STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT III
APPEAL NO: 2022AP937

LEGEND LAKE PROPERTY OWNERS ASSOCIATION, INC.,

Plaintiff-Appellant,

v.

GUY KESHENA and
THE MENOMINEE INDIAN TRIBE OF WISCONSIN,

Defendants-Respondents.

Appeal from the Circuit Court for Menominee County,
Case No. 2018-CV-0007
The Honorable Katherine Sloma, Presiding

BRIEF OF DEFENDANTS-RESPONDENTS GUY KESHENA AND THE MENOMINEE INDIAN TRIBE OF WISCONSIN

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Wisconsin Laws

Tribal Law

Statutes

Other Authorities

STATEMENT OF THE ISSUES

Issue One: Whether the circuit court properly dismissed the declaratory judgment claim of Legend Lake Property Owners Association, Inc. ("LLPOA") seeking a ruling on the enforceability of certain restrictive covenants on real property on the grounds of the sovereign immunity of Defendant Menominee Indian Tribe of Wisconsin (the "Tribe"), of which Defendant Guy F. Keshena ("Keshena") is a member.

Disposition Below: The circuit court held that the Tribe's sovereign immunity barred LLPOA's declaratory judgment claim [R.163:3-4, App.349-350]. The circuit court further held there was no *in rem* or "immovable property" exception to sovereign immunity, and that sovereign immunity was not waived by the Tribe [R.163:3, App.349].

Issue Two: Whether the circuit court properly held, as an alternative ground for dismissal of LLPOA's complaint, that the Menominee Restoration Act, 87 Stat. 770, formerly codified at 25 U.S.C. § 903, *et seq.* (the "Act"),[1] preempts state law with respect to LLPOA's restrictive covenants and precludes taxation of the subject property?

Disposition Below: The circuit court held that the Act preempts state law with respect to LLPOA's restrictive covenants. (R.163:3-4, App.349-350).

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The Tribe and Keshena agree with LLPOA that this case may be decided on the briefs; while oral argument may be helpful, it is not necessary.

This case meets the criteria for publication under Rule 809.23(1) as the opinion of this case clarifies existing rules, will apply established rules of law to a factual situation significantly different from that in published opinions, and is a case that is of substantial and continuing public interest.

[1] The Termination and Restoration Acts are no longer codified but remain as law. The references throughout this brief are to their former codification cites.

STATEMENT OF THE CASE

A. Nature of the Case

The case involves the Menominee Indian Tribe of Wisconsin's sovereign immunity, as well as a plain reading of an Act of Congress, the Menominee Restoration Act.

Guy F. Keshena is an enrolled member of the Menominee Indian Tribe of Wisconsin, a federally recognized Indian tribe (the "Tribe") (*see* 84 Fed. Reg. 1200-01). [R. 1:1; R. 16: 3]. After federal recognition of the Tribe was terminated in 1954 by the Menominee Termination Act, 68 Stat. 250, 25 U.S.C. §§ 891-902a, the Menominee Restoration Act of 1973 (the "Restoration Act") expressly restored the federal government's recognition of the Tribe. 25 U.S.C. § 903a. [R. 16:3]. Among other provisions of the Restoration Act, the Secretary of the Interior was and is required to accept all real property transferred by a Tribal member to the United States government in trust for the Tribe where that property is in or adjacent to Menominee County. 25 U.S.C. § 903d(c). [R. 16:4].

There is no dispute that Mr. Keshena, a Tribal member, acquired title to 33 lots within the Legend Lake development in Menominee County (the "Properties") as "a single person for and on behalf of the Menominee Indian Tribe of Wisconsin." R.1:9-10, App.009-010; R.14:18-55; R.15:1-6, App.065-119; App.059-064].[2] It is also undisputed that, at the time of the Tribe's acquisition of the Properties, said Properties were within the boundaries of real estate described as subject to certain restrictive covenants recorded on June 18, 2009, by the Legend Lake Property Owners Association, Inc. ("LLPOA"). These covenants, among other restrictions, purport to preclude any owner of the land subject thereto from "remov[ing] or eliminat[ing] the Subject Real Estate (or any part thereof) from the tax rolls of Menominee County, Wisconsin."

[2] Given the Mr. Keshena's capacity as agent for the Tribe, references to the Tribe are references to both.

There is no dispute that, under the express language of the Restoration Act, a transfer by the Tribe to the United States government in trust for the Tribe would remove the Properties from the tax rolls of Menominee County. Thus, the LLPOA filed this suit for a declaratory judgment holding that the Restrictive Covenants are valid and enforceable to preclude any such transfer. The Tribe moved to dismiss LLPOA's complaint on the grounds, among other things, of: (i) sovereign immunity; and (ii) federal preemption.

B. Procedural History and Circuit Court Disposition

The LLPOA filed the instant action (the "Lawsuit") on October 25, 2018, seeking a declaration that the Restrictive Covenants are valid and legally enforceable as against the Properties and that any transfer of the Properties in violation of the Restrictive Covenants are null and void [R.1:11 at ¶ 24, App.011]. The Tribe moved to dismiss LLPOA's complaint for: (i) lack of personal and subject matter jurisdiction, pursuant to Wis. Stat. §§ 802.06(2)(a)(2), 802.06(2)(a)(3); and (ii) failure to state a claim, pursuant to Wis. Stat. § 802.06(2)(a)(6) [R.10:1, App.019]. The Tribe argued, *inter alia*, that it was entitled to tribal sovereign immunity, and that state law with respect to the Restrictive Covenants is preempted by the federal Menominee Restoration Act [R.16:15-21, 30-37, App.035-041, App.050-057].

The circuit court initially denied the motion to dismiss on March 25, 2019 [R.25:2 at ¶ 1, App.277]. The case continued through the litigation process and the parties filed cross-motions for summary judgment. However, in the interim, opinions in several major cases potentially affecting the outcome of this case were published:

1. On July 9, 2020, the United States Supreme Court issued its opinion in *McGirt v. Oklahoma,* 140 S. Ct. 2452 (2020), holding – among many other things of significance to this case – that "this Court long ago rejected the notion that the purchase of lands by non-Indians is inconsistent with reservation status." *Id.* at 2464, n.3.

2. On January 7, 2020, the United States Court of Appeals for the Second Circuit issued its opinion in *Cayuga Indian Nation of N.Y. v. Seneca Cty.*, 978 F.3d 829 (2nd Cir. 2020), rejecting the notion that an "immovable property" exception to sovereign immunity applies to foreclosure cases against a tribe.
3. On July 30, 2020, the United States Court of Appeals for the Seventh Circuit issued an opinion in *Oneida Nation v. Village of Hobart,* 968 F.3d 664 (7th Cir. 2020), noting the effect of *McGirt* on the legal landscape.
4. On *January* 26, 2021, the California Court of Appeals issued an opinion in *Self v. Cher-Ae Heights Indian Community,* 2021 Cal. App. LEXIS 67. The *Self* court directly addressed sovereign immunity of Indian tribes in the context of the fee-to-trust process.[3]

On the same day that the Tribe filed its response to the LLPOA's motion for summary judgment, it also filed a motion for reconsideration of the circuit court's order denying the motion to dismiss [R.140, App.279-282]. After oral argument, the circuit court granted the motion and dismissed the case on April 21, 2022 [R.163, App.347-350]. In its order for judgment and judgment of dismissal, the circuit court stated that "new case law has addressed issues of preemption and tribal sovereignty" [R.163:2 at ¶ 3, 348]. This appeal followed.

