STATE OF WISCONSIN
IN SUPREME COURT
APPEAL NO. 2022AP000937

LEGEND LAKE PROPERTY OWNERS ASSOCIATION, INC.,

Plaintiff-Appellant,

v.

GUY KESHENA and
THE MENOMINEE INDIAN TRIBE OF WISCONSIN,

Defendants-Respondents.

BRIEF OF PLAINTIFF-APPELLANT

On Appeal from the Circuit Court for Menominee County,
The Honorable Katherine Sloma, Presiding
Circuit Court Case No. 2018CV000007

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Issue One: Does sovereign immunity bar this case? The circuit court answered yes. R.163, at 3, A-App. 272.

Issue Two: Are the Restrictive Covenants preempted by the Menominee Restoration Act? The circuit court answered yes. R.163, at 3., A-App. 272. This was followed by a ruling by the Eastern District of Wisconsin that the transfer restriction and the tax roll provisions of the Restrictive Covenants were preempted. *Legend Lake Property Owners Association, Inc. v. United States Department of the Interior*, No. 23-C-480, 2024 WL 449287 (E.D. Wis. Feb 6, 2024), A-App. 290-99. This issue has therefore narrowed since the circuit court's decision.

Issue Three: Is the United States an indispensable party to this action? The circuit court did not reach this question.

Issue Four: Does this Court have jurisdiction to hear this case? The circuit court did not reach this question.

Statement on Oral Argument and Publication

Appellant requests oral argument and publication, as this case involves complex issues of great importance and precedential value to landowners in Menominee County as well as to the public.

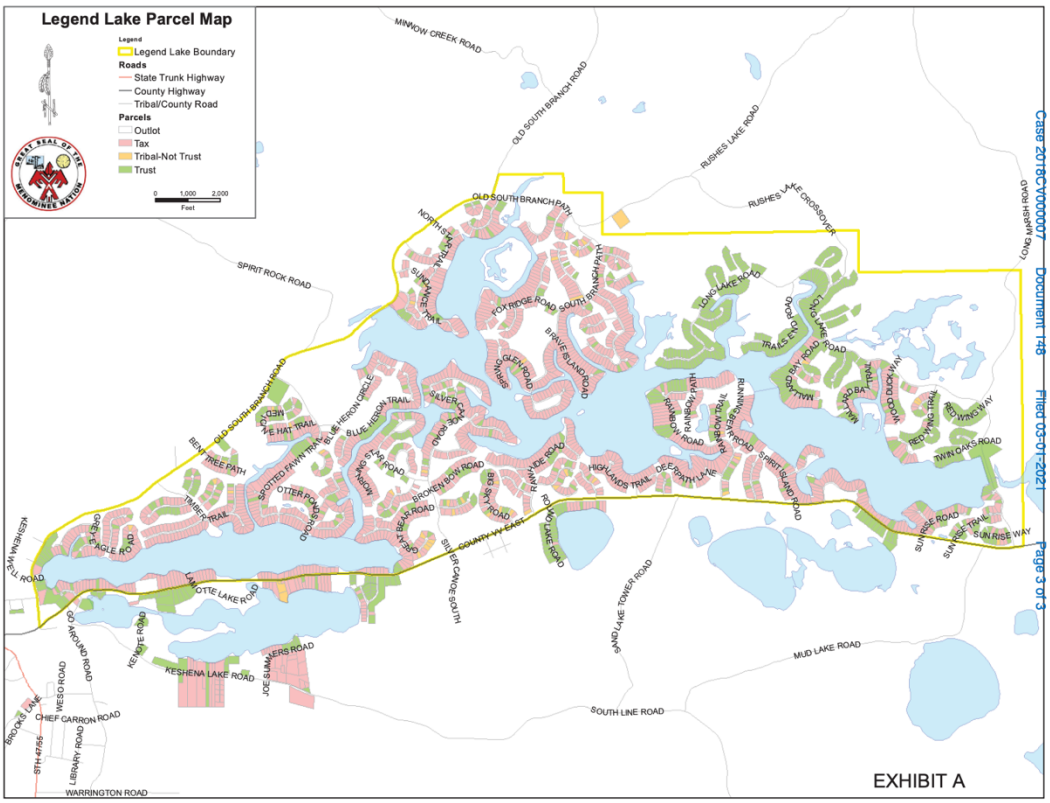
Statement of the Case

This case involves the question of whether private restrictive covenants survive a transfer of ownership of land to a member of the Menominee Indian Tribe of Wisconsin ("Tribe"), and then to the United States, to be held in trust for the Tribe. This question arises because the Legend Lake residential development in Menominee County was created and sold during a unique, short period of history, the time in between the 1954 Menominee Termination Act, 68 Stat. 250, 25 U.S.C. §§ 891-902, and the 1973 Menominee Restoration Act, Pub. L. 93-197, 87 Stat. 770 (24 U.S.C. § 903 *et seq*). After the Menominee reservation was terminated, Menominee Enterprises, Inc. ("MEI"), which was created to own the tribal lands after termination, sold lots in the Legend Lake development (located within the former Menominee reservation) to private buyers. R.16, at 3-4. Following the 1973 Restoration Act ("MRA"), the land still owned by MEI was transferred to the United States to be held in trust for the Tribe, and again became the Menominee reservation. R.16, at 4.

This means that the modern Menominee reservation contains most of the land in Menominee County, except for a limited amount of land in private ownership, including many Legend Lake lots. Over the years, the members of the Tribe have purchased Legend Lake lots to restore them to the reservation by transferring the lots into trust, pursuant to the MRA. Therefore, following restoration, the Legend Lake development has a mix of some lots owned by private owners and some lots held in trust by the United States for the Tribe. The Legend Lake Property Owners Association, Inc. ("LLPOA") rules and regulations, set forth in its bylaws and its Restrictive Covenants, however, were intended to apply across the entire Legend Lake development in a uniform way.

This map, filed by the Respondents, showing the trust lots interspersed with the privately owned lots in Legend Lake, illustrates the potential difficulty that LLPOA has in ensuring that the development adheres to its bylaws, including building and use regulations such as a prohibition against commercial use and a restriction on cutting trees, as well as rules governing the common areas of the development, including the collection of dues to support common area maintenance.

See R.122, Bylaws at 12-16, 5-6, A-App. 190-94, 183-84.



R.148 at 3.

On October 25, 2018, LLPOA filed this declaratory judgment action in Menominee County Circuit Court, with Guy Keshena ("Keshena") and the Tribe as Defendants. R.1, A-App. 003. LLPOA is an association of property owners for properties in the Legend Lake development, whose principal purpose is the management, maintenance, preservation, and operation of such properties, which has been carried out through its bylaws. R.1, Compl.

¶¶1, 7, A-App. 006-07. One purpose of the restrictive covenants at issue in this case was to assure that anyone purchasing a property in Legend Lake would be subject to the resolutions and bylaws of LLPOA. R.20, Tr. 27:25-28:5, A-App. 128-29.

The Complaint alleged that Keshena was the owner of 33 lots in Legend Lake ("Keshena Properties"), and that these Keshena Properties were subject to restrictive covenants recorded by LLPOA before Keshena took title. R.1, Compl. ¶¶19-20, A-App. 011-12. Keshena had been appointed by the Tribe to purchase lots, with the goal that he would then offer those lots to be placed into trust for the benefit of the Tribe. R.15, A-App. 096. Keshena then did proffer deeds to the United States. R.14 at 19-51, A-App. 039-71. The Complaint sought declaratory judgment under Wis. Stat. § 806.04 that the Restrictive Covenants were valid and legally enforceable, the Restrictive Covenants apply and are of force and effect concerning the Keshena Properties, and any transfer of the Keshena Properties in violation of the Restrictive Covenants be null and void. R.1, Compl. ¶24, A-App. 013.

