did not intend the immovable property exception, whether in the FSIA or common law, to apply to tribes." *Id.*

¶47 Likewise, the California Court of Appeal has held that the common law immovable property

exception to sovereign immunity does not extend to tribes. *Self v. Cher-Ae Heights Indian Cmty. of Trinidad Rancheria*, 274 Cal. Rptr. 3d 255, 259 (Cal. Ct. App. 2021), *cert. denied*, 142 S. Ct. 1107 (2022). In reaching this conclusion, the court rejected plaintiffs' reliance on state sovereign immunity, which "turns on the nature of the constitutional compact as informed by the Eleventh Amendment," and "[t]ribes, who were not parties to that compact, did not surrender any aspect of their sovereignty as part of the constitutional plan." *Id.* at 260. Further, the court noted that while *Georgia v. Chattanooga*, 264 U.S. 472 (1924) limits state immunity to traditional sovereign activities, "the Supreme Court has not limited tribal immunity" in that way. *Self*, 274 Cal. Rptr. 3d at 260. The court also rejected plaintiffs' arguments based on foreign sovereign immunity, observing that "tribes are not foreign sovereigns" and that "the relation of the Indians to the United States is marked by peculiar and cardinal distinctions which exist nowhere else." *Id.* at 261 (quoting *Cherokee Nation*, 30 U.S. (5 Pet.) at 16). Lastly, the *Self* court identified two other reasons that counsel against applying an immovable property exception to tribes: "[d]eferring to Congress on tribal immunity has been the Supreme Court's practice for decades" and "tribal land acquisition is a key feature of modern federal tribal policy, which Congress adopted after its prior policy divested tribes of millions of acres of land." *Id.* at 261-62.

¶48 We decline to recognize a common law immovable property exception to tribal sovereign immunity. "[T]he common law immovable property exception has never been applied in the context of Indian tribes, which are domestic dependent nations." *Flying T Ranch*, 577 P.3d at 394. The reasoning of the

two courts that have considered and rejected the exception in the context of tribal sovereign immunity is sound. *See supra* ¶¶46-47; *see also Flying T Ranch*, 577 P.3d at 390-94; *Self*, 274 Cal. Rptr. 3d at 259-63. The sovereign immunity enjoyed by states, foreign governments, and Indian tribes each derives from a distinct source and principles. They are not coextensive. Tribal sovereignty is a recognition of tribes' "'original natural rights' in matters of local self-government," predating the formation of the United States. *Santa Clara Pueblo*, 436 U.S. at 55 (quoting *Worcester*, 31 U.S. (6 Pet.) at 559). Applying an immovable property exception to tribal sovereign immunity would disregard these historical origins and the fact that tribes possess a "special brand of sovereignty" that "rests in the hands of Congress." *Bay Mills Indian Cmty.*, 572 U.S. at 800. As the court in *Self* succinctly explained: "For decades, the Supreme Court has treated tribal sovereign immunity as settled law, and deferred to Congress for the simple reason that it is fundamentally Congress's job, not ours, to determine whether or how to limit sovereign immunity. We see no reason to depart from this practice." 274 Cal. Rptr. 3d at 262 (citation modified). Thus, we defer to Congress to determine whether to carve out further exceptions to tribal sovereign immunity, rather than adopting a heretofore unrecognized exception under the guise of common law.

¶49 Even if the Association had cited any precedent establishing that a common law immovable property exception to tribal sovereign immunity

exists, the exception would not apply in this case.[16] The Association's argument about an immovable property exception is based on the flawed premise that the Keshena lots are exclusively within the territory and jurisdiction of another sovereign, namely the state of Wisconsin. The Keshena lots are now owned by the United States and are part of the Menominee Reservation. "[A]ll land within reservation boundaries is Indian country," COHEN'S HANDBOOK § 4.04[2][c][ii], at 235, and "primary jurisdiction over land that is Indian country rests with the Federal Government and the Indian tribe inhabiting it, and not with the States." *Alaska v. Native Vill. of Venetie Tribal Gov't*, 522 U.S. 520, 527 n.1 (1998). While "the Constitution allows a State to exercise jurisdiction in Indian country," that jurisdiction is not exclusive. *Oklahoma v. Castro Huerta*, 597 U.S. 629, 636 (2022) (holding that state and federal government have concurrent jurisdiction to prosecute crimes committed by non-Indians in Indian country). This overlapping territorial jurisdiction undermines the Association's position that, for purposes of this dispute, the Tribe should be deemed to stand in the position of a private individual, like the hypothetical foreign prince who acquires private property in another nation, thus subjecting himself to that sovereign's jurisdiction. *Schooner Exch.*, 11 U.S. (7 Cranch) at 145.

¶50 Lastly, applying an immovable property exception here would not merely subject the Tribe to the jurisdiction of a state court for the resolution of a dispute. It would fundamentally undercut the Tribe's sovereign *authority* over its reservation lands, as well

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[16] Justice Bradley's dissent concedes that the immovable property exception would not apply to reservation lands.

as the federal government's primary jurisdiction over Indian Country. Thus, even if an immovable property exception to tribal sovereign immunity existed, it would not apply in the present situation.

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¶51 To summarize, nothing abrogates, waives, or otherwise precludes the Tribe's sovereign immunity. Accordingly, the Tribe is immune from the Association's lawsuit.

B. KESHENA

¶52 The Association's action against Keshena also ends here. First, Keshena is no longer a proper defendant. The Association seeks a declaratory judgment that the portions of the 2009 restrictive covenants that do not prohibit transfers to the Tribe are valid and legally enforceable with respect to the Keshena lots. Such a claim is not properly asserted against Keshena because he no longer holds title to or an interest in the Keshena lots: the United States holds title for the benefit of the Tribe. Moreover, the Association has never requested any retrospective relief against Keshena.

¶53 Second, even if Keshena remained a proper defendant, the Tribe's sovereign immunity would bar the claims raised against Keshena, because the Tribe is the real party in interest. To determine if a sovereign is the real party in interest, courts "must determine in the first instance whether the remedy sought is truly against the sovereign." *Lewis v. Clarke*, 581 U.S. 155, 162 (2017). This rule applies with equal force "in the context of tribal sovereign immunity." *Id.* at 163. The Association's desired remedy—enforcement of the 2009 restrictive

covenants against the Keshena lots—would operate against the Tribe, as it is the beneficiary of land held in trust by the United States. Keshena was named as a defendant to prohibit him from transferring the lots to the United States—something that has already happened and that the Association cannot further challenge in state court. The Tribe's sovereign immunity bars the Association's remaining claims asserted against Keshena.

III. CONCLUSION

¶54 Tribal sovereign immunity is the rule, not the exception. A litigant can overcome tribal sovereign immunity if Congress abrogates it or if a tribe clearly waives it. Neither occurred here. Nor does the Association persuade us that in rem or immovable property exceptions defeat a tribe's sovereign immunity from suit. The Tribe's sovereign immunity extends to Keshena, assuming he is a proper defendant in this case, because the Tribe is the real party in interest. Our determination that the Tribe and Keshena are immune from suit is dispositive and we reach no other issue raised by the parties.

¶55 Today's decision provides finality to the parties and acknowledges that factual circumstances have changed since the filing of the complaint, namely that the United States now holds title to the Keshena lots. We acknowledge that "a fundamental commitment of Indian law is judicial respect for Congress's primary role in defining the contours of tribal sovereignty." *Bay Mills Indian Cmty.*, 572 U.S. at 803. The "[e]xclusion of states from tribal and Indian affairs was a founding principle of constitutional law and federal policy." COHEN'S HANDBOOK § 7.01, at 428-29. Our decision accords

with these principles, affirming that tribes are immune from suit in Wisconsin state courts unless such immunity is expressly abrogated by Congress or affirmatively waived by the tribe.

By the Court.—The judgment of the circuit court is affirmed.

REBECCA GRASSL BRADLEY, J., with whom ANNETTE KINGSLAND ZIEGLER, J., joins, dissenting.

¶56 "The correct answer cannot be that the tribe always wins no matter what; otherwise a tribe could wield sovereign immunity as a sword and seize property with impunity, even without a colorable claim of right." *Upper Skagit Indian Tribe v. Lundgren*, 584 U.S. 554, 562 (2018) (Roberts, C.J., concurring). The majority confers the sword of sovereign immunity on tribes, replacing "the common-law immunity from suit traditionally enjoyed by sovereign powers[,]" *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978), with absolute immunity subject only to Congress's specific articulations of exceptions to sovereign immunity. The majority has no authority to require Congress to enact common-law exceptions, and it has no basis in law for granting tribes immunity beyond what the common law provides.

¶57 I join Justice Hagedorn's dissent in full because the majority improperly resolves this dispute without the participation of the United States, which owns the property at issue. I write separately because the majority's usurpation of Congress's prerogative should not evade criticism simply due to its error at the threshold.

¶58 Under the law, tribes have only the "common-law immunity from suit traditionally enjoyed by

sovereign powers." *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 788 (2014) (quoting *Santa Clara Pueblo*, 436 U.S. at 58). Such immunity includes all exceptions under the common law. Specifically, "a foreign sovereign's immunity does not extend to 'an action to obtain possession of or establish a property interest in immovable property located in the territory of the state exercising jurisdiction.'" *Permanent Mission of India to the United Nations v. City of New York*, 551 U.S. 193, 200 (2007) (quoting RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 68(b), p. 205 (1965)) (discussing the status of the immovable property exception at the time of enactment of the Foreign Sovereign Immunities Act of 1976). The immovable property exception is a common-law exception to sovereign immunity, and it is deeply rooted in the nation's history. *Upper Skagit Indian Tribe*, 584 U.S. at 566-67 (Thomas, J., dissenting) (citing H. Lauterpacht, *The Problem of Jurisdictional Immunities of Foreign States*, 28 BRIT. Y.B. INT'L L. 220, 244 (1951)) (observing that the immovable property exception to sovereign immunity has existed for centuries and "has been hornbook law almost as long as there have been hornbooks"); *see Schooner Exch. v. McFaddon*, 11 U.S. (7 Cranch) 116, 145 (1812).

¶59 Sovereigns lack immunity over immovable property within the territory of another sovereign because "property ownership is not an inherently sovereign function." *Permanent Mission of India to the United Nations*, 551 U.S. at 199. Indeed, the Supreme Court has long observed that "[a] prince, by acquiring private property in a foreign country, may possibly be considered as subjecting that property to the territorial jurisdiction; he may be considered as so

far laying down the prince, and assuming the character of a private individual." *Schooner Exch.*, 11 U.S. (7 Cranch) at 145. Concomitantly, "[a] territorial sovereign has a primeval interest in resolving all disputes over use or right to use of real property within its own domain." *Asociacion de Reclamantes v. United Mexican States*, 735 F.2d 1517, 1521 (D.C. Cir. 1984) (Scalia, J.).

¶60 "[B]ecause 'land is so indissolubly connected with the territory of a State,' a State 'cannot permit' a foreign sovereign to displace its jurisdiction by purchasing land and then claiming 'immunity.'" *Upper Skagit Indian Tribe*, 584 U.S. at 568 (Thomas, J., dissenting) (quoting *Competence of Courts in Regard to Foreign States*, 26 AM. J. INT'L L. SUPP. 451, 578 (1932)). The immovable property exception is so pervasive in the common law that it applies not only to foreign sovereigns but also to the States. *See Permanent Mission of India to the United Nations*, 551 U.S. at 200; *Georgia v. Chattanooga*, 264 U.S. 472, 480 (1924) ("Land acquired by one state in another state is held subject to the laws of the latter and to all the incidents of private ownership.").

¶61 This common-law exception to sovereign immunity applies to tribes because they have the "common-law immunity from suit traditionally enjoyed by sovereign powers." *Bay Mills Indian Cmty.*, 572 U.S. at 788 (quoting *Santa Clara Pueblo*, 436 U.S. at 58). The common-law immunity from suit traditionally enjoyed by sovereign powers naturally carries with it all the caveats and exceptions existing at common law, including the exception for immovable property located in the territory of another sovereign. In granting tribes immunity in contravention of the common law, the majority manufactures a novel

immunity with no legal foundation. By fashioning a new rule based on its preferences, the majority usurps Congress's prerogative in this realm, and unlawfully expands sovereign immunity with no authority to do so.

¶62 The majority gaslights the reader by declaring tribal immunity from suit over property located in the territory of another sovereign to be "settled law" while proclaiming its deference to Congress. Majority op., ¶48. Far from applying "settled law," the majority invents a new immunity for tribes out of whole cloth. The majority cites zero binding authority or even a consensus of other jurisdictions in accord with the majority to support its farcical assertion. Instead, the majority parrots two non-binding cases in which other courts expanded immunity in so called "deference" to Congress, along with United States Supreme Court precedent generally declaring tribal sovereign immunity "settled law."

¶63 If the majority actually were deferring to Congress, it would recognize the immovable property exception is well-rooted in the common law and has been left undisturbed by Congress. Congressional inaction leaves the default rule intact. Without explaining why, the majority simplistically assumes Congress wanted absolute immunity for the tribes. The majority's inference is baseless. The non-binding cases on which the majority relies in turn rely on cases addressing immunity for commercial activities. The law on *that* subject may indeed be considered settled because the Court has repeatedly addressed it. In contrast, the last time the immovable property exception was brought before the Court, it declined to address the issue.

¶64 As the law currently stands, tribes are not immune from suits concerning immovable property located in the territory of another sovereign. "[T]ribes possess the 'common-law immunity from suit traditionally enjoyed by sovereign powers.'" *Lac du Flambeau Band of Lake Superior Chippewa Indians v. Coughlin*, 599 U.S. 382, 387 (2023) (quoting *Santa Clara Pueblo*, 436 U.S. at 58). A sovereign who acquires immovable property in another sovereign's territory assumes the character of a private individual. *See Schooner Exch.*, 11 U.S. (7 Cranch) at 145; *Permanent Mission of India to the United Nations*, 551 U.S. at 199-200; *Georgia v. Chattanooga*, 264 U.S. at 480. Courts cannot extend tribal sovereign immunity beyond what the common law provides. *See Lewis v. Clarke*, 581 U.S. 155, 163-64 (2017). "Settled law" compels this court to acknowledge and respect the immovable property exception. The United States Supreme Court's recent decision not to revisit the exception does not give this court free rein to alter the common law.