[3] Further, after this appeal was filed, the U.S. Court of Appeals for the Seventh Circuit issued its opinion in the case of *Lac Court Oreilles Band of Lake Superior Chippewa Indians v. Evers*, 46 F.4th 552 (7th Cir. 2022), holding that, in the case of the Chippewa, "the Constitution makes clear that Congress alone may diminish the inherent sovereignty of the Indian tribes, particularly where taxes are concerned. Here, Congress has not authorized the State to tax Ojibwe [Chippewa] lands." The same result should obtain with respect to the Menominee, as explained herein.

C. Statement of Facts

On June 17, 1954, Congress terminated federal recognition of the Tribe in the Menominee Termination Act, 68 Stat. 250, 25 U.S.C. §§ 891-902. Over time, the land of the Tribe decreased in size by thousands of acres – including the Legend Lake development – sold by an entity created to own tribal lands following termination. [R. 16: 3-4]. In 1973, when portions of the last remaining lands had been sold to private non-Tribal ownership, Congress sought to bring the losses to a halt by re-establishing federal recognition of the Tribe in the Menominee Restoration Act. [R. 16:4].

Legend Lake was a site of development in the late 1960s and early 1970s, the waning years of the Menominee Termination Act. While the Tribe had resisted allotment and carefully safeguarded its land for generations, the years just before passage of the Restoration Act saw significant loss of Tribal land in the Legend Lake area to private ownership. [R. 16: 3-4].

On December 22, 1973, President Richard Nixon signed into law the Restoration Act, Pub. L. 93-197, 87 Stat. 770, now codified at 25 U.S.C. § 903 *et seq*. [App.351-354].

The land made the subject of this case is in Menominee County and, therefore, the Tribe's acquisition of the land is subject to the Restoration Act. Seeking a "work around" to Restoration Act's potential effect on its local tax base, on June 13, 2009, LLPOA amended its bylaws to include, and recorded on June 18, 2009, certain restrictive covenants "intended to preserve the tax base of Menominee County as well as increase the property values of Legend Lake properties by ensuring compliance with state and local governance and with the membership responsibilities of the Association." Appellant's Br. at 17. The Restrictive Covenants expressly purport to apply to any transfer of property "placed into federal trust pursuant to the Indian Reorganization Act" and require compliance with the "property tax collection laws," among others. *Id.* at 19. The Restrictive Covenants also purport to require the title owner to waive any defense to an action filed by

LLPOA "based on sovereign immunity," and expressly consent to a suit in Menominee County, Wisconsin. *Id.* at 19-20.

In 2015 and 2016, each of the 33 properties at issue in this case (the "Properties"), among others, were foreclosed upon by Menominee County owing to tax liens. [R 73: 1-39; R 70: 8-9]. Menominee County conveyed its interest in the Properties by tax sale bid, which ultimately were conveyed to Guy F. Keshena "for and on behalf of the Menominee Indian Tribe of Wisconsin" for the express purpose of conveying title to the Properties to the United States of America in trust for the Tribe. [R.1:9-10, App. 009-010; R.14:18-55, App.; R.15:1-6, App. 059-064] – exactly as provided for in the Restoration Act. Mr. Keshena proffered deeds to the Properties to the United States and, on behalf of the Secretary of the Interior, the Bureau of Indian Affairs issued a notice of intent to accept these properties into trust. [R.14, Ex. 3].

On October 25, 2018, LLPOA filed the instant suit seeking a declaration that: (1) the Restrictive Covenants are valid and legally enforceable; (2) the Restrictive Covenants apply and are of force and effect concerning the Properties; and (3) any purported transfer of the Properties in violation of the Restrictive Covenants shall be null and void. [R.1:11 at ¶ 24]. As noted above, the Tribe moved to dismiss the Complaint. After initially denying the motion to dismiss, the circuit court on reconsideration granted the motion, specifically citing the grounds of sovereign immunity and federal preemption. [R. 163: 1-4].

LEGAL STANDARD

The parties agree that this Court reviews a circuit court's decision to dismiss for lack of jurisdiction on the grounds of sovereign immunity independently of any prior decision. Appellant's Br. at 20. The parties also agree that this Court's review of a circuit court's decision to dismiss for failure to state a claim is *de novo*, as is whether federal law preempts state law. Appellant's Br. at 21. However, we note

that this Court may affirm the disposition below from any ground apparent from the record. *Finch v. Southside Lincoln Mercury*, 274 Wis. 2d 719 (Wis. App. 2004).

ARGUMENT

This case involves the taxation of property currently owned by the Tribe within Menominee County and deeded to the United States in trust for the Menominee Indian Tribe of Wisconsin. When Congress passed, and the President signed, the Menominee Restoration Act in 1973, federal law expressly stated that all such land "shall be part of their [the Tribe's] reservation" and the federal policy with respect to taxes on such land is stated in unambiguous language: "The transfer of assets authorized by this section shall be exempt from all local, State, and Federal taxation. All assets transferred under this section shall, as of the date of transfer, be exempt from all local, State, and Federal taxation." It is difficult to imagine a clearer statement of federal policy.

The LLPOA argues that it – and by extension, any private homeowners' association – can thwart this unambiguous federal policy simply by recording a restrictive covenant and then claiming that any tribal purchaser "agreed" to its terms by the mere acquisition of the land. However, LLPOA cannot contradict federal law so easily. The trial court properly dismissed LLPOA's complaint, and this Court should affirm its judgment of dismissal.

I. PRINCIPLES OF JUDICIAL ECONOMY PERMIT THE CIRCUIT COURT TO PROVIDE ALTERNATIVE GROUNDS FOR ITS ORDER

LLPOA spends the first approximately eight pages of its Argument section contending that the trial court's decision to dismiss the case on its merits is "procedurally and fundamentally erroneous" [Appellant's Br. at 21] because the trial court ruled both that it lacked jurisdiction (on account of sovereign immunity) and on the merits (on account of federal preemption).

LLPOA's point here is without substantial consequence. As things stand, the Tribe agrees that the trial court's dismissal is without prejudice for lack of

jurisdiction. However, none of the Tribe, the trial judge nor this Court knows what the future holds. This Court – or the Wisconsin Supreme Court or possibly the United States Supreme Court – might not agree that the trial court lacked jurisdiction over this matter on account of the Tribe's sovereign immunity. If this Court (or any subsequent higher court) rules that the Wisconsin courts lack jurisdiction over this dispute, perhaps the issue on the merits of preemptive federal law is reserved for another day in another tribunal. But if this Court (or any subsequent court) holds that the Wisconsin courts have jurisdiction over this case, the Court will be required to decide whether to dismiss the case on the merits of federal law. Principles of judicial economy suggest that this Court should decide the question on the merits here and now, in the alternative. No one knows whether a higher court will agree with its jurisdictional ruling, and it makes little sense to suffer the possibility of having the parties to return to the trial court to repeat the entire process.