The Legend Lake development was developed in the late 1960s via recorded plats that contained restrictive covenants ("Original Covenants"). R.1, Compl. ¶4, A-App. 006. The Original Covenants stated, "After completion of the project, ten or more property owners may form an Association for such purpose of policing and enforcing the aforesaid covenants and for the maintenance and use of wilderness areas, outlots, and lodge." R.127, A-App. 205. The Original Covenants included commercial use prohibitions, building size and setback rules, restrictions on camping, and restrictions on cutting trees. R.127, A-App. 205. The LLPOA was created in 1972 via articles of incorporation, which were re-stated in 1998 along with amended bylaws. R.1, Compl. ¶¶6, 9, A-App. 007. The Original Covenants expired on July 1, 1999, but by that point, many of the provisions contained

in the Original Covenants had been adopted into the 1998 amended bylaws. *Id.*, ¶¶5, 9, A-App. 006-07.

In 2009, LLPOA amended the bylaws, via affirmative vote by the membership, to adopt the restrictive covenants at issue in this case ("Restrictive Covenants"). R.1, Compl. ¶12, A-App. 008. The 2009 bylaws were in the record, and contained, among other things, building and use restrictions, provisions for the collection of dues for the maintenance of the common areas, rules governing LLPOA, and the Restrictive Covenants. R.122, A-App. 179. The 2009 bylaws state,

> These By-laws shall be deemed covenants running with the land and shall govern and be binding on all individual and joint Lot Owners, mortgagees and other encumbrance's and their respective heirs, administrators, personal representatives, successors, and assigns, as well as all other persons occupying or having any legal or equitable interest in the property in any way whatsoever and all licensees, invitees, employees, agents, servants and guests of any of the foregoing.

R.122, at 1, A-App. 179.

The Restrictive Covenants were recorded at the Menominee County Register of Deeds. R.125. The Restrictive Covenants contained transfer restrictions, which included a prohibition on a transfer of property in the development that could or would remove the property from the Menominee County tax rolls. R.1, Compl. ¶15, A-App. 009. The Restrictive Covenants contained a provision that owners of lots must comply with all municipal and LLPOA laws, rules, regulations, and obligations. *Id.*, ¶15, A-App. 010. This provision was distinct from the transfer restriction, as it explicitly stated, "The Subject Real Estate remains subject to said municipal and Association rules, regulations and obligations, in rem, *notwithstanding a transfer to an owner not otherwise subject to them.*" *Id.* (emphasis added). The Restrictive Covenants contained a consent to venue and jurisdiction clause, requiring that any proceedings arising out of the Restrictive Covenants be brought in Menominee County Circuit Court. *Id.*, ¶17, A-App. 010-11. The Restrictive

Covenants contained a provision waiving any defense based on sovereign immunity by accepting a deed transferring ownership of property subject to the Restrictive Covenants. *Id.*, ¶18, A-App. 011.

On December 17, 2018, the Defendants moved to dismiss the Complaint, focusing almost exclusively on the transfer restriction and taxation provisions, arguing that they were preempted by the Restoration Act, along with a sovereign immunity defense. R.10. Following briefing and a hearing, the circuit court, the Honorable James R. Habeck, presiding, denied the motion. R.25, A-App. 176. The parties then filed cross motions for summary judgment. R.33; R.66. The Defendants also filed a motion for reconsideration of the motion to dismiss, based on the issues of sovereign immunity and preemption. R.140. Following a hearing, the circuit court, the Honorable Katherine Sloma, presiding, granted the Defendants' motion for reconsideration and motion to dismiss via order filed April 18, 2022. R.160, A-App. 206; R.161, A-App. 260; R.163, A-App. 270. The circuit court did not address the motions for summary judgment. R.163, A-App. 273. LLPOA timely appealed. R.173. The parties then briefed the case before the Court of Appeals, which included supplemental briefing requested by the Court of Appeals. Then, on January 22, 2025, the Court of Appeals certified the case to this Court. A-App. 310.

Meanwhile, the United States decided to accept the Keshena Properties into trust. This decision was published on November 14, 2018. R.14, at 53-55, A-App. 073-75. LLPOA appealed that decision to the Interior Board of Indian Appeals ("IBIA") on December 11, 2018. R.14, at 68-75, A-App. 088-95. The IBIA denied LLPOA's appeal, and LLPOA appealed on April 12, 2023 to the United States District Court for the Eastern District of Wisconsin. The District Court granted the Defendants' motion to dismiss on February 6, 2024. *See Legend Lake Property Owners Association, Inc. v. United States Department of the Interior*, No. 23-C-480, 2024 WL 449287

(E.D. Wis. Feb 6, 2024), A-App. 290. The District Court concluded that the transfer restriction and the tax roll provisions of the Restrictive Covenants were preempted by the Restoration Act. *Id.* at 9-10, A-App. 298-99. However, the Court did not rule on whether the other provisions of the Restrictive Covenants were preempted. *Id.* at 10, A-App. 299. LLPOA did not appeal the District Court's decision. This appeal is no longer seeking a ruling on the transfer restriction or tax roll provisions. However, the question remains as to whether the remaining provisions in the Restrictive Covenants, including the applicability of the LLPOA bylaws to the lots in the Legend Lake development, including the 33 lots accepted into trust, are valid and legally enforceable.

Argument

This case raises the issue of whether the numerous procedural and jurisdictional hurdles identified by the Tribe and Keshena bar this case. The MRA explicitly provides that properties will be taken into trust "subject to all valid existing rights" and that "nothing contained in this Act shall alter any property rights or obligations, any contractual rights or obligations, including existing fishing rights, or any obligations for taxes already levied." MRA §§ 3(d), 6(c). However, the Tribe and Keshena's positions taken in this case would make it impossible for a rights holder to have their "valid existing rights" adjudicated, either before or after transfer. This would render the quoted provisions of MRA §§ 3(d) and 6(c) a nullity. Nullifying LLPOA's reciprocal rights that the Legend Lake properties follow the Restrictive Covenants and bylaws would be an unconstitutional taking of LLPOA's property rights. As will be explained in each section below, the circuit court should not have dismissed the case, and this case should be decided on the merits. Although the District Court held that the transfer restriction and the tax roll provisions of the Restrictive Covenants were preempted by the MRA, the other provisions of the Restrictive Covenants are valid and legally enforceable.

I. Sovereign immunity does not bar this case.

Sovereign immunity, as asserted by either the Tribe, Keshena, or the United States, does not bar this case due to Keshena's status as an individual member of the Tribe, abrogation of sovereign immunity by the MRA, waiver, and the applicability of the immovable property and in rem exceptions. Review of this issue is de novo. *Wisconsin Dep't of Nat. Resources v. Timber and Wood Products Located in Sawyer County*, 2018 WI App 6, ¶17, 379 Wis. 2d 690, 906 N.W.2d 707.

The MRA§ 6(c), by which Keshena offered the Keshena Properties to be held in trust, provides for transfers of property, in or adjacent to Menominee County, by members of the Tribe, to the United States to be held in trust, and states: "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." MRA § 6(c). The MRA also provides, "[e]xcept as specifically provided in this Act, nothing contained in this Act shall alter any property rights or obligations, any contractual rights rights or obligations, including existing fishing rights, or any obligations for taxes already levied." MRA § 3(d).

If the tribal member and the United States do not agree to the nature and enforceability of the valid existing rights encumbering the property being transferred, there has to be some way for the obligation holder to bring suit to enforce the obligations. The MRA explicitly states, "[t]he land transferred to the Secretary pursuant to this subjection 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.*" MRA § 6(c) (emphasis added). Therefore, in order to give effect to the express terms of the MRA § 6(c), either the member of the Menominee Tribe, or the United States, *or both*, must be subject to suit and cannot rely on sovereign immunity to escape a court determination on the obligations encumbering the property sought to be put into trust.

