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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT 3

Case No. 2017AP0181

WISCONSIN DEPARTMENT OF NATURAL RESOURCES,

Plaintiff-Appellant,

v.

TIMBER AND WOOD PRODUCTS LOCATED IN SAWYER COUNTY, LAC COURTE OREILLES BAND OF LAKE SUPERIOR CHIPPEWA INDIANS OF WISCONSIN AND UNKNOWN DEFENDANTS,

Defendants-Respondents.

APPEAL FROM AN ORDER ENTERED IN THE SAWYER COUNTY CIRCUIT COURT, THE HONORABLE JOHN M. YACKEL, PRESIDING

RESPONSE BRIEF OF DEFENDANTS-RESPONDENTS

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TABLE OF CONTENTS

ISSUES PRESENTED 1

STATEMENT ON ORAL ARGUMENT AND PUBLICATION 2

ARGUMENT 2

I. THE CIRCUIT COURT CORRECTLY CONCLUDED THAT SOVEREIGN IMMUNITY PRECLUDES THIS LAWSUIT AGAINST THE TRIBE AND ITS PROPERTY 3

A. Supreme Court Precedent Precludes Actions Brought Directly or Indirectly Against Government Property 5

B. The Contrary Cases Cited By Wisconsin Are Not Persuasive ... 12

C. Even if the Wisconsin DNR Holds a Valid Lien on Timber and Wood Products, Sovereign Immunity Precludes Enforcement of that Lien 17

II. THE TRIBE HAS NOT WAIVED SOVEREIGN IMMUNITY FOR THESE PROCEEDINGS 21

A. There is no Waiver of Sovereign Immunity 21

B. Alternatively, This Matter Exceeds the Scope of Any Waiver of Immunity 28

III. STATE COURTS LACK SUBJECT MATTER JURISDICTION OVER THIS ACTION 32

CONCLUSION 44

CERTIFICATE OF MAILING 45

FORM AND LENGTH CERTIFCATION 45

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § 809.19(12) 46

TABLE OF AUTHORITIES

Cases

American Indian Agricultural Credit Consortium, Inc. v. Standing Rock Sioux Tribe, 780 F.2d 1374 (8th Cir. 1985) 28

Anderson v. Middleton Lumber Co. v. Quinault Indian Nation, 929 P.2d 379 (Wash. 1996) 15-16

Atkinson Trading Co. v. Shirley, 532 U.S. 645 (2001) 41-42

Blake Construction Co., Inc. v. American Vocational Association, Inc., 419 F.2d 308 (D.C. Cir. 1969) 7

Blatchford v. Native Village of Noatak, 501 U.S. 775 (1991) 4

Big Valley Band of Pomo Indians v. Superior Court, 35 Cal. Rptr. 3d 357 (Cal. Ct. App. 2005) 29-30

Binder v. City of Madison, 72 Wis. 2d 613, 241 N.W.2d 613 (Wis. 1976) 17

Bonnet v. Harvest (U.S.) Holdings, Inc., 741 F.3d 1155 (10th Cir. 2014) 5

Bryan v. Itasca Cnty., 426 U.S. 373 (1976) 22, 33

California v. Cabazon Band of Mission Indians, 480 U.S. 202 (1987) ...34,35,37

California v. Deep Sea Research, Inc., 523 U.S. 491 (1998) 10, 11

Calvello v. Yankton, 584 N.W.2d 108 (S.D. 1998) 31-32

Cass County Joint Water Resource District v. 1.43 Acres of Land in Highland Township, 643 N.W.2d 685 (N.D. 2002) 16

Cayuga Indian Nation v. Seneca Cnty., 890 F.Supp.2d 240 (W.D.N.Y. 2012) 17

C&L Enterprises, Inc. v. Citizen Band Potawatomi Indian Tribe,

532 U.S. 411 (2001) ..... .12, 25-26

Cohen v. Little Six, Inc., 543 N.W.2d 376 (Minn. Ct. App. 1996) 25

Coleman v. U.S. Bureau of Indian Affairs, 715 F.2d 1156 (7th Cir. 1983)... 29

Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163 (1989) 36, 39

Cty. of Yakima v. Confederated Tribes & Bands of the Yakima Indian Nation, 502 U.S. 251 (1992) 16

Dep't of the Army v. Blue Fox, Inc., 525 U.S. 255 (1999) 28

Dorr v. Sacred Heart Hosp., 597 N.W.2d 462, 228 Wis. 2d 425 (Wis. Ct. App. 1999) 19

Edelman v. Jordan, 415 U.S. 651 (1974) 9

E.F.W. and A.T.B. v. St. Stephen's Indian High School, 264 F.3d 1297 (10th Cir. 2001) 24

Fisher v. District Court, 424 U.S. 382 (1976) 40

Florida Paraplegic, Ass'n, Inc. v. Miccosukee Tribe of Indians of Florida, 166 F.3d 1126 (11th Cir. 1999) 24

Fluent v. Salamanca Indian Lease Auth., 928 F.2d 542 (2d Cir. 1991) 11

Gustafson v. Estate of Poitra, 800 N.W.2d 842 (N.D. 2011) 42-43

Hafer v. Melo, 502 U.S. 21 (1991) 13

Hamaatsa, Inc. v. Pueblo of San Felipe, 388 P.3d 977 (N.M. 2016) 14-16

Harris v. Lake of the Torches Resort & Casino, 2015 WI App 37, 862 N.W.2d 903, 363 Wis. 2d 656 28-29

Hawaii v. Gordon, 373 U.S. 57 (1963) 7

Hinkle v. Abeita, 283 P.3d 877 (N.M. Ct. App. 2012) 43

Idaho v. Coeur d'Alene Tribe of Idaho, 521 U.S. 261 (1997) 7

In re New York (I), 256 U.S. 490 (1921) 9

In re New York (II), 256 U.S. 503 (1921) 9-10, 14

Kennerly v. District Court, 400 U.S. 423 (1971) 40

Keweenaw Bay Indian Cmty. v. Naftaly, 452 F.3d 514 (6th Cir. 2006) 2

Kiowa Tribe of Okla. v. Mfg. Techs., Inc., 523 U.S. 751 (1998) 4,12,14,23,25

Koscielak v. Stockbridge-Munsee Cmty., 2012 WI App 30, 340 Wis. 2d 409, 811 N.W.2d 451 (2012) 14

Landreman v. Martin, 191 Wis. 2d 787, 530 N.W.2d 62 (Wis. Ct. App. 1995) .,.....23

Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682 (1949) ...1, 6, 14

Lewis v. Clarke, 137 S. Ct. 1285 (2017) 4, 6, 13-14

Madison Cnty. v. Oneida Indian Nation of New York, 562 U.S. 42 (2011) 17

Malone v. Bowdoin, 369 U.S. 643 (1962) 8

Maricopa County v. Valley National Bank of Phoenix, 318 U.S. 357 (1943)..21

McClanahan v. State Tax Comm'n of Arizona, 411 U.S. 164 (1973) 38, 43

Michigan v. Bay Mills Indian Cmty., 572 U.S. ___, 134 S. Ct. 2024 (2014) 3

Minnesota v. United States, 305 U.S. 382 (1939) 11

MM&A Prod., LLC v. Yavapai-Apache Nation, 316 P.3d 1248 (Ariz. Ct. App. 2014) 13

Moe v. Confederated Salish and Kootenai Tribes, 425 U.S. 463 (1976) 37

Montana v. United States, 450 U.S. 544 (1981) 41

Nanomantube v. Kickapoo Tribe in Kansas, 631 F.3d 1150 (10th Cir. 2011) 23-24

New Mexico v. Mescalero Apache Tribe, 462 U.S. 324 (1983) 33-34, 37, 39

O'Connell v. O'Connell, 2005 WI App. 51, 279 Wis. 2d 406, 694 N.W.2d 429 (Wis. Ct. App. 2005) 19-20

Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Oklahoma, 498 U.S. 505 (1991) 22

Oneida Indian Nation of New York v. Madison Cnty., 401 F.Supp. 2d 219 (N.D.N.Y. 2005), 605 F.3d 149 (2d Cir. 2010) 16, 17

Orff v. United States, 545 U.S. 596 (2005) 28

Pan American Co. v. Sycuan Band of Mission Indians, 884 F.2d 416 (9th Cir. 1989) 13

Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89 (1984) 1, 6

Plains Commerce Bank v. Long Family Land and Cattle Co., 554 U.S. 316 (2008) .;..... 41, 42

Ramey Construction Company v. Apache Tribe of the Mescalero Apache Reservation, 673 F.2d 315 (10th Cir. 1982) 27, 31

Republic of Argentina v. City of New York, 250 N.E.2d 698 (N.Y. Ct. App. 1969) 10

Sanderlin v. Seminole Tribe, 243 F.3d 1282 (11th Cir. 2001) 24

Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978) 4, 5, 43

Sheffer v. Buffalo Run Casino, PTE, Inc., 315 P.3d 359 (Okla. 2013) 24

Sossamon v. Texas, 563 U.S. 277 (2011) 29

Talton v. Mayes, 163 U.S. 376 (1896) 3

Thebo v. Choctaw Tribe of Indians, 66 F. 372 (8th Cir. 1895) 8,13

Three Affiliated Tribes of Fort Berthold Reservation v. Wold Eng'g, 476 U.S. 877 (1986) 22