II. MR. KESHENA AND THE TRIBE ARE IMMUNE FROM LLPOA'S SUIT

In a line of cases decided over a period of more than 150 years, the United States Supreme Court has recognized that Indian tribes "retain[] their original natural rights" which vested in them, as sovereign entities, long before the genesis of the United States. *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 559, 8 L. Ed. 483 (1832).

> Although Indian tribes are 'domestic dependent nations' whose sovereignty is not absolute but may be limited by Congress, *see Oklahoma Tax Comm'n v. Potawatomi Indian Tribe*, 498 U.S. 505, 509 (1991) (quoting *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17, 8 L. Ed. 25 (1831)), federal encroachment upon Indian tribes' natural rights is a serious undertaking, and we should not assume lightly that Congress intended to restrict Indian sovereignty through a piece of legislation.

Florida Paraplegic Ass'n v. Miccosukee Tribe, 166 F.3d 1126, 1130 (11th Cir. 1999).

This respect for the inherent autonomy Indian tribes enjoy has been particularly enduring where tribal immunity from suit is concerned. Utilizing a heightened

level of scrutiny regarding Congress's intent, the Supreme Court has ruled in certain instances – for example, regarding federal income taxes and confiscation of land for a federal project – that Congress meant the laws under which the federal agencies were acting to apply to Indians because they were "general statutes in terms applying to all persons" that did not explicitly exclude Indians. *See, e.g., FPC v. Tuscarora Indian Nation*, 362 U.S. 99, 116 (1960).

The Court unwaveringly has held, however, that "Indian Nations are exempt from suit without Congressional authorization," *United States v. United States Fid. & Guar. Co.*, 309 U.S. 506, 512 (1940), and that "a [Congressional] waiver of [Indian tribal] sovereign immunity cannot be implied but must be unequivocally expressed." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978) (internal quotations omitted). With tribal sovereign immunity, as with the rest of Indian law, only Congress may make the rules. "An Indian tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity." *Kiowa Tribe v. Manufacturing Tech., Inc.*, 523 U.S. 751, 754 (1998). Thus, the Court must examine whether: (i) Congress has *expressly* abrogated the Menominee Tribe's sovereign immunity; or (ii) the Tribe has waived such sovereign immunity. In each case, the answer is "no."

A. Congress Has Not Abrogated the Tribe's Sovereign Immunity

It is fundamentally the job of the United States Congress to determine whether or how to limit tribal immunity. *McGirt v. Oklahoma*, 140 S. Ct. 2452, 2459 ("[t]he Legislature wields … even the authority to breach its own promises and treaties [with tribes] … [b]ut that power, this Court has cautioned, belongs to Congress alone"); *see also Thurmond v. Forest County Potawatomi Comm.*, 2020 U.S. Dist., Lexis 15291, *8 (E.D. Wis) ("It is an 'uncontroversial two-century-old concept that Indian tribes have inherent sovereign authority …. Thus, unless and until Congress acts, the tribes retain their historic sovereign authority").

At issue here is whether the Congress, in the Menominee Restoration Act, 25 U.S.C. § 903, *et seq*., limits the sovereign authority of the Menominee Tribe. As

this case is a matter of statutory interpretation, we start with the pertinent text of the statute itself:

> **§ 903a. Federal Recognition**
>
> **(a) Extension; laws applicable**
>
> Notwithstanding the provisions of the Act of June 17, 1954 (68 Stat. 250; 25 U.S.C. 891–902), as amended, or any other law, Federal recognition is hereby extended to the Menominee Indian Tribe of Wisconsin and the provisions of the Act of June 18, 1934 (48 Stat. 984; 25 U.S.C. 461 et seq.), as amended, are made applicable to it.
>
> **(b) Repeal of provisions terminating Federal supervision; reinstatement of tribal rights and privileges**
>
> The Act of June 17, 1954 (68 Stat. 250; 25 U.S.C. 891–902) as amended, is hereby repealed and there are hereby reinstated all rights and privileges of the tribe or its members under Federal treaty, statute, or otherwise which may have been diminished or lost pursuant to such Act.
>
> **(c) Continuation of tribal rights and privileges**
>
> Nothing contained in this subchapter shall diminish any rights or privileges enjoyed by the tribe or its members now or prior to June 17, 1954, under Federal treaty, statute, or otherwise, which are now inconsistent with the provisions of this subchapter.
>
> * * *
>
> **§ 903d. Transfer of assets of Menominee Enterprises, Inc.**
>
> * * *
>
> **(b) Acceptance of assets by Secretary; pre-requisites; preexisting rights and obligations in assets; United States as trustee for land transferred; exemption from taxation for transfer of assets and assets transferred**
>
> If neither House of Congress shall have passed a resolution of disapproval of the plan within sixty days of the date the plan is submitted to Congress, the Secretary shall, subject to the terms and conditions of the plan negotiated pursuant to subsection (a) of this section, accept the assets (excluding any real property not located in or adjacent to the territory, constituting, on December 22, 1973, the county of Menominee, Wisconsin) of Menominee Enterprises, Incorporated, but only if transferred to him by the Board of Directors of Menominee Enterprises, Incorporated, subject to the approval of the shareholders as required by the laws of Wisconsin. Such assets shall be subject to all valid existing rights, including, but not limited to, liens, outstanding taxes (local, State, and Federal), mortgages, outstanding corporate indebtedness of all types, and any other obligation. The land and other assets transferred to the Secretary pursuant to this subsection shall be subject to foreclosure or sale pursuant to the terms of any valid existing obligation in accordance with the laws of the State of Wisconsin. Subject to the conditions imposed by this section, the land transferred shall be taken in the name of the United States in trust for the tribe and

> shall be their reservation. ***The transfer of assets authorized by this section shall be exempt from all local, State, and Federal taxation. All assets transferred under this section shall, as of the date of transfer, be exempt from all local, State, and Federal taxation***.
>
> **(c) Transfer to Secretary of real property of Menominee Tribe members; necessity for transfer by Menominee owner or owners; preexisting rights and obligations in land; United States as trustee for land transferred; exemption from taxation for transfer of assets and assets transferred**
>
> The Secretary shall accept the real property (excluding any real property not located in or adjacent to the territory constituting, on December 22, 1973, the county of Menominee, Wisconsin) of members of the Menominee Tribe, but only if transferred to him by the Menominee owner or owners. 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 pursuant to this subsection shall be subject to foreclosure or sale pursuant to the terms of any valid existing obligation in accordance with the laws of the State of Wisconsin. Subject to the conditions imposed by this subsection, the land transferred shall be taken in the name of the United States in trust for the Menominee Tribe of Wisconsin and shall be part of their reservation. ***The transfer of assets authorized by this section shall be exempt from all local, State, and Federal taxation. All assets transferred under this section shall, as of the date of transfer, be exempt from all local, State, and Federal taxation***.

(Emphasis supplied).

25 U.S.C. §§ 903a, 903d.

There is no language in the Restoration Act that even impliedly, must less expressly, abrogates the Tribe's sovereign immunity.[4] For lack of any such abrogation, this should be the end of the inquiry.