A. In order to effectuate the transfer into trust, Keshena owned the properties in his capacity as a member of the tribe, therefore, sovereign immunity does not protect him from suit.

The deeds to the Keshena Properties were titled to "Guy F. Keshena, a single person for and on behalf of the Menominee Indian Tribe of Wisconsin." R.14, A-App. 039-071. Keshena had documentation from the Tribe authorizing him to acquire properties for the purpose of placing those properties in trust. R.15, A-App. 096-101. However, whether Keshena was acting as agent of the Tribe in any "official" capacity is not the dispositive inquiry for the sovereign immunity analysis. *See Lewis v. Clark*, 581 U.S. 155, 137 S.Ct. 1285, 1289 (2017) (employee acting within the scope of his employment was not "on its own, sufficient to bar a suit against that employee on the basis of tribal sovereign immunity.").

Critically important under the express terms of the MRA, Keshena was acting in his capacity as a *member* of the Menominee Tribe when he transferred the Keshena Properties to the United States. "The Secretary shall accept the real property (excluding any real property not located in or adjacent to the territory constituting, on the effective date of this Act, the county of Menominee, Wisconsin) of members of the Menominee Tribe, but only if transferred to him by the Menominee owner or owners." MRA § 6(c). Presumably, if the Tribe thought it could buy properties itself, and then transfer them to the Secretary, it would do so, rather than designating an individual member. However, it is a requirement of the MRA that "members of the Menominee Tribe" be the ones to transfer the property.

Throughout this litigation, the Tribe and Keshena have never asserted that individual tribal members have sovereign immunity from suit. By drafting the MRA in such a way that an individual member must be the one with title before transferring a property to the Secretary, Congress ensured

that any litigation surrounding the "liens, outstanding taxes, … mortgages, and any other obligations" could take place, without facing the hurdle of sovereign immunity asserted by the Tribe. MRA § 6(c). The MRA explicitly states that "foreclosure or sale pursuant to the terms of any valid existing obligation" would be "in accordance with the laws of the State of Wisconsin." MRA § 6(c). Although the MRA otherwise provides for renewed Tribal jurisdiction, this section dealing with existing obligations on property going through the trust transfer process is a notable exception that explicitly states that the laws of the State of Wisconsin will apply.

The Tribe and Keshena seek to make it difficult for obligation holders to vindicate their rights in court prior to transfer by asserting that Keshena has sovereign immunity as an agent. This dilemma can be completely avoided: the dispositive fact is that Keshena had to act in his capacity as an individual member to transfer the properties. This gives effect to MRA § 6(c), allowing "valid existing rights" to be determined prior to transfer, without such determination being barred or delayed by claimed sovereign immunity.

B. The United States cannot assert sovereign immunity that would bar this case.

The Tribe and Keshena then argue that once the property is held by the United States, the obligation holder still cannot vindicate their rights, because of the United States' sovereign immunity. Resp. Supp. Br. 8. However, earlier in the briefing, they implicitly admitted that the United States *could* be sued under the MRA, after transfer. Resp. Br. 26 (interpreting MRA § 6(c) as "a provision that offers a mechanism for pre-existing liens to be enforced *after* the land is acquired by the United States." (emphasis added, original emphasis removed). The Tribe and Keshena have admitted that Section 6(c) is *at least* enforceable against the United States, after transfer.

In the absence of a timing requirement either way, the MRA allows for the valid existing obligations to be dealt with either before or after transfer.

In addition, if the United States could not be sued to adjudicate "valid existing rights," this would mean that the timing of the trust transfer would frequently moot cases filed to adjudicate rights, frustrating the intent of the MRA that the property be transferred "subject to" such rights. Transfers under the MRA are not discretionary and the transfer process is not necessarily lengthy. This means that, if the foreclosure or other proceeding to determine rights in the property takes longer, the rights holder would be stymied at the moment the transfer was accepted. The MRA provides a real, meaningful protection to lien and other rights holders and specifically states that it is not extinguishing property rights or obligations. This means either that (1) the rights holder must be able to sue the Tribal member owner prior to transfer and the suit must be resolved prior to the transfer being accepted, and/or (2) the rights holder must be able to sue the United States after transfer. The Tribe and Keshena are arguing that neither of these options are available to a rights holder, which would make Section 6(c) a nullity. The IBIA considers the trust acceptance process to be mandatory and does not wait for rights outside its limited jurisdiction to be adjudicated. *See, i.e.*, *Legend Lake Property Owners Association, Inc. v. Midwest Regional Director, Bureau of Indian Affairs*, 68 Interior Dec. 284 (IBIA March 24, 2023), A-App. 274. If, as the Tribe and Keshena argue, the United States is an indispensable party but cannot be sued, then Tribal members could always evade the obligations on their properties because the transfer could be completed faster than the civil case adjudicating the rights.

The Quiet Title Act, 28 U.S.C. § 2409a ("QTA") is not applicable to this case, because LLPOA is not challenging the transfer of the Keshena Properties and therefore not challenging the United States' title to the properties. Rather than needing to rely on the QTA for a waiver of sovereign

immunity, the LLPOA's ability to enforce its rights in the Keshena Properties is provided for in the MRA itself. As explained above, in order to be effective, the MRA must allow for suit against either the Tribal member offering the property, the United States who accepts the property, or both. One way of achieving this requirement is that the MRA abrogates the United States' sovereign immunity for the limited purpose of adjudicating valid existing rights in the property.

C. If the Tribe is considered the real party in interest, then the Restoration Act abrogates the Tribe's sovereign immunity, and the Tribe waived its sovereign immunity.

The Tribe and Keshena argue that because Keshena was an agent of the Tribe when he acquired the Keshena Properties, the Tribe is the real party in interest. However, if the Tribe is the real party in interest, then in order to give effect to the language of the MRA, the MRA must abrogate the Tribe's sovereign immunity for the limited purpose of adjudicating the "valid, existing rights" in the property. In addition, if the Tribe is the real party in interest for the purpose of ensuring sovereign immunity, then the Tribe is also the real party in interest who waived sovereign immunity by accepting the deeds to the Keshena Properties. The Tribe lacks sovereign immunity "only where Congress has authorized the suit or the tribe has waived its immunity." *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 751, 754 (1998). Here, both have occurred.

1. If the Tribe includes itself in the transaction, then the Restoration Act abrogates the Tribe's immunity for the limited purpose of adjudicating the valid existing rights in the property offered into trust.

There was no requirement that the Tribe include itself in the transactions by designating an agent and having the Keshena Properties titled to "Guy F. Keshena *for and on behalf of the Menominee Indian Tribe of Wisconsin*." R.14, A-App. 039-071 (emphasis added). The transfer would be effective due to being offered by Keshena in his individual capacity as a member. MRA § 6(c). But by including itself, the Tribe claims that this suit seeking to adjudicate "valid, existing rights" in the Keshena Properties cannot be brought due to its sovereign immunity. The Tribe cannot prevent one of the explicit requirements of the MRA by involving itself in the transfer process. If the Tribe chooses to include itself in the transaction, then the Tribe waives its sovereign immunity for the limited purpose of the required resolution of any "valid, existing rights" in the properties sought to be transferred. Otherwise, MRA Section 6(c) is rendered a nullity.