Turner v. United States, 248 U.S. 354 (1919) 4

United States v. Alabama, 313 U.S. 274 (1941) 20-21

United States v. Farmers State Bank, 249 F.Supp. 579 (D.S.D. 1966) 11

United States v. Lewis Cnty., 175 F.3d 671 (9th Cir. 1999) 29

United States v. Nordic Village, Inc., 503 U.S. 30 (1992) 7

United States v. Wheeler, 435 U.S. 313 (1978) 4

United States v. United States Fid. & Guar. Co., 309 U.S. 506 (1940) 5, 12-13

Washington v. Confederated Tribes of Colville Indian Reservation, 447 U.S. 134 (1980) 37

White Mountain Apache Tribe v. Bracker, 448 U.S. 136 (1980) 34, 35, 36

Williams v. Lee, 358 U.S. 217 (1959) 32-33, 41, 42

Winer v. Penny Enterprises, Inc., 674 N.W.2d 9 (N.D. 2004) 43

Worcester v. Georgia, 31 U.S. 515 (1832) 32

Yavapai-Apache Nation v. Iipay Nation of Santa Ysabel, 135 Cal. Rptr. 3d 42, (Ca. Ct. App. 2011) 28

Zych v. Wrecked Vessel, 960 F.2d 665 (7th Cir. 1992) 8-9

Statutes

18 U.S.C. § 1151 41

Public Law 280, 18 U.S.C. s. 1360(a) 22, 33

Wis. Stat. § 77.03 .....19, 30, 31, 35

Wis. Stat. § 77.06(5) 19

Wis. Stat. § 77.07(2) 2

Wis. Stat. § 77.07 .....18, 19

Other Sources

72 Op. Att'y Gen. 74 (1983) 3

Black's Law Dictionary 1006 (9th ed. 2009) 20

Cohen's Handbook of Federal Indian Law (2012 ed.) 38, 40

Indian Entities Recognized and Eligible To Receive Services From the United States Bureau of Indian Affairs, 81 Fed. Reg. 5,019 (Jan. 29, 2016) 5

William Wood, *It Wasn't an Accident: The Tribal Sovereign Immunity Story*, 62 Am. U. L. Rev. 1587 (2013) 4

ISSUES PRESENTED

1. Federally recognized Indian tribes possess immunity from all court processes. This includes not only direct litigation where the tribe is named as a party, but also any lawsuit where the tribe is the "real party in interest," *Penhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 101 (1984), because the lawsuit would "require action by the sovereign or disturb the sovereign's property." *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 687 (1949). Is this lawsuit, which seeks a money judgment against the Tribe as well as the ability to cut down and seize the trees found on the Tribe's land, barred by sovereign immunity?

   Decision below: Yes.

2. Congress or the tribe itself can waive the tribe's immunity from suit. Such a waiver cannot be implied, but must be clearly expressed. Additionally, any waiver must be strictly construed to preserve sovereign rights. The Tribe's Secretary-Treasurer signed a form agreement typically executed only by individual property owners (non-sovereigns) that stated the grantee "agrees to comply with the terms of the Forest Crop Law . . . including the payment of the severance taxes" due. Does this language somehow waive the Tribe's sovereign immunity to allow the Wisconsin Department of Natural Resources to enforce a tax that it calculated without using the process required by the Forest Crop Law?

   Decision below: No.

3. Absent tribal consent or Congressional authorization, state courts lack subject matter jurisdiction over lawsuits involving Indian tribes or tribal property within Indian country unless non-Indians are the real target of the lawsuit. Congress has not granted Wisconsin jurisdiction over Indian tribes. Do Wisconsin courts possess subject matter jurisdiction over this lawsuit, which does not involve non-Indians, but rather seeks a money judgment against the Tribe and the ability to cut down and seize the trees found on the Tribe's land?

   Decision below: No.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument and publication are requested by the Tribe, as this case involves important issues of tribal sovereignty. While this case is controlled by Supreme Court precedent, this is the first time such issues have been presented to Wisconsin state courts, and publication may assist the circuit courts in complying with federal law.

ARGUMENT

In December 2015, the Wisconsin Department of Natural Resources ("Wisconsin DNR") served a Complaint on the Lac Courte Oreilles Band of Lake Superior Chippewa Indians ("Tribe"). The lawsuit alleged that the Tribe owed the Wisconsin DNR a severance tax of $74,819.74 plus penalties and interest, pursuant to Wis. Stat. § 77.07(2). The Tribe and the "Timber and Wood Products" located on Tribal lands were named as defendants, and among other things, the Wisconsin DNR sought court permission to enter Tribal lands and cut down the trees found thereon.

The Tribe denies that any lien exists on its property, or that any tax is due, but these are substantive questions not presented at this stage in the litigation.[1] The Tribe filed an Answer and a Motion to Dismiss, both of which

[1] The Tribe has numerous substantive defenses as set forth in its Answer. For example, any taxation of the property is precluded by the 1854 Treaty of LaPointe. *See Keweenaw Bay Indian Cmty. v. Naftaly*, 452 F.3d 514 (6th Cir. 2006) (holding that Michigan lacked authority to impose real estate taxes on fee lands within the Keweenaw Bay Indian Community if they were

argued that even assuming the facts contained in the Complaint to be true, the case must be dismissed because the Tribe possesses immunity from suit, and Wisconsin courts lack subject matter jurisdiction over a lawsuit where the Tribe and Tribal property are defendants. While the case was pending in the circuit court, the Wisconsin Legislature abolished the severance tax for all parcels still enrolled in the Forest Crop Law program, *see* 2015 Wis. Act 358, but it did not apply this revision retroactively, and the Wisconsin DNR doggedly pursued its claim. After considering the parties' briefing and more than two hours of oral argument, however, the circuit court dismissed the lawsuit. This court should uphold that decision.

I. THE CIRCUIT COURT CORRECTLY CONCLUDED THAT SOVEREIGN IMMUNITY PRECLUDES THIS LAWSUIT AGAINST THE TRIBE AND ITS PROPERTY.

Indian tribes are "separate sovereigns pre-existing the Constitution." *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. ___, 134 S. Ct. 2024, 2030 (2014). *See also Talton v. Mayes*, 163 U.S. 376, 382 (1896) (noting that tribal sovereignty was not created by, and does not spring from, the U.S. Constitution). As such, they possess all "aspects of sovereignty not withdrawn by treaty or statute, or by implication as a necessary result of

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originally allotted pursuant to the 1854 Treaty of LaPointe); 72 Op. Att'y Gen. 74, 75 (1983) (opining that Wisconsin lacked the authority to impose ad valorem property taxes on land owned in fee within an Indian reservation if the land was allotted under the 1854 Treaty of LaPointe).

their dependent status." *United States v. Wheeler*, 435 U.S. 313, 323 (1978). Among these retained, core aspects of sovereignty is the "common-law immunity from suit traditionally enjoyed by sovereign powers." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978). *See also Lewis v. Clarke*, 137 S. Ct. 1285, 1290 (2017) (citing *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 782 (1991), for the proposition that Indian tribes have not surrendered their immunity to permit suits by States).

Today, tribal sovereign immunity is "settled law," *Kiowa Tribe of Okla. v. Mfg. Techs., Inc.*, 523 U.S. 751, 756 (1998), as it has been recognized by federal courts for more than 100 years. *Turner v. United States*, 248 U.S. 354, 358 (1919) (dismissing lawsuit against the Creek Nation and holding that "[w]ithout authorization from Congress, the Nation could not then have been sued in any court; at least without its consent"); William Wood, *It Wasn't an Accident: The Tribal Sovereign Immunity Story*, 62 Am. U. L. Rev. 1587 (2013) (recounting the history of the development of tribal sovereign immunity, including cases from federal courts in the nineteenth century). It includes all tribal activities, whether on-reservation or off-reservation, and regardless of whether the activity is governmental or commercial in nature. *Kiowa*, 523 U.S. at 757 (holding that tribe was immune from suit on a contract to buy stock executed outside of the tribe's reservation). It protects a

tribe from suits seeking declaratory or injunctive relief as well as money damages, *id.* at 760; *Santa Clara Pueblo*, 436 U.S. at 58, from counterclaims, *e.g.*, *United States v. United States Fid. & Guar. Co.*, 309 U.S. 506, 513 (1940), and from all court processes (e.g., subpoenas, discovery). *E.g.*, *Bonnet v. Harvest (U.S.) Holdings, Inc.*, 741 F.3d 1155, 1156 (10th Cir. 2014) (quashing non-party subpoena *duces tecum* requesting documents from tribe).