[4] The Appellant argues that the Restoration Act explicitly abrogates the Tribe's immunity (Appellant's Br. at 41), referencing Section 6(c) of the Act which states "The land transferred. . . shall be subject to foreclosure or sale pursuant to the terms of any valid existing obligations in accordance with the laws of the State of Wisconsin." This is an odd use of the word "explicit," as this provision neither expressly nor even implicitly waives the Tribe's immunity in the present circumstances. The Appellant has not brought forward a foreclosure action implemented to enforce some previous existing lien or mortgage instituted after the land has been acquired by the federal government as contemplated by Section 6(c). Instead, LLPOA pursues a declaratory judgment to prohibit the United States from obtaining the land. This is neither an explicit nor implicit abrogation of the Tribe's immunity in this matter and is as far from the "unequivocally expressed waiver" required by federal law. *Santa Clara Pueblo* v. *Martinez*, 436 U.S. 49, 58 (1978); *accord, C&B Invs, v. Wisconsin Winnebago Hlth. Dept.*, 542 N.W.2d 168, 169 (Wis. App. 1995) ("A waiver of [tribal sovereign] immunity cannot be implied but must be unequivocally expressed."). Moreover, as the Restoration Act is a federal law providing rights to the Tribe, if there is any ambiguity regarding this issue the court must decide in favor of the Tribe's immunity. "When we are faced with these two possible constructions, our choice between them must be dictated by a principle deeply rooted in this Court's Indian jurisprudence: '[S]tatutes are to be construed liberally

Of course, no litigant on the wrong end of this kind of legal question wants to admit that its position lacks any legal basis. Thus, the LLPOA has had to try a different tack, arguing that a case involving tribal property may proceed pursuant to a so-called "*in rem*" or "immovable property" exceptions to sovereign immunity. No such exceptions exist, and certainly not here.

The LLPOA's argument runs thusly: There are laws that apply to foreign states to the effect that, if one acquires immovable property (i.e., real estate) in the United States, the foreign state waives its sovereign immunity with respect to the property and is subject to suit *in rem*. See 28 U.S.C. § 1605(a)(4) ("A foreign state shall not be immune from the jurisdiction of courts of the United States … in any case … in which … rights in immovable property situated in the United States are in issue").

However, as noted above, Indian tribes are not *foreign* sovereigns, but are 'domestic dependent nations' whose sovereignty is not absolute but may be limited only by Congress, *see Oklahoma Tax Comm'n v. Potawatomi Indian Tribe*, 498 U.S. 505, 509 (1991) (quoting *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17, 8 L. Ed. 25 (1831)); *Florida Paraplegic Ass'n v. Miccosukee Tribe*, 166 F.3d 1126, 1130 (11th Cir. 1999). Thus, Congress did not limit *tribal* sovereign immunity – by the so-called "immovable property" exception – where Congress has expressly acted to enact the exception into law for foreign sovereigns but not as against Indian tribes. And, unlike foreign sovereigns, Indian tribes, including the Menominee, pre-existed the United States on the land.

LLPOA 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. In *Wisconsin DNR v. Timber & Wood Prods. Located in Sawyer Cty*., 2018 WI App 6, ¶ 32, 379 Wis. 2d 690, 712, *rev. den'd.,* 2018 WI 92, the court wrote that "in the context of

in favor of the Indians, with ambiguous provisions interpreted to their benefit.'" *County of Yakima v. Confederated Tribes and Bands of Yakima Indian Nation*, 502 U.S. 251, 269 (1992) (quoting *Montana v. Blackfeet Tribe*, 471 U.S. 759, 766 (1985)).

tribal sovereign immunity there exists no meaningful distinction between *in rem* and *in personam* claims." 379 Wis. 2d at 713.

LLPOA contends that the *Timber & Wood* court's clear repudiation of an *in rem* exception to sovereign immunity does not apply to this case, relying on the Washington supreme court's opinion in *Lundgren v. Upper Skagit Indian Tribe,* 187 Wash. 2d 857, 389 P.3d 569 (2017). In *Lundgren*, the Upper Skagit tribe acquired land outside of its reservation. *Id.; see also Carney v. Washington*, 2021 U.S. Dist. LEXIS 149249, 2021 WL 3491744 (W.D. Wash). The state court in *Lundgren* held that the tribe lacked sovereign immunity under the so-called immovable property exception. 187 Wash. 2d 857, 868.

But the Washington court's decision was vacated by the United States Supreme Court in *Upper Skagit Indian Tribe v. Lundgren,* 138 S. Ct. 1649 (2018), in which the U.S. Supreme Court held that the Washington court erroneously relied on *County of Yakima v. Confederated Tribes and Bands of Yakima Nation,* 502 U.S. 251 (1992), in holding that there is an "*in rem*" or "immovable property" exception to sovereign immunity as against Indian tribes:

> Like some courts before it, the Washington Supreme Court read *Yakima* as distinguishing *in rem* from *in personam* lawsuits and "establish[ing] the principle that . . . courts have subject matter jurisdiction over in rem proceedings in certain situations where claims of sovereign immunity are asserted." 187 Wash. 2d, at 868, 389 P. 3d, at 574.
>
> That was error. Yakima did not address the scope of tribal sovereign immunity. Instead, it involved only a much more prosaic question of statutory interpretation concerning the Indian General Allotment Act of 1887. See 24 Stat. 388.

Thus, the U.S. Supreme Court remanded *Lundgren* to the state court for consideration as to whether any such exception applied in that case.

LLPOA asserts that the US Supreme Court's decision in *Lundgren* leaves open the issue of *in rem* or "immovable property" exception to sovereign immunity, and cites cases from other states holding, LLPOA argues, "sovereign immunity does not bar *in rem* proceedings – independent of those cases' reading of *Yakima*." Appellant's Br. at 34. However, each of the cited cases each pre-dated *Lundgren*,

which noted the consistent mis-reading of *Yakima*. This places squarely into question whether the decisions were, in fact, "independent of those cases' reading of *Yakima*" as asserted by LLPOA.[5] *See, e.g., Cass County Joint Water Res. Dist. v. 1.43 Acres of Land in Highland Twp.*, 2002 N.D. 83, ¶¶ 13-18, 643 N.W. 2d 685, 691-93 (repeatedly citing *Yakima*); *Anderson & Middleton Lumber Co. v. Quinault Indian Nation*, 130 Wash. 2d 862, 873 (1996) (expressly citing *Yakima*); *Miccosukee Tribe of Indians v. Department of Environmental Protection*, 78 So. 3d 31, 34-35 (Fla. App. 2011) (repeatedly citing *Yakima*); *Smale v. Noretep*, 150 Wash. App. 476, 479 (2009) (holding it was bound by the Washington Supreme Court's (mis-)reading of *Yakima* in *Anderson & Middleton*).

As noted above, one key distinguishing factor from *Lundgren* is that the tribe had voluntarily acquired land unrelated to its reservation. Justice Roberts referred to the issue as a "mundane dispute over property ownership." In this case, the property acquisition is not a "mundane dispute over property ownership," but involves the congressionally mandated acquisition of these specific properties by the United States, in Menominee County – as expressly provided in 25 U.S.C. § 903d(c) of the Restoration Act – and there is no question that sovereign immunity applies here.