To abrogate the Tribe's sovereign immunity by statute, Congress must make this "unmistakably clear," with any ambiguity in the statute construed in favor of immunity. *Lac du Flambeau Band of Lake Superior Chippewa Indians v. Coughlin*, 599 U.S. 382, 143 S.Ct. 1689, 1695 (2023) (citations omitted). However, there is no "magic-words requirement." *Id*. As explained above, if the Menominee member was offering the property into trust, without the Tribe's involvement, the question of sovereign immunity would not even arise. However, the adjudication of "valid existing rights" still has to take place, even if the Tribe has inserted itself into the transaction. Even in this situation, the MRA is "unmistakably clear" and unambiguous that the property's subjection to valid existing rights is still a statutory requirement because there are no exceptions listed. If a limited abrogation of the Tribe's

immunity must take place in order to adjudicate the existing rights in the property, then this is the consequence of Section 6(c) containing no exceptions to this requirement.

2. The Tribe waived its immunity by involving itself in the transaction.

Second, by involving itself in the transaction and claiming that Keshena was merely its agent, the Tribe waived its sovereign immunity due to the clear, express provisions of the Restrictive Covenants. Although there is a "strong presumption" against waiver, tribal sovereign immunity may be waived if it is "clear." *Timber & Wood Prod.*, 2018 WI App 6, ¶19; *C & L Enters., Inc. v. Citizen Band Potawatomi Indian Tribe of Okla.*, 532 U.S. 411, 418 (2001) (quoting *Oklahoma Tax Comm'n* v. *Citizen Band Potawatomi Tribe of Okla.,* 498 U. S. 505, 509 (1991)).

The Court of Appeals acknowledged that, "the 2009 restrictive covenants expressly state that the purchaser of the property is waiving immunity." Certification, 28 n.19, A-App. 337. The Restrictive Covenants state in paragraph 4(F):

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

R.1, Compl. 17, A-App. 019 (underline in original). The Restrictive Covenants state in Paragraph 4(G):

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

> **Paragraph 4F above, and enforcement of any judgment rendered therein.**

R.1, Compl. 17, A-App. 019 (underline and bold in original). Therefore, a purchaser, transferee, or title owner of the property consents to jurisdiction in Menominee County Circuit Court, waiving sovereign immunity. The Tribe has argued that it was not the title owner, but this argument was inconsistent with the Tribe's insistence that Keshena was merely its agent when he acquired the properties and had them titled "Guy F. Keshena for and on behalf of the Menominee Indian Tribe of Wisconsin." R.14, A-App. 039-71.

The Court of Appeals acknowledged, "at least one jurisdiction has held that the doctrine of 'apparent authority' permitted a tribal member to waive the tribe's immunity despite lacking the authority under the tribe's laws to provide such a waiver." Certification, 31, A-App. 340 (citing *Rush Creek Sols., Inc. v. Ute Mountain Ute Tribe*, 107 P.3d 402, 406-08 (Colo. App. 2004)). However, it was part of that court's analysis that the tribe's constitution was "silent as to the requisite procedures for waiving" immunity. *Rush Creek*, 107 P.3d at 406. Here, the Tribe has argued that its constitution prohibits waiving immunity. Resp. Br. 22. However, the Court of Appeals also collected a number of cases (although not the majority view) that "tend to support the proposition that a tribe may waive its immunity even without following proper tribal procedure. Certification, 32-33, A-App. 341-42 (citing *United States v. Velarde*, 40 F. Supp. 2d 1314, 1317 (D.N.M. 1999); *StoreVisions, Inc. v. Omaha Tribe of Neb.*, 795 N.W.2d 271, 278-79 (Neb. 2011), *modified on reh'g*, 802 N.W.2d 420 (Neb. 2011); *Granite Valley Hotel Ltd. v. Jackpot Junction Bingo & Casino*, 559 N.W.2d 135, 137 (Minn. Ct. App. 1997); *Bates Assocs., LLC v. 132 Assocs., LLC*, 799 N.W.2d 177, 182-84 (Mich. Ct. App. 2010); *Smith v. Hopland Band of Pomo Indians*, 95 Cal. App. 4th 1, 6-8 (Cal. Ct. App. 2002)) (*But see, i.e., Memphis Biofuels, LLC v. Chickasaw Nation Indus., Inc.*, 585 F.3d 917, 922 (6th Cir. 2009)).

The Tribe may argue that the waiver in the Restrictive Covenants was an impermissible adhesion contract, because the option of not restoring land to the reservation in order to avoid waiving its immunity was not a real choice. *See C & L Enters.*, 532 U.S. at 423. However, this argument sets up a false dichotomy. As explained above, the MRA does not require the Tribe's inclusion in the transfer transaction. It is entirely possible for tribal members to restore property in or adjacent Menominee County by offering it into trust, but without adding the Tribe's name to the deed such that the Tribe's sovereign immunity is arguably implicated. Here, however, the Tribe chose to be involved, above and beyond the individual member needed to transfer the property. Therefore, the Tribe accepted the waiver conditions in the Restrictive Covenants. If Keshena was the Tribe's agent who was to acquire these specific 33 properties on behalf of the Tribe, then Keshena had the apparent and actual authority to take the necessary steps to accomplish this, which included accepting the properties encumbered with the existing restrictions, including the waiver. "Whether an agent has apparent authority to bind the principal is a factual question determined from all the circumstances of the transaction." *StoreVisions*, 795 N.W.2d at 279.

D. This case qualifies for the immovable property and in rem exceptions to sovereign immunity.

1. The immovable property exception applies to this case.

The immovable property exception to sovereign immunity has long-standing recognition in common law. *Cayuga Indian Nation of New York v. Seneca County*, 978 F.3d 829, 836 (2d Cir. 2020) (citations omitted). Since the tribes possess common law sovereign immunity, *Michigan v. Bay Mills Indian Community*, 572 U.S. 782, 134 S.Ct. 2024, 2030 (2014), tribal immunity includes the common law exceptions. Congress has not taken

affirmative steps to remove the immovable property exception for tribal immunity.

"American common law has long recognized an 'exception to sovereign immunity for actions to determine rights in immovable property.'" *Cayuga Indian Nation*, 978 F.3d at 836 (quoting *Upper Skagit Indian Tribe v. Lundgren*, 584 U.S. 554, 138 S.Ct. 1649, 1655 (2018) (Roberts, C.J., concurring)). This exception rests on two basic premises. First, "property ownership is not an inherently sovereign function." *Permanent Mission of India to the United Nations v. City of New York*, 551 U.S. 193, 127 S.Ct. 2352, 2357 (2007) (citation omitted). Second, "each state has 'a primeval interest in resolving disputes over use or right to use of real property' located within its own territory." *Cayuga Indian Nation*, 978 F.3d at 836 (quoting *Asociacion de Reclamantes v. United Mexican States*, 735 F.2d 1517, 1521 (D.C. Cir. 1984)). Therefore, under the exception, sovereign immunity does not bar a suit to determine the rights or interests of a foreign sovereign in real property located within the territory of the state that is exercising jurisdiction. *Asociacion de Reclamantes*, 735 F.2d at 1521 (citation omitted).

Whether the immovable property exception applies to tribal sovereign immunity remains unsettled, both in federal and Wisconsin law. The United States Supreme Court declined to resolve the issue in *Lundgren*. A critical question is thus left to state courts to decide: does the immovable property exception extend to tribal sovereign immunity, or are plaintiffs like LLPOA left without a remedy? *See Lundgren*, 138 S.Ct. at 1655-56 (Roberts, C.J., concurring). A consistent application of tribal sovereign immunity principles reveals that the immovable property exception does apply here.

Indian tribes, as "domestic dependent nations," are "subject to plenary control by Congress." *Bay Mills*, 134 S.Ct. at 2030 (citation omitted). As "separate sovereigns pre-existing the Constitution," the tribes retain their historic sovereignty unless Congress acts to alter it. *Id.* (quoting *Santa Clara*

Pueblo v. Martinez, 436 U.S. 49, 56 (1978)) A core aspect of the tribes' historic sovereignty is "the 'common law immunity from suit traditionally enjoyed by sovereign powers.'" *Id*. (quoting *Santa Clara Pueblo*, 436 U.S. at 58).