¶65 In an effort to establish a legal basis for its ruling, the majority notes "that tribes possess a 'special brand of sovereignty'" distinct from foreign nations and the States. Majority op., ¶48. It reasons that because "[t]ribal sovereignty is a recognition of tribes' original natural rights in matters of local self-government," the immovable property exception does not apply to tribes. *Id.* (citation omitted) (citation modified). The majority attempts to distinguish tribes from foreign nations and the States because Congress has articulated the scope of sovereignty applicable to foreign nations in the Foreign Sovereign Immunities Act, and States' immunities are limited by the constitutional compact—neither of which applies to

tribes. *Id.*, ¶¶46-47. While tribes do derive their immunity from their "original natural rights," tribes nevertheless possess only "common-law immunity from suit traditionally enjoyed by sovereign powers." *Coughlin*, 599 U.S. at 387. The majority identifies nothing about the "original natural rights" of tribes that alters their common law immunity.

¶66 The fact that Congress enacted a law codifying the limits of sovereign immunity of foreign nations has no bearing on the scope of the sovereign immunity of tribes. *See Permanent Mission of India to the United Nations*, 551 U.S. at 200 ("[T]he [Foreign Sovereign Immunities Act] was also meant 'to codify . . . the pre-existing real property exception to sovereign immunity recognized by international practice.'" (quoting *Asociacion de Reclamantes*, 735 F.2d at 1521 (Scalia, J.))). The Foreign Sovereign Immunities Act has nothing to say about the sovereign immunity of tribes. "The principle that a matter not covered is not covered is so obvious that it seems absurd to recite it." *Koble Investments v. Marquardt*, 2026 WI 19, ¶37, __ Wis. 2d __, __ N.W.2d __ (Bradley, J., concurring) (quoting ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 93 (2012)).

¶67 The immovable property exception applies to the States not because of the constitutional compact but because acquiring property in the territory of another sovereign "is a private undertaking[,]" and a State's sovereignty does not extend into the territory of another sovereign. *Georgia v. Chattanooga*, 264 U.S. at 481. These principles apply to tribes with equal force, but the majority inexplicably refuses to apply a rule that explicitly applies to virtually every sovereign in existence. The majority neglects to

explain what "'original natural rights' in matters of local self government" belong to tribes that confer immunity from suit regarding land outside of their territory—a right that belongs to no other sovereign.

¶68 With no legal basis, the majority expands tribal immunity beyond what sovereigns traditionally enjoyed at common law. Puzzlingly, the majority professes to defer to Congress by concocting a new immunity rule requiring Congress to expressly declare common-law exceptions to immunity before the majority will acknowledge them. Far from "deferring" to Congress, the majority unlawfully tells Congress what it must do to prevent the judiciary from invading Congress's realm. At the same time, the majority flouts longstanding Supreme Court precedent recognizing tribal common-law immunity. *See Coughlin*, 599 U.S. at 387; *Santa Clara Pueblo*, 436 U.S. at 58; *Bay Mills Indian Cmty.*, 572 U.S. at 788.

¶69 In the face of contrary law and marshalling only feeble reasoning, the majority resorts to policy justifications for its activism, arguing that supporting tribal land acquisition is a key feature of modern federal tribal policy. Majority op., ¶47. So? Although the Supreme Court has permitted the policies of the political branches to alter its immunity determinations, the Court has clearly prohibited the judiciary from "allow[ing] an immunity on new grounds which the government has not seen fit to recognize." *Republic of Mexico v. Hoffman*, 324 U.S. 30, 35 (1945). The fact that Congress supports the growth of reservations does not authorize the judiciary to immunize tribes from suits involving non reservation land.

¶70 Actual deference to Congress should compel this court to refrain from extending immunity in cases concerning immovable property outside of a tribe's territory. Congress's decision not to expand immunity does not allow the judiciary to alter the scope of common-law immunity. Nothing in the law requires Congress to appease the majority's request for an explicit delineation of common-law immunity. Forcing Congress to override the majority's activism creates a serious separation of powers problem. Instead of remaining within the judicial domain of interpreting the law, the majority invades the legislative domain of making the law. The majority creates absolute immunity restricted only by Congress's pronounced exceptions, effectively eliminating longstanding exceptions to which tribes were already subject.

¶71 To make matters worse, the court's error was entirely avoidable. During the course of this litigation, the United States took the property into trust, making the disputed land part of the Tribe's reservation. In this case, the Legend Lake Property Owners Association, Inc.'s suit concerns land within the Tribe's territory. Because the land is part of the Tribe's reservation, the immovable property exception does not apply in this case—which the majority explicitly acknowledges.[1] Majority op., ¶49. The

[1] The majority says I "concede[] that the immovable property exception would not apply to reservation lands[,]" but the majority misses the point. Majority op,. ¶49 n.16. The immovable property exception applies only when the sovereign owns land in the territory of another sovereign. Because the land at issue exists within the Tribe's reservation, the immovable property exception does not apply in this case. Because the

majority could have reached the result it wanted without rewriting the law in the process. Rather than deciding the case before the court, the majority promulgates a new rule contravening the traditional common-law immunity enjoyed by sovereigns. Because the court usurps the prerogative of Congress and decides issues impacting United States' property without the United States present, I dissent.

BRIAN K. HAGEDORN, J., with whom ANNETTE KINGSLAND ZIEGLER and REBECCA GRASSL BRADLEY, JJ., join, dissenting.

¶72 This case raises thorny federal and tribal law issues affecting the property rights pertaining to lots in the Legend Lake Property Owners Association. But these questions come to us in a most unusual posture. The long and short of it is that the owner of the lots—the United States government—is not a party to this case. Therefore, we should not decide these weighty and consequential legal questions without the owner of the property having its day in court.

¶73 Bear with me here; we must dip our feet into the messy procedural waters to understand how we got here. In 2017, a member of the Menominee Indian Tribe named Guy Keshena purchased the lots at issue. Under the Menominee Restoration Act, and as a member of the Tribe, Keshena could ask the United States to hold these properties in trust for the Tribe. He did so in 2018. Later that year, the Association commenced this litigation in state court against

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exception does not apply, the majority's decision to write the exception out of the law is unnecessary. The majority should explain why it opines on an issue that has no bearing on the disposition of the case—in the process doing grave damage to the law.

Keshena and the Tribe seeking to enforce its restrictive covenants on the land. The Association also challenged the transfer of the lots to the United States before the Bureau of Indian Affairs, and later in federal court. In the end, the upshot for our purposes is that the land was accepted by the United States into trust and officially transferred to it in 2023. Federal litigation in 2024 upheld this transfer. Meanwhile, back in 2022, the circuit court in our case granted the Tribe's motion to dismiss. The Association appealed, and after accepting additional briefing on the effects of the federal decision, the court of appeals certified the case to us in January 2025.

¶74 This litigation, then, was fundamentally transformed in 2023—five years after the initial suit was filed and well after the circuit court's decision we are reviewing. This suit continues before us with the Association on the one hand and the Tribe and Keshena on the other hand. Who's missing? The United States—the party that owns the land. Thus, it is exceedingly odd—and in my view, improper—for this court to pass judgment on complicated matters of federal and tribal law when the property owner potentially affected by those determinations is not a party to the litigation.

¶75 It seems obvious that the property owner should be included in litigation that adjudicates the rights and duties attendant to that property. More importantly, our rules of civil procedure require it.

¶76 WISCONSIN STAT. § 803.03(1) provides that a party must be joined to the litigation if certain criteria are satisfied. First, the potential party must "claim[] an interest relating to the subject of the action." WIS.

STAT. § 803.03(1).[1] The United States has claimed an interest in the property and defended against a suit challenging this right in federal court. Proceeding to the second requirement, the party must be joined if either of two conditions is met: 1) "In the person's absence complete relief cannot be accorded among those already parties," or 2) the judgment will "[a]s a practical matter impair or impede the person's ability to protect that interest." WIS. STAT. § 803.03(1)(a); § 803.03(1)(b)1. Both of these are satisfied. This litigation seeks to create binding duties and recognize certain rights and limitations regarding real property. But that can't happen in a way that binds the landowner without the landowner participating in the litigation. That is, the Association would want the landowner to fulfill the obligations it seeks to impose on the land, which cannot be made effective without the landowner participating and therefore being subject to the court order. Thus, complete relief cannot be given because the United States is not bound by any judgment. In the alternative, the United States' interest in using the properties would be impaired or impeded by an adverse judgment in this case because a judgment about the property rights pertaining to land will obviously impact the landowner. In this case, the landowner is the United States, so the United States ought to have a voice in these proceedings. From any vantage point, the requirements of § 803.03(1) are satisfied.

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[1] The statute also calls for joinder if the judgment will "[l]eave any of the persons already parties subject to a substantial risk of incurring double, multiple or otherwise inconsistent obligations by reason of his or her claimed interest." WIS. STAT. § 803.03(1)(b)2. This provision does not apply here.

¶77 That being the case, the statute *requires* the United States to be joined unless it "cannot be made a party." WIS. STAT. § 803.03(3). Here, the Association argues that the United States cannot be made a party because of its own sovereign immunity. This, too, is an argument that we should allow the United States to answer for itself. But even if the United States could not be made a party, the court must still consider "whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed" because the absent party is "indispensable." *Id.* The statute provides four factors to consider in determining whether a party is indispensable:

> (a) To what extent a judgment rendered in the person's absence might be prejudicial to the person or those already parties;
>
> (b) The extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided;
>
> (c) Whether a judgment rendered in the person's absence will be adequate; and
>
> (d) Whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

Id.

¶78 Here, the equities and conscience weigh heavily in favor of finding the United States indispensable. As already mentioned, a judgment may be prejudicial to the United States. There is no remedy to shape the burdens on the land without the presence of the landowner. And as already explained, the judgment is not adequate without the United

States because the judgment would impose restrictions on the land, presumably to be enforced against the landowner. If the Association has a right to a remedy, it can obtain judgment against the United States in some other proceeding. These factors in our civil procedure statute counsel in favor of dismissing the action. While the majority also dismisses the case, it does so based on its answers to the broad jurisdictional questions, all without the United States. Even if the United States cannot be joined, the correct answer is not to plunge ahead and resolve the important and messy federal questions. Rather, the case should be dismissed as a matter of procedure, and leave the resolution of weightier questions to a case that has the necessary and indispensable parties. These statutes, then, do double work against the majority's approach. First, they require joining the United States to this action. Second, if the United States could not be joined, the statutory factors require dismissing the action as a matter of procedure—not resolving the jurisdictional dispute without the appropriate parties.

¶79 The Tribe and Keshena also argue that our declaratory judgment statute requires the United States to be joined. It provides: "When declaratory relief is sought, all persons shall be made parties who have or claim any interest which would be affected by the declaration, and no declaration may prejudice the right of persons not parties to the proceeding." WIS. STAT. § 806.04(11). The Association does seek a declaratory judgment, and the interests of the United States would be affected by a court ruling adjudicating property rights on land it owns. Under these procedural requirements as well, the United States must be made a party to this action.

¶80 In the face of all this, the majority ignores these matters of procedural law and decides the far-reaching substantive issues before us. The majority contends it is proper to wade into these matters because tribal sovereign immunity is a jurisdictional defense. Majority op., ¶15 n.8.

¶81 There are at least two problems with this argument. First, the majority cites no Wisconsin authority mandating its methodology here. The decision to wade into these matters is one of choice, not necessity. Second, and more importantly, the court's decision in this case is not the type of immunity claim that ignores the merits. It is rather an immunity claim that is intimately intertwined with the merits of the dispute. The majority decides important and far-reaching matters of federal law that have vast consequences for the rights of tribes, private parties who do business with tribes, and the actual landowner—the United States.

¶82 Rather than issue a sweeping ruling, the more prudent path—and the procedurally mandated course—is to send this case back to the circuit court for a consideration of whether the United States can be joined as a party. While the circuit court already rendered a decision, this was before circumstances changed in 2023. This court should not decide these substantive questions without the proper parties before it. For these reasons, I respectfully dissent.

Filed January 22, 2025

Court of Appeals of Wisconsin

Legend Lake Property Owners Association, Inc.,
Plaintiff-Appellant,

v.

Guy Keshena and
The Menominee Indian Tribe of Wisconsin,
Defendants-Respondents.

Appeal No. 2022AP937

Cir. Ct. No. 2018CV7

CERTIFICATION BY WISCONSIN COURT OF APPEALS

Before Stark, P.J., Hruz and Gill, JJ.

Opinion

Pursuant to WIS. STAT. RULE 809.61 (2021-22),[1] this appeal is certified to the Wisconsin Supreme Court for its review and determination.

ISSUES

This lawsuit involves properties accepted into trust by the federal government on behalf of one of Wisconsin's eleven federally recognized Indian tribes. This case presents several issues regarding an incorporated property association's attempt to enforce restrictive covenants attached to those properties. The Legend Lake Property Owners Association, Inc. (the Association), filed a declaratory judgment action to enforce previously recorded restrictive covenants

[1] All references to the Wisconsin Statutes are to the 2021-22 version unless otherwise noted.

affecting those properties acquired by the Menominee Indian Tribe of Wisconsin (the Tribe). The circuit court ultimately granted the Tribe's motion to dismiss after concluding that the court lacked jurisdiction to enforce the restrictive covenants because either that enforcement was preempted by the Menominee Restoration Act, Pub. L. No. 93-197, § 3(b), 87 Stat. 770 (1973) (MRA), or in the alternative, that the Tribe did not waive its sovereign immunity, and no exception to sovereign immunity applied.

The first three issues addressed in this certification concern whether the Tribe's sovereign immunity prevented the circuit court from having personal jurisdiction over the Tribe to hear the Association's declaratory judgment action. The parties dispute whether: (1) Congress abrogated the Tribe's sovereign immunity through the MRA; (2) there exists an "in rem" or an "immovable property" exception to tribal sovereign immunity and, if so, whether either of those exceptions apply under the facts of this case; and (3) the Tribe waived its sovereign immunity by purchasing the properties in question. The last issue addressed in this certification concerns whether the MRA preempts the 2009 restrictive covenants.