The Lac Courte Oreilles Band of Lake Superior Chippewa Indians is a federally recognized Indian tribe. Indian Entities Recognized and Eligible To Receive Services From the United States Bureau of Indian Affairs, 81 Fed. Reg. 5,019, 5,021 (Jan. 29, 2016). As such, the circuit court rightly concluded that the Tribe possesses sovereign immunity. The Wisconsin DNR claims, however, that the circuit court erred in dismissing this lawsuit because (1) the Tribe's immunity does not extend to *in rem* actions against government property, (2) even if the Tribe's immunity extends to such actions, the Tribe does not own the trees on its land because they are subject to a lien in favor of the State, and (3) even if sovereign immunity would typically prevent this action, the Tribe has waived its immunity by contract. Each of these claims must be rejected.

A. Supreme Court Precedent Precludes Actions Brought Directly or Indirectly Against Government Property.

The Wisconsin DNR named the "Timber and Wood Products Located in Sawyer County, Wisconsin" as one of the defendants, making this portion of the case an *in rem* proceeding. App. at 114 (Complaint at ¶ 26). The Complaint defined "Wood Products" to include "standing trees, cut timber, stumpage, or other wood products located on such property or traceable to such property." App. at 116 (Complaint at ¶ 30). Count 3 of the Complaint sought a judgement for replevin of the Wood Products, and an order from this Court that would enable the Wisconsin DNR to enter the Tribe's property and cut down and remove the standing timber located thereon. App. at 125-26 (Complaint at ¶ 96 & Conclusion and Remedies at ¶ 4). The circuit court correctly concluded that this *in rem* action was barred by tribal sovereign immunity.

Sovereign immunity bars not only lawsuits that name the sovereign, but also all lawsuits where the government is the "real, substantial party in interest." *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 101 (1984). In deciding whether a case is barred by sovereign immunity, "courts may not simply rely on the characterization of the parties in the complaint, but rather must determine in the first instance whether the remedy sought is truly against the sovereign." *Lewis*, 137 S.Ct. at 1291. Consequently, a litigant cannot evade sovereign immunity by simply naming governmental

officials as defendants if he seeks to compel government action, seize government property, or obtain money from the government coffers. *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 688 (1949) (barring a suit seeking an injunction prohibiting the head of the War Assets Administration from delivering coal to anyone other than the plaintiff, because the suit was "in substance, a suit against the Government"); *Hawaii v. Gordon*, 373 U.S. 57, 58 (1963) (per curiam) (dismissing lawsuit against governmental official after concluding that the "relief sought nominally against an officer is in fact against the sovereign" because, among other things, it would "cause . . . the disposition of property admittedly belonging to the United States").

Likewise, a litigant cannot avoid sovereign immunity by bringing an *in rem* proceeding where the *res* is owned by, and within the possession of, a government. *United States v. Nordic Village, Inc.*, 503 U.S. 30, 38 (1992) (finding "respondent's . . . argument that a bankruptcy court's *in rem* jurisdiction overrides sovereign immunity" to be "unpersuasive"). *See also Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 281-88 (1997) (holding that sovereign immunity precluded federal courts from exercising jurisdiction over a lawsuit seeking to divest the state of a property interest in lands submerged under Lake Coeur d'Alene); *Blake Construction Co., Inc. v. American Vocational Association, Inc.*, 419 F.2d 308, 312, n.16 (D.C. Cir.

1969) (noting that "[p]erhaps one of the clearest facets of the doctrine of sovereign immunity is that '[a] proceeding against property in which the United States has an interest is a suit against the United States,'" and collecting Supreme Court cases standing for this proposition). This should not be surprising. After all, one of the primary purposes of sovereign immunity is to protect government property. *Malone v. Bowdoin*, 369 U.S. 643, 646 (1962) (dismissing action for ejectment against U.S. Forest Service employee by private citizen who claimed to own the land in question and noting that "suits against government agents, specifically affecting property in which the United States claimed an interest, were barred by the doctrine of sovereign immunity"). Without such protections, the government – especially tribal governments, which still have relatively limited resources – might not be able to operate. *Thebo v. Choctaw Tribe of Indians*, 66 F. 372, 376 (8th Cir. 1895) (upholding tribal sovereign immunity while noting that "[a]s rich as the Choctaw Nation is said to be in lands and money, it would soon be impoverished if it was subject to the jurisdiction of the courts, and required to respond to all the demands which private parties chose to [bring] against it").

That *in rem* proceedings over property owned by and in the possession of a government are barred by sovereign immunity is well-settled law, supported by numerous, binding Supreme Court decisions. By way of

illustration, litigants often bring admiralty cases against government officials or against government-owned ships (*in rem*). Case law firmly establishes that in both of these cases, sovereign immunity prevents the lawsuit from proceeding unless there is a valid waiver. For example, in *Zych v. Wrecked Vessel*, the plaintiff brought an *in rem* action seeking to establish his ownership of a shipwreck in Lake Michigan that he located while diving. 960 F.2d 665, 666 (7th Cir. 1992). The U.S. Court of Appeals for the Seventh Circuit held that the federal courts could adjudicate the plaintiff's claims with respect to the whole world except for the state of Illinois, because the state was shielded by sovereign immunity. *Id.* at 669. In doing so, the Court noted that "[t]he strength of the state's legal position is irrelevant; the eleventh amendment prevents the district judge from exercising jurisdiction" over the state, *id.* at 670, and contrary to the plaintiff's claims, "there is no general *in rem* exception to principles of sovereign immunity."[2] *Id.* at 669.

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[2] The Wisconsin DNR argues that this quotation supports its position, because supposedly when *Zych* notes that "there is no general [exception]" to sovereign immunity in *in rem* cases, that means that there are specific exceptions (i.e., that sovereign immunity does not bar all in rem claims). Wisconsin DNR Br. at 24-25. This is a misreading of *Zych*. In the quoted passage, the Seventh Circuit was refuting the plaintiff's claim that the Supreme Court's decision in *Edelman v. Jordan*, 415 U.S. 651 (1974), had created a general exception to sovereign immunity. Elsewhere in the opinion, the Seventh Circuit emphatically states without any qualification that "[t]he eleventh amendment applies to admiralty *in rem* proceedings," and "[a] judgment declaring that the state possesses no interest in particular property

The Seventh Circuit in *Zych* did not invent this decision out of whole cloth; it relied on long-standing Supreme Court precedent. In particular, *Zych* cites two companion cases decided on the same day by the Supreme Court in 1921. *In re New York (I)*, 256 U.S. 490 (1921); *In re New York (II)*, 256 U.S. 503 (1921). *In re New York (II)* involved claims against The Queen City, a steam tug owned by the state of New York, which was allegedly responsible for the drowning death of an individual. The Supreme Court dismissed the lawsuit against the tug. It reasoned as follows:

> [I]t is uniformly held in this country that even in the case of municipal corporations . . . their property and revenue necessary for the exercise of those powers are to be considered as part of the machinery of government exempt from seizure and sale under process against the city. As Mr. Chief Justice Waite said, speaking for this court in *Klein v. New Orleans*, 99 U.S. 149, 150, 25 L. Ed. 430):
>
> > 'To permit a creditor to seize and sell them to collect his debt would be to permit him in some degree to destroy the government itself.'
>
> . . . .
>
> The principle so uniformly held to exempt the property of municipal corporations employed for public and governmental purposes from seizure by admiralty process in rem applies with even greater force to exempt public property of a state used and employed for public and governmental purposes.

New York (II), 256 U.S. at 511. This remains good law. *See also e.g., California v. Deep Sea Research, Inc.*, 523 U.S. 491 (1998) (holding that a state's Eleventh Amendment immunity precluded *in rem* admiralty

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is a judgment 'against one of the United States' for constitutional purposes," and therefore barred by sovereign immunity. *Zych*, 960 F.2d at 669.

proceedings when the res was owned and possessed by the state, and citing similar cases involving federal and foreign immunity); *Republic of Argentina v. City of New York*, 250 N.E.2d 698, 701-02 (N.Y. Ct. App. 1969) (noting that "no sovereign state can itself be sued without its consent, and its governmental property is not susceptible to attachment, levy or seizure by the courts").

Here, the Wisconsin DNR brings the precise type of case the Supreme Court has prohibited – a case "where, in order to sustain the proceeding, the possession of the [tribe] must be invaded under process of the court" – as the State seeks to enter the Tribe's property and cut down the standing timber thereon to satisfy any judgment in this case. *Deep Sea*, 523 U.S. at 507. Moreover, sovereign immunity requires dismissal of this *in rem* action because if the Tribe is not actually a defendant in a case against its property, it should be, since it is an indispensable party. *Minnesota v. United States*, 305 U.S. 382, 386-87 (1939) (holding that the United States was an indispensable party in proceedings brought by the state to condemn lands which had been allotted to individual Indians but were still held in trust by the United States); *Fluent v. Salamanca Indian Lease Auth.*, 928 F.2d 542, 547-48 (2d Cir. 1991) (dismissing suit affecting lease of tribal lands because tribe was an indispensable party); *United States v. Farmers State Bank*, 249 F.Supp. 579, 581-83 (D.S.D. 1966) (holding that the United States was an

indispensable party that could not be joined due to its sovereign immunity, necessitating dismissal of garnishment lawsuit where the government held an interest in the property in question).