The relationship between these two principles of tribal sovereignty may appear to conflict. On one hand, only Congress can create exceptions to tribal sovereign immunity. *Kiowa Tribe*, 523 U.S. at 754. On the other hand, common law immunity, which the tribe possesses, *Santa Clara Pueblo*, 436 U.S. at 58, is subject to the long-standing immovable property exception. This apparent conflict is resolved by the proper understanding that Congress need not authorize the immovable property exception for it to apply to tribal immunity.

Absent an act of Congress, the common law principles of sovereign immunity will continue to apply to the tribes. The immovable property exception is not an alteration of the common law immunity. Rather, it is an inherent limitation on the traditional, pre-existing common law immunity principles. *See Permanent Mission of India*, 127 S.Ct. at 2357. Therefore, common law immunity, with its inherent limitations, will continue to apply to the tribes until Congress alters it.

Two relevant state cases recently refused to apply the immovable property exception to tribal immunity. *Flying T Ranch, Inc. v. Stillaguamish Tribe of Indians*, 549 P.3d 727 (Wash. Ct. App. 2024), review granted (Wash. Dec. 4, 2024) (No. 103430-0); *Self v. Cher-Ae Heights Indian Community of Trinidad Rancheria*, 60 Cal. App. 5th 209, 274 Cal. Rptr. 3d 255 (Cal. Ct. App. 2021). The reasoning in both *Flying T Ranch* and *Self* revolved around two primary principles: (1) the court should defer to congress, and (2), tribal immunity is not necessarily coextensive with foreign and state immunity. *See*, *e.g.*, *Flying T Ranch*, 549 P.3d at 740, 743.

This Court should not find the reasoning of either *Flying T Ranch* or *Self* to be persuasive here. First, applying the immovable property exception to tribal sovereign immunity is not inconsistent with the authority of Congress over tribal immunity. To the contrary, a refusal to apply the immovable property exception would be a refusal to apply the traditional principles of common law immunity that the tribes possess. This Court should defer to Congress for any such alteration of tribal immunity. Second, tribal sovereign immunity does not need to be identical to state or foreign immunity for the immovable property exception to apply. Indeed, tribal immunity principles may differ from state and foreign immunity principles. *Kiowa*, 523 U.S. at 756.

Since the immovable property exception applies to tribal immunity, the Tribe's immunity does not extend to bar LLPOA's action. Further, the United States' decision to take the Keshena Properties into trust does not render the immovable property exception inapplicable. First, LLPOA's action falls within the definition of an "action to determine rights in immovable property." *Cayuga Indian Nation*, 978 F.3d at 836 (quoting *Lundgren*, 138 S.Ct. at 1655 (Roberts, C.J., concurring)). The United States accepted the lots in trust for the benefit of the tribe. The Tribe therefore holds rights in lots within the territory of another sovereign (the State of Wisconsin). *See Oklahoma v. Castro-Huerta*, 597 U.S. 629, 142 S.Ct. 2486, 2493-94 (2022) ("Indian country is part of the State, not separate from the State."). In addition, the Restrictive Covenants encumbering the Keshena Properties are property rights appurtenant to the other Legend Lake lots not in the reservation. Therefore, LLPOA's action to determine the validity of the Restrictive Covenants falls within the immovable property exception and is not barred by the Tribe's sovereign immunity defense.

Critically, LLPOA's case seeks a declaration of rights, not a taking of the Tribe's property or a money judgment. *Cayuga Indian Nation* explains, by contrast, why this is a critical difference:

> As we explain below, the Foreclosure Actions do not seek to establish Seneca County's *rights* in real estate such as are the animating concern of the immovable-property exception. Rather, because in the Foreclosure Actions the County seeks to seize the Properties as a *remedy* for the nonpayment of taxes, the proceedings are best seen as the functional equivalent of an action to execute on a money judgment. Viewed accordingly, they lie well within the categories of suits from which sovereigns were traditionally immune under the common law, and the existence or not of an immovable-property exception to tribal sovereign immunity is of no moment.

Cayuga Indian Nation, 978 F.3d at 831-32 (emphasis in original). This reasoning explains why the cases which rejected the immovable property exception on the basis of their specific facts are not applicable here, where all LLPOA seeks is a declaratory judgment.

2. The in rem exception applies to this case.

The relationship between in rem jurisdiction and tribal immunity is also unsettled. This Court should clarify this issue and hold that the in rem exception permits this case to proceed. A tribe's sovereign immunity does not bar an action in rem that does not seek to take possession of property.

An in rem action looks to the property, and not the Tribe, for jurisdiction. *See Shaffer v. Heitner*, 433 U.S. 186, 199 (1977). An in rem action is "a proceeding to determine rights in a specific thing or in specific property, against all the world, equally binding on everyone." *Cass County Joint Water Resource Dist. v. 1.43 Acres in Highland Township*, 2002 ND 83, ¶9, 643 N.W.2d 685 (quoting 1 Am. Jur. 2d Actions § 34 (1994)). "[A] decision in rem does not impose responsibility or liability on a person directly, but operates directly against the property in question ... irrespective

of whether the owner is subject to the jurisdiction of the court in personam." *Id.* (quoting 20 Am. Jur. 2d Courts § 80 (1995)).

Lundgren provided very little clarification on the relationship between in rem jurisdiction and tribal immunity. The Supreme Court did clarify that its previous decision in *County of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation*, 502 U.S. 251 (1992) "resolved nothing about the law of sovereign immunity." *Lundgren*, 138 S.Ct. at 1653. *Lundgren* did not clarify whether in rem jurisdiction provides an exception to tribal sovereign immunity. *See id.* at 1656 (Thomas, J., dissenting).

The Wisconsin Court of Appeals in *Timber & Wood Products* recently refused to apply the in rem exception: "tribal sovereign immunity also bars in rem claims against the tribe's property." *Timber & Wood Products*, 2018 WI App 6, ¶47. However, in the very same paragraph, the court provided clear context for this refusal: "allowing in rem claims against tribal property to proceed 'would simply circumvent tribal sovereign immunity[,] allowing taking of tribal property.'" *Id*.

Unlike the DNR in *Timber & Wood Products*, LLPOA does not seek to take possession of tribal property. This distinction is not trivial. Protecting a tribe's possession of its property was the court's core consideration in rejecting the in rem exception. *See id*., ¶¶42, 46. Further, *Timber & Wood Products* relied heavily on other cases that also raised possession as a core issue. *Id*., ¶¶32, 41. LLPOA's action to determine the validity of the Restrictive Covenants does not seek to impose liability on the Tribe as it is "limited to the property that supports jurisdiction" and is therefore an in rem action. *Shaffer*, 433 U.S. at 199 (1977). Further, LLPOA does not seek to take possession of the Tribe's property. Therefore, LLPOA's in rem action does not impair the Tribe's sovereign authority to possess property. The in rem exception prevents the Tribe's sovereign immunity from applying to this case.

II. The Restrictive Covenants still before the Court are not preempted by the Restoration Act.

The provisions of the Restrictive Covenants still before this Court are not preempted by the MRA. This issue is reviewed de novo. *Town of Delafield v. Cent. Transp. Kriewaldt*, 2020 WI 61, ¶4, 392 Wis. 2d 427, 944 N.W.2d 819 (citation omitted).

A. LLPOA is seeking a declaration that the Restrictive Covenants, other than the transfer restriction and tax roll provisions, are valid and legally enforceable.