Even more recently than *McGirt* and *Oneida*, on January 26, 2021, a California court adjudicated the issue tribal sovereign immunity in the context of a fee-to-trust transfer. In *Self v. Cher-Ae Heights Indian Community*, 2021 Cal. App. LEXIS 67, the court rejected the argument that any exception applied to sovereign

[5] Considering all of these cases, in *Wisconsin DNR v. Timber & Wood Prods. Located in Sawyer Cty*., 2018 WI App 6, 379 Wis. 2d 690, *rev. den'd.,* 2018 WI 92, the court wrote that: "The DNR cites several cases from other states in support of its position. In response, the Tribe cites state and federal cases that have rejected the DNR's position and instead held that sovereign immunity bars in rem actions pertaining to a tribe's property. We find the cases cited by the Tribe more persuasive than those cited by the DNR." *Id.* at ¶ 31. Among the cases with which *Timber & Woods* expressly disagreed were the *Cass County*, *Miccosukee*, *Anderson & Middleton* and the Washington court's decision in *Lundgren* – basically, LLPOA's entire lineup. Five months later, the U.S. Supreme Court vindicated the *Timber & Woods* court by vacating *Lundgren* and holding that *Yakima*, just as *Timber & Woods* said, did not address the scope of tribal sovereign immunity.

immunity in a lawsuit against a tribe seeking to enforce an easement over property where the tribe had applied to the Bureau of Indian Affairs to accept that property into trust. The *Self* case found that no real property, or "immovable property," exception to tribal sovereign immunity applied.

For decades, the Supreme Court has set aside these and other concerns, and treated tribal sovereign immunity as settled law. *Self* also determined that particular deference to Congress is required in the context of acquiring tribal property "because supporting tribal land acquisition is a key feature of modern federal tribal policy." *Id*. at *13. Additionally, "tribal land acquisition generally advances Congress's goals of tribal self-sufficiency and economic development." *Id.* at *14.

Finally, after considering recent Congressional legislation, the *Self* court held as follows:

> This history weighs strongly in favor of deferring to Congress to weigh the relevant policy concerns of an immovable property rule in light of the government's solemn obligations to tribes, the importance of tribal land acquisition in federal policy, and Congress's practice of selectively addressing tribal immunity issues in property disputes.

Self at *17. The *Self* case is consistent with *McGirt*'s reaffirmation that the policy "of leaving Indians free from State jurisdiction and control" as "deeply rooted in this Nation's history." *McGirt v. Oklahoma*, 140 S. Ct. 2452, at 2476.

Because Congress has not created an "in rem" or "immovable property" exception to tribal sovereign immunity, sovereign immunity bars this suit against the Tribe and its agent.

B. The Tribe Did Not Waive Its Sovereign Immunity by Accepting a Deed

Closely aligned with the foregoing, LLPOA argues that when Mr. Keshena acquired the Properties on behalf of the Tribe, the Tribe in effect agreed to waive its sovereign immunity and to abide by the exclusive forum provisions in the Restrictive Covenants. However, LLPOA cannot force a waiver of sovereign

immunity on the Tribe by unilaterally recording a document and then claiming that the Tribe "agreed" to it.

At its core, a waiver is the intentional relinquishment or abandonment of a known right. *E.g., Hamer v. Neighborhood Hous. Servs*., 138 S. Ct. 13, 17 at n.1 (2017). Thus, the question to be answered is whether the Tribe intentionally relinquished or abandoned its sovereign immunity by acquiring real estate within its reservation boundaries on account of a restrictive covenant with which it had nothing to do.

The answer to the question is a clear "no," and the proof in the pudding is the very case on which LLPOA principally relies, *C&L Enterprises, Inc. v. Citizen Band Potawatomi Indian Tribe*, 532 U.S. 411 (2001). Appellant's Br. at 42-43. In *C&L*, the Potawatomi tribe made a contract with C&L Enterprises for the installation of a roof on a building owned by the tribe. 532 U.S. at 414. The building was <u>not</u> on the tribe's reservation boundaries. *Id.* at 415. The contract contained an agreement to arbitrate any disputes in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association. *Id.* In addition, the contract included a choice-of-law clause that read: "The contract shall be governed by the law of the place where the Project is located." *Id.*

The Supreme Court held that the tribe's express agreement to arbitrate and its agreement to state law (there, Oklahoma law) was an express waiver of its sovereign immunity. Continuing, however, with respect to the intentional aspect of the waiver, the Court wrote:

> Nor did the Tribe find itself holding the short end of an adhesion contract stick: The Tribe proposed and prepared the contract; C & L foisted no form on a quiescent Tribe. *Cf. United States v. Bankers Ins. Co.*, 245 F.3d 315, 2001 U.S. App. LEXIS 4924, No. 00-1342, 2001 WL 293669, *3 (CA4, 2001), (where federal agency prepared agreement, including its arbitration provision, sovereign immunity does not shield the agency from engaging in the arbitration process).

532 U.S. at 423.

This passage in *C&L* provides part of the key distinguishing feature between the type of contract entered into by the Potawatomi in *C&L* and the Menominee Tribe's actions in this case: the waiver of rights, as with any waiver of rights, must truly be *intentional*. In *C&L*, the Court made specific note that the Potawatomi tribe had drafted the contract and presented it to the outside contractor, suggesting that, had the tribe been on "the short end of an adhesion contract stick" or had "C&L foisted [a] form on a quiescent Tribe," the outcome would have been different. In the instant case, to the extent that the Restrictive Covenants are "contracts" at all, they are clearly contracts of adhesion as the Tribe had no role whatsoever in creating them. Not having any choice (other than to refrain from re-acquiring its own historical land subject to an unacceptable restrictive covenant that is unenforceable under a plain reading of federal law) is not an intentional relinquishment of the Tribe's right of sovereign immunity.

Finally, to be effective, a waiver of tribal sovereign immunity must not only be clear and express, it must also be approved by the tribe's governing body consistent with tribal law. *See Calvello* v. *Yankton Sioux Tribe,* 1998 S.D. 107, ¶ 12, 584 N.W.2d 108, 112 (S.D. 1998) ("A waiver must be clear and unequivocal and must issue from a tribe's governing body, not from unapproved acts of tribal officials."); *Sharber v. Spirit Mountain Gaming Inc.,* 343 F.3d 974, 976 (9th Cir. 2003) ("Determining whether the tribe has waived immunity ... requires 'a careful study of the application of tribal laws, and tribal court decisions.'") (citation omitted); *Chance* v. *Coquille Indian Tribe,* 963 P.2d 638, 641-42 (Ore. 1998) (rejecting claim that an employment contract waived tribal sovereign immunity because the alleged waiver did not comport with procedures and standards for such waiver under tribal law).