Because these issues raise novel questions regarding the application of tribal sovereign immunity and federal preemption principles, we certify this appeal to the Wisconsin Supreme Court.[2]

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[2] The Association raises two other issues on appeal challenging the procedure by which the circuit court dismissed its lawsuit. First, the Association challenges the court's ability to dismiss a lawsuit on the merits after concluding that it lacks jurisdiction to hear the case. Second, the Association argues that

BACKGROUND

In 1854, the United States and the Tribe entered into the Treaty of Wolf River, under which, "in exchange for other lands previously claimed and held by the [Tribe], the United States granted to [the Tribe] certain lands, the bulk of which comprised what is now Menominee [C]ounty." *Van Camp v. Menominee Enters., Inc.*, 68 Wis. 2d 332, 334, 228 N.W.2d 664 (1975). The treaty provided that the land was "for a home, to be held as Indian lands are held." *Menominee Tribe of Indians v. United States*, 391 U.S. 404, 405 (1968) (citation omitted). The land totaled approximately 234,000 acres and was held in trust by the United States. *See Van Camp*, 68 Wis. 2d at 334-35.

For reasons not relevant to this lawsuit, the federal government terminated federal supervision of the Tribe in 1954 through the Menominee Indian Termination Act. *See Menominee Tribe of Indians*, 391 U.S. at 408. The Termination Act provided for the "orderly termination of Federal supervision over the property and members" of the Tribe. *Id.* (citation omitted). Pursuant to the Termination Act, a tribal corporation, Menominee Enterprises, Inc. (MEI), was created to hold legal title to tribal property and manage certain tribal assets. Joseph F. Preloznik &

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the court applied an improper standard of review to the Tribe's motion for reconsideration.

We do not believe that either of these additional issues, in and of themselves, are worthy of certification, and we therefore do not address them further. However, if the Wisconsin Supreme Court were to accept this certification, it would acquire jurisdiction over the entire appeal, including all issues raised before this court. *See State v. Denk*, 2008 WI 130, ¶29, 315 Wis. 2d 5, 758 N.W.2d 775.

Steven Felsenthal, *The Menominee Struggle to Maintain their Tribal Assets and Protect their Treaty Rights following Termination*, 51 N.D. L. REV. 53, 56-57 (1974).

In 1967, facing financial challenges, MEI passed a resolution permitting the sale of tribal lands held by MEI pursuant to the Termination Act to nontribal members. *Id.* at 64. MEI entered into an agreement with a land developer whereby they established a joint venture to undertake a land and lake development project known as Legend Lake. *Id.* Over the objection of many tribal members, roughly five thousand tribal acres were contributed to the Legend Lake development, some of which were later returned to, or repurchased by, the Tribe.[3] *Id.* at 64-65. That being said, much of the land in the Legend Lake development was sold to nontribal members. *See id.* at 64.

According to the Association's complaint in this action, the plat map governing the Legend Lake development contained restrictive covenants which operated as deed restrictions. These restrictive covenants expired in 1999; however, they permitted the creation of an owner's association, which was established in 1972 as a corporation—i.e., the Association. The Association is composed of property owners in and around Legend Lake, and, pursuant to its articles of incorporation, membership in the Association is "mandatory" for all property owners of record. The complaint states that the Association's

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[3] A lawsuit ensued seeking to halt the sale of more tribal land for the Legend Lake development. *See Tomow v. Menominee Enters., Inc.*, 60 Wis. 2d 1, 26-28, 208 N.W.2d 824 (1973) (ruling against the plaintiff tribal members).

"principal purpose . . . has been the collective and efficient management, maintenance, preservation, and operation of properties within Legend Lake."

In 1973, the federal government passed the MRA, which repealed the Termination Act and "reinstated all rights and privileges of the [T]ribe or its members under Federal treaty, statute, or otherwise which may have been diminished or lost pursuant to the [Termination Act]." Menominee Restoration Act § 3(b).[4]

Under the MRA, "[t]he Secretary [of the Interior] shall accept the real property . . . of members of the Menominee Tribe, but only if transferred to him [or her] by the Menominee owner or owners." Menominee Restoration Act § 6(c). The real property "shall be taken in the name of the United States in trust for the [Tribe] and shall be part of their reservation." Menominee Restoration Act § 6(b). Following a property transfer to the United States in trust, the real property "shall be exempt from all local, State, and Federal taxation." Menominee Restoration Act § 6(c). The MRA also declares,

> Such property shall be subject to all valid existing rights including, but not limited to, liens, outstanding taxes (local, State, and Federal), mortgages, and any other obligations. The land transferred to the Secretary . . . shall be subject to foreclosure or sale pursuant to the terms of any valid existing obligation in accordance with the laws of . . . Wisconsin.

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[4] The MRA was previously codified in 25 U.S.C. §§ 903d-903f; however, since 2016, the MRA has been omitted from the United States Code.

Id. Elsewhere, the MRA states, "Except as specifically provided in this Act, nothing contained in this Act shall alter any property rights or obligations, any contractual rights or obligations, including existing fishing rights, or any obligations for taxes already levied." Menominee Restoration Act § 3(d).

In 1998, prior to the expiration of the original restrictive covenants, the Association amended its bylaws to include new restrictive covenants. This amendment led to litigation and eventually an appeal before this court. In 2006, we held that "the Association could, through its by[ ]law process, properly re-create and expand the property restrictions that expired in 1999 and can continue to maintain itself as a perpetual organization." *Legend Lake Prop. Owners Ass'n, Inc. v. Lemay*, No. 2004AP2537, unpublished slip op. ¶4 (WI App Jan. 26, 2006).

The bylaws were amended again in 2001 and 2009. The 2009 amendment adopted additional restrictive covenants ("2009 restrictive covenants"), which, according to the bylaws, are "intended to preserve the tax base of Menominee County" and "increase property values of Legend Lake properties by [e]nsuring compliance with state and local municipal control and governance, and to assure compliance with membership responsibilities." The 2009 restrictive covenants were recorded with the Menominee County Register of Deeds.

In relevant part, the 2009 restrictive covenants state:

> **1. <u>Restriction on transfer.</u>**
>
> . . . .

B. Without the express written consent of the Association . . . no owner of any interest in the Subject Real Estate (or any part thereof) shall transfer any interest in the Subject Real Estate to any individual, entity . . . , organization, or sovereign or dependent sovereign nation, or during the period of ownership take any action, the result of which could or would:

> (1) remove or eliminate the Subject Real Estate . . . from the tax rolls of Menominee County . . . ,
>
> (2) diminish or eliminate the payment of real estate taxes duly levied or assessed against the Subject Real Estate . . . . ,
>
> (3) remove the Subject Real Estate . . . from the zoning authority and general municipal jurisdiction of Menominee County . . . . ,
>
> (4) remove the Subject Real Estate . . . from the general municipal jurisdiction of the State of Wisconsin . . . . ,
>
> (5) remove the Subject Real Estate . . . from the obligations and/or restrictions imposed on [that property] by the duly adopted bylaws and resolutions of the Association, to include, without limitation, the obligation to pay all dues and assessments properly levied by the Association.

C. . . . . This restriction shall . . . expressly apply to any application to have the Subject Real Estate . . . placed into federal trust pursuant to the Indian Reorganization Act.

D. Any owner of an interest in the Subject Real Estate (or any part thereof) shall at all times comply with any and all municipal and Association laws, rules, regulations and obligations as set forth in the foregoing restrictions, to include, without limitation, the property tax collection laws set forth in [WIS. STAT. chs.] 74 and 75 . . . . The Subject Real Estate remains subject to said municipal and Association laws, rules, regulations and obligations, in rem, notwithstanding a transfer to an owner not otherwise subject to them.

E. Any purported transfer of any interest in the Subject Real Estate . . . in violation of these restrictions shall be null and void.

. . . .

4. <u>Miscellaneous.</u>

. . . .

F. <u>Applicable law; Jurisdiction and Venue</u>. Any and all actions or proceedings seeking to enforce any provision of, or based upon any right arising out of, these Restrictive Covenants running with the land <u>shall</u> be brought against a party in the Circuit Court of Menominee County . . . , and any purchaser and/or transferee of the land that is a party to any such action, by accepting the deed thereto, consents to the exclusive jurisdiction and venue of such

> court (and the appropriate appellate courts therefrom) in any such action or proceeding and waives any objection to jurisdiction and venue laid therein.
>
> G. Waiver of Defense. By acceptance of a deed transferring title ownership of any portion of the Subject Real Estate, the title owner hereby waives any defense to an action filed with respect to these Restrictive Covenants by the Association based on sovereign immunity, and expressly consents to suit as provided for in Paragraph 4F above, and enforcement of any judgment rendered therein.

(Formatting altered.)

Around 2017, Guy Keshena, who is a member of the Tribe, acquired title to forty parcels of land located within the Legend Lake development as "a single person for and on behalf of the [Tribe]" for the express purpose of conveying the parcels to the United States to be held in trust pursuant to the MRA. The Tribe then requested that the Bureau of Indian Affairs (BIA) place the parcels into trust. The BIA accepted the parcels after finding that the trust acquisitions were "mandated" by the MRA.[5] *See Legend Lake Prop.*

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[5] The BIA accepted the parcels into trust in three decisions. *See Legend Lake Prop. Owners Ass'n v. Midwest Reg'l Dir., Bureau of Indian Affs.*, 68 Interior Dec. 284, 284-85 & 285 n.2 (IBIA 2023).

There were 40 parcels at issue in the federal litigation before the BIA. *See id.* The complaint in this case listed only 34 parcels—33 "owned" by Keshena and one "owned" by the Tribe. This discrepancy has not been addressed by the parties. In addition, the Association in this case abandoned its declaratory

Owners Ass'n v. Midwest Reg'l Dir., Bureau of Indian Affs., 68 Interior Dec. 284, 288 (IBIA 2023).

Shortly after the BIA accepted the parcels into trust, the Association filed the present lawsuit in Menominee County Circuit Court against the Tribe. The Association sought a declaratory judgment that: (1) the 2009 restrictive covenants are valid and legally enforceable; (2) the 2009 restrictive covenants apply to the parcels at issue; and (3) any transfers of the parcels in violation of the 2009 restrictive covenants are null and void.

The Tribe filed a motion to dismiss, arguing, among other things, that the 2009 restrictive covenants are preempted by the MRA and that the Tribe's sovereign immunity barred the lawsuit in its entirety. The circuit court denied the Tribe's motion after concluding that the "in rem" exception to sovereign immunity applied and, relying on *Baylake Bank v. TCGC, LLC*, No. 08-C-608, 2008 WL 4525009 (E.D. Wis. Oct. 1, 2008), that the 2009 restrictive covenants are not preempted by the MRA.[6] The Tribe filed a petition for leave to appeal that decision, which we denied in June 2019.

Thereafter, the Tribe filed a motion for reconsideration of the circuit court's decision denying its motion to dismiss. On reconsideration, the circuit court held that the MRA preempts the 2009 restrictive covenants and that the Association does not have "legal authority to create law or ask this court to

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judgment action with respect to the one parcel owned by the Tribe.

[6] The Honorable James R. Habeck issued the order denying the Tribe's motion to dismiss.

prevent the restoration of the . . . land to the [Tribe]."[7] The court also held that the lawsuit was prevented on sovereign immunity grounds and that the in rem exception to sovereign immunity did not apply. Accordingly, the court granted the Tribe's motion for reconsideration and issued a judgment of dismissal with prejudice in the Tribe's favor.

Concurrent with the state action, the Association sought review of the BIA's trust determinations with the Interior Board of Indian Appeals (IBIA). The Association argued that the 2009 restrictive covenants barred transfer of the parcels into trust. *Legend Lake*, 68 Interior Dec. at 292; *see also* 43 C.F.R. § 4.1(b)(1) (2024) (outlining the IBIA's authority to hear appeals).

The IBIA concluded that the 2009 restrictive covenants—specifically those provisions barring the transfer of the parcels into trust—were preempted by the MRA.[8] *Legend Lake*, 68 Interior Dec. at 293. The IBIA also held that "[t]he record supports the [BIA] determination that the trust acquisition criteria established in [§ 6(c) of the Menominee Restoration Act] are satisfied and [Legend Lake] concedes that the trust acquisitions were therefore mandatory under the [MRA]." *Legend Lake*, 68 Interior Dec. at 285.

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[7] The Honorable Katherine Sloma issued the order granting the Tribe's motion for reconsideration.

[8] The Association also raised several contract claims before the IBIA. On jurisdictional grounds, the IBIA declined to address the Association's claims, concluding that "[t]o whatever extent the Association might have justiciable breach of contract claims against *Keshena or the Tribe* based on the [2009 restrictive covenants], proper adjudication of those claims l[ies] before a forum other than the [IBIA] (as the Association has so pursued)." *Legend Lake*, 68 Interior Dec. at 297.

According to the IBIA, the MRA's mandatory criteria do not include consideration of restrictive covenants. *Id.* at 291-92. Therefore, the IBIA concluded that title to the parcels was correctly conveyed to the United States to be held in trust for the Tribe.[9]

The Association then challenged the IBIA decision in federal district court pursuant to the APA. *See* 5 U.S.C. § 701 et seq. In turn, the Tribe filed a motion to dismiss, which the United States District Court for the Eastern District of Wisconsin granted. *See Legend Lake Prop. Owners Ass'n v. United States Dep't of Interior*, No. 23-C-480, 2024 WL 449287, at *1 (E.D. Wis. Feb. 6, 2024). The court held that the IBIA did not exceed its authority in deciding whether the 2009 restrictive covenants were preempted by federal law. *Id.* at *5. Moreover, the court held that "the IBIA did not act arbitrarily and capriciously in finding that the MRA conflicts with," and preempts, the 2009 restrictive covenants. *Id.* The court declined to address the issue of whether the "remainder of the [2009] restrictive covenants are not preempted and are thus valid and enforceable under the covenant's severability clause." *Id.* at *6.

Citing the federal district court decision, the Tribe filed additional supplemental authority in this case. The Association responded to the Tribe's submission by arguing that the federal district court's decision did not address "the issue of whether the other terms and conditions of the [2009 restrictive covenants] survived

[9] Following the IBIA's decision, the Tribe cited that decision in a supplemental authority submission in this court and, shortly thereafter, moved to dismiss as moot the Association's appeal in this case. We denied the motion because the IBIA decision was not final pursuant to the federal Administrative Procedure Act (APA). *See* 5 U.S.C. § 701 et seq.

the placement of the land into trust." The Association also made an argument, in passing, that the federal district court's decision is "not binding precedent for this court."