B. The Contrary Cases Cited By Wisconsin Are Not Persuasive.

The above cases were considered by the circuit court, and it found them persuasive. App. at 106 ("The Court finds persuasive the cases cited by LCO with respect to the DNR's *in rem* claim"). Yet the Wisconsin DNR did not try to distinguish these cases in its briefing here. Instead, it simply cites a handful of lower federal and state court cases that have concluded that *in rem* actions can proceed against tribal property.

While the cases cited above primarily deal with the sovereign immunity of the federal government and the Eleventh Amendment immunity of the states, they are controlling here, because the Supreme Court has repeatedly stated that the scope of tribal, federal and state sovereign immunity are, for the most part, coextensive. *C&L Enterprises, Inc. v. Citizen Band Potawatomi Indian Tribe*, 532 U.S. 411, 421 n.3 (2001) ("Instructive here is the law governing waivers of immunity by foreign sovereigns"); *Kiowa*, 523 U.S. at 759 ("In considering Congress' role in reforming tribal immunity, we

find instructive the problems of sovereign immunity for foreign countries"); *United States Fid. & Guar. Co.*, 309 U.S. at 512-13 (analogizing the sovereign immunity of the federal government to the immunity of Indian tribes).[3] The Supreme Court reiterated this point in a case decided just this term:

Lewis v. Clarke involved a lawsuit brought against a tribal employee (Clarke) in his individual capacity, for negligently causing a car accident that injured the plaintiffs, Brian and Michelle Lewis. 137 S. Ct. 1285 (2017). Clarke argued that the lawsuit was barred by tribal sovereign immunity. The Supreme Court disagreed, because the case was not filed against Clarke in his official capacity. The Court stated:

> Our cases establish that, in the context of lawsuits against state and federal employees or entities, courts should look to whether the sovereign is the real party in interest to determine whether sovereign immunity bars the suit. See *Hafer v. Melo,* 502 U.S. 21, 25 (1991). In making this assessment, courts may not simply rely on the characterization of the parties in the complaint, but rather must determine in the first instance whether the remedy sought is truly against the sovereign. See, *e.g.*, *Ex parte New York*, 256 U.S. 490, 500-02 (1921). If, for example, an action is in essence against a State even if the State is not a named party,

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[3] *See also Pan American Co. v. Sycuan Band of Mission Indians,* 884 F.2d 416, 418 (9th Cir. 1989) ("Indian tribes have long been recognized as possessing common-law immunities from suit co-extensive with those enjoyed by other sovereign powers including the United States"); *MM&A Prods., LLC v. Yavapai-Apache Nation*, 316 P.3d 1248, 1251 (Ariz. Ct. App. 2014) (same); *Thebo*, 66 F. at 376 ("It has been the settled policy of congress not to sanction suits generally against these Indian Nations . . . . they have been placed by the United States, substantially, on the plane occupied by the states under the eleventh amendment to the constitution").

> then the State is the real party in interest and is entitled to invoke the Eleventh Amendment's protection. . . .
>
> There is no reason to depart from these general rules in the context of tribal sovereign immunity. . . .[This case is not barred by sovereign immunity because] [i]t is simply a suit against Clarke to recover for his personal actions, which 'will not require action by the sovereign or disturb the sovereign's property.' *Larson v. Domestic and Foreign Commerce Corp.*, 337 U.S. 682, 687 (1949).

137 S. Ct. at 1291-92. In other words, in its most recent decision, the Court reaffirmed that the scope of tribal sovereign immunity was the same as federal and state sovereign immunity. It cited the same cases relied on by the Tribe in Section I(A) above – *Larson* and *New York (II)* – both of which were also provided to the circuit court below. And those cases establish that if the sovereign is the "real party in interest," because, for example, the action would "disturb the sovereign's property," then the lawsuit is barred.

Tribal sovereign immunity is a matter of federal law. It cannot be redefined by state courts. *Kiowa*, 523 U.S. at 756 ("tribal immunity is a matter of federal law and is not subject to diminution by the States"); *Koscielak v. Stockbridge-Munsee Cmty.*, 2012 WI App 30, ¶ 7, 340 Wis. 2d 409, 414, 811 N.W.2d 451, 454. As the Supreme Court of New Mexico recently stated in an extensively reasoned opinion, "the unequivocal precedent of the United States Supreme Court declares only two exceptions to tribal sovereign immunity – the tribe's waiver of immunity or

congressional authorization." *Hamaatsa, Inc. v. Pueblo of San Felipe*, 388 P.3d 977, 983 (N.M. 2016). Nothing in Supreme Court precedent indicates that states can create a third exception for *in rem* proceedings. *Id.* at 984 (holding that tribal sovereign immunity precluded the court from entertaining a lawsuit seeking declaratory judgment that landowner possessed a valid easement over tribal land).

It is true that lower court cases lack complete uniformity, but the cases cited by the State are not persuasive, and many are factually and legally distinct from the case at hand. For example, Wisconsin cites *Anderson v. Middleton Lumber Co. v. Quinault Indian Nation*, 929 P.2d 379 (Wash. 1996). Wisconsin DNR Br. at 22. In that case, a lumber company brought action to partition and quiet title to fee-patented lands within the Quinault Indian Reservation in which it held five-sixths interest, as tenant-in-common. When the lawsuit was commenced, the other one-sixth interest was held by ten individuals. While the case was pending, those individuals transferred their interest to the tribe. *Quinault*, 929 P.2d at 381. The court held that the tribe's sovereign immunity did not bar the *in rem* proceeding. While the reasoning of the decision is confused in parts, the decision was not remarkable, because whether a court possesses jurisdiction is determined at the outset of the litigation. In this case, the court was able to exert *in rem*

jurisdiction over the property when the lawsuit was filed, because that property was not owned by a sovereign. Transferring the property to an Indian tribe after the litigation had already commenced could not defeat the court's jurisdiction. *Id.* at 385. *Quinault* is inapposite to these proceedings, where the Tribe has owned the parcels (and wood products found thereon) in dispute since 1992/1993, lbefore this litigation was commenced.[4]

There are many lower state and federal court cases that have properly followed Supreme Court precedent and held that sovereign immunity precludes an *in rem* proceeding against tribal property. *See, e.g.*, *Hamaatsa,* 388 P.3d 977 (dismissing, in a lengthy and well-reasoned opinion, a lawsuit

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[4] Wisconsin also cites *Cass County Joint Water Resource District v. 1.43 Acres of Land in Highland Township*, 643 N.W.2d 685 (N.D. 2002). Wisconsin DNR Br. at 21. In that case, the Cass County Joint Water Resource District, a political subdivision of North Dakota, sought to construct a dam. It submitted an application to the United States in 1994 to gain approval for the project, and at the time, there was a private landowner whose property would be affected that opposed the project. Fourteen years later, in an action designed solely in an attempt to halt the already-approved project, this private landowner transferred his property to the Turtle Mountain Band of Chippewa Indians. The tract of land was approximately 200 miles from the tribe's reservation and did not even lie within the aboriginal territory of the tribe. *Id.* at 688. The tribe then argued that sovereign immunity barred condemnation proceedings. The North Dakota Supreme Court rejected this argument citing *Quinault* and the Supreme Court's decision in *Cty. of Yakima v. Confederated Tribes & Bands of the Yakima Indian Nation,* 502 U.S. 251 (1992), the latter of which does not address sovereign immunity at all. In doing so, the court noted that "[t]he Tribe has not cited any case holding that tribal sovereign immunity bars an in rem condemnation action in state court." *Id.* at 691. In other words, bad facts and bad advocacy resulted in an erroneous decision. This case should not be found persuasive.

seeking to establish the validity of an easement across tribally owned fee land located outside of reservation boundaries); *Oneida Indian Nation of New York v. Madison Cnty.*, 401 F.Supp. 2d 219, 229 (N.D.N.Y. 2005) (dismissing county's attempts to foreclose on fee land owned by an Indian tribe due to non-payment of real estate taxes and noting that "[i]t is of no moment that the state foreclosure suit at issue here is *in rem*. . . . The County cannot circumvent Tribal sovereign immunity by characterizing the suit as *in rem*, when it is, in actuality, a suit to take the tribe's property");[5] *Cayuga Indian Nation v. Seneca Cnty.*, 890 F.Supp.2d 240 (W.D.N.Y. 2012) (concluding that *Madison Cnty.* was still persuasive and enjoining county from foreclosing on tribal lands for failure to pay taxes). This court should do the same.

C. Even if the Wisconsin DNR Holds a Valid Lien on the Timber and Wood Products, Sovereign Immunity Precludes Enforcement of that Lien.