Appellant does not allege that the Tribe has enacted any resolution or otherwise undertaken any official act to waive its immunity to this suit. Appellant's claim for waiver must fail because neither the Tribal Legislature nor any tribal official has expressly waived the Tribe's immunity, nor was any tribal official

authorized to do so. Mr. Keshena took title to each of the properties "for and on behalf of the [Tribe,]" but he had no authority to waive the Tribe's immunity, and his actions in purchasing the land on behalf of the Tribe cannot be found to waive the Tribe's immunity. The Resolution of the Menominee Tribal Legislature authorizing the appointment of a Menominee tribal member to receive title to lands on behalf of the Tribe for the purpose of conveying them to the United States in Trust for the Tribe pursuant to Section 6(c) of the Restoration Act does not waive the Tribe's immunity or authorize the individual so appointed to do so; nor does the appointment of Mr. Keshena waive the Tribe's immunity or authorize him to do so. Further, the Tribe's governing body, the Menominee Tribal Legislature ("Legislature"), could not have authorized Mr. Keshena to waive the Tribe's immunity, through the purchase of land or otherwise, because the Legislature lacks any such authority under the Tribe's Constitution & Bylaws. Menominee Const. & Bylaws, art. XVIII, §§ 1,2. The Constitution preserves the Tribe's immunity to suit except as expressly authorized by the Constitution, Art. XVIII, § 1, and none of the authorizations in the Constitution apply to this case. The Constitution authorizes suits by "persons subject to tribal jurisdiction" in Tribal Courts, but expressly declines to extend that waiver to federal or state courts. Menominee Const. & Bylaws art. XVIII, § 2. The Constitution provides no authority for the Legislature to waive the Tribe's immunity to this suit.

As a result, the Tribe did not waive its sovereign immunity simply by acquiring land within its reservation as expressly stated in the Restoration Act. And without any Congressional abrogation, the Tribe's sovereign immunity is intact and deprives the state courts of authority over this matter.

C. Mr. Keshena Acted As Agent for the Tribe

Finally, almost in passing, LLPOA asserts that Mr. Keshena was not acting as the Tribe's agent and that he, individually, is subject to the circuit court's jurisdiction. It is undisputed that Guy F. Keshena "for and on behalf of the Menominee Indian Tribe of Wisconsin" for the express purpose of conveying title

to the Properties to the United States of America in trust for the Tribe. [R.1:9-10, App. 009-010; R.14:18-55, App.; R.15:1-6, App. 059-064]. This delegation of authority from the Tribe strictly limits Mr. Keshena's ability to take any action with respect to those properties except "pursuant to Tribal directive." [R.15 Ex. 2]. The Supreme Court case directly on point, *Lewis v. Clarke*, 137 S. Ct. 1285, 1290-91 (2017), is cited by both parties and yet the LLPOA continues to misconstrue the standard's foundation. As argued consistently in the circuit court, the consideration for a finder of fact in determining Tribal sovereign immunity is the practical effect that the remedy will have on the Tribe and its interests, as opposed to Mr. Keshena (the Tribe's agent) as an individual. *See Ex-parte New York*, 256 U.S. 490, 500 (1921). Here, the LLPOA's desired restriction has the practical effect of destroying the Tribe's statutorily-provided method of restoring its ancestral homelands – which, axiomatically, *must* occur via individual agents' purchases.

The trial court's dismissal for lack of jurisdiction over this matter was correct and should be affirmed.

III. FEDERAL LAW PREEMPTS STATE LAW AND PRECLUDES TAXATION OF THE SUBJECT PROPERTY

Assuming that the Wisconsin courts are an appropriate forum for these disputes, the state law on which enforcement of the Restrictive Covenants depends is preempted by federal law, which unambiguously and expressly requires the United States to accept title to the Properties at issue and precludes taxation of the subject property.

Preemption is a doctrine based on the Supremacy Clause in Art. IV, cl. 2 of the U.S. Constitution, and in short it means that when Congress has enacted a federal policy on a given issue, state law claims in conflict with federal policy are preempted. "Conflict preemption analysis examines the federal statute as a whole to determine whether a party's compliance with both federal and state requirements is impossible or whether, in light of the federal statute's purpose and intended

effects, state law poses an obstacle to the accomplishment of Congress's objectives." *Crosby v. National Foreign Trade Council*, 530 U.S. 363, 373 (2000).

A. The Restoration Act Expresses a Clear Federal Policy: The United States Shall Acquire Land in Trust for the Tribe when Located in Menominee County

The U.S. Supreme Court in the case of *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020), held with great clarity that courts must enforce Congress's acts and treaties when it comes to reservation lands. The Covenant here is little more than a declaration that the Restoration Act shall not apply to Legend Lake. A private neighborhood association does not have the power to trump federal law in this fashion. The fact that the Covenant seeks to block the operation of federal law renders it preempted by federal law.

Federal law preempts state law claims to enforce private agreements, and renders such agreements unenforceable, when they conflict with federal law. *Smallwood v. Allied Van Lines, Inc.*, 660 F. 3d 1115, 1123 (9th Cir. 2011); *Resolution Tr. Corp. v. Charles House Condo Ass'n, Inc*., 853 F. Supp. 226, 230 (E.D. La. 1994). This includes cases where "the imposition of state standards would conflict with federal law and interfere with federal objectives." *Chicago Hous. Auth. v. DeStefano & Partners, Ltd.*, 45 N.E. 3d 767, 772, 776 (Ill. App. 2015) (quoting *Witty v. Delta Air Lines, Inc*., 366 F. 3d 380, 384 (5th Cir. 2004)) ("Because allowing the state law claim would interfere with Congress' goal, [the Plaintiff's] breach of contract claim is preempted under the obstacle preemption doctrine"); *Nevada v. United States*, 221 F. Supp. at 1251 ("It is well established that Federal Government has plenary authority over both acquisition of federal property and Indian affairs" and "when a state law conflicts with a federal law, under the Supremacy Clause the federal law overrides any conflicting state laws") (internal citations omitted).

A restriction on transfers into trust is patently incompatible with Congress's statutory scheme for the restoration of Menominee Reservation lands under the

Restoration Act. The terms of the Covenant conflict with specific statutory requirements in Section 6(c) of the Restoration Act providing that the Secretary ***shall*** accept transfers of real property located within or adjacent to Menominee County from any member of the Menominee Tribe. Further, enforcement of the Covenant as a restraint on alienation would interfere with Congress' objectives and with operation of the mandatory trust acquisition procedure adopted by Congress in the Restoration Act. Both the effect and the stated purposes of the Covenant blatantly attempt to interfere with and undermine the statutory scheme mandated by Congress in the Restoration Act.

In addition to this direct conflict with specific provisions of Section 6(c), enforcement of the Covenants would "stand as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" in the Menominee Restoration Act, and is also preempted on that basis. *Chicago Hous. Auth.*, 45 N.E. 3d at 772 (quoting *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 98 (1992)). Indeed, it is plain on its face that the Covenants' purpose is to prevent land from being taken into trust pursuant to some federal law. [R.1:14 at 1 ¶ C, App.014] ("This restriction shall, among other things, expressly apply to any application to have the Subject Real Estate (or any part thereof) placed into federal trust pursuant to the Indian Reorganization Act."). *See also* [R:14:57; App.121] – LLPOA's website states that placing lands into trust would violate covenants) and [R.14: 73 at ¶ 11, App.137] (IBIA appeal, wherein LLPOA states: "The placement of these lots in federal trust for and on behalf of the Tribe would violate the Restrictive Covenants . . .").

The Menominee Restoration Act seeks to restore Menominee land to the Tribe. "Restoration" is in its very title. Yet LLPOA seeks to create its own law preventing the restoration of that same land to the Tribe.