The Tribe submitted an "advisory update" to its supplemental authority stating that the Association has not appealed the federal district court's decision. Afterward, we asked the parties to file supplemental briefs addressing several issues, including:

> [N]ow that the parcels of land are held by the United States in trust pursuant to the federal litigation, is the Association abandoning its arguments in this state court litigation that the transfer of the parcels in violation of the 2009 restrictive covenants is null and void? In other words, is the Association seeking only a determination in this litigation that the non-transfer specific restrictive covenants are enforceable? If so, what are the specific restrictive covenants that the Association argues remain enforceable?

The Association responded stating that it "does not seek a determination that the transfer of the parcels into trust is null and void as a result of the [2009] [r]estrictive [c]ovenants." The Association also conceded that it cannot impose taxation requirements on the parcels. Rather, the Association requests a determination as to "whether the non-transfer specific portions of the [2009] [r]estrictive [c]ovenants remain enforceable." These "portions," according to the

Association, are located in article (1)(D) of the 2009 restrictive covenants.[10]

DISCUSSION

I. Sovereign Immunity

"A motion to dismiss based on sovereign immunity challenges a court's personal jurisdiction."[11] *DNR v. Timber & Wood Prods. Located in Sawyer Cnty.*, 2018 WI App 6, ¶17, 379 Wis. 2d 690, 906 N.W.2d 707, *review denied* (WI July 10, 2018) (No. 2017AP181); *Pries v. McMillon*, 2010 WI 63, ¶20 n.11, 326 Wis. 2d 37, 784 N.W.2d 648. "Where, as here, the underlying facts are essentially undisputed, whether the circuit court properly granted a motion to dismiss for lack of personal jurisdiction based on sovereign immunity is a question of law that we review independently." *See Timber & Wood Prods.*, 379 Wis. 2d 690, ¶17.

The United States Supreme Court has explained that Indian tribes are "domestic dependent nations" that exercise "inherent sovereign authority." *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 788 (2014) (citation omitted). "Among the core aspects of sovereignty that tribes possess . . . is the 'common[ ]law immunity from suit traditionally enjoyed by sovereign powers.'" *Id.* (citation omitted).

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[10] The Association also contends that article (1)(B)(3)-(5) constitute "non-transfer specific portions of the 2009 restrictive covenants." However, as the Tribe articulated in its supplemental briefing, article (1)(B) contains covenants that specifically restrict the transfer of parcels into trust.

[11] "[C]ourts in other jurisdictions have held that sovereign immunity goes to subject matter jurisdiction, rather than personal jurisdiction." *DNR v. Timber & Wood Prods. Located in Sawyer Cnty.*, 2018 WI App 6, ¶30 n.8, 379 Wis. 2d 690, 906 N.W.2d 707, *review denied* (WI July 10, 2018) (No. 2017AP181).

Tribal immunity originated as a "judicial doctrine" out of common law; it is not mandated by the United States Constitution.[12] *Kiowa Tribe of Okla. v.*

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[12] It should be noted that "immunity doctrines lifted from other contexts do not always neatly apply to Indian tribes." *See Upper Skagit Indian Tribe v. Lundgren*, 584 U.S. 554, 560 (2018); *Kiowa Tribe of Okla. v. Manufacturing Techs., Inc.*, 523 U.S. 751, 756 (1998) ("[T]he immunity possessed by Indian tribes is not coextensive with that of the States."); *Three Affiliated Tribes of the Fort Berthold Rsrv. v. Wold Eng'g*, 476 U.S. 877, 890 (1986) ("[B]ecause of the peculiar 'quasi-sovereign' status of the Indian tribes, the Tribe's immunity is not congruent with that which the Federal Government, or the States, enjoy.").

In certain circumstances, however, the United States Supreme Court has looked to cases involving the sovereign immunity of state, federal, and foreign governments when analyzing tribal sovereign immunity. *See, e.g.*, *Lewis v. Clarke*, 581 U.S. 155, 161-63 (2017). Indeed, the legal bases of the four forms of sovereign immunity overlap at least to some degree. "Generally, States are immune from suit under the terms of the Eleventh Amendment and the doctrine of sovereign immunity," with the latter stemming from English political theory and principles surrounding the ratification of the Constitution. *See Whole Woman's Health v. Jackson*, 595 U.S. 30, 39 (2021); *Federal Mar. Comm'n v. South Carolina State Ports Auth.*, 535 U.S. 743, 751-53 (2002); *Alden v. Maine*, 527 U.S. 706, 712-16 (1999). Federal sovereign immunity similarly stems from the doctrine of sovereign immunity. Gregory C. Sisk, *A Primer on the Doctrine of Federal Sovereign Immunity*, 58 OKLA. L. REV. 439, 443 (2005). "[F]oreign sovereign immunity is a matter of grace and comity on the part of the United States, and not a restriction imposed by the Constitution." *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 486-88 (1983) (stating that foreign immunity is now governed by the Foreign Sovereign Immunities Act (FSIA) of 1976). As we will articulate later, the FSIA includes provisions relating to immunity waiver and congressional abrogation. Given the above, we will cite to case law on the other three forms of sovereign immunity in our analysis of tribal immunity where potentially analogous. *See Timber & Wood Prods.*, 379 Wis. 2d 690, ¶40 n.12.

Manufacturing Techs., Inc., 523 U.S. 751, 759 (1998); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978). Moreover, "tribal immunity 'is a matter of federal law and is not subject to diminution by the States.'" *Bay Mills Indian Cmty.*, 572 U.S. at 789 (citation omitted). As such, an Indian tribe is subject to suit, brought by a state or by an individual, "only where Congress has authorized the suit or the tribe has waived its immunity." *Kiowa Tribe of Okla.*, 523 U.S. at 754; *Bay Mills Indian Cmty.*, 572 U.S. at 789.

Here, the Association argues that: (1) Congress has unequivocally authorized suit against the Tribe under the MRA;[13] (2) the in rem exception to sovereign immunity applies to tribal immunity and to the Association's claims; (3) the immovable property exception to sovereign immunity applies to tribal immunity and to the Association's claims; and (4) the Tribe waived its sovereign immunity.

A. Congressional Authorization for Suit Against the Tribe under the MRA

"To 'abrogate sovereign immunity,' Congress 'must make its intent . . . unmistakably clear in the language of [a] statute.'" *Lac du Flambeau Band of Lake Superior Chippewa Indians v. Coughlin*, 599 U.S. 382, 387 (2023) (citation omitted). That is to say, courts "construe any ambiguities in the scope of a waiver in favor of the sovereign." *Federal Aviation Admin. v. Cooper*, 566 U.S. 284, 291 (2012). "This clear-statement rule is a demanding standard. If

[13] The Association's argument with respect to congressional authorization under the MRA is one paragraph in length and lacks citation to legal authority. That said, we will provide an overview of the issue.

'there is a plausible interpretation of the statute' that preserves sovereign immunity, Congress has not unambiguously expressed the requisite intent." *Lac du Flambeau*, 599 U.S. at 388 (citation omitted). "The rule is not a magic-words requirement, however." *Id.* "The clear-statement question is simply whether, upon applying 'traditional' tools of statutory interpretation, Congress's abrogation of tribal sovereign immunity is 'clearly discernable' from the statute itself." *Id.* (citation omitted).

In support of its argument that Congress abrogated the Tribe's immunity from the type of suit the Association brought in circuit court, the Association cites the following (emphasized) portion of the MRA:

> Such property shall be subject to all valid existing rights including, but not limited to, liens, outstanding taxes (local, State, and Federal), mortgages, and any other obligations. *The land transferred to the Secretary . . . shall be subject to foreclosure or sale pursuant to the terms of any valid existing obligation in accordance with the laws of . . . Wisconsin.*

Menominee Restoration Act § 6(c) (emphasis added). We also note that § (3)(d) of the Menominee Restoration Act states, "Except as specifically provided in this Act, nothing contained in this Act shall alter any property rights or obligations, any contractual rights or obligations, including existing fishing rights, or any obligations for taxes already levied."

The Tribe asserts that "[t]here is no language in the [MRA] that even impliedly, mu[ch] less expressly, abrogates the Tribe's sovereign immunity." To the

extent the above-referenced portion of § 6(c) of the Menominee Restoration Act waives the Tribe's immunity, the Tribe claims this subsection is limited to foreclosure actions, which the Association did not file. The Tribe also posits that courts must favor the Tribe's immunity if there is any ambiguity as to waiver within the MRA.

Neither party on appeal directs our attention to any case law analyzing a law similar to the MRA or to a case in which a court has analyzed a similar law to determine if Congress abrogated a tribe's sovereign immunity. Nor are we aware of any law or opinions on this issue, even when considered in the context of federal, state, or foreign immunity.

The United States Supreme Court most recently addressed congressional tribal immunity abrogation in *Lac du Flambeau*, in which the Court considered whether Congress authorized suits against tribes under a bankruptcy statute. *Lac du Flambeau*, 599 U.S. at 386-87. That law stated, "Notwithstanding an assertion of sovereign immunity, sovereign immunity is abrogated as to a governmental unit to the extent set forth in this section." *Id.* at 387 (citation omitted). The parties and the Court agreed that this unequivocally abrogated tribal immunity *if* a tribe could be considered a "governmental unit." *See id.* Ultimately, the Court concluded that a tribe could be a "governmental unit." *Id.* at 388. The type of unequivocal language stating that "sovereign immunity is abrogated" under the bankruptcy law is clearly not present in the MRA.

Perhaps the most analogous case to the one at hand is *Memphis Biofuels, LLC v. Chickasaw Nation Industries, Inc.*, 585 F.3d 917 (6th Cir. 2009). There,

a private company contracted with a federally chartered tribal corporation, which was "wholly owned by the Chickasaw Nation tribe but [was] an entity separate and distinct from the Chickasaw Nation." *Id.* at 918. The tribal corporation's principal place of business was in Oklahoma, and it was incorporated under the Oklahoma Indian Welfare Act (OIWA). *Memphis Biofuels*, 585 F.3d at 918. The OIWA expanded the Indian Reorganization Act (IRA) to include Indian tribes located in Oklahoma. *Memphis Biofuels*, 585 F.3d at 918. "Section 17 of the IRA . . . allows for a tribe to incorporate; thus, tribes incorporated under the IRA or OIWA are called Section 17 corporations." *Memphis Biofuels*, 585 F.3d at 918.

The contract between the parties included a provision expressly waiving any sovereign immunity. *Id.* Later, the tribal corporation repudiated the agreement, and the private company began mediation procedures pursuant to the contract. *Id.* at 919. After unsuccessful attempts at mediation, the private company filed suit in federal district court and sought a declaratory judgment that the tribe's waiver was valid. *Id.*

On appeal, the private company argued that "the act of incorporation under Section 17 divests entities of their tribal[ ]sovereign immunity." *Id.* at 920. Section 17 of the IRA provides:

> The Secretary of the Interior may, upon petition by any tribe, issue a charter of incorporation to such tribe . . . . Such charter may convey to the incorporated tribe the power to purchase, take by gift, or bequest, or otherwise, own, hold, manage,

> operate, and dispose of property of every description, real and personal, including the power to purchase restricted Indian lands and to issue in exchange therefor interests in corporate property, and such further powers as may be incidental to the conduct of business, not inconsistent with law . . . .

Memphis Biofuels, 585 F.3d at 920 (citation omitted). The United States Court of Appeals for the Sixth Circuit held that the provision "is silent as to whether . . . incorporated tribes have sovereign immunity." *Id.* The court interpreted "this silence as not abrogating sovereign immunity" because Congress had not clearly expressed otherwise, and because "statutes are to be construed liberally in favor of" tribal immunity. *See id.* at 920-21 (citation omitted); *see also American Vintage Cos. v. Table Mountain Rancheria*, 292 F.3d 1091, 1099 (9th Cir. 2002) (reaching the same conclusion); *but see GNS, Inc. v. Winnebago Tribe of Neb.*, 866 F. Supp. 1185, 1188-89 (N.D. Iowa 1994) (noting that the court has previously held that a Section 17 corporation waived its sovereign immunity).

B. In Rem Exception

The Association contends that, in the event the Tribe can claim sovereign immunity, Wisconsin should recognize two common law exceptions—the in rem exception and the immovable property exception—to tribal sovereign immunity, and that those exceptions apply to its declaratory judgment action in this case. The Tribe, in turn, asserts that Congress has not enacted any law authorizing suit against tribes based on an in rem exception or immovable property exception.

Beginning with the in rem exception to sovereign immunity, state and federal courts are divided on whether a court's exercise of in rem jurisdiction, as opposed to in personam jurisdiction, overcomes the jurisdictional bar of tribal immunity.[14] *Upper Skagit Indian Tribe v. Lundgren*, 584 U.S. 554, 564 (2018) (Thomas, J., dissenting).

In 2017, the United States Supreme Court granted certiorari review from a Supreme Court of Washington decision to determine whether "a court's exercise of in rem jurisdiction overcome[s] the jurisdictional bar of tribal sovereign immunity." *See id.* (alteration in original). Ultimately, the Court did not directly address this question; instead, the Court held that *County of Yakima v. Confederated Tribes and Bands of Yakima Nation*, 502 U.S. 251, 265 (1992) (concluding that unlike in personam taxes, state in rem taxes on property were permissible within tribal land), "resolved nothing about the law of [tribal] sovereign immunity." *Upper Skagit Indian Tribe*, 584

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[14] The Tribe does not argue that the Association's declaratory judgment action does not constitute an in rem proceeding. We recently summarized the difference between in rem and in personam jurisdiction, stating:

> If a court's jurisdiction is based on its authority over the defendant's person, the action and judgment are denominated "in personam" and can impose a personal obligation on the defendant in favor of the plaintiff. If jurisdiction is based on the court's power over property within its territory, the action is called "in rem" or "quasi in rem." The effect of a judgment in such a case is limited to the property that supports jurisdiction and does not impose a personal liability on the property owner, since he [or she] is not before the court.

Timber & Wood Prods., 379 Wis. 2d 690, ¶30 (citation omitted).

U.S. at 559. The Court remanded the case back to the Washington appellate court "for further proceedings not inconsistent" with the opinion. *Id.* at 561.