Throughout this litigation, starting with the filing of the complaint, LLPOA has sought a broad declaration that all the provisions of the Restrictive Covenants were valid and enforceable. R.1. LLPOA's complaint, briefs and argument before the circuit court, and briefs before the court of appeals all addressed the Restrictive Covenants in their entirety, and consistently argued that one of the purposes of the covenants and of LLPOA's very existence was ensuring compliance with association rules and regulations of the lots and common areas. R.1, Compl. ¶¶7, 13, 23-24, A-App. 007-08, 012-13; R.18 at 2-6; R.20, Tr. 27:19-28:5, A-App. 128-29; R.66 at 4, R.160, Tr. 11:24-12:4, A-App. 126-17; App Br. 17, 19; Supp. Br. 5. The Tribe and Keshena, on the other hand, focused almost exclusively on the transfer restriction and the tax roll provisions. *See, i.e.*, R.16 at 23-30. However, LLPOA never limited its arguments to just those two provisions. The "non-transfer provisions" are squarely before this Court, and are part of the relief that LLPOA has requested since the beginning.

First, the Restrictive Covenants require compliance with municipal and LLPOA laws, rules, regulations, and obligations. R.1, Compl. 14, A-App. 016. The Restrictive Covenants also contained a consent to venue and jurisdiction in Menominee County Circuit Court, and waiver of sovereign

immunity. R.1, Compl. 17, A-App. 019. Taken together, these provisions provide that LLPOA can sue to enforce its own rules, regulations, and obligations, as well as municipal regulations, in Menominee County Circuit Court, and the defendant consents to such suit and waives any defense based on sovereign immunity. The Tribe and Keshena argued that LLPOA did not put forth evidence as to what its own rules and regulations are. Resp. Supp. Br. 11. However, the LLPOA bylaws, referenced in the complaint, were also in the record in their entirety. R.122, A-App. 179-204. The 2009 bylaws contained, among other things, building and use restrictions for the Legend Lake lots, provisions for the collection of dues for the maintenance of the common areas, rules governing LLPOA, and the Restrictive Covenants. *Id.* This case was dismissed after the circuit court's reconsideration of the Tribe and Keshena's motion to dismiss, but the 2009 bylaws were filed along with other evidence during the summary judgment briefing. *See Soderlund v. Zibolski*, 2016 WI App 6, ¶37, 366 Wis. 2d 579, 874 N.W.2d 561 (consideration of documents referred to in the complaint and central to the claim is permissible as part of deciding a motion to dismiss).

The focus of the preemption question narrowed after the District Court ruled on the transfer restriction and the tax roll provisions. The Restrictive Covenants contained a severability clause, R.1, Compl. 16, A-App. 018, and the Court may rule on the provisions that are still before this Court. All along, LLPOA had argued that *all* of the Restrictive Covenants were valid and enforceable, and the Court may consider the LLPOA rules and regulations, which were in the record before the circuit court. R.122, A-App. 179-204.

B. The remaining Restrictive Covenants are not preempted by the Restoration Act.

The private Restrictive Covenants are not preempted by the MRA. Although this is an issue of first impression, the *Friends of East Willits Valley* persuasively explains why a private agreement is different from involuntary municipal regulation: "However, the federal preemption of involuntary restrictions on tribal land use is not at issue here. The issue is not whether the state or County can regulate the Ranch in the future; it is, instead, whether the Ranch remains subject to voluntarily accepted contractual restrictions." *Friends of East Willits Valley v. County of Mendocino*, 101 Cal. App. 4th 191, 123 Cal. Rptr. 2d 708, 714 (Cal. Ct. App. 2002). The court concluded, "We hold that federal law does not void prior restrictions on land agreed to before the land passed into trust." *Id.* In general, "courts usually read preemption clauses to leave private contracts unaffected." *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447, 1454 (7th Cir. 1996) (citation omitted). In addition, there is a presumption against preemption in the area of state property law. *Franks Inv. Co. v. Union Pac. R.R. Co.*, 593 F.3d 404, 407 (5th Cir. 2010) (citation omitted).

The Tribe and Keshena may argue that the *Friends of East Willits Valley* case involved a covenant that the Tribe voluntarily signed, *id.* at 711, whereas here, they argue that they did not agree to the Restrictive Covenants in 2009. In response, it is necessary to look back much further than 2009. In the 1960s, MEI was created to hold the Tribe's land, and MEI agreed to sell the land that became the Legend Lake lots, which were created with the Original Covenants in place, including the condition that a mandatory association could be created to enforce the covenants. R.1, Compl. ¶5, A-App. 006; R.16, at 3-4; R.127, A-App. 205. LLPOA was created and proceeded to issue various bylaws, including the 2009 bylaws that included the Restrictive Covenants. R.1, Compl. ¶¶5, 9, A-App. 006-07. The Legend

Lake lots were therefore encumbered by the Restrictive Covenants, which was the consequence of MEI selling the land to a developer who convinced private buyers to purchase the lots by creating a planned development protected by restrictions. *See Crowley v. Knapp*, 94 Wis. 2d 421, 425, 288 N.W.2d 815 (1980) ("In Wisconsin, this court has enforced private deed covenants on the theory that the common grantor imposed restrictions on each parcel of property sold, with a general scheme in mind of making the individual lots more attractive to all purchasers.").

In order to determine whether the Restrictive Covenants are preempted, the Restrictive Covenants must be compared to the text of the MRA. "'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.'" *Baylake Bank v. TCGC, LLC*, 2008 WL 4525009, at *7 (E.D. Wis. 2008) (quoting *Whistler Investments, Inc. v. Depository Trust and Clearing Corp.*, 539 F.3d 1159, 1164 (9th Cir. 2008)). *Baylake Bank* applied this analysis where the party was challenging a private restrictive covenant rather than a specific state law, although it noted that the challenge "fits less snugly" than a traditional preemption analysis involving a specific state law. *Id.*

The MRA does not have any express language on the creation or elimination of private property rights, and instead states, "Except as specifically provided in this Act, nothing contained in this Act shall alter any property rights or obligations, any contractual rights or obligations, including existing fishing rights, or any obligations for taxes already levied." MRA § 3(d). The MRA specifically does not have any language that preempts private restrictive covenants, and actually has express language to the contrary in regard to property being transferred into trust: "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." MRA § 6(c). The agreement in the Restrictive Covenants to follow the LLPOA's own rules and regulations, which were in the record, R.122, A-App. 179, is not preempted by the MRA and instead is explicitly required to survive a transfer into trust.

LLPOA is obviously not a municipal entity trying to enforce ordinances using the police power of the state. However, the Restrictive Covenants contain a private agreement to follow municipal laws. R.1, Compl. 14, A-App. 016. Private parties can agree to bind themselves to the law of a specific place, and this is often a practical way of drafting a contract. Rather than writing up all the terms from scratch, the parties incorporate the existing laws of a specific place. Therefore, the argument that the MRA preempts this provision by stating that it "reinstated all rights and privileges of the tribe" (MRA § 3(b)), is not squarely addressing LLPOA's claim. The Restrictive Covenants are not themselves a municipal regulation, rather, they are a private agreement to follow the municipal regulations. As stated in *Friends of East Willits Valle*y, the issue is not whether the municipality can regulate the property, it is, rather, whether the property "remains subject to voluntarily accepted contractual restrictions." *Friends of East Willits Valley*, 123 Cal. Rptr. 2d at 714.

Furthermore, the MRA does not preempt the consent to venue and waiver of immunity provisions. "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." MRA § 6(c). Although the MRA otherwise provides for renewed Tribal jurisdiction, this section dealing with existing obligations on property going through the trust transfer process is a notable exception that explicitly states that the laws of the State of Wisconsin will apply.

C. *McGirt* and *Oneida Nation* do not change the analysis because the clear language of the Restoration Act controls here.