Appellant's reliance on certain provisions in Section 6(c) of the Restoration Act as evidence that the present action is not contrary to the explicit policy of the Act is misplaced. Appellant argues that the portion of 6(c) which states, "The land

transferred. . . shall be subject to foreclosure or sale pursuant to the terms of any valid existing obligations in accordance with the laws of the State of Wisconsin" supports LLPOA's present action. This is a provision that offers a mechanism for *pre-existing* liens to be enforced after the land is acquired by the United States. By its very terms it is not applicable until land is acquired by the United States, and therefore, cannot be evidence of a federal purpose to allow or contemplate the present action which is meant to prohibit the very transfer into trust that is a prerequisite to any "foreclosure" action under Section 6(c).

B. The Restoration Act Expresses a Clear Federal Policy: Thou Shalt Not Tax Menominee Land

The Restoration Act's primary goal was to restore the Menominee Tribe's sovereignty and land. *H.R. 7429 Trans.,* p. 16. The Restoration Act was also intended to function as a comprehensive mechanism to address all issues of tax burdens and zoning relating to restoration. Congress specifically considered the rights and needs of the individuals, particularly the non-Native individuals, who purchased lots within Menominee County during termination *and the potential impact of a reduced tax base on those owners*. *See e.g., id.* at 22; 51; 174. Congress also considered evidence that the tax burden should be addressed with federal funds resulting from restoration and economic development by the Tribe. *See, e.g., id.* at 13, 52. The latter view prevailed, and is embodied in the Restoration Act as passed by Congress and signed by the President.

The Restrictive Covenants purport to prevent any transfer of lands that "could or would," *inter alia,* remove the properties from the County tax rolls, or from County zoning authority and general County authority [R.1:14 at 1 ¶ C]. "This Restriction shall, among other things, expressly apply to any application to have the Subject Real Estate (or any part thereof) placed into federal trust pursuant to the Indian Reorganization Act" [*id.*]. If the Restrictive Covenants apply to the Tribe's

acquisition and submission to federal trust under the Restoration Act,[6] section 903d(c) makes plain that this restriction is unenforceable.

We start with the plain language of the statute:

> The Secretary shall accept the real property (excluding any real property not located in or adjacent to the territory constituting, on December 22, 1973, the county of Menominee, Wisconsin) of members of the Menominee Tribe, but only if transferred to him by the Menominee owner or owners. 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 pursuant to this subsection shall be subject to foreclosure or sale pursuant to the terms of any valid existing obligation in accordance with the laws of the State of Wisconsin. Subject to the conditions imposed by this subsection, the land transferred shall be taken in the name of the United States in trust for the Menominee Tribe of Wisconsin and shall be part of their reservation. ***The transfer of assets authorized by this section shall be exempt from all local, State, and Federal taxation. All assets transferred under this section shall, as of the date of transfer, be exempt from all local, State, and Federal taxation***.

25 U.S.C. § 903d(c) (emphasis supplied). In plain, unambiguous English, the bolded language says that: (i) any transfer of land to the Tribe in or adjacent to Menominee County is exempt from all local, State and Federal taxation; and (ii) all assets shall, *as of the date of transfer*, be exempt from all local, State and Federal taxation. Thus, going forward after the transfer, the Restrictive Covenants, if enforced under state law, would run directly afoul of this statutory language.

LLPOA argues that the language making any transfer "subject to all valid existing rights including, but not limited to, liens, outstanding taxes (local, State, and Federal), mortgages, and any other obligations," means that the lands continue to be subject to local taxes despite the clear bolded language to the contrary. LLPOA misinterprets this language. The Tribe and Keshena do not quarrel with the fact that the transfers are subject to *existing* taxes, liens, mortgages, etc. – meaning that, to the extent that taxes have accrued up to the date of the transfer, they must be paid or suffer the appropriate state law remedy. Congress has expressly spoken as such. But any lien or obligation for taxes that does not exist at the time of the

[6] The Menominee Tribe seeks to place the subject property into federal trust pursuant to the Menominee Restoration Act of 1973. The Indian Reorganization Act is separate legislation, enacted in 1934 as 73 P.L.383, 48 Stat. 984.

transfer is not preserved by this language. Indeed, it is hard to imagine how a statute can be clearer: "all assets transferred under this section shall, *as of the date of transfer*, be exempt from all local, State, and Federal taxation" (emphasis added).

It is a basic rule of contractual interpretation that a court should give each word meaning in the context of the congressional objective:

> If the statutory language is plain, we must enforce it according to its terms. But often times the "meaning – or ambiguity – of certain words or phrases may only become evident when placed in context." So when deciding whether the language is plain, we must read the words "in their context and with a view to their place in the overall statutory scheme." Our duty, after all, is "to construe statutes, not isolated provisions."

King v. Burwell, 576 U.S. 473, 486 (2015) (internal citations omitted). Given the congressional objectives stated above: (i) to restore the Menominee Tribe's sovereignty and land; (ii) to function as a comprehensive mechanism to address all issues of tax burdens and zoning relating to restoration, considering: (a) the rights and needs of the individuals, particularly the non-Native individuals, who purchased lots within Menominee County during termination *and the potential impact of a reduced tax base on those owners*, and (b) evidence that the tax burden should be addressed with federal funds as a result of restoration and economic development by the Tribe, it is fundamentally clear that federal policy was to make the Properties exempt from all local, state and Federal taxation after the date of transfer in trust to the Secretary of the Interior. Any covenant to the contrary, enforced under state law, is plainly preempted by this federal statute.

C. The Supreme Court's *McGirt* Decision Changed the Landscape

On July 9, 2020, the Supreme Court issued its landmark decision in *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020). *McGirt* provides a new lens through which any Indian law issue should be analyzed but is particularly relevant to the issue of preemption. *McGirt* cautions that courts must not frustrate the laws of Congress in the field of Indian law.

McGirt involved the Major Crimes Act but applies to any federal legislation in the field of Indian law. *McGirt's* central holding is that Congress's laws in this

area must not be interfered with: "This court long ago held that the Legislature wields significant constitutional authority when it comes to tribal relations, possessing even the authority to breach its own promises and treaties. But that power, this Court has cautioned, belongs to Congress alone." *McGirt,* 140 S. Ct. 2452 at 2462 (internal citation omitted). The *McGirt* court rejected calls to enforce state law practices that conflicted with federal law in this area, explaining that doing so would be at odds with the Constitution, which "[e]ntrusts Congress with the authority to regulate commerce with Native Americans, and directs that federal treaties and statutes are the "Supreme law of the Land." *Id.* at 2462 (citing the Constitution, Art. I, § 8; Art. VI, cl. 2). The *McGirt* court does not permit even a state to "usurp the legislative function" of Congress in the area of Indian law nor can they "treat Native American claims of statutory right as less valuable than others." *Id.* at 2470. *McGirt's* clear holding that courts may not second-guess Congress in this field has since been applied by the Seventh Circuit. *Oneida v. Hobart,* 968 F.3d 664 (7th Cir. 2020).

A. Absent Express Congressional Authority, Land Currently Owned by Indian Tribes Within Their Reservation May Not Be Taxed

Perhaps closest on its facts to the instant case is *Lac Court Oreilles Band of Lake Superior Chippewa Indians v. Evers*, 46 F.4th 552 (7th Cir. 2022), decided on August 15, 2022. In *Lac Court Oreilles*, the State of Wisconsin sought to impose real estate taxes on land within the Ojibwe (Chippewa) reservation currently owned by tribal members on the basis that, at some point in the chain of title, the land was owned by non-tribal members. The state argued that, once a parcel is owned by a non-tribal member, it effectively loses forever its status as non-taxable property.