The parties dispute whether this court affirmatively adopted a position on this issue in *Timber & Wood Products*, which was decided shortly before the United States Supreme Court's decision in *Upper Skagit Indian Tribe*. In *Timber & Wood Products*, the DNR attempted to recover taxes that it alleged the Lac Courte Oreilles Band of Lake Superior Chippewa Indians of Wisconsin owed under Wisconsin's Forest Croplands Law. *Timber & Wood Prods.*, 379 Wis. 2d 690, ¶1. After failing to recover the taxes, the DNR filed a lawsuit against the tribe. *Id.*, ¶15. The DNR sought a declaratory judgment that the tribe was liable for the taxes, a money judgment against the tribe in the tax amount, and a judgment of replevin entitling it to possession of the timber and wood products "or such portion . . . as is required to satisfy the" tax owed. *Id.* The circuit court granted the tribe's motion to dismiss after concluding that the tribe's sovereign immunity barred the DNR's claims. *Id.*, ¶16.

On appeal, the DNR argued, among other things, that the tribe's sovereign immunity did not bar its claim against the tribe because "personal jurisdiction is not required for an in rem claim." *Id.*, ¶30. We disagreed with the DNR, concluding that "beyond simply barring in personam claims against a tribe, tribal sovereign immunity also bars in rem claims against the tribe's property." *Id.*, ¶47. In reaching this conclusion, we relied on case law from other jurisdictions holding that sovereign immunity bars in rem actions pertaining to a tribe's property. *See id.*, ¶¶31-34. This court also cited "[c]ases involving the

sovereign immunity of state" governments holding that "a state's sovereign immunity bars in rem admiralty proceedings . . . where the property at issue is both owned and possessed by the state."[15] *See id.*, ¶¶40-41; *see also California v. Deep Sea Rsch., Inc.*, 523 U.S. 491, 507 (1998); *Hammer v. United States Dep't of Health and Hum. Servs.*, 905 F.3d 517, 528 (7th Cir. 2018) ("[T]here is no general in rem exception to principles of sovereign immunity." (alteration in original; citation omitted)). Finally, we stated that allowing in rem claims against tribal property "would simply circumvent tribal sovereign immunity[,] allowing taking of tribal property" contrary to "one of the primary purposes of sovereign immunity—protecting tribal treasuries." *Timber & Wood Prods.*, 379 Wis. 2d 690, ¶47 (alteration in original) (citing *Runyon ex rel. B.R. v. Association of Vill. Council Presidents*, 84 P.3d 437, 440 (Alaska 2004), *overruled on other grounds by Ito v. Copper River Native Assoc.*, 547 P.3d 1003 (Alaska 2024)).

The Association argues that *Timber & Wood Products* does not apply to the facts of this case because the Association's declaratory judgment action

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[15] In *Timber & Wood Products*, the DNR cited cases that relied "in large part" on an interpretation of the United States Supreme Court's decision in *County of Yakima v. Confederated Tribes and Bands of Yakima Nation*, 502 U.S. 251 (1992), "as holding that tribal sovereign immunity bars in personam claims against a tribe, but not in rem claims against the tribe's property." *Timber & Wood Prods.*, 379 Wis. 2d 690, ¶¶35-37. This court concluded that this interpretation was incorrect. *Id.*, ¶¶37-38. As noted previously, the United States Supreme Court reached a similar conclusion as the court in *Timber & Wood Products*, albeit on different grounds, and held that *Yakima* did not address the scope of tribal sovereign immunity. *See Upper Skagit Indian Tribe*, 584 U.S. at 558-59.

"does not seek to take ownership or possession" of tribal property. In response, the Tribe contends that *Timber & Wood Products* clearly "repudiat[ed]" the argument that there exists an in rem exception to tribal sovereign immunity.

The Association further asserts that Wisconsin courts should hold that tribal sovereign immunity does not apply to in rem proceedings when the claim or claims seek solely "to determine the validity and enforceability of recorded rights attached to that property." In support of this position, the Association cites a number of cases from other jurisdictions that have adopted an in rem exception to tribal immunity. *See Cass Cnty. Joint Water Res. Dist. v. 1.43 Acres of Land in Highland Twp.*, 643 N.W.2d 685, 694 (N.D. 2002); *Anderson & Middleton Lumber Co. v. Quinault Indian Nation*, 929 P.2d 379, 383-85 (Wash. 1996); *Miccosukee Tribe of Indians of Fla. v. Department of Env't Prot.*, 78 So. 3d 31, 34 (Fla. Dist. Ct. App. 2011).

The Tribe argues that each of the cases cited by the Association predates the United State Supreme Court's holding in *Upper Skagit Indian Tribe* and relied on *Yakima* in adopting an in rem exception to tribal sovereign immunity. Because the United States Supreme court refuted the rationale of these cases inasmuch as they relied on *Yakima*, the Tribe asserts that a reviewing court should disregard the cases cited by the Association.

The Association concedes that "these cases relied, in part, on *Yakima*," but it contends, without citation to the relevant cases, that "their holdings were not limited to such and clarification of *Yakima* does not change their results." Of the cases cited by the Association, only one appears to have relied on

reasoning aside from *Yakima* in reaching its conclusion. Specifically, the North Dakota Supreme Court in *Cass County Joint Water Resource District* also considered United States Supreme Court precedent holding that a state's sovereign immunity does not bar a condemnation action in the courts of another state.[16] *See Cass Cnty.*, 643 N.W.2d at 693-94 (discussing *Georgia v. City of Chattanooga*, 264 U.S. 472, 479-82 (1924)).

Neither party cites authority post-dating *Upper Skagit Indian Tribe* that supports or opposes the in rem exception to tribal sovereign immunity. This court is aware of only one case that has addressed the issue since that decision. *See Flying T Ranch, Inc. v. Stillaguamish Tribe of Indians*, 549 P.3d 727, 732-33 (Wash. Ct. App. 2024) (discussing the in rem exception to tribal immunity unfavorably but not expressly ruling on the issue), *review granted* (Wash. Dec. 4, 2024) (No. 103430-0).

We believe that we are bound by *Timber & Wood Products*, which we interpret as holding that tribal sovereign immunity bars in rem claims against a tribe regardless of the specific types of in rem claims brought against the tribe or its property. In our view, the United States Supreme Court's decision in *Upper Skagit Indian Tribe* supports this conclusion. Nevertheless, this case presents an opportunity for the Wisconsin Supreme Court to determine the validity and scope of *Timber & Wood Products*, as well as to assess the viability of the in rem exception to

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[16] This reasoning appears to invoke the immovable property exception to sovereign immunity, which we discuss in greater detail in the next subsection.

tribal sovereign immunity following the decision in *Upper Skagit Indian Tribe*.

C. The Immovable Property Exception

"American common law has long recognized an 'exception to sovereign immunity for actions to determine rights in immovable property.'" *See Cayuga Indian Nation of N.Y. v. Seneca County*, 978 F.3d 829, 836 (2d Cir. 2020) (citation omitted). "This rule—which has developed primarily in the context of international law and practice—derives from two basic aspects of sovereign authority."[17] *Id.* The first is that "property ownership is not an inherently sovereign function." *Id.* (quoting *Permanent Mission of India to the United Nations v. City of New York*, 551 U.S. 193, 199 (2007)). Therefore, courts traditionally treat land acquired by a state outside of its own territory as if it were owned by a private individual. *Id.* "The second is that each state has 'a primeval interest in resolving disputes over use or right to use of real property' located within its own territory." *Id.* (citation omitted). "A state therefore 'cannot safely permit the title to its land to be determined by a foreign power.'" *Id.* (citation omitted).

> [T]he exception has not been thought to eliminate the immunity defense as to

[17] The FSIA includes an exception to foreign sovereign immunity for actions in which "rights in immovable property situated in the United States are in issue." *Permanent Mission of India to the United Nations v. City of New York*, 551 U.S. 193, 197 (2007) (quoting 28 U.S.C. § 1605(a)(4)). This exception "was enacted to codify, with minor modifications . . . , the pre-existing real property exception to sovereign immunity recognized by international practice." *Asociacion de Reclamantes v. United Mexican States*, 735 F.2d 1517, 1521 (D.C. Cir. 1984).

> "disputes that arise out of [a foreign sovereign's] rights in real estate but do not actually place [those rights] at issue." Nor has it been applied when the party who invokes the exception "makes no claim to any interest" in a foreign sovereign's real property and is "not seeking to establish any rights" in that property.

Id. (second and third alterations in original; footnote omitted; citations omitted). Stated differently, the exception will not apply "to claims incidental to property ownership." *See Permanent Mission of India*, 551 U.S. at 200.

Instead, "courts and other authorities have generally understood the immovable[ ]property exception as permitting only those lawsuits against a sovereign that 'contest[ ]' its rights or interests in real property." *Cayuga Indian Nation*, 978 F.3d at 836 (second alteration in original) (quoting RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 68 cmt. d (AM. L. INST. 1965)).[18] In addition to those courts applying the exception to foreign sovereign immunity, other courts have similarly applied it "as a limitation on the sovereign immunity of States claiming an interest in land located within other States." *See Upper Skagit Indian Tribe*, 584 U.S. at 563 (Roberts, C.J., concurring) (citing *City of Chattanooga*, 264 U.S. at 480-82).

The immovable property exception under the FSIA has been applied to a state's eminent domain action

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[18] The United States Supreme Court in *Permanent Mission of India* favorably cited the RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 68 (AM. L. INST. 1965). *See Permanent Mission of India*, 551 U.S. at 200.

against a foreign state's property located in the state exercising eminent domain. *Permanent Mission of India*, 551 U.S. at 200. It has also been held to apply to lawsuits seeking to establish "the validity of [a city's] tax liens on property held by [a foreign] sovereign." *Id.* at 195. The exception under the FSIA has been held to not apply to lawsuits against a foreign sovereign that involve "injury suffered in a fall" on the foreign sovereign's property, *see id.* at 200, or to lawsuits concerning a residential area association's attempt to collect damages from a foreign sovereign for temporary occupation and use of a building that allegedly violated zoning laws, *MacArthur Area Citizens v. Republic of Peru*, 809 F.2d 918, 919, 921 (D.C. Cir. 1987).

Courts are, however, divided on whether to apply the immovable property exception to tribal sovereign immunity. The United States Supreme Court in *Upper Skagit Indian Tribe*—in addition to dispelling improper interpretations of *Yakima*—also discussed the possibility of applying the immovable property exception to tribal sovereign immunity. The facts of that case concerned a tribe's purchase of land located within Washington State "with an eye to asking the federal government to take the land into trust." *Upper Skagit Indian Tribe*, 584 U.S. at 556. A boundary dispute arose with adjacent property owners, and the tribe informed them that "it intended to tear down [a] fence; clear[-]cut the intervening acre; and build a new fence in the right spot." *Id.* at 557. In response, the adjacent property owners filed a quiet title action in state court, invoking doctrines of adverse possession and mutual acquiescence. *Id.*

Before the United States Supreme Court, the adjacent property owners abandoned their in rem

jurisdiction argument and instead asserted that the immovable property exception to sovereign immunity applies equally to tribal immunity and to the tribe's immunity in that case. *Id.* at 559-60. According to the adjacent property owners, "[a]t common law . . . sovereigns enjoyed no immunity from actions involving immovable property located in the territory of another sovereign." *Id.* Applied to the facts of that case, the adjacent property owners contended that the tribe was not shielded by sovereign immunity because the suit related "to immovable property located in the State of Washington that the [t]ribe purchased in 'the character of a private individual.'" *Id.* at 560 (citation omitted). The tribe disagreed, stating that "immunity doctrines lifted from other contexts do not always neatly apply to Indian tribes." *Id.*

The Court decided to not address the merits of the parties' arguments and, instead, remanded the issue to the Supreme Court of Washington "to address these arguments in the first instance" because the "alternative argument for affirmance did not emerge until late in th[e] case." *Id.* On remand, the Washington Supreme Court terminated its review. *See Lundgren v. Upper Skagit Indian Tribe*, Case No. 91622-5, available at https://dw.courts.wa.gov/index.cfm?fa=home.casesearch&terms=accept&flashform=0&tab=clj (last visited Jan. 16, 2025).

The dissent in *Upper Skagit Indian Tribe*, written by Justice Thomas and joined by Justice Alito, characterized the Court's failure to address the issue as a "grave" decision that would cast "uncertainty" over the law and leave lower courts with insufficient "guidance." *Upper Skagit Indian Tribe*, 584 U.S. at 565-66, 575 (Thomas, J., dissenting). Justice Thomas further explained that the immovable property

exception to sovereign immunity "has been hornbook law almost as long as there have been hornbooks." *Id.* at 566. The concurrence, written by Chief Justice Roberts and joined by Justice Kennedy, argued that a party in the adjacent property owners' position should have some recourse. *Id.* at 562 (Roberts, C.J., concurring). Chief Justice Roberts wrote, "The correct answer cannot be that the tribe always wins no matter what; otherwise a tribe could wield sovereign immunity as a sword and seize property with impunity, even without a colorable claim of right." *Id.*

In *Cayuga Indian Nation*, decided after *Upper Skagit Indian Tribe*, the United States Court of Appeals for the Second Circuit assumed, without deciding, that the immovable property exception applied to tribal immunity, as a general matter. *Cayuga Indian Nation*, 978 F.3d at 835-36. The court then concluded that the exception would not apply to a county's attempt to foreclose on tribal property after the tribe refused to pay taxes levied by the county. *Id.* at 831, 836. The court reasoned that if the county prevailed on the foreclosure actions, it would acquire title to the properties, but only as a remedy to satisfy the tribe's tax debt. *Id.* at 838. Thus, the court did "not view the [f]oreclosure [a]ctions as 'actions to *determine* rights in immovable property.'" *Id.* (citation omitted); *see also Oneida Indian Nation v. Phillips*, 981 F.3d 157, 169-70 (2d Cir. 2020).

Courts in other jurisdictions have refused to adopt the exception as applied to tribal immunity. *See Flying T Ranch*, 549 P.3d at 734 (rejecting the exception); *Self v. Cher-Ae Heights Indian Cmty. of Trinidad Rancheria*, 60 Cal. App. 5th 209, 216-21 (Cal. Ct. App. 2021) (questioning whether there was ever a common law immovable property exception to

foreign sovereign immunity; stating that, if Congress desires, it should, like it did with foreign immunity, enact legislation permitting an immovable property exception for tribal immunity; and also stating that the facts before the court were "a poor vehicle for extending the immovable property rule to tribes").

Review of whether there exists an immovable property exception to tribal immunity would be a matter of first impression in Wisconsin. Even if such an exception exists, whether it would be applicable to a declaratory judgment action seeking to enforce restrictive covenants would similarly be an issue of first impression.