Although *McGirt* has been widely cited by courts across the country, it is less applicable here, due to the unique legislative history of the Menominee Termination and Restoration Acts. Many tribes across the country were subjected in the past to the United States' general policies of allotment and expected diminishment. *Oneida Nation v. Village of Hobart*, 968 F.3d 664, 668-70 (7th Cir. 2020) (referencing "Congress's general expectation in the late nineteenth and early twentieth centuries" and describing the history of the General Allotment Act and other "disastrous" policies).

However, the Menominee Tribe was not among them, because the Menominee Tribe was instead subjected to the very specific legislation of the Menominee Termination Act. Rather than setting up unclear expectations for whether the reservation had been diminished, and to what extent, the Menominee reservation was entirely terminated by a clear legislative act. Joseph F. Preloznik & Steven Felsenthal, *The Menominee Struggle to Maintain their Tribal Assets and Protect their Treaty Rights following Termination*, 51 N.D. L. REV. 53, 58-59 (1974) (describing the "former" reservation lands).

In *McGirt*, it took 100 years and a Supreme Court case to recognize the rights of the tribe and the existence of their reservation. *McGirt v. Oklahoma*, 591 U.S. 894, 140 S.Ct. 2452, 2459, 2481-82 (2020). Even so, the dissent still disputed whether the court could suddenly "discover" the reservation. *McGirt*, 140 S.Ct. at 2482 (Roberts, C.J., dissenting). However, for the Menominee Tribe, there was a clear legislative act that definitively restored the Menominee reservation, with boundaries clearly defined by the MRA: any property located in or adjacent to Menominee County, that has

been offered by MEI or members of the Menominee Tribe, to the United States to be held in trust. MRA §§ 6(b) and 6(c).

McGirt cautions against restricting the rights of Indian tribes in the absence of clear congressional acts. *McGirt*, 140 S.Ct. at 2482. However, there is not a lack of clarity here. The Menominee Tribe experienced a clear termination, and then a very clear restoration of their federally recognized tribal status and reservation. Therefore, *McGirt* is not directly applicable to the preemption (or sovereign immunity) issues presented in this specific case.

Oneida Nation is similarly not directly applicable. The Village of Hobart was asking the court to "find congressional intent to diminish in the two generally applicable statutes that were used to allot many Indian reservations in the late 1800s." *Oneida Nation*, 968 F.3d at 676. The court declined. *Id.* The court held, "McGirt teaches that neither allotment nor the general expectation of Congress are enough to diminish a reservation." *Id.* at 685. The case at hand is completely different because it does not deal with allotment or general expectations. Instead, the specific Termination and Restoration Acts control here.

III. This action need not be dismissed for nonjoinder of the United States as a party.

This action need not be dismissed for nonjoinder of the United States, since the United States is neither a necessary nor indispensable party. This issue is reviewed de novo. *Dairyland Greyhound Park, Inc. v. McCallum*, 2002 WI App 259, ¶¶10-11, 258 Wis. 2d 210, 655 N.W.2d 474.

As an initial matter, LLPOA did not concede that the United States was an indispensable party in the proceedings before the IBIA. *See* Resp. Supp. Br. 7-8. At the time of the briefing before the IBIA in 2019, LLPOA was referring to, and bound by, the circuit court's ruling on this issue. Resp.

Supp. Br., Ex. A, ¶8, n.4. LLPOA was also within its rights to make the pragmatic decision to dismiss one of the lots in order to avoid an unnecessary dispute over this issue. Dismissing Lot 60 (leaving 33 lots still in the suit) completely disposed of the issue and allowed the case to proceed on to other issues. R.61.

A. The United States is not a necessary party under Wis. Stat. § 803.03(1).

Wis. Stat. § 803.03 provides a two-part analysis for analyzing whether an action must be dismissed for nonjoinder of a party. Under Wis. Stat. § 803.03(1), a court must first determine whether the person is a necessary party, and then whether that necessary party is also indispensable under Wis. Stat. § 803.03(3).

Here, the United States is not a necessary party. Complete relief can be afforded between the existing parties under Wis. Stat. § 803.03(1)(a). "In examining this prong of the statute, we look to the requested relief for guidance." *Koschkee v. Evers*, 2018 WI 82, ¶18, 382 Wis. 2d 666, 913 N.W.2d 878. LLPOA is seeking a declaratory judgment as to whether the Restrictive Covenants are valid and legally enforceable, and no longer seeking a ruling on the transfer restrictions. Therefore, complete relief may be afforded without joining the United States, since the transfer of legal title is not being challenged.

To the extent the United States has an interest in this action, its absence will not impair or impede its ability to protect that interest under Wis. Stat. § 803.03(1)(b)(1). This analysis is equivalent to the analysis under Wis. Stat. § 803.09(1), regarding intervention as a matter of right, and requires a pragmatic, non-technical approach to the determination of a party's interest. *Dairyland Greyhound Park*, 2002 WI App 259, ¶¶10, 15. The United States has an interest to protect the legal title from transfer or

alienation. *See generally Imperial Granite Co. v. Pala Band of Mission Indians*, 940 F.2d 1269, 1272 (9th Cir. 1991) ("The whole purpose of trust land is to protect the land from unauthorized alienation...."). However, LLPOA is no longer seeking a judgment on the transfer restrictions. Therefore, protecting against loss of title is not at issue in this action.

To the extent that the United States could claim another interest in this action, such as an interest in protecting the Tribe's beneficial interest in the properties, that interest would not be impaired by nonjoinder, because the Tribe can adequately represent this interest. The United States does not have "more at stake" than the existing parties. *See Dairyland Greyhound Park*, 2002 WI App 259, ¶18 (quoting *Wolff v. Town of Jamestown*, 229 Wis. 2d 738, 749, 601 N.W.2d 301 (Ct. App. 1999)). In both *Dairyland Greyhound Park* and *Wolff*, the courts concluded that the potential parties had disproportionately more at stake than the existing parties. *Id*. Here, however, the United States as legal title holder has no more at stake than the Tribe. Another relevant consideration is whether the potential and existing party's interests are aligned. *See id*. In this action, the Tribe's interests are aligned with the United States' interests. The United States is not any better situated than the Tribe to protect the Tribe's beneficial interest in the properties in trust, and the United States' interests are therefore adequately represented.

Finally, the United States' absence will not leave any of the existing parties subject to a substantial risk of incurring double, multiple or otherwise inconsistent obligations under Wis. Stat. § 803.03(1)(b)(2). The only obligation arising out of this lawsuit is a declaration of the validity of the Restrictive Covenants. There is no potential for inconsistent or duplicative obligations.

B. The United States is not an indispensable party under Wis. Stat. § 803.03(3).

If this Court agrees that the United States is not a necessary party under Wis. Stat. § 803.03(1), the analysis ends. *See Dairyland Greyhound Park*, 2002 WI App 259, ¶9. However, if this Court concludes that the United States must be joined, then the next step is whether the United States can be made a party under Wis. Stat. § 803.03(3), and, if not, "whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable." Wis. Stat. § 803.03(3).

Whether the United States can be made a party is dependent on whether it has waived sovereign immunity for this action. The United States is immune from suit unless suit has been authorized by an act of Congress. *Block v. North Dakota*, 461 U.S. 273, 280 (1983). The QTA provides a waiver of immunity by Congress for certain actions "by which adverse claimants could challenge the United States' title to real property." 28 U.S.C. § 2409a(a). The QTA "does not apply to trust or restricted Indian lands." 28 U.S.C. § 2409a(a).

However, LLPOA is not challenging the United States' title to the Keshena Lots. LLPOA is not asserting an interest adverse to the United States' interest, rather, when the United States accepted the Keshena Properties, they were subject to the "valid existing rights" encumbering the properties. Keshena could convey no more property to the United States than he had. LLPOA's rights are consistent with, not challenging, the United States' title. Therefore, LLPOA does not need to resort to the QTA. Under the express terms of the MRA, "[s]uch property shall be subject to all valid existing rights" and "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." MRA § 6(c). This section provides a limited waiver of

immunity for enforcing existing obligations against the property held in trust by the United States. In addition, the Restrictive Covenants themselves had an express waiver of immunity "by acceptance of a deed transferring title ownership." R.1, Compl. 17, A-App. 019.