In a detailed and incisive opinion, the Seventh Circuit analyzed the frame-work of the relationships between the tribes, the federal government and the states. After this initial analysis, the court reviewed the history of Supreme Court decisions on the states' ability to assess real property taxes against Indian lands, specifically distinguishing other types of regulation of Indian lands. While there remain ongoing

"questions about the scope of state authority within Indian country more generally [, i]n the context of state taxation of tribal lands, the Court has 'never wavered' from its commitment to the categorical presumption against state taxing authority." 46 F.4th at 558. Thus, absent cessation of jurisdiction by the Tribe, the state's ability to tax is dependent on the express authorization of Congress. *Id.* at 562.

In the case of the Chippewa, the court engaged in an in-depth review of the applicable court decisions, treaties, and statutes (the 1854 Treaty with the Chippewa, 10 Stat. 1109, and the General Allotment Act, 25 U.S.C. § 331, *et seq*.), finding no express authorization by Congress for the state to tax Chippewa lands. In this case, the analysis is much simpler because the 1973 Restoration Act contains an express *prohibition* of state and local taxation of Menominee lands submitted to the Secretary of the Interior to be held in trust by the United States.

Perhaps more importantly in this context, however, is the court's analysis of why, while the state may tax the land while owned by a non-Indian, it may not tax the land once re-acquired by a tribal member. In the section entitled "The Supreme Court's Cases Do Not Support the State's Surrender-of-Tax-Immunity Theory," beginning at 46 F.4th at 566, the court painstakingly reviews the principal cases on the subject, including *Montana v. United States*, 450 U.S. 544 (1981), and *Brendale v. Confederated Tribes & Bands of Yakima Indian Nation*, 492 U.S. 408 (1989), concluding that unless the Congress speaks to the contrary, the presumption remains that reservation lands conveyed to non-Indians that return to tribal ownership are returned to non-taxable status. *Id.* at 566-69. To emphasize the point, the court compared the non-taxable status of tribal lands with the non-taxable status of lands owned by religious organizations:

> Nor is this sort of distinction particularly unusual in tax law. Wisconsin exempts religious organizations from property taxes. *See, e.g.*, Wis. Stat. § 70.11(4). This, too, is a categorical rule based on the identity of the owner (a religious organization) and the use to which the property is put (religious uses or housing for certain religious leaders). If a church sells its minister's quarters to a secular bookstore, the land becomes taxable. See, e.g., *Wauwatosa Ave. United Methodist Church v. City of Wauwatosa*, 2009 WI App 171, 321 Wis. 2d 796, 776 N.W.2d 280, 282-83 (Wis. Ct. App. 2009). But if the church reacquires the space and

> resumes using it for religious purposes, the church's exemption returns in full force. So too here on the Tribes' reading. That result is neither absurd nor internally inconsistent.

46 F.4th at 570. At the end of the day, the Restoration Act is Congress's promise to the Menominee, and only Congress can break it. *Id.* at 569, citing *McGirt v. Oklahoma,* 140 S. Ct. 2452. 2462 (2020).

LLPOA seeks solace in the Eastern District of Wisconsin's decision in *Baylake Bank v. TCGC, LLC*, 2008 U.S. Dist. LEXIS 77291 (E.D. Wis.) [App.355-364]. In *Baylake Bank*, the federal district court held that a covenant that contained terms similar, though not identical to the Restrictive Covenants here, was not preempted by the Indian Reorganization Act (formerly codified at 25 U.S.C. §§ 461 – 494a, now at 25 U.S.C. §§ 5101 – 5144). It is worth noting that in *Baylake Bank*, a covenant had been adopted by the owner of the property at issue in that case – and even consented to by the very parties that were seeking to avoid it. *Baylake Bank*, at *2. *Baylake Bank* also did not involve a lawsuit against any tribe or its agent, and the United States had not approved an application to accept the property into trust and there was no current Bureau of Indian Affairs proceeding. For all of these reasons, *Baylake Bank* is distinguished from this case even before reaching the question of federal preemption.

On the question of federal preemption, the text and purposes of the (1934) Indian Reorganization Act were plainly different than the Menominee Restoration Act enacted nearly 40 years later. In the Indian Reorganization Act, Congress did not set a tax policy, or mandate acquisition of specific land; rather, the regulations promulgated in the wake of the Indian Reorganization Act (25 C.F.R. § 151.10(e)) "require the Secretary of the Interior, in ruling on an application for trust status, to consider such things as the impact on the community of the land's removal from the property tax rolls." *Baylake Bank,* 2008 U.S. Dist. LEXIS 77291 at *24. In declining to find federal preemption in that suit, the court noted that the Secretary

could deny the application to put the subject property into trust after considering the impact on the tax rolls and, as a result:

> implementing the IRA and its regulations may result in essentially the same outcome as enforcing the restrictive covenants at issue here, namely, the property remaining on the tax rolls of the Village of Hobart. The fact that the covenants might effectively decide the question before it may even be brought to the Secretary does not mean that their enforcement is inconsistent with the IRA and its regulations.

Id. at *24.

Regardless of what one thinks about the district judge's *Baylake Bank* conclusion on this point, even if this Court agrees wholeheartedly with the *Baylake Bank* court's view, it should still rule in the Tribe's favor here because the Menominee Restoration Act takes all discretion regarding the tax roll and other decisions out of the Secretary's hands – it specifies that the Secretary ***shall*** accept the real property and any land transferred to the Secretary is, after the date of the transfer, exempt from all local, State and Federal taxation. So long as the property transferred is within the geographical boundaries of (or "adjacent to") Menominee County and the transfer to the Secretary is by a Tribal Member, it may not be taxed – meaning that compliance with both the Restoration Act and Restrictive Covenant is impossible. Because federal and state law are mutually exclusive, the state law upon which enforcement of the Restrictive Covenant depends is preempted and may not be enforced. If this Court finds that the Wisconsin courts have jurisdiction over this matter, the trial court's judgment of dismissal on the merits should be affirmed.

CONCLUSION

Because:

A. the Tribe's sovereign immunity has neither been abrogated nor waived, the Wisconsin courts have no jurisdiction over this suit; and

B. in the alternative, the state law upon which enforcement of the Restrictive Covenants depend is preempted by the clear and unambiguous language of the Menominee Restoration Act,

Defendants Menominee Indian Tribe of Wisconsin and Guy F. Keshena respectfully pray this Court to affirm the trial court's order of dismissal, and for such other and further relief in the Defendants' favor as is just.

Respectfully submitted this 5th day of December, 2022.

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CERTIFICATION

I hereby certify that this Brief conforms to the rules contained in Wis. Stat § 809.19 (8) (b), (bm), and (c) for a brief. The length of this brief is 10,189 words.

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CERTIFICATE OF SERVICE

I hereby certify that on December 5, 2022, I personally caused copies of the Brief Of Defendants-Respondents Guy Keshena and The Menominee Indian Tribe of Wisconsin, to be served on counsel via the court's e-filing system.

Dated this 5th day of December, 2022.

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