D. Waiver

A tribe may waive its immunity. *Kiowa Tribe of Okla.*, 523 U.S. at 754. "[T]o relinquish its immunity, a tribe's waiver must be 'clear.'" *C & L Enters., Inc. v. Citizen Band Potawatomi Indian Tribe of Okla.*, 532 U.S. 411, 418 (2001). Put differently, "a waiver of sovereign immunity 'cannot be implied but must be unequivocally expressed.'" *Santa Clara Pueblo*, 436 U.S. at 58 (citation omitted). The waiver must also be made "by the tribe or congressional abrogation." *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Okla.*, 498 U.S. 505, 509 (1991). "A strong presumption exists against waiver of tribal sovereign immunity." *Timber & Wood Prods.*, 379 Wis. 2d 690, ¶19 (citing *Demontiney v. United States ex rel. Dep't of Interior, Bureau of Indian Affs.*, 255 F.3d 801, 811 (9th Cir. 2001)).

The question of whether acquiring a property subject to a restrictive covenant providing for the waiver of sovereign immunity constitutes a tribal waiver appears not to have been answered by any

Wisconsin appellate court, any federal court, or any other state appellate court.[19] In fact, the United States Supreme Court has seldom visited the issue of tribal immunity waiver.

In *C & L Enterprises*, a federally recognized Indian tribe entered into a contract, containing an arbitration clause, with a private company for the installation of a roof on a building owned by the tribe. *C & L Enters.*, 532 U.S. at 414-15. Later, the company submitted an arbitration demand, claiming that the tribe had dishonored the contract. *Id.* at 416. The tribe "asserted sovereign immunity and declined to participate in the arbitration proceeding." *Id.*

The Court held that the tribe waived its sovereign immunity by entering into the contract. *Id.* at 418. Several features of the contract supported the Court's conclusion. *Id.* at 418-19. First, the arbitration clause required that all contract-related disputes between

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[19] This court, as well as other courts throughout the country, has "repeatedly held that a tribe's mere agreement to comply with a particular law does not amount to an unequivocal waiver of the tribe's sovereign immunity" because "[t]here is a difference between the right to demand compliance with state laws and the means available to enforce them." *Timber & Wood Prods.*, 379 Wis. 2d 690, ¶21 (alteration in original) (quoting *Kiowa Tribe of Okla.*, 523 U.S. at 775); *see also Nanomantube v. Kickapoo Tribe in Kan.*, 631 F.3d 1150, 1153 (10th Cir. 2011); *Sanderlin v. Seminole Tribe of Fla.*, 243 F.3d 1282, 1289 (11th Cir. 2001); *Sheffer v. Buffalo Run Casino, PTE, Inc.*, 315 P.3d 359, 371 (Okla. 2013); *Cohen v. Little Six, Inc.*, 543 N.W.2d 376, 380 (Minn. Ct. App. 1996).

This line of cases is largely unhelpful to deciding whether restrictive covenants, like those at issue here, can waive tribal sovereign immunity because the 2009 restrictive covenants expressly state that the purchaser of the property is waiving immunity.

the parties be resolved by binding arbitration, stating that "[t]he award rendered by the arbitrator or arbitrators shall be final, and judgment may be entered upon it in accordance with applicable law in any court having jurisdiction thereof." *Id.* at 415, 418-19. The arbitration process was governed by the American Arbitration Association Rules for the construction industry, and under those rules, the parties "shall be deemed to have consented that judgment upon the arbitration award may be entered in any federal or state court having jurisdiction thereof." *Id.* at 415, 419.

Second, the contract stated that it was "governed by the law of the place where" the project was located—i.e., Oklahoma. *Id.* Oklahoma had adopted an arbitration law, which instructed that "[t]he making of an agreement . . . providing for arbitration in this state confers jurisdiction on the court to enforce the agreement under this act and to enter judgment on an award thereunder." *Id.* at 415-16 (alteration in original; citation omitted). The Court stated that "[b]y selecting Oklahoma law . . . to govern the contract, the parties . . . effectively consented to confirmation of the award 'in accordance with'" Oklahoma law. *Id.* at 419. Third, "the contract specifically authorize[d] judicial enforcement of the resolution arrived at through arbitration." *Id.* at 422.

Fourth, the tribe itself proposed and prepared the contract; the company had not "foisted" a contract "on a quiescent [t]ribe." *Id.* at 423. Thus, the Court reasoned that the tribe did not "find itself holding the short end of an adhesion contract stick." *Id.* (citing *United States v. Bankers Ins. Co.*, 245 F.3d 315, 319-20 (4th Cir. 2001) (concluding that the federal government waived its immunity under similar

facts)). The Court concluded "that under the agreement . . . , the [t]ribe clearly consented to arbitration and to the enforcement of arbitral awards in Oklahoma state court." *Id.*

More recently, the United States Supreme Court briefly discussed how a state could obtain a sovereign immunity waiver from a federally recognized Indian tribe under the Indian Gaming Regulatory Act. *Bay Mills Indian Cmty.*, 572 U.S. at 796-97. The Court first held that Congress did not authorize a state to sue a tribe for opening a casino outside of Indian lands. *Id.* at 785. In so holding, the Court noted that "if a [s]tate really wants to sue a tribe for gaming outside Indian lands, the [s]tate need only bargain for a waiver of immunity." *Id.* at 796. The Court then pointed to a provision within the Indian Gaming Regulatory Act—that allows a compact between a state and a tribe to "include . . . remedies for breach of contract"—to posit that a state could obtain a tribe's waiver by including such a provision. *Id.* at 796-97.

Moreover, how a tribe allegedly waived immunity, and under what tribal authority it did so, is significant. The majority view among other jurisdictions is that a tribe has not waived its immunity where the "tribe's enacted laws, constitutions, ordinances, and codes require specific procedures to waive immunity, and those provisions were not followed."[20] *See, e.g.*, *Caremark, LLC v. Choctaw Nation*, 104 F.4th 81, 90 & n.8 (9th Cir.

[20] The United States Supreme Court in *C & L Enterprises* refused, on procedural grounds, to address the tribe's argument that "the members of the [t]ribe who executed the contract lacked the authority to do so on the [t]ribe's behalf." *C & L Enters., Inc. v. Citizen Band Potawatomi Indian Tribe of Okla.*, 532 U.S. 411, 423 n.6 (2001).

2024); *Memphis Biofuels*, 585 F.3d at 921-22; *Native Am. Distrib. v. Seneca-Cayuga Tobacco Co.*, 546 F.3d 1288, 1293-96 (10th Cir. 2008); *Sanderlin v. Seminole Tribe of Fla.*, 243 F.3d 1282, 1287-88 (11th Cir. 2001); *Amerind Risk Mgmt. Corp. v. Malaterre*, 633 F.3d 680, 685-86 (8th Cir. 2011); *MM&A Prods., LLC v. Yavapai-Apache Nation*, 316 P.3d 1248, 1252 (Ariz. Ct. App. 2014); *ACF Leasing v. Oneida Seven Generations Corp.*, No. 1-14-3443, 2015 WL 5965249, at *7-8 (Ill. App. Ct. Oct. 13, 2015). Stated differently, "case law ha[s] established [that] 'unauthorized acts of tribal officials are insufficient to waive tribal-sovereign immunity' despite any seemingly unfair result." *MM&A Prods.*, 316 P.3d at 1252 (citation omitted).

Nevertheless, at least one jurisdiction has held that the doctrine of "apparent authority" permitted a tribal member to waive the tribe's immunity despite lacking the authority under the tribe's laws to provide such a waiver. *Rush Creek Sols., Inc. v. Ute Mountain Ute Tribe*, 107 P.3d 402, 406-08 (Colo. App. 2004). In *Rush Creek Solutions*, the tribe's chief financial officer (CFO) signed a contract on the tribe's behalf for a private company to provide services to the tribe. *Id.* at 404. The contract provided that the tribe waived "any objection which" the tribe "may have based on lack of jurisdiction or improper venue or forum non conveniens to any suit or proceeding instituted by" the company "under this [a]greement in any state or federal court with jurisdiction." *Id.* The company eventually sued the tribe in state court, asserting various contract claims. *Id.* The tribe filed a motion to dismiss, arguing that while the CFO had the authority to enter into contracts, he had "no authority to waive [the tribe's] sovereign immunity" under the

tribe's laws. *Id.* at 404, 406. In response, the company asserted that the CFO had apparent authority to waive the tribe's immunity because the tribe's constitution was "silent as to the requisite procedures for waiving" immunity. *Id.* at 406.

The Colorado Court of Appeals held that the authority to waive sovereign immunity may be implied, and, as applied to the facts before it, "the general laws of agency govern" "because nothing in the [t]ribe's [c]onstitution expressly speaks to the issue" of waiving immunity. *Id.* at 407. Citing the RESTATEMENT (THIRD) OF THE LAW OF FOREIGN RELATIONS OF THE UNITED STATES § 456 cmt. b (AM. L. INST. 1987), the court stated, "When, as here, a person has authority to sign an agreement on behalf of a sovereign, it is assumed that the authority extends to a waiver of immunity contained in the agreement."[21] *Rush Creek Sols.*, 107 P.3d at 408. Applying that principle, the court concluded that "[t]he words, actions, and other described conduct of the [t]ribe, reasonably interpreted, would and did cause [the company] to believe that the [t]ribe consented to have the contract and waiver signed on its behalf by the CFO." *Id.*

Other jurisdictions have expressly adopted a similar approach with respect to apparent authority, or they have conducted analyses that tend to support the proposition that a tribe may waive its immunity

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[21] The United States Supreme Court in *C & L Enterprises* also relied on the RESTATEMENT (THIRD) OF THE LAW OF FOREIGN RELATIONS OF THE UNITED STATES § 456 (AM. L. INST. 1987), when it addressed tribal sovereign immunity waiver. *See C & L Enters.*, 532 U.S. at 421 n.3.

even without following proper tribal procedure.[22] *See United States v. Velarde*, 40 F. Supp. 2d 1314, 1317 (D.N.M. 1999) (rejecting a tribe's "contention that there could be no waiver because the prior disclosures" to the government in a criminal case, which waived immunity, "were not authorized"); *StoreVisions, Inc. v. Omaha Tribe of Neb.*, 795 N.W.2d 271, 278-79 (Neb. 2011), *modified on reh'g*, 802 N.W.2d 420 (Neb. 2011); *Granite Valley Hotel Ltd. v. Jackpot Junction Bingo & Casino*, 559 N.W.2d 135, 137 (Minn. Ct. App. 1997); *Bates Assocs., LLC v. 132 Assocs., LLC*, 799 N.W.2d 177, 182-84 (Mich. Ct. App. 2010); *Smith v. Hopland Band of Pomo Indians*, 95 Cal. App. 4th 1, 6-8 (Cal. Ct. App. 2002).

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[22] Several jurisdictions have expressly rejected the apparent authority doctrine in the tribal immunity context or they have rejected arguments that a tribe should be equitably estopped from raising an immunity defense because of an unauthorized express waiver. *See, e.g.*, *Memphis Biofuels, LLC v. Chickasaw Nation Indus., Inc.*, 585 F.3d 917, 922 (6th Cir. 2009); *Sanderlin*, 243 F.3d at 1288; *Native Am. Distrib. v. Seneca-Cayuga Tobacco Co.*, 546 F.3d 1288, 1295 (10th Cir. 2008); *Dilliner v. Seneca-Cayuga*, 258 P.3d 516, 520-21 (Okla. 2011); *Chance v. Coquille Indian Tribe*, 963 P.2d 638, 640-42 (Or. 1998). Other courts have rejected the apparent authority doctrine in the foreign sovereign immunity context. *See, e.g.*, *SACE S.P.A. v. Republic of Paraguay*, 243 F. Supp. 3d 21, 39 (D.D.C. 2017) (concluding that the term "foreign state" under the FSIA's waiver provision did not permit an agent with apparent authority to waive a foreign state's sovereign immunity).

Conversely, at least one court has ruled that a state official with apparent authority can waive a state's sovereign immunity. *eScholar LLC v. Nebraska Dep't of Educ.*, 497 F. Supp. 3d 414, 424 (D. Neb. 2020) (relying on *Lapides v. Board of Regents of Univ. Sys. of Ga.*, 535 U.S. 613, 623-24 (2002)).

In this case, the Association argues that the Tribe waived its sovereign immunity when Keshena acquired the deeds to the parcels that were subject to article (4)(F) and (G) of the 2009 restrictive covenants. Again, those provisions state:

> F. Applicable law; Jurisdiction and Venue. Any and all actions or proceedings seeking to enforce any provision of, or based upon any right arising out of, these Restrictive Covenants running with the land shall be brought against a party in the Circuit Court of Menominee County . . . , and any purchaser and/or transferee of the land that is a party to any such action, by accepting the deed thereto, consents to the exclusive jurisdiction and venue of such court (and the appropriate appellate courts therefrom) in any such action or proceeding and waives any objection to jurisdiction and venue laid therein.
>
> G. Waiver of Defense. By acceptance of a deed transferring title ownership of any portion of the Subject Real Estate, the title owner hereby waives any defense to an action filed with respect to these Restrictive Covenants by the Association based on sovereign immunity, and expressly consents to suit as provided for in Paragraph 4F above, and enforcement of any judgment rendered therein.

(Formatting altered.)

It appears that the 2009 restrictive covenants contain an affirmative and clear sovereign immunity waiver and provide for a judicial enforcement

mechanism like the arbitration clause in *C & L Enterprises* and the optional compact provision in *Bay Mills Indian Community*. The relevant provisions in the 2009 restrictive covenants provide for venue and jurisdiction, and they state that "the title owner hereby waives any defense to an action filed with respect to these Restrictive Covenants by the Association based on sovereign immunity."

The question then becomes whether that waiver is valid. The Tribe contends that the Association "cannot force a waiver of sovereign immunity on the Tribe by unilaterally recording a document and then claiming that the Tribe 'agreed' to it." In support, the Tribe asserts that it did not propose or prepare the provisions providing for venue and jurisdiction and waiving its immunity, and, therefore, the Tribe found "itself holding the short end of an adhesion contract stick." *See C & L Enters.*, 532 U.S. at 423.

Recorded restrictive covenants contained in a deed are a type of "contract" like the contract and compact discussed in *C & L Enterprises* and *Bay Mills Indian Community*. *See Solowicz v. Forward Geneva Nat., LLC*, 2010 WI 20, ¶¶1, 4, 34, 323 Wis. 2d 556, 780 N.W.2d 111 (stating that a recorded declaration containing restrictive covenants was a contract). That said, we are unaware of any case, in any jurisdiction, addressing whether a restrictive covenant in a deed can constitute a valid immunity waiver upon a property's purchase by, or transfer to, a tribe to be held in trust by the United States.