On page 25-26 of its brief, the Wisconsin DNR offers a new argument that appears nowhere in its argument to the circuit court, and therefore is likely barred on appeal. *Binder v. City of Madison*, 72 Wis. 2d 613, 621, 241 N.W.2d 613, 617 (Wis. 1976) ("issues not presented to the trial court will not

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[5] The Second Circuit upheld this decision on appeal, *see* 605 F.3d 149 (2d Cir. 2010), and the Supreme Court granted certiorari. While the case was pending before the Supreme Court, the Oneida Nation decided to grant a waiver of its sovereign immunity. Thus, the Court vacated and remanded the case for further proceedings unrelated to the issue of sovereign immunity. *Madison Cnty. v. Oneida Indian Nation of New York*, 562 U.S. 42 (2011).

be considered for the first time on appeal"). It claims that the state acquired a lien on the timber products in 1962, when the land was enrolled in the Forest Crop Lands program, and therefore, "when Futurewood Corporation sold the Real Estate to the Tribe in 1992-93, it could not and did not convey to the Tribe any ownership of the property interest in the Timber that the State had already owned for approximately 30 years." Wisconsin DNR Br. at 25-26. The Wisconsin DNR reasons that the *in rem* action can move forward, because it is "not ask[ing] the Court to deprive the Tribe of any property interest that it had obtained when it purchased the Real Estate in 1992-92." *Id.* at 26. No cases or statutes are cited in support of this argument.

As an initial matter, the Wisconsin DNR is incorrect in asserting that a lien existed on the timber and wood products in 1962. The provision of Wisconsin law that supposedly created this lien was identical in both 1962, when the land was enrolled in the Forest Crop Law program, and in 1992/1993, when the Tribe purchased the property in question. That provision, which has since been repealed, stated as follows:

> Severance tax. (1) Liability for Taxes, Liens. The owner of the land shall be personally liable for any severance tax because of any wood products cut therefrom, which tax shall also be a lien on such wood products wherever situated and in whatever form, or if mingled with other products, then on the common mass, until paid, while in the possession of such owner, or of any other person than a purchaser for value without notice in the usual course of business.

Wis. Stat. § 77.07 (1962 & 1992), available at https://docs.legis.wisconsin.gov/archive. The plain language of the statute requires that for the lien to exist, the severance tax must be due, and the severance tax is only due when trees are cut and removed from the property, Wis. Stat. § 77.06(5), or when the contract period has ended. Wis. Stat. § 77.03.

That the tax must be due before the lien can exist should be obvious. As this court has previously stated:

> Nowhere in the Wisconsin statutes does the legislature reflect an intent to allow a lien to be impressed on an individual's property when that person owes no obligation to the lien claimant. Indeed, the creation of lien rights is an attempt to secure payment for debts due the lienholder and to facilitate the satisfaction of that obligation. To suggest that a lien can exist independent of a debt turns the purpose and provisions of a lien statute on its head.

Dorr v. Sacred Heart Hosp., 597 N.W.2d 462, 470, 228 Wis. 2d 425, 438 (Wis. Ct. App. 1999). The Wisconsin DNR does not allege in its Complaint that prior to the date the Tribe purchased the land in question a severance tax remained unpaid, resulting in a lien under Wis. Stat. § 77.07. Instead, this lawsuit claims that a tax was due on the standing timber when the property left the Forest Crop Law program, in December 2012. Wis. Stat. § 77.03. At *best*, that would mean that the lien arose on that date, when the property was Tribally owned.

The Wisconsin DNR has also failed to cite any case law for its claim that a preexisting lien would deprive the Tribe of an ownership interest in the trees found on its land. This argument defies common sense. A lien is an encumbrance on property. It does not deprive the owner of his interest in that property until and unless executed by the court. *See, e.g., O'Connell v. O'Connell*, 2005 WI App. 51, ¶12, 279 Wis. 2d 406, 414, 694 N.W.2d 429, 434 (Wis. Ct. App. 2005) (referring to Black's Law Dictionary's definition of encumbrance and noting that a lien is a "claim or liability that is attached to property . . . that is not an ownership interest"); Black's Law Dictionary 1006 (9th ed. 2009) (defining lien as "[a] legal right or interest that a creditor has *in another's property*, lasting usually until a debt or duty that it secures is satisfied," and noting that "[t]ypically, the creditor does not take possession of the property on which the lien has been obtained") (emphasis added).

Finally, if the Wisconsin DNR is alleging that the existence of the lien should somehow create an exception to sovereign immunity such that this *in rem* lawsuit can proceed, this is also in err. In *United States v. Alabama*, the Supreme Court noted that while the federal government was not entitled to cancellation of a lien on land that it owned, that same lien could not be enforced against the United States unless it waived its immunity from suit:

> Our present inquiry is whether, assuming the validity of the state statute creating a lien as of October 1, 1935, as against all other subsequent purchasers, it should be deemed invalid as

> against the United States. *The question is not whether such a lien could be enforced against the United States. The fact that the United States had taken title and that proceedings could not be taken against the United States without its consent would protect it against such enforcement.* But that immunity would not be predicated upon the invalidity of the lien. If in this instance title had been taken by the United States in the summer of 1937 after the amount of the taxes had been ascertained and the respective liens were concededly valid, still proceedings against the United States could not be prosecuted without its consent.

313 U.S. 274, 281 (1941) (emphasis added).

Similarly, in *Maricopa County v. Valley National Bank of Phoenix*, state taxing authorities were precluded from foreclosing on a lien existing on federally owned land without a waiver of sovereign immunity. The Supreme Court stated:

> In the instant case the state taxing authorities are asserting rights which if recognized can be enforced by the maintenance of a suit to establish and foreclose a lien on property of a federal instrumentality, the Reconstruction Finance Corporation. *But even a proceeding against property in which the United States has an interest is a suit against the United States. No such suit may be maintained without the consent of the United States.*

318 U.S. 357, 362 (1943) (emphasis added). Thus, even if the Wisconsin DNR is correct and a lien existed on the timber and wood products prior to the Tribe's acquisition of the land, the timber and wood products were still owned by the Tribe, and the Tribe's sovereign immunity still would not permit the State to enforce that lien through an *in rem* action without a valid waiver.

II. The Tribe Has Not Waived Sovereign Immunity For These Proceedings.

A. There is no Waiver of Sovereign Immunity.

As established above, the Tribe has immunity from suit and all court processes, whether directed at the Tribe itself or at its property. Therefore, without an express waiver of immunity, state courts may not exercise jurisdiction over the Tribe or its property. *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505, 509 (1991).

There is a strong presumption against waivers of sovereign immunity. *Id.* at 509. To waive tribal sovereign immunity, Congress must "unequivocally" express that purpose. *Santa Clara Pueblo*, 436 U.S. at 58. Likewise, to relinquish its own immunity, an Indian tribe's waiver must be "clear." *Potawatomi,* 498 U.S. at 509.

The State does not refer to any Congressional statute that could have waived tribal sovereign immunity and there is none. Congress "has never authorized suits [by states] to enforce tax assessments." *Potawatomi*, 498 U.S. at 510. While Public Law 280 extended the scope of Wisconsin's civil and criminal jurisdiction over individual Indians in certain circumstances, it did not provide the State jurisdiction over tribes themselves, *Bryan v. Itasca Cnty.*, 426 U.S. 373, 383-88 (1976), and it did not waive tribal sovereign

immunity. *Three Affiliated Tribes of Fort Berthold Reservation v. Wold Eng'g*, 476 U.S. 877, 892 (1986).

Instead, the State alleges that the Tribe waived its immunity. The only document provided by the Wisconsin DNR is a one-page "Transfer of Ownership" form included as Exhibit 4 to the Complaint.[6] App. at 158-59. That form does not include an express waiver of sovereign immunity. After all, this is a form used for all Forest Crop Law transfers and nearly everyone executing this document is doing so for their own personal property, not for a government that possesses immunity from suit. The only language on the form is in fine print and states as follows:

> And that the Grantee accepts the transfer of the Forest Crop Law entry. The Grantee intends to continue to practice forestry on such land. Further, the Grantee agrees to comply with the terms of the Forest Crop Law and the contract applicable to the said lands including the payment of severance taxes and the annual acreage share.

App. at 158.

