Appeal No. 2022AP937 **Cir. Ct. No. 2018CV7**

WISCONSIN COURT OF APPEALS
DISTRICT III

LEGEND LAKE PROPERTY OWNERS ASSOCIATION, INC.,

PLAINTIFF-APPELLANT,

V.

GUY KESHENA AND THE MENOMINEE INDIAN TRIBE OF WISCONSIN,

DEFENDANTS-RESPONDENTS.

CERTIFICATION BY WISCONSIN COURT OF APPEALS

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

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

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

declaratory judgment action to enforce previously recorded restrictive covenants 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]

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

(continued)

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 & 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).

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.

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 "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

[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).

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.

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,

[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.

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 <u>could or would</u>:
>
> > (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. 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

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

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 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.

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

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

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. 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

[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.

[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.

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 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.

[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).

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). 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. 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

[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.

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 '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

[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.

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).

[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).

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 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)).

[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.

The Association argues that ***Timber & Wood Products*** does not apply to the facts of this case because the Association's declaratory judgment action "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 tribal sovereign immunity following the decision in ***Upper Skagit Indian Tribe***.

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

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 "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.

[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).

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 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

[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.

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

[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.

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 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***

[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).

v. Choctaw Nation, 104 F.4th 81, 90 & n.8 (9th Cir. 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 even without following proper

[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.

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).

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

[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)).

> 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]

[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.

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 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.

[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).

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 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.

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

[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.

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] ***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.").

[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 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 ….

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 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).