Moreover, the Tribe also asserts that any waiver was not valid because the Tribe did not enact "any resolution" or "official act" to waive its immunity. In response, the Association argues that Keshena

"act[ed] within his agency" and with the Tribe's authority to waive immunity.[23]

Keshena purchased the properties on behalf of the Tribe for the purpose of having the land placed in trust, and the Tribe concedes that Keshena was acting as an agent of the Tribe. Keshena's authority to purchase the land derived from a "Menominee Tribal Legislature" resolution "authorizing the appointment of a [tribal] member to receive title to lands on behalf of the Tribe for the purpose of conveying them to the

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[23] The Association makes several other arguments in the waiver context that we conclude do not have merit. For example, it contends that "the Tribe is bound by the [2009 restrictive covenants'] sovereign immunity waiver as a third-party beneficiary of the transactions under which Mr. Keshena acquired the [p]roperties." *See City of Mequon v. Lake Ests. Co.*, 52 Wis. 2d 765, 773, 190 N.W.2d 912 (1971) ("[W]hen a right has been created by contract, the third party claiming the benefit of the contract takes the right subject to all the terms and conditions of the contract creating the right." (citation omitted)). However, "[a] party *wishing* to enforce a contract must either be a party to that contract or a third-party beneficiary." *Becker v. Crispell-Snyder, Inc.*, 2009 WI App. 24, ¶9, 316 Wis. 2d 359, 763 N.W.2d 192 (emphasis added). The Tribe is not seeking to enforce the 2009 restrictive covenants or to be made a third-party beneficiary. The properties are already held in trust by the United States for the Tribe, and we are not persuaded that the third-party beneficiary principle would have any bearing on this case.

The Association also argues, in the alternative, that Keshena, "individually, is subject to the circuit court's jurisdiction." Due to the federal litigation, the Association concedes that the properties are currently held in trust by the United States for the Tribe. Accordingly, Keshena cannot be individually subject to the court's jurisdiction because "the remedy sought" by the Association—the enforceability of the 2009 restrictive covenants—"is truly against the sovereign." *See Lewis*, 581 U.S. at 161-63.

United States" pursuant to the MRA. The resolution also states that "all such authorized conveyances shall be of the same effect and force as if made to the [Tribe]."

Under the Tribe's constitution and bylaws, the "Tribe does not . . . waive or limit any rights which it may have to be immune from suit in the courts of the United States or of any State." CONST. & BYLAWS OF THE MENOMINEE INDIAN TRIBE OF WIS. art. XVIII, § 2 (available at https://narf.org/nill/constitutions/menominee/index.html) (last visited Jan. 9, 2025).[24] In addition, the Tribe's constitution and bylaws state that the Menominee Tribal Legislature "shall not waive or limit the right of the [Tribe] to be immune from suit, except as authorized" elsewhere in the constitution.[25] *Id.*, art. XVIII, § 1. Thus, under the majority view, as articulated in cases like *Memphis Biofuels*, Keshena could not have had the authority to waive the Tribe's immunity because the Tribe's constitution and bylaws do not permit the Menominee Tribal Legislature to waive immunity in this situation.

The view adopted by the majority of jurisdictions is supported by several notable principles that the Wisconsin Supreme Court may find persuasive. First, a tribe cannot implicitly waive its immunity. *Santa*

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[24] The Tribe's constitution and bylaws were last amended in 1991.

[25] The limited situations in which the tribe's constitution and bylaws permit the waiver of immunity are inapplicable to this case. For example, the constitution required the establishment of a successor business to the MEI, and it permits that business "to agree by specific written agreement with any party to waive any immunity from suit." *See* CONST. & BYLAWS OF THE MENOMINEE INDIAN TRIBE OF WIS. art. XII, § 2(c).

Clara Pueblo, 436 U.S. at 58. Second, "tribal immunity is a matter of federal law and is not subject to diminution by the States." *Kiowa Tribe of Okla.*, 523 U.S. at 756. Third, there is a strong presumption against waiver of tribal immunity. *Demontiney*, 255 F.3d at 811. Fourth, there is some support in United States Supreme Court precedent for the position that a tribe cannot waive immunity without following proper tribal procedure. *See United States v. United States Fid. & Guar. Co.*, 309 U.S. 506, 513 (1940) (stating that it is a "corollary to immunity from suit on the part of the United States and the Indian Nations in tutelage that this immunity cannot be waived by officials. If the contrary were true, it would subject the government to suit in any court in the discretion of its responsible officers.").

There remains a lack of Wisconsin or United States Supreme Court case law on the waiver of tribal immunity in this context—namely, cases do not answer the question of whether a tribe waives its immunity when its agent acquires land on its behalf that is subject to restrictive covenants that purport to waive the tribe's immunity. We believe that a decision on this issue by the Wisconsin Supreme Court would be appropriate because it would "help develop, clarify or harmonize the law." *See* WIS. STAT. RULE 809.62(1r)(c).

II. Preemption

If the in rem or immovable property exceptions to sovereign immunity apply to tribal immunity (and the exceptions properly apply to the Association's declaratory judgment action), the Tribe argues that

the MRA and federal common law preempt the Association's lawsuit.[26]

We again note that the Association is no longer seeking to enforce the 2009 restrictive covenants prohibiting the transfer of the properties into trust to be held by the United States. Nor is the Association seeking to enforce those covenants relating to taxation. Thus, the issue is whether the MRA preempts the enforcement of the non-transfer-related 2009 restrictive covenants—specifically article (1)(D), which provides:

> D. Any owner of an interest in the Subject Real Estate (or any part thereof) shall at all times comply with any and all municipal and Association laws, rules, regulations and obligations as set forth in the foregoing restrictions . . . . The Subject Real Estate remains subject to said municipal and Association laws, rules, regulations and obligations, in rem, notwithstanding a transfer to an owner not otherwise subject to them.

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[26] Although not addressed by the parties, we believe that if the Tribe waived its immunity to suit by accepting the properties with the 2009 restrictive covenants attached, it also waived its immunity from having the provisions in article (1)(D) of the 2009 restrictive covenants enforced against the properties in question. Moreover, the parties do not expressly address whether—if Congress abrogated the Tribe's immunity under the MRA with respect to the Association's declaratory judgment action—the municipality could enforce its ordinances upon the Tribe and the relevant properties at issue. The MRA says nothing about the enforcement of municipal ordinances, and we believe that the preemption argument could apply to such an issue even if Congress authorized suit against the Tribe.

We interpret the Association to argue that article (1)(D) requires compliance with municipal ordinances and the Association's laws, rules, and regulations.

The Tribe cites § 3(b) of the Menominee Restoration Act, which states that the MRA "reinstated all rights and privileges of the [T]ribe or its members under Federal treaty, statute, or otherwise which may have been diminished or lost pursuant to the [Termination Act]." For its part, the Association cites § (3)(d) of the Menominee Restoration Act in support of its argument that the MRA does not preempt the enforceability of article (1)(D). Section (3)(d) of the Menominee Restoration Act states, "Except as specifically provided in this Act, nothing contained in this Act shall alter any property rights or obligations, any contractual rights or obligations, including existing fishing rights, or any obligations for taxes already levied."

The Supremacy Clause of the United States Constitution provides that the "Constitution, and the Laws of the United States which shall be made in Pursuance thereof," are "the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. CONST. art. VI, cl. 2. This clause requires that "[w]here state and federal law 'directly conflict,' state law must give way" to the federal law. *PLIVA, Inc. v. Mensing*, 564 U.S. 604, 617 (2011) (citation omitted). "Consideration of issues arising under the Supremacy Clause 'start[s] with the assumption that the historic police powers of the States [are] not to be superseded by . . . Federal Act unless that [is] the clear and manifest purpose of Congress.'" *Cipollone v. Liggett Grp., Inc.*, 505 U.S. 504, 516 (1992) (alterations in original;

citation omitted). Accordingly, Congress's purpose "'is the ultimate touchstone' of pre[ ]emption analysis." *Id.* (citation omitted).

"[E]ven where . . . a statute does not refer expressly to pre[ ]emption, Congress may implicitly pre[ ]empt a state law, rule, or other state action." *Oneok, Inc. v. Learjet, Inc.*, 575 U.S. 373, 376-77 (2015). "In the absence of an express congressional command, state law is pre[ ]empted if that law actually conflicts with federal law or if federal law so thoroughly occupies a legislative field 'as to make reasonable the inference that Congress left no room for the States to supplement it.'" *Cipollone*, 505 U.S. at 516 (citations omitted).

We agree with the Tribe that the MRA and other federal law directly and indirectly preempt the enforcement of any municipal ordinances against the Tribe or the subject properties. The MRA states that it "reinstated all rights and privileges of the [T]ribe . . . which may have been diminished or lost pursuant to the [Termination Act]." Menominee Restoration Act § 3(b). Furthermore, nothing in the MRA expressly permits enforcement of municipal ordinances, and, absent such a waiver, we believe that the Tribe maintains its sovereign authority that it regained under the MRA. *See* 25 C.F.R. § 1.4 (2024);[27]

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[27] 25 C.F.R. § 1.4(a) (2024) states:

> 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

State v. Webster, 114 Wis. 2d 418, 436, 338 N.W.2d 474 (1983) ("The state's jurisdiction ended . . . when Congress passed the [MRA]."); 66 Wis. Op. Att'y Gen. 116, 118 (1977) ("[T]he [MRA] and its legislative history support[ ] the conclusion that Congress intended to restore the Tribe to the same jurisdictional status it enjoyed prior to termination."); *Segundo v. City of Rancho Mirage*, 813 F.2d 1387, 1393 (9th Cir. 1987) ("It is beyond question that land use regulation is within the Tribe's legitimate sovereign authority over its lands.").

With respect to the Association's laws, rules and regulations, we agree with the Tribe that the Association failed to "put forth any evidence in the [c]ircuit [c]ourt as to what those rules and regulations are, and [it has] not address[ed] those rules and regulations in its briefs before" this court. In its brief-in-chief, the Association stated that the bylaws include "the obligation to pay all dues and assessments properly levied by the Association," but the record contains neither a copy of the bylaws nor a summary of their terms.

To the extent we can review the Association's laws, rules and regulations, the MRA provides, "Except as specifically provided in this Act, nothing contained in this Act shall alter any property rights or obligations, any contractual rights or obligations, including existing fishing rights, or any obligations for taxes already levied." Menominee Restoration Act § 3(d). No federal or state appellate case has examined the

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> such property . . . 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 . . . .

MRA, or a similar federal law, to determine whether it permits a tribe to be bound by a private organization's bylaws. *But see Friends of E. Willits Valley v. County of Mendocino*, 101 Cal. App. 4th 191, 201 (Cal. Ct. App. 2002) (concluding under materially different facts that "federal law does not void prior restrictions on land" that the tribe agreed to before the land passed into trust). Therefore, we believe that a decision by the Wisconsin Supreme Court on this issue would be appropriate.

CONCLUSION

"The policy of leaving Indians free from state jurisdiction and control is deeply rooted in this Nation's history." *McGirt v. Oklahoma*, 591 U.S. 894, 928 (2020) (citation omitted). Despite the deeply rooted nature of Indian sovereignty, there remain important questions as to a state's jurisdiction to entertain actions pertaining to a tribe's property. The issues outlined above are uniquely relevant to Wisconsin, which is home to eleven federally recognized tribes. The Wisconsin Supreme Court "has been designated by the constitution and the legislature as a law-declaring court." *State v. Grawien*, 123 Wis. 2d 428, 432, 367 N.W.2d 816 (Ct. App. 1985). "While the court of appeals also serves a law-declaring function, such pronouncements should not occur in cases of great moment." *Id.* A decision by the supreme court on the issues presented by this case "will help develop, clarify or harmonize the law." *See* WIS. STAT. RULE 809.62(1r)(c).

Filed April 18, 2022

Circuit Court of Wisconsin
Menominee County

Legend Lake Property Owners Association, Inc.,
Plaintiff,

v.

Guy Keshena, and
The Menominee Indian Tribe of Wisconsin,
Defendants.

No. 2018-CV-007

Order for Judgment and Judgment of Dismissal

Katie Sloma, Judge

ORDER FOR JUDGMENT

Having reviewed the briefing and supporting papers of the parties and having considered the oral arguments of the parties on November 12, 2021, Clarence Duchac III of Hanaway Ross, S.C., representing the plaintiff, Legend Lake Property Owners Association, Inc. ("LLPOA"), and John Wilhelmi of the Legal Division of the Menominee Indian Tribe of Wisconsin and Jordana Thomadsen of Carlson Dash, LLC, representing the defendants, the Menominee Indian Tribe of Wisconsin and Guy Keshena, and the Court having issued an oral ruling on March 22, 2022, the Court Finds and Orders as follows:

1. The LLPOA filed this case on October 25, 2018 seeking the following three declarations relating to a restrictive covenant recorded by the LLPOA in the Menominee County Register of Deeds on June 18,

2009 in Vol. 84 of Records, p. 876 - 946, as Document number 29803 (the "Restrictive Covenant"): (1) that the Restrictive Covenant is valid and enforceable; (2) that the Restrictive Covenant applies and is of full force as to certain properties that the LLPOA calls the "Keshena Properties"; and (3) that any purported transfer of the Keshena Properties in violation of the Restrictive Covenant shall be rendered null and void. The LLPOA named as defendants the Menominee Indian Tribe of Wisconsin ("the Tribe") and Guy Keshena. Guy Keshena holds the Keshena Properties "for and on behalf of the Menominee Indian Tribe of Wisconsin."

2. The Tribe and Mr. Keshena moved the Court to dismiss the Complaint on numerous grounds, including the grounds of preemption and tribal sovereign immunity. On March 25, 2019, the Court granted an order denying the *Motion to Dismiss*.

3. Since March of 2019, new case law has addressed issues of preemption and tribal sovereign immunity. Defendants moved the Court to reconsider its 2019 denial of the *Motion to Dismiss*.

4. Among other things, the cases establish that Courts must enforce Congress's acts and treaties when it comes to reservation lands. They also hold that State Court judges cannot enable interference with federal law, and that the Court has no proper role in the adjustment of reservation borders.