Simply entering into a contract does not waive a tribe's immunity from suit. *Landreman v. Martin*, 191 Wis. 2d 787, 802-04, 530 N.W.2d 62, 67-68 (Wis. Ct. App. 1995). This is true even if the contract indicates that the sovereign will agree to comply with certain laws. As the Court in *Kiowa*

[6] The Tribe does not concede that this document was validly entered into, *see* Answer at ¶ 51, but that substantive claim raises factual issues not appropriate at the Motion to Dismiss stage, where the Complaints' allegations are presumed to be true.

made clear, "[t]here is a difference between the right to demand compliance with state laws and the means available to enforce them." *Kiowa,* 523 U.S. at 755. *See also Nanomantube v. Kickapoo Tribe in Kansas*, 631 F.3d 1150, 1153 (10th Cir. 2011) (holding that tribe's agreement to comply with Federal statutes contained in Title VII of the Civil Rights Act of 1964, did not create "an unequivocal expression of waiver"). *Sanderlin v. Seminole Tribe*, 243 F.3d 1282, 1289 (11th Cir. 2001) (A tribe's contractual promise to comply with the Rehabilitation Act merely amounted to a promise to not discriminate and "in no way constitute[d] an express and unequivocal waiver of sovereign immunity[.]"); *E.F.W. and A.T.B. v. St. Stephen's Indian High School*, 264 F.3d 1297, 1304 (10th Cir. 2001) ("The fact that the Tribes agreed to act in accordance with state law to some degree and in essence to adopt state law is simply not an express waiver of their [sovereign immunity] with respect to their actions taken under that law"); *Florida Paraplegic, Ass'n, Inc. v. Miccosukee Tribe of Indians of Florida*, 166 F.3d 1126, 1130 (11th Cir. 1999) (holding that tribe retained sovereign immunity from suit under a federal statute because the inquiry into "whether an Indian tribe is subject to a statute and whether the tribe may be sued for violating the statute are two entirely different questions."); *Sheffer v. Buffalo Run Casino, PTE, Inc.*, 315 P.3d 359, 373 (Okla. 2013) (internal citation omitted) (holding that tribe had not waived its sovereign immunity merely by applying for and receiving a

state liquor license which required applicant to state on the application form that it would "not violate any of the laws of the United States, the State of Oklahoma, or applicable municipal ordinances," because license was "nothing more than a promise to comply with state liquor laws, not a voluntary waiver of sovereign immunity"); *Cohen v. Little Six, Inc.*, 543 N.W.2d 376 (Minn. Ct. App. 1996) (holding that tribal corporation did not waive immunity by agreeing that it "shall be subject to the laws of this state").

The State also turns to the Forest Crop Law for proof of a waiver, without acknowledging the problems inherent in this approach. The State does not have the authority to waive a tribe's immunity through statute; only Congress does. *Kiowa*, 523 U.S. at 756. While the Transfer of Ownership-Forest Crop Law form indicates that the Tribe was agreeing to comply with Wisconsin law, nothing on that form indicates that the Tribe was agreeing to resolution of any disputes that may arise, let alone any specific dispute resolution mechanism. This then, is completely different from the arbitration cases cited by the State in its brief. In those cases, the contract signed by the tribe included an affirmative agreement to have disputes resolved by arbitration, for the American Arbitration Association Rules to apply to such disputes, and for courts to compel arbitration and enforce any arbitration award.

For example, in *C&L Enterprises, Inc. v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, the agreement, as executed, stated as follows:

> 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 in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association currently in effect unless the parties mutually agree otherwise . . . The 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.

532 U.S. 417, 415 (2001). Thus, in this contractual provision, the tribe agreed that disputes would be subject to resolution by a third party, that the dispute resolution mechanism would be arbitration, that the arbitration proceeding would be governed by the AAA rules, and that those rules would govern which court had jurisdiction to enforce any arbitration award rendered. *Id.* The Supreme Court concluded that this constituted an express waiver of immunity. The tribe had argued that this was a form contract, "designed principally for private parties who have no immunity to waive," and therefore, it "cannot establish a clear waiver of tribal suit immunity." *Id.* at 423. But while the Court agreed that this would normally require ambiguous provisions to be construed against the drafter, it noted that it need not do so here, because the tribe was the party that actually proposed this form contract. *Id.*

No provisions like this are contained in the Transfer of Ownership-Forest Crop Law form. That form does not include any language committing the Tribe to the resolution of disputes with the State, let alone indicating that Wisconsin state courts will be the forum for such disputes. Instead, Wisconsin argues that all of the language that could be considered a waiver of immunity can be found in *state law* – a law drafted to apply to private state citizens, not sovereign governments that possess immunity from suit – and a law that it does not even contend, as a factual matter, was appended to the Transfer of Ownership-Forest Crop Law form. This simply cannot be an "unequivocally clear" waiver by the Tribe.

In its Brief at 18, the State notes that the Section 77.07 of the Forest Crop Law states that "the department of natural resources shall report to the attorney general any unpaid severance tax, adding said penalty, and the attorney general shall thereupon proceed to collect the same with penalty and interest by suit against the owner and by attachment or other legal means to enforce the lien." But this section is simply a delegation of authority by the State Legislature to the Wisconsin Attorney General to proceed with certain collection efforts. Nothing in this provision states that the property owner consents to this enforcement or that the property owner consents to suit in Wisconsin state courts for such enforcement actions.

There simply is no clear and unequivocal waiver here, and therefore this suit must be dismissed. *Compare Ramey Construction Company v. Apache Tribe of the Mescalero Apache Reservation*, 673 F.2d 315, 319 (10th Cir. 1982) (refusing to find a waiver of sovereign immunity in a contract where the tribe agreed that any party prevailing in litigation could obtain attorney's fees, accepted a loan and agreed to "duly pay and discharge . . .all claims of any kind," submitted a certificate to the U.S. Economic Development Agency warranting that the contract documents "constitute valid and legally binding obligations upon the parties," and obtained payment and performance bonds from a surety); *American Indian Agricultural Credit Consortium, Inc. v. Standing Rock Sioux Tribe*, 780 F.2d 1374, 1377, 1379 (8th Cir. 1985) (refusing to find a waiver of sovereign immunity in an agreement that confirmed the parties "rights and remedies provided by law" should collection efforts be required, included an attorney's fee provision for a party prevailing in any litigation, and contained a state choice-of-law provision), *with Yavapai-Apache Nation v. Iipay Nation of Santa Ysabel*, 135 Cal. Rptr. 3d 42, 60 (Ca. Ct. App. 2011) (finding a clear waiver of sovereign immunity where the loan agreement and three subsequent amendments included language stating that Arizona law governed the contract, the right to a jury trial was waived, the Nation waived its immunity from suit or proceeding in any forum including any confirmation of arbitration awards,

and the Nation consented to the jurisdiction of Arizona state courts, United States courts and the courts of any other state that may have jurisdiction over the proceedings).

B. Alternatively, This Matter Exceeds the Scope of Any Waiver of Immunity

Waivers of sovereign immunity must be strictly construed in favor of the sovereign. *Orff v. United States*, 545 U.S. 596, 601-02 (2005); *Dep't of the Army v. Blue Fox, Inc.*, 525 U.S. 255, 261 (1999); *Harris v. Lake of the Torches Resort & Casino*, 2015 WI App 37, ¶ 28, 862 N.W.2d 903, 363 Wis. 2d 656. *See also U.S. v. Lewis Cnty.*, 175 F.3d 671, 676-78 (9th Cir. 1999) (holding that explicit waiver of immunity permitting taxation of certain federally owned real property did not unequivocally include a waiver for the assessment of interest and penalties, nor did it permit foreclosure). This means that the language employed must be closely examined to determine what parties, what assets, what claims, and in what courts the waiver of immunity has been granted. *See, e.g.*, *Sossamon v. Texas*, 563 U.S. 277, 285 (2011) (noting that, for example, a state's consent to suit in its own courts is not a waiver of immunity from suit in federal court, and a waiver of immunity for other types of relief does not waive immunity for damage claims); *Coleman v. U.S. Bureau of Indian Affairs*, 715 F.2d 1156, 1161 (7th Cir. 1983) ("It is elementary that when consent to sue the United States is

granted, the precise terms, conditions, and qualifications of such consent must be scrupulously followed" and "[t]hus Congress may prescribe a particular procedure to be followed, or a particular tribunal to be invoked, or a particular remedy to be pursued"). As a result, when an Indian tribe waives its immunity, it sets the limits of the waiver, and any doubts about the waiver's scope must be resolved in favor of preserving immunity. *Ramey*, 673 F.2d at 320 ("When consent to be sued is given, the terms of the consent establish the bounds of the court's jurisdiction"); *Big Valley Band of Pomo Indians v. Superior Court*, 35 Cal. Rptr. 3d 357, 364 (Cal. Ct. App. 2005) ("Because a waiver of immunity is altogether voluntary on the part of a tribe, it follows that a tribe may prescribe the terms and conditions on which it consents to be sued, and the manner in which the suit shall be conducted").

While the Tribe remains adamant that it has not waived its immunity, if such a waiver exists, it is limited by Section 77.03 of the Wisconsin Forest Crop Law. That section, as it existed in 1993 (when the Tribe supposedly waived its immunity), stated as follows:

> If at the end of the contract period the land is not designated as managed forest land under subch. VI, the merchantable timber on the land shall be estimated by an estimator jointly agreed upon by the department of natural resources and the owner, and if the department and the owner fail to agree on an estimator, the judge of the circuit court of the district in which the lands lie shall appoint a qualified forester, whose estimate shall be final, and the cost thereof shall be borne jointly by the department of natural resources and the owner;

> and the 10% severance tax paid on the stumpage thereon in the same manner as if the stumpage had been cut.

