INSTITUTE FOR REFORMING GOVERNMENT

IRG COURT WATCH

A QUESTION IT DID NOT NEED TO ANSWER: A DIVIDED COURT EXPANDS TRIBAL IMMUNITY

OVERVIEW

A divided Wisconsin Supreme Court has held that the Menominee Indian Tribe is immune from a suit to enforce private restrictive covenants against former reservation land now held in federal trust. *Legend Lake Property Owners Ass'n v. Keshena*, 2026 WI 21. The narrow grounds are unremarkable: the federal Menominee Restoration Act contains no clear statement abrogating immunity, and a covenant the Tribe never signed cannot waive it. What fractured the court 4–3 was the majority's decision to go further—holding, for the first time in any court, that the common-law "immovable property" exception to sovereign immunity categorically does not apply to Indian tribes. By the majority's own admission that holding was unnecessary to the result, and it came over two dissents and without the land's actual owner, the United States, before the court.[1]

WHAT YOU SHOULD KNOW

- The Court split 4–3. Justice Crawford wrote for the majority, joined by Chief Justice Karofsky and Justices Dallet and Protasiewicz. Justices Rebecca Grassl Bradley and Hagedorn each dissented; Justice Ziegler joined both.[1]
- The bottom line: tribal immunity bars the suit. Congress did not clearly abrogate it in the Restoration Act, and the Association's unilaterally imposed 2009 covenants—which the Tribe never signed, and Keshena had no authority to accept for the Tribe—did not waive it.
- The contested move: the majority refused to recognize any "immovable property" exception to tribal immunity—even though, because the land is now reservation land, the exception could not have applied here anyway. The majority concedes as much. Both dissents call the broad ruling avoidable.
- The landowner was never in the case. The United States holds the land in trust but was never joined. Justice Hagedorn would have sent the case back rather than decide far-reaching federal and tribal questions without the property owner present.

WHAT HAPPENED

The Menominee are among Wisconsin's oldest continuous residents. In 1954, Congress terminated federal recognition of the Tribe and ended the trust status of its reservation, exposing the land to taxation and sale. Under financial pressure the tribal corporation sold thousands of acres to non-members—including the tract that became the Legend Lake development, whose owners' association formed in 1972. One year later

Congress reversed course: the 1973 Menominee Restoration Act restored recognition and created a mechanism for the Tribe to reacquire lost reservation land by transferring it to the United States to hold in trust.

In 2009 the Association amended its covenants to block exactly that—prohibiting any transfer into federal trust or to a "sovereign or dependent sovereign nation," barring transfers that would remove land from the county tax rolls or local zoning and purporting to make any purchaser waive a sovereign-immunity defense by accepting a deed. In 2017 tribal member Guy Keshena acquired more than thirty lots for the Tribe and asked the Bureau of Indian Affairs to take them into trust. The Association sued in 2018. While the suit was pending, the United States accepted the lots into trust in 2023, and parallel federal litigation upheld that transfer. The circuit court dismissed on immunity grounds; the court of appeals certified the case up. Writing for the majority, Justice Crawford affirmed, holding that nothing abrogated, waived, or displaced the Tribe's immunity, and that the immunity extends to Keshena because the Tribe is the real party in interest.

LEGAL BACKGROUND

Under federal law, tribal sovereign immunity is the "baseline position." *Michigan v. Bay Mills Indian Community*, 572 U.S. 782 (2014). Congress may strip it, but only by a clear statement; abrogation is never implied. A tribe may give it up, but only by a waiver that is clear and unequivocal—and a party that wants the ability to sue a tribe "need only bargain for a waiver of immunity." *Bay Mills*, 572 U.S. at 796; see *C&L Enterprises v. Citizen Band Potawatomi Indian Tribe*, 532 U.S. 411 (2001).[2]

The "immovable property" exception is a separate, much older idea: a sovereign that acquires land inside another sovereign's territory is treated, as to that land, like a private owner subject to local jurisdiction. The principle traces to *Schooner Exchange v. McFaddon* (1812) and has been applied to foreign nations and to the States alike; Congress codified it for foreign states in the Foreign Sovereign Immunities Act. *Permanent Mission of India v. City of New York*, 551 U.S. 193 (2007); 28 U.S.C. § 1605(a)(4). No court, however, had ever applied it to a tribe—and the U.S. Supreme Court has twice declined to decide whether it should. *Upper Skagit Indian Tribe v. Lundgren*, 584 U.S. 554 (2018).[3]

ZOOM IN

The genuinely contested ground was the immovable property exception—and the case could have ended without touching it. As the majority itself acknowledges, the Keshena lots are now part of the Menominee Reservation, and the exception applies only when a sovereign owns land in *another* sovereign's territory; it could not have rescued the suit even if it existed for tribes. The majority reached out to hold that it does not. Two justices wrote separately to say it should not have:

- **Justice Rebecca Grassl Bradley, joined by Justice Ziegler.** Tribes possess the "common-law immunity from suit traditionally enjoyed by sovereign powers"—and, she argues, that immunity carries the common-law exceptions with it, the immovable property exception included. On her reading the majority manufactures a near-absolute immunity the common law does not supply, then turns deference on its head: true deference to Congress would leave a long-settled exception intact until Congress abolishes it, not require Congress to re-enact it before courts will honor it. She invokes the omitted-case canon from her *Koble* concurrence— "a matter not covered is not covered."[4]
- **Justice Hagedorn, joined by Justices Ziegler and Bradley.** The owner of the land—the United States—was never a party. Wisconsin's joinder and declaratory-judgment statutes require joining a party that claims an interest in the property and forbid a declaration that prejudices an absent party. The proper course was to send the case back to test joinder or dismiss on procedure—not to resolve weighty federal and tribal questions with the landowner absent. He adds that the majority cites no Wisconsin authority forcing it to reach those questions; doing so was a choice, not a necessity.[5]

» **The thread they share.** The dissents differ in emphasis—one on the merits of the exception, one on the absent party—but converge on one objection: a divided majority announced a broad, first-of-its-kind rule the disposition did not require.

It is worth being candid about what is, and is not, controversial here. The majority's narrow holdings rest on solid textualist ground: demanding a clear statement before immunity is abrogated and refusing to bind a sovereign to a contract it never signed, are exactly the disciplined readings courts should give. The objection is not that the Tribe should have lost. It is that the court answered a sweeping question it did not have to answer, in a posture missing the one party most affected by the answer.

WHAT'S NEXT

The decision leaves two very different markers. The narrow holdings will guide future dealings between private parties and tribes, and the practical lesson is the one the U.S. Supreme Court already gave: if you want the ability to sue a tribe, bargain for an express waiver up front—you cannot impose one after the fact.

The broad holding is a different matter. Wisconsin is now on record that no immovable property exception applies to tribes, but that rule rests on a 4–3 split, follows only two out-of-state decisions, and answers a question the U.S. Supreme Court has pointedly left open. Expect continued litigation and watch for a future case—ideally one involving non-reservation land with the landowner as a party—to test whether the rule holds. The indispensable-party problem Justice Hagedorn flagged is a recurring procedural risk worth monitoring. And the underlying policy question—whether private covenants can keep former reservation land on local tax rolls and under local zoning—the court has now placed squarely with Congress.

ENDNOTES

1. *Legend Lake Prop. Owners Ass'n v. Keshena*, 2026 WI 21 (decided June 23, 2026). Crawford, J., delivered the opinion of the Court, joined by Karofsky, C.J., and Dallet and Protasiewicz, JJ. R.G. Bradley, J., filed a dissent, joined by Ziegler, J. Hagedorn, J., filed a dissent, joined by Ziegler and R.G. Bradley, JJ.
2. On the clear-statement rule and the baseline of tribal immunity, see *Lac du Flambeau Band of Lake Superior Chippewa Indians v. Coughlin*, 599 U.S. 382 (2023); *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782 (2014); *Kiowa Tribe of Okla. v. Mfg. Techs., Inc.*, 523 U.S. 751 (1998). On contractual waiver, see *C&L Enters. v. Citizen Band Potawatomi Indian Tribe of Okla.*, 532 U.S. 411 (2001).
3. On the immovable property exception, see *Schooner Exch. v. McFaddon*, 11 U.S. (7 Cranch) 116 (1812); *Permanent Mission of India to the U.N. v. City of New York*, 551 U.S. 193 (2007); *Georgia v. Chattanooga*, 264 U.S. 472 (1924); 28 U.S.C. § 1605(a)(4). The only courts to decline to extend it to tribes are *Flying T Ranch, Inc. v. Stillaguamish Tribe of Indians*, 577 P.3d 382 (Wash. 2025), and *Self v. Cher-Ae Heights Indian Cmty. of Trinidad Rancheria*, 274 Cal. Rptr. 3d 255 (Cal. Ct. App. 2021). The U.S. Supreme Court granted certiorari on the question but did not resolve it in *Upper Skagit Indian Tribe v. Lundgren*, 584 U.S. 554 (2018).
4. R.G. Bradley, J., dissenting (joined by Ziegler, J.). The omitted-case canon is drawn from *Koble Investments v. Marquardt*, 2026 WI 19, ¶37 (R.G. Bradley, J., concurring) (quoting Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 93 (2012)).
5. Hagedorn, J., dissenting (joined by Ziegler and R.G. Bradley, JJ.), citing Wis. Stat. §§ 803.03 (joinder of persons needed for just adjudication) and 806.04(11) (parties to declaratory-judgment actions).

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