5. The Menominee Restoration Act, a federal law enacted in 1973, seeks to restore land to the Menominee Tribe and provides a mechanism to do so.

6. The Restrictive Covenant seeks to prohibit the restoration of land to the Menominee Tribe.

7. The Court holds that the Menominee Restoration Act preempts the Restrictive Covenant, and that the Restrictive Covenant is not enforceable to prevent restoration of land to the United States of America in trust for the Menominee Tribe where that land is within the area addressed by the Menominee Restoration Act.

8. Further, the Menominee Indian Tribe of Wisconsin is a federally recognized Indian Tribe.

9. The Tribe, and agents that are duly appointed to purchase land for and on behalf of the Tribe, are immune from suit when those agents acquire property for and on behalf of the Tribe within the scope of that agent's authority.

10. There is no "in rem" exception to tribal sovereign immunity that is applicable to this case.

11. Tribal sovereign immunity has not been waived.

12. The Court holds that tribal sovereign immunity bars this suit against these defendants.

13. Because enforcement of the restrictive covenant is preempted by federal law, and, separately and in addition, because defendants are immune from this lawsuit as a result of tribal sovereign immunity, the Court grants Defendants' *Motion for Reconsideration and Motion to Dismiss*. The Court dismisses this case on its merits and orders that the *Judgment of Dismissal*, below, be entered.

14. Because the case is dismissed, it is unnecessary to address the remaining arguments of the parties, including the parties' cross-motions for summary judgment.

15. Statutory costs shall be taxed against the LLPOA pursuant to Wisconsin Statute Section 814.04.

16. In the event that this *Order for Judgment and Judgment of Dismissal* is provided to the Menominee County Register of Deeds, which the Tribe may do, the Register of Deeds shall duly record it in the Menominee County property records in the records of all properties against which the Restrictive Covenants, recorded in the Menominee County Register of Deeds on June 18, 2009 in Vol. 84 of Records, p. 876 - 946, as Document number 29803, has been recorded.

JUDGMENT OF DISMISSAL

1. This case is dismissed with prejudice.

2. This is a Final Order under Wisconsin Statute Section 808.04.

Let the judgment be entered accordingly.

Filed October 25, 2018

Circuit Court of Wisconsin
Menominee County

Legend Lake Property Owners Association, Inc.,
Plaintiff,

v.

Guy F. Keshena,

and

The Menominee Indian Tribe of Wisconsin,
Defendants.

No. 18 CV

Case Code: 30701

Complaint

Randall L. Gast, State Bar No. 1022132, Hanaway Ross, S.C., 345 South Jefferson Street, Green Bay, WI 54301-4522, Telephone No. 920-432-3381, for plaintiff.

COMES NOW the Plaintiff, Legend Lake Property Owners Association, Inc., by and through undersigned counsel, Hanaway Ross, S.C., by Attorney Randall L. Gast, and as and for its Complaint against the above named Defendants, alleges and shows the Court as follows:

THE PARTIES

1. Plaintiff Legend Lake Property Owners Association, Inc. ("Association") is, and at all times herein mentioned was, a corporation existing under the laws of the State of Wisconsin and is an association of property owners for properties in and

around Legend Lake in the County of Menominee, State of Wisconsin.

2. Defendant Guy F. Keshena is, and at all times herein mentioned was, an individual whose residence address is 503 ½ Main St., Apt. 4, Shawano, Shawano County, State of Wisconsin.

3. Defendant Menominee Indian Tribe of Wisconsin (the "Tribe") is, and at all times herein mentioned was, a dependent sovereign Indian Nation. The Tribe has its principal business location at W2908 Tribal Off Loop Rd., Keshena, Menominee County, Wisconsin

BACKGROUND FACTS

4. Legend Lake was initially developed in the late 1960s. The plat map governing the development contained certain restrictive covenants (the "Covenants"), which had been in effect and operated as deed restrictions since 1969.

5. The Covenants expired on July 1, 1999. The Covenants, however, expressly contemplated the creation of an owners' association:

> After completion of the project, ten or more property owners may form an Association for such purpose of policing and enforcing the aforesaid covenants and for the maintenance and use of wilderness areas, outlots, and lodge. Membership in such Association shall be mandatory to all property owners, ... The Association may adopt such by-laws to govern its operations, provided that such by-laws shall provide that a majority of voting rights shall constitute a quorum for any meeting and a

majority vote of voting rights present shall be required to carry any matter submitted to a vote.

6. The Association was created in 1972 when the Articles of Incorporation (the "Articles") were filed and recorded with the State of Wisconsin and the Menominee County Register of Deeds. Per the Articles, the Association's period of existence was deemed "perpetual" (Article 2), and membership was "mandatory" for all record owners, which membership was declared "appurtenant" to and inseparable from lot ownership (Article 7).

7. Since its inception, the principal purpose of the Association has been the collective and efficient management, maintenance, preservation, and operation of properties within Legend Lake. The Association has carried out these purposes through various forms of bylaws over the years.

8. In 1998, drastic action was necessary by the membership due to the prospective expiration of the Covenants in July 1999. Comprehensive efforts were therefore taken to reaffirm the continued viability of the Association, itself, and to modify the bylaws so as to, among other things, carry forward the terms and conditions of the Covenants.

9. In 1998, the Articles were restated ratifying the "perpetual" and "mandatory" membership provisions of the original Articles. Many of the restrictions contained in the Covenants were duly carried over to the bylaws when they were effectively amended on December 12, 1998 by the members (the "1998 Bylaws").

10. The restated Articles and 1998 Bylaws were not ratified by the Association's membership in a

vacuum. The Association conducted a number of informational sessions in advance of the votes so as to advise the electorate that the Covenants were set to expire and that comprehensive changes were necessary to preserve the status quo. Various alternatives and suggestions to the bylaws were tendered and considered by the members. The 1998 Bylaws were later revised by the Association's membership on January 20, 2001.

11. In prior litigation involving certain Association members and the Association, the Wisconsin Court of Appeals held that ". . . the Association could, through its by-law process, properly re-create and expand the property restrictions that expired in 1999 and can continue to maintain itself as a perpetual organization." *Legend Lake Property Owners Ass'n v. Lemay*, 289 Wis. 2d 549, 710 N.W.2d 725 (Ct. App. 2006).

THE RESTRICTIVE COVENANTS

12. On June 13, 2009, by way of an Amendment to the bylaws of the Association, upon due notice and requisite affirmative vote of the membership at the annual meeting, adopted restrictive covenants which constituted "covenants, conditions and restrictions running with the land as to any plot of land designated as a 'lot' or 'out lot' as set forth on the plat of Legend Lake, and any additions or amendments thereto, filed with the Register of Deeds for Menominee County" (the "Restrictive Covenants"). The Restrictive Covenants were recorded with the Menominee County Register of Deeds on June 18, 2009 as Document No. 29803. A true and correct copy of the Restrictive Covenants is attached hereto as Exhibit A and is incorporated herein by reference.

13. The Restrictive Covenants were intended to preserve the tax base of Menominee County, Wisconsin. The Restrictive Covenants were further intended to, among other things, "increase property values of Legend Lake properties by insuring compliance with state and local municipal control and governance, and to assure compliance with membership responsibilities" of the Association.

14. All Legend Lake properties subject to the Restrictive Covenants could only be "held, sold or conveyed only in accordance with these Restrictive Covenants, which shall be binding upon all parties acquiring or holding any right, title or interest in the Subject Real Estate (or any part thereof), their heirs, personal representatives, successors or assigns, and the Restrictive Covenants contained herein shall inure to the benefit of each owner thereof."

15. Article 1 of the Restrictive Covenants contain certain restrictions on transfer which provide, *inter alia*, as follows:

> B. Without the express written consent of the Association, which to be effective must be duly voted upon and approved by the Association's membership by amendment to the bylaws, no owner of any interest in the Subject Real Estate (or any part thereof) shall transfer any interest in the Subject Real Estate to any individual, entity (whether corporation, limited liability company, limited partnership, limited liability partnership, general partnership or otherwise), organization, or sovereign or dependent sovereign nation, or during the

period of ownership take any action, the result of which could or would:

(1) remove or eliminate the Subject Real Estate (or any part thereof) from the tax rolls of Menominee County, Wisconsin,

(2) diminish or eliminate the payment of real estate taxes duly levied or assessed against the Subject Real Estate (or any part thereof),

(3) remove the Subject Real Estate (or any part thereof) from the zoning authority and general municipal jurisdiction of Menominee County, Wisconsin,

(4) remove the Subject Real Estate (or any part thereof) from the general municipal jurisdiction of the State of Wisconsin, to include administrative regulations duly adopted, and/or

(5) remove the Subject Real Estate (or any part thereof) from the obligations and/or restrictions imposed on the Subject Real Estate (or any part thereof) by the duly adopted bylaws and resolutions of the Association, to include, without limitation, the obligation to pay all dues and assessments properly levied by the Association.

C. This Restriction on Transfer of Paragraph 1 shall apply to the transfer of an interest in an entity that is an owner of the Subject Real Estate if, as a result of the transfer, any of items (1)-(5) above could or would occur. This restriction shall, among

other things, expressly apply to any application to have the Subject Real Estate (or any part thereof) placed into federal trust pursuant to the Indian Reorganization Act.

D. Any owner of an interest in the Subject Real Estate (or any part thereof) shall at all times comply with any and all municipal and Association laws, rules, regulations and obligations as set forth in the foregoing restrictions, to include, without limitation, the property tax collection laws set forth in Chapters 74 and 75 of the Wisconsin Statutes. The Subject Real Estate remains subject to said municipal and Association laws, rules, regulations and obligations, in rem, notwithstanding a transfer to an owner not otherwise subject to them.

E. Any purported transfer of any interest in the Subject Real Estate (or any part thereof) in violation of these restrictions shall be null and void.

16. Article 4A of the Restrictive Covenants provides:

Expenses. In the event that any legal action is filed arising out of, or relating to, these Restrictive Covenants, and the Association is a party to said action, in the event that the Association is a prevailing party, all non-prevailing parties, jointly and severally, shall be liable to the Association for all costs and expenses incurred by the Association in defending or prosecuting such action, including reasonable attorney

fees and said costs and expenses shall be an Association lien on the disputed lot or out lot.

17. Article 4F of the Restrictive Covenants provides:

> Applicable Law: Jurisdiction and Venue. Any and all actions or proceedings seeking to enforce any provision of, or based upon any right arising out of, these Restrictive Covenants running with the land shall be brought against a party in the Circuit Court of Menominee County, State of Wisconsin (sitting in Shawano, Wisconsin) where the land is situated, and any purchaser and/or transferee of the land that is a party to any such action, by accepting the deed thereto, consents to the exclusive jurisdiction and venue of such court (and the appropriate appellate courts therefrom) in any such action or proceeding and waives any objection to jurisdiction and venue laid therein.

18. Article 4G of the Restrictive Covenants provides:

> Waiver of Defense. By acceptance of a deed transferring title ownership of any portion of the Subject Real Estate, the title owner waives any defense to an action filed with respect to these Restrictive Covenants by the Association based on sovereign immunity, and expressly consents to suit as provided for in Paragraph 4F above, and enforcement of any judgment rendered therein.

DEFENDANTS' LEGEND LAKE PROPERTY HOLDINGS

19. Defendant Guy F. Keshena is the owner of the following designated parcels within the Legend Lake development, taking title as "Guy F. Keshena, a single person for and on behalf of the Menominee Indian Tribe of Wisconsin" (the "Keshena Properties"):

Lot 22 Bent Tree Addition
Lot 35 Bent Tree Addition
Lot 56 Bent Tree Addition
Lot 38 Big Sky Addition
Lot 40 Big Sky Addition
Lot 43 Big Sky Addition
Lot 51 Big Sky Addition
Lot 68 Big Sky Addition
Lot 57 Council Hill Addition
Lot 80 Council Hill Addition
Lot 35 Great Bear Addition
Lot 36 Great Bear Addition
Lot 37 Great Bear Addition
Lot 33 Gray Eagle Addition
Lot 1 Hawk's Nest Addition
Lot 14 Hawk's Nest Addition
Lot 27 Hawk's Nest Addition
Lot 56 Hawk's Nest Addition
Lot 61 Hawk's Nest Addition
Lot 82 Mallard Bay Addition
Lot 63 Morning Star Addition
Lot 64 Morning Star Addition
Lot 31 Rainbow Pond Addition

Lot 1 Spirit Island Addition

Lot 12 Spirit Island Addition

Lot 42 Spring Glen Addition

Lot 48 Straight Arrow Addition

Lot 52 Straight Arrow Addition

Lot 15 Sun Dance Addition

Lot 27 Sun Dance Addition

Lot 54 Sun Rise Addition

Lot 32 Wood Duck Addition

Lot 33 Wood Duck Addition

20. The Keshena Properties are subject to the Restrictive Covenants and Defendant Guy F. Keshena took title to the Keshena Properties after the Restrictive Covenants were duly recorded with Menominee County Register of Deeds.

21. Defendant Menominee Indian Tribe of Wisconsin is the owner of Lot 60 Medicine Hat Addition within the Legend Lake development (the "Tribal Property"). The Tribal Property is subject to the Restrictive Covenants and Defendant Tribe took title to the Tribal Property after the Restrictive Covenants were duly recorded with the Menominee County Register of Deeds.

CLAIM FOR DECLARATORY JUDGMENT

22. The Association incorporates by reference and in full all of the allegations contained in paragraphs 1 through 21, above, as though fully set forth herein.

23. A justiciable controversy exists as to whether the Restrictive Covenants apply and are in force and effect with respect to the Keshena Properties and the Tribal Property. A declaratory judgment is, therefore, appropriate consistent with the Uniform Declaratory

Judgments Act, Section 806.04 of the Wisconsin Statutes.

24. The Association seeks declaratory judgment from this Court that:

A. The Restrictive Covenants are valid and legally enforceable.

B. The Restrictive Covenants apply and are of force and effect concerning the Keshena Properties and the Tribal Property.

C. Any purported transfer of the Keshena Properties and the Tribal Property in violation of the Restrictive Covenants shall be null and void.

WHEREFORE, the Association respectfully prays for judgment, as follows:

A. For declaratory judgment as requested;

B. For attorneys' fees and costs as provided for in the Restrictive Covenants, or as otherwise allowed by law; and

C. For such other and further relief as the Court deems just and proper.

Dated this 25th day of October, 2018.

HANAWAY ROSS, S.C.

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