The Wisconsin DNR never followed this process. Instead, the State unilaterally selected a person to estimate the value of the trees on the land. The Tribe did not "jointly agree[]" to this estimator; the Tribe was not even informed of his identity prior to receiving a purported bill for the severance tax supposedly owed.[7]

The State cannot bring suit to enforce a severance tax in the amount of $74,819.74 as claimed in its Complaint, nor can the State enforce a lien against the Tribe's trees, because even if a waiver of immunity exists, that waiver is limited to the parties jointly agreeing to an estimator, or if this could not occur, to the circuit court appointing one. Then, the estimator's assessment was to be considered "final." The Tribe never consented to State court litigation in this matter. The State failed to follow the confines of the

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[7] Exhibit 6 to the Complaint in this matter is the notice the State sent to Lac Courte Oreilles Band C/O Bill Baker." That notice states:

> The merchantable timber on your land will be estimated by your DNR forester in January after your land has expired. If you prefer, you may hire your own estimator that is jointly agreed upon by you and the DNR by submitting the names of 3 estimators for consideration to the Forest Tax Program. The Forest Tax Program will notify you of the selected estimator and you will be responsible for hiring that estimator and paying the entire costs of the estimate.

App. at 172-73. The Tribe's governing body never received this letter (which conflicts with Wis. Stat. 77.03), and therefore, no response was sent to the State. Answer ¶¶ 59, 68. Regardless, the State proceeded to use its own forester to conduct the estimate. App. at 121-22 (Complaint ¶¶ 68-69, 72).

purported waiver of immunity, and lawsuits that exceed the scope of the waiver of tribal sovereign immunity must be dismissed. *See, e.g.*, *Ramey*, 673 F.2d at 320 (holding that where the tribe consented only to entry of judgment in the amount of the contract retainage it withheld, "it did not thereby agree to be sued on any other claims," and the circuit court could not even award interest on the retainage amount without violating the tribe's immunity); *Calvello v. Yankton*, 584 N.W.2d 108, 113 (S.D. 1998) (holding that even if agreement to *arbitrate* was validly entered into, that supposed waiver of immunity could not serve as the basis for a *lawsuit* alleging breach of contract, because that would be outside the scope of such a waiver).

III. STATES COURTS LACK SUBJECT MATTER JURISDICTION OVER THIS ACTION

Before the circuit court, the Wisconsin DNR claimed that even if the Tribe had not waived sovereign immunity and consented to state court jurisdiction, this action could proceed *in rem*. To be successful, this argument would have required the court to find that: (1) Tribal immunity did not protect the Tribe's property from an action seeking to seize it; and (2) subject matter jurisdiction over the *in rem* action lies in state court. For the reasons already set forth above, the court rightly rejected the first argument. The court also held, in the alternative, that state courts lacked subject matter jurisdiction over these proceedings. This decision should also be upheld.

State courts generally lack jurisdiction over Indian tribes and tribal members for activities that take place within Indian country. *Worcester v. Georgia*, 31 U.S. 515, 519, 520 (1832) (holding that Indian tribes are "distinct, independent political communities" and that state law generally has "no force" within their boundaries). In *Williams v. Lee*, for example, the Supreme Court concluded that Arizona courts could not exercise jurisdiction over a contract dispute where the defendants were Navajo tribal members and where the activities that formed the basis of the lawsuit occurred within the Navajo Reservation. 358 U.S. 217, 220 (1959). Doing so, the Court held, would "infringe on the rights of reservation Indians to make their own laws and be ruled by them." *Id.* at 223.

Two exceptions have been applied to this general ban on state court jurisdiction. First, because Congress has plenary power over Indian affairs, it can pass legislation that authorizes state courts to exert civil adjudicatory jurisdiction over disputes that arise in Indian country. One example of such a statute is Public Law 280, which granted some state courts – including Wisconsin – jurisdiction over civil cases that involve tribal-member plaintiffs and/or defendants, even if the cause of action arose in Indian country. 18 U.S.C. § 1360(a). Importantly, however, Public Law 280 only conferred state court jurisdiction over *individual* Indians. It did not grant states any

jurisdiction over *Indian tribes*. *Bryan*, 426 U.S. at 389 (stating that "there is notably absent any conferral of state jurisdiction over the tribes themselves" in Public Law 280). Congress has not authorized the State to exercise jurisdiction over this lawsuit, which involves the Tribe and its property.

Second, the Supreme Court has concluded that without Congressional authorization states only have the ability to regulate (and possibly adjudicate) the conduct of tribal members and Indian tribes in "exceptional circumstances." *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 331-32 (1983). This exception is exceedingly narrow. It is only applicable when non-Indians are the real target of state regulation, such as where the state is attempting to regulate tribal members selling cigarettes to non-Indians on the reservation, or where the state – prior to passage of the Indian Gaming Regulatory Act – was attempting to regulate non-Indians gambling at the tribe's on-reservation facility. *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 214-15 (1987). Additionally, if this exception is triggered, the state can only impose its jurisdiction on the tribe or tribal members if it demonstrates that its interests in doing so outweigh the combined interests of the federal government and tribal government. *Id.* at 216-18; *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 143 (1980).

Here, there is no way that the Wisconsin DNR can argue that "exceptional circumstances" are present. It has brought this action in state court seeking to enforce state taxes on the Tribe and its property. This case simply does not involve a "state burden on tribal Indians in the context of their dealings with non-Indians." *Cabazon*, 480 U.S. at 216.

In its brief, the Wisconsin DNR claims that this Court possesses subject matter jurisdiction over this dispute for two reasons. First, the State claims the following:

> [W]hen the Tribe agreed to comply with the terms of the Forest Croplands Law, including its enforcement provisions, it not only waived its sovereign immunity, but also consented to state court jurisdiction over enforcement actions like this one. Where such tribal consent exists, the balance of state and tribal interests regarding the exercise of jurisdiction favors the State. Similarly, the Tribe's right to make its own laws and be ruled by them is not infringed where the Tribe itself has consented to state jurisdiction. *Cf. Oneida Indian Nation of N.Y. v. Madison Cty.*, 665 F.3d 408, 424-25 (2d Cir. 2011) (recognizing that, where a tribe has waived its sovereign immunity from suit, a state court may exercise jurisdiction over an action to enforce a state tax on tribal property).

Wisconsin DNR Br. at 27. But as noted in the above sections, there is no clear and express waiver of sovereign immunity, and even if there were such a waiver, it would not include state court proceedings such as this one, since the Forest Crop Law provides a wholly different process for determining the severance tax due upon expiration of the statutory period. *See* Wis. Stat. §

77.03. This argument also does nothing to advance the Wisconsin DNR's claim that *even if there is no waiver of immunity*, and the Tribe must be dismissed from this lawsuit, this Court somehow possesses subject matter jurisdiction over the *in rem* proceeding.

Second, the Wisconsin DNR claims that this Court possesses subject matter jurisdiction over the *in rem* proceedings under the balancing/preemption test established by the Supreme Court in *Cabazon, Bracker*, and other similar cases, because the state's interest in adjudicating a case involving fee land is greater than the federal and tribal interests. Wisconsin DNR Br. at 26-30. In doing so, the State misreads and misapplies the Supreme Court's precedent.

As noted above, the balancing/preemption test in *Cabazon* only applies when a state is attempting to (1) regulate the conduct of a non-Indian,[8] or (2)

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[8] For example, this is the test to be applied whenever a state seeks to tax non-Indians within Indian country. *E.g.*, *Bracker*, 448 U.S. at 138, 151-52 (refusing to allow the state to impose taxes on a non-Indian company harvesting timber on the White Mountain Apache Reservation after concluding that the interests of the federal and tribal governments outweighed the interests of the state in applying the tax); *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163 (1989) (permitting the state to impose a severance tax on the production of oil and gas by non-Indian lessees of wells located on the Jicarilla Apache Tribe's Reservation after applying the preemption/balancing test). This preemption/balancing test is *not* applicable, however, to state taxation of Indian tribes, tribal members, or tribal property within Indian country. There, the Supreme Court has adopted a *per se* rule

in "exceptional circumstances" where non-Indians are the real target of state regulation, but their behavior can only be regulated through application of state law to the conduct of the tribe or tribal member. For example, in *Cabazon*, the Supreme Court concluded that the preemption/balancing test should be applied to determine whether the state's attempts to apply its bingo laws to the tribe's gaming operation were valid. The Court noted that this test was applicable only because the case "involves a state burden on tribal Indians *in the context of their dealings with non-Indians* since the question is whether the State may prevent the Tribes from making available high stakes bingo games to non-Indians coming from outside the reservations." 480 U.S. at 216 (emphasis added). The Court then went on to hold that the state lacked jurisdiction because the interests of the federal government and the tribe outweighed any state interest. *Id.* at 221-22.

Cabazon also referred to two prior Supreme Court decisions applying the preemption/balancing test to the conduct of Indian tribes or tribal members within Indian country. In both *Moe v. Confederated Salish and Kootenai Tribes,* 425 U.S. 463 (1976), and *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134 (1980), the question was whether a state could require tribal smokeshops to collect state sales tax *from their*

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that precludes any state taxation without clear authorization from Congress. *Oklahoma Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450, 458-59 (1995).

non-Indian customers. The Court applied the preemption/balancing test because and concluded that "[t]he State's interest in assuring the collection of sales taxes from non-Indians enjoying the off-reservation services of the State was sufficient to warrant the minimal burden imposed on the tribal smokeshop operators." *Cabazon*, 480 U.S. at 215-16. Likewise in *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324 (1983), the question was whether the state could restrict an Indian tribe's regulation of hunting and fishing on the reservation by applying its laws to non-Indian hunters on tribal lands. Because this case was actually about non-Indian hunting, the Court applied the preemption/balancing test, but it ultimately concluded that the State lacked jurisdiction to regulate such activities. *Id.* at 325.