If this Court disagrees and concludes that the United States cannot be joined as a party, then the analysis moves to the final step under Wis. Stat. § 803.03(3), whether this action should proceed with the parties before it. Under Wis. Stat. § 803.03(3)(a)-(d), this action may proceed in equity and good conscience without joining the United States as a party.

First, a judgment rendered in the United States' absence would not be prejudicial under Wis. Stat. § 803.03(3)(a), either to the United States or the current parties. This analysis is similar to that under Wis. Stat. § 803.03(1). However, this should not be the sole factor considered; otherwise, every party deemed necessary under Wis. Stat. § 803.03(1) would also be deemed indispensable under Wis. Stat. § 803.03(3). *See Dairyland Greyhound Park*, 2002 WI App 259, ¶27. A judgment would not be prejudicial, as the United States' interest would not be impaired by a judgment, and the United States as a party would not protect the Tribe's beneficial interest in the properties any more than the Tribe itself would.

Second, the declaratory relief requested by LLPOA completely avoids prejudice under Wis. Stat. § 803.03(3)(b). A declaratory judgment regarding the validity of the Restrictive Covenants would not cause prejudice to any party, because the properties are not at risk of losing their trust status. The United States specifically would not be prejudiced, since LLPOA is not seeking a judgment against the transfer of title.

Third, judgment will be adequate in the United States' absence under Wis. Stat. § 803.03(3)(c). The Restrictive Covenants, through the bylaws and incorporation of the municipal regulations, seek to place reasonable

restrictions on the use of the properties. A judgment against the United States as holder of legal title is not necessary for judgment to be adequate.

Fourth, under Wis. Stat. § 803.03(3)(d), LLPOA will not have an adequate remedy if this action is dismissed for nonjoinder. *See Dairyland Greyhound Park*, 2002 WI App 259, ¶31. This result is harmful, not only to LLPOA's interests, but also to the interests of the public that weigh in favor of providing certainty in regard to questions regarding property rights. Further, Congress expressed an intent in the MRA § 6(c) that the property taken into trust be subject to valid existing rights. Depriving LLPOA of a remedy would run contrary to Congress' expressed intent in Section 6(c).

C. The United States is not an indispensable party under federal case law.

Federal case law also provides guidance on the issue of whether the United States is an indispensable party to real property actions. In *Minnesota v. United States*, the Supreme Court held that, "[a] proceeding against property in which the United States has an interest is a suit against the United States," and the United States is thus an indispensable party. *Minnesota v. United States,* 305 U.S. 382, 386 (1939) (citation omitted). However, this holding is distinguishable from the present action. In *Minnesota*, the state was seeking to take the property through a condemnation proceeding, and thus directly challenging the United States' ability to hold legal title. *See Minnesota*, 305 U.S. at 385-86. In this action, LLPOA is not seeking to take legal title. In addition, "*Minnesota* did not distinguish between attempts to create new interests in land and attempts to have pre-existing interests recognized." *Lyon v. Gila River Indian Community*, 626 F.3d 1059, 1069 (9th Cir. 2010).

Similar decisions by the federal courts of appeals, which held the United States to be an indispensable party, are distinguishable on similar

grounds. *See, i.e., Town of Okemah v. United States*, 140 F.2d 963, 964-65 (10th Cir. 1944). The Tenth Circuit specifically distinguished *Minnesota* and *Town of Okemah* because they were condemnation actions that would have resulted in alienation. *Choctaw and Chickasaw Nations v. Seitz*, 193 F. 2d 456, 460 (10th Cir. 1951).

The federal courts of appeals have created an exception that the United States is not an indispensable party in certain real property actions brought by a tribe. *See Lyon*, 626 F.3d at 1069. The Seventh Circuit has noted that the indispensability analysis requires "a weighing of intangibles" and warned against overgeneralization. *Sokaogon Chippewa Community v. Wisconsin*, 879 F. 2d 300, 304 (7th Cir. 1989). In this case, the "weighing of intangibles," including the lack of challenge to the United States' title, and the necessity of resolving the validity of rights appurtenant to Wisconsin property, requires that, in "equity and good conscience," the action should proceed with the parties currently before it.

IV. The Court has jurisdiction over the case.

This Court has subject matter jurisdiction to hear this case. This issue is de novo. In their supplemental briefing, the Tribe and Keshena argued briefly that state court jurisdiction was lacking. Resp. Supp. Br. 12. The Tribe and Keshena quote the *Sanapaw* case for the proposition that there is no state court jurisdiction "over an incident arising within 'Indian County' and involving enrolled tribal members who reside on a reservation." *Id.* (quoting *Sanapaw v. Smith*, 113 Wis. 2d 232, 240, 335 N.W.2d 445 (Ct. App. 1983)). However, the "incident" at issue in this case did not "arise" within Indian Country. At the time the Restrictive Covenant was recorded in 2009, the Keshena Properties were privately owned lots, located in the State of Wisconsin, outside the boundaries of the Menominee reservation. At the time

this case was filed in 2018, the Keshena Properties were still privately owned lots. Therefore, this case arose within the State of Wisconsin, involving a question of Wisconsin property law.

Although the *Webster* case stated that, "[t]he state's jurisdiction ended, however, when Congress passed the Menominee Restoration Act," it also stated, "the Supreme Court has rejected the view that the states are absolutely barred from exercising jurisdiction over tribal reservations and members." *State v. Webster*, 114 Wis. 2d 418, 432, 436, 338 N.W.2d 474 (1983).

> [T]he Constitution allows a State to exercise jurisdiction in Indian country. Indian country is part of the State, not separate from the State. To be sure, under this Court's precedents, federal law may preempt that state jurisdiction in certain circumstances. But otherwise, as a matter of state sovereignty, a State has jurisdiction over all of its territory, including Indian country."

Oklahoma v. Castro-Huerta, 597 U.S. 629, 142 S.Ct. 2486, 2493 (2022).

State court jurisdiction depends on whether the state court action infringes on the rights of reservation Indians to rule themselves. *Sanapaw*, 113 Wis. 2d at 236 (citations omitted). "[E]ven on the reservation, state laws may be applied unless that would interfere with reservation self-government or impair a right granted or reserved by federal law." *Id.* (citation omitted).

Here, although acceptance of the Keshena Properties into trust places them in the reservation, the Restrictive Covenants encumbering the Keshena Properties are appurtenant to properties that are still outside the reservation. This Court's jurisdiction would not preempt federal law or interfere with reservation self-government. As explained above, the Restrictive Covenants are not preempted by the MRA. And this case would not interfere with reservation self-government because it does not involve an issue that is contained within the reservation, but rather, an issue that is necessarily linked to appurtenant property rights located outside the reservation. The MRA

explicitly provides that the land being transferred (which would soon be self-governed by the Tribe) is still subject to existing rights.

Conclusion

For the above reasons, LLPOA respectfully requests that the Court reverse the order of the circuit court and remand the case for further proceedings.

Respectfully Submitted this 14th day of May, 2025.

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WIS. STAT. § 809.19(8g)(a) FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in s. 809.19 (8) (b), (bm), and (c) for a brief. The length of this brief is 10,954 words.

Signed: May 14, 2025.

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WIS. STAT. § 809.19(8g)(b) APPENDIX CERTIFICATION

CERTIFICATION BY ATTORNEY

I hereby certify that filed with this brief is an appendix that complies with s. 809.19 (2) (a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under s. 809.23 (3) (a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using one or more initials or other appropriate pseudonym or designation instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

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