In this case, then, the preemption/balancing test is simply inapplicable. The defendant is not a non-Indian, it is a federally recognized tribe. And the tribe is not being sued to regulate the conduct of non-Indians that are seeking to avoid state law, but rather, the tribe is being sued to deprive it of its own property! *See* Cohen's Handbook of Federal Indian Law, § 7.03(2) (2012 ed.) (noting that "[t]here are two independent but related barriers to the assertion of state authority over *nonmembers* within Indian country. 'First the exercise of such authority may be pre-empted by federal law. Second, the application of state law may unlawfully infringe on the right of reservation Indians to

make their own laws and be ruled by them.'"); *McClanahan v. State Tax Comm'n of Arizona*, 411 U.S. 164, 170-71 (1973) ("state laws generally are not applicable to tribal Indians on an Indian reservation except where Congress has expressly provided that State laws shall apply").

Furthermore, even if this test were to apply, the State has not shown how the balance of interests favors its ability to assert jurisdiction here. Supreme Court cases establish that tribes have a strong interest in engaging in conduct free of state interference if the tribal conduct is derived from value generated on the reservation (e.g., timber or other natural resources) and if the state cannot demonstrate that there are specific functions or services it performs in connection with the on-reservation activity. *E.g., Mescalero Apache Tribe*, 462 U.S. at 327-28, 336 (noting that "[t]he exercise of State authority [on-reservation] . . . must ordinarily be justified by functions or services performed by the State in connection with the on-reservation activity," and holding that state hunting laws would not apply to non-Indians on the reservation because the tribe's interests stemmed from on-reservation natural resources, while the state could not establish that it had taken any recent steps to contribute to those resources, such as by stocking fish in reservation lakes or adding to the elk herd). For the State to seek to apply this test, it would have to have pled or introduced evidence

before the circuit court that it extended services to the Tribe on the precise parcels at issue in this case. *E.g., Cotton Petroleum*, 490 U.S. at 185 (permitting taxation of non-Indian oil and gas lessee where evidence established that during the tax period the State had provided $89,394 in relevant services to the extraction operation). It did not do so, and consequently, any argument on this point has been waived.

The Wisconsin DNR argues that because this land is held in fee simple, the state courts have subject matter jurisdiction over claims against it. This is not the case. Anytime the Tribe, its members or its property are defendants in a state court proceeding, it would infringe on the right of reservation Indians to make their own laws and be ruled by them, and therefore, state court jurisdiction does not exist without explicit Congressional authorization.[9] Cohen's Handbook of Federal Indian Law, § 7.03(1)(a)(ii) (2012 ed.) ("Absent clear federal authorization, state courts lack jurisdiction to hear actions against Indians arising within Indian country");

[9] The Wisconsin DNR claims that since the Tribe's Secretary-Treasurer signed the standard Transfer of Ownership form, which states in fine print that the Grantee "agrees to comply with the terms of the Forest Crop Law," there is no concern about usurping Tribal law. *See, e.g.*, Wisconsin DNR Br. at 27. As the Tribe indicated in its Answer, if these proceedings move forward it will argue that the Secretary-Treasurer had no authority to sign the form, let alone waive the immunity of the Tribe, as there is no Tribal Council resolution authorizing such action. These and other questions are mixed questions of fact and law, and the law that should govern is Tribal law. The Tribe has a strong interest in applying Tribal law and in having its Tribal Court interpret the Tribal Constitution, Bylaws and Ordinances.

Fisher v. District Court, 424 U.S. 382 (1976) (holding that state court lacked jurisdiction over a custody dispute where the child was a tribal member and the case arose on the reservation); *Kennerly v. District Court*, 400 U.S. 423, 430 (1971) (holding that Montana courts lacked jurisdiction to hear a case against tribal-member-defendants for payment of groceries purchased on credit from a non-Indian within the Blackfeet Reservation).

"Indian tribes are unique aggregations possessing attributes of sovereignty over both their members and their territory." *Wheeler*, 435 U.S. at 323. Tribal territory includes all land that is considered "Indian country" and Indian country includes all reservation land, regardless of whether it is fee land, and regardless of whether the fee land is held by a non-Indian, a tribal member, or the tribe itself. 18 U.S.C. § 1151 (defining Indian country to include "all land within the limits of any Indian reservation under the jurisdiction of the United States Government, *notwithstanding the issuance of any patent*, and, including rights-of-way running through the reservation") (emphasis added). "The cases in [the Supreme Court] have consistently guarded the authority of Indian governments over their reservations" and "Congress has also acted consistently upon the assumption that the States have no power to regulate the affairs of Indians on a reservation." *Williams*, 358 U.S. at 220.

The State cites *Plains Commerce Bank v. Long Family Land and Cattle Co.*, 554 U.S. 316 (2008), for support. Wisconsin DNR Br. at 28. But *Plains Commerce* is part of a long line of cases that limits a tribe's jurisdiction over *non-Indian* conduct on *non-Indian-owned fee land* within reservation boundaries. *See, e.g.*, *Montana v. United States*, 450 U.S. 544 (1981) (holding that the Crow Tribe could not regulate the hunting and fishing of non-Indians on fee lands owned by non-Indians within reservation boundaries); *Atkinson Trading Co. v. Shirley*, 532 U.S. 645 (2001) (holding that the Navajo Nation could not apply a hotel occupancy tax on non-Indian patrons of the Cameron Trading Post, which was located on non-Indian fee land within the Navajo Reservation). It has no relevance to the determination of whether a *state court* possesses subject matter jurisdiction over a lawsuit where the defendant is an *Indian tribe* and *tribally owned fee land* is located within reservation boundaries.[10]

State courts have agreed with this interpretation of *Plains Commerce* and *Williams*. For example, in *Gustafson v. Estate of Poitra*, 800 N.W.2d 842 (N.D. 2011), the Supreme Court of North Dakota held that state courts

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[10] The State curiously argues that because this land was at one time owned by a non-Indian the Tribe "no longer has any right of absolute and exclusive use and occupation of it, other than the rights that belong to any fee simple landowner." Wisconsin DNR Br. at 29. There is no citation to any authority here, and the undersigned do not know of any cases that somehow accord a tribe less sovereignty over lands that it owns today, simply because it did not own the land continuously since the beginning of time.

lacked jurisdiction to hear a declaratory judgment action regarding a non-Indians' interest under a lease, where the defendant in the proceeding was a tribal member and a portion of the land that was subject to the lease was Indian-owned fee land located within the boundaries of the Turtle Mountain Indian Reservation. *Id.* at 844. The court held that *Williams*, not *Plains Commerce* controlled:

> The jurisdictional facts of *Plains Commerce Bank* are distinguished from the facts of this case, because the present case involves a lease of Indian-owned fee land and the rights attached to the lease, and Gustafson initiated this case involving Indian defendants in the state court. . . .
> The state district court did not have subject matter jurisdiction in this case. Gustafson asserted a claim against the Poitras over a lease of Indian-owned fee land located within the boundaries of the reservation. Under the infringement test, state jurisdiction over a claim asserted by a non-Indian against an Indian arising within the boundaries of that Indian's reservation is prohibited.

Id. at 847, 848. *See also Hinkle v. Abeita*, 283 P.3d 877 (N.M. Ct. App. 2012) (holding that state courts lacked subject matter jurisdiction over a tort claim filed against Indian defendants for conduct occurring on state highways within Indian country); *Winer v. Penny Enterprises, Inc.*, 674 N.W.2d 9 (N.D. 2004) (same).

"The policy of leaving Indians free from state jurisdiction and control is deeply rooted in the Nation's history." *McClanahan*, 411 U.S. at 168. "Tribal courts have repeatedly been recognized as appropriate forums for the exclusive adjudication of disputes affecting important personal and property

interests of . . . Indians." *Santa Clara Pueblo*, 436 U.S. at 65-66. Wisconsin courts have no jurisdiction over tribally owned land and the trees growing therein because they are located within the Tribe's reservation.

CONCLUSION

For the aforementioned reasons, this Court should affirm the decision of the Circuit Court, which dismissed this lawsuit.

Dated: June 8, 2017

By: _____

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CERTIFICATION OF MAILING

I certify that this brief was deposited in the United States mail for delivery to the Clerk of the Court of Appeals by first-class mail, or other class of mail that is at least as expeditious, on June 8, 2017. I further certify that the brief was corrected addressed and postage was pre-paid.

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FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 10,924 words [11,000 word maximum], for the sections required by the rule.

Date: June 8, 2017

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I hereby certify that I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § 809.19(12).

I further certify that this electronic brief is identical in content and format to the printed form of the brief filed as of this date.

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