COURT OF APPEALS
DECISION
DATED AND FILED

December 19, 2017

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2017AP181 **Cir. Ct. No. 2015CV171**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT III

WISCONSIN DEPARTMENT OF NATURAL RESOURCES,

PLAINTIFF-APPELLANT,

V.

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

DEFENDANTS-RESPONDENTS.

APPEAL from an order of the circuit court for Sawyer County: JOHN M. YACKEL, Judge. *Affirmed*.

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

¶1 STARK, P.J. This appeal involves an attempt by the Wisconsin Department of Natural Resources (DNR) to recover taxes that it alleges the Lac Courte Oreilles Band of Lake Superior Chippewa Indians of Wisconsin (the

Tribe) owes under Wisconsin's Forest Croplands Law, WIS. STAT. §§ 77.01-77.17 (2015-16).[1] The circuit court granted the Tribe's motion to dismiss, concluding the Tribe's sovereign immunity barred the DNR's claims. We agree. We reject the DNR's argument that the Tribe waived its sovereign immunity. We further conclude that, in addition to barring in personam claims against the Tribe, the Tribe's sovereign immunity prevents the DNR from bringing an in rem claim pertaining to the timber and wood products located on the Tribe's property. We therefore affirm the order dismissing the DNR's claims.[2]

BACKGROUND

I. The Forest Croplands Law

¶2 Because this appeal involves taxes allegedly owed under the Forest Croplands Law, we begin with a brief overview of the relevant statutory provisions. The Forest Croplands Law was enacted in 1927. *See* 1927 Wis. Laws, ch. 454. Its stated purpose is

> to encourage a policy of protecting from destructive or premature cutting the forest growth in this state, and of reproducing and growing for the future adequate crops through sound forestry practices of forest products on lands not more useful for other purposes, so that such lands shall continue to furnish recurring forest crops for commercial use with public hunting and fishing as extra public benefits,

[1] All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

[2] In addition to arguing sovereign immunity bars the DNR's claims, the Tribe argues dismissal was proper because the circuit court lacked subject matter jurisdiction. We need not address this alternative argument because we conclude the circuit court properly granted the Tribe's motion to dismiss on sovereign immunity grounds. *See* ***Turner v. Taylor***, 2003 WI App 256, ¶1 n.1, 268 Wis. 2d 628, 673 N.W.2d 716 (court of appeals need not address all issues raised by the parties if one is dispositive).

> all in a manner which shall not hamper the towns in which such lands lie from receiving their just tax revenue from such lands.

WIS. STAT. § 77.01.

¶3 Before 1986, a landowner could petition the DNR (or its predecessor agency) to enroll land in the Forest Croplands program.[3] *See* WIS. STAT. § 77.02(1). The petition was required to allege, among other things, that the owner "believe[d] the lands … are more useful for growing timber and other forest crops than for any other purpose" and that the owner "intend[ed] to practice forestry thereon." ***Id.*** Upon making certain findings, including that the property was held permanently for the growing of timber under sound forestry practices and would produce a merchantable timber crop within a reasonable time, the DNR was required to enter an order granting the petition. Sec. 77.02(3)(a). The statutes provide that the Forest Croplands Law, the landowner's petition, and the order granting the petition "shall constitute a contract between the state and the owner." WIS. STAT. § 77.03.

¶4 Enrollment of a property in the Forest Croplands program "subject[s] the property to certain 'forestry' practices as well as substantial tax benefits." ***Sausen v. Town of Black Creek Bd. of Review***, 2014 WI 9, ¶64, 352 Wis. 2d 576, 843 N.W.2d 39. Owners of property enrolled in the Forest Croplands program are required, among other things, to notify the DNR of any timber harvests on the property and to permit public access for hunting and

[3] In 1985, the Managed Forest Law was created to succeed and replace the Forest Croplands Law. *See* 1985 Wis. Act 29, §§ 1482, 1501. The Forest Croplands program was closed to new land enrollments as of January 1, 1986. WIS. STAT. § 77.13(2). However, it is undisputed the Forest Croplands Law continues to apply to property, like the land at issue in this case, that was enrolled in the Forest Croplands program before January 1, 1986.

fishing. *See generally* WIS. STAT. §§ 77.03, 77.06. In return, land enrolled in the program is not subject to an annual real estate property tax. WIS. STAT. § 77.04(1). However, owners of enrolled property are required to make several other types of tax payments.

¶5 First, owners of land enrolled in the Forest Croplands program are required to pay a per-acre annual tax known as the "acreage share." WIS. STAT. § 77.04(2). For land—like the property at issue in this case—that was enrolled in the Forest Croplands program before 1972, the acreage share is computed "at the rate of 10 cents per acre." ***Id.***

¶6 Second, during the time period at issue in this case, landowners were required to pay a "severance tax" whenever merchantable wood products were harvested from property enrolled in the Forest Croplands program. WIS. STAT. §§ 77.06(5), 77.07 (2011-12). The amount of the severance tax was ten percent of the value of the harvested wood products. Sec. 77.05(6) (2011-12). Pursuant to § 77.07(1) (2011-12), the landowner was "personally liable for any severance tax because of any wood products cut [from enrolled property], which tax shall also be a lien on such wood products wherever situated and in whatever form … until paid." The statutes imposing the severance tax—§§ 77.06(5) and 77.07 (2011-12)—were repealed in 2016. *See* 2015 Wis. Act 358, §§ 16-17.

¶7 Third, if enrolled land is either withdrawn from the Forest Croplands program by the owner or expelled by the DNR for noncompliance before the end of the contract period, the owner is required to pay what the DNR refers to as a "withdrawal tax." *See* WIS. STAT. § 77.10(1)(a), (2)(a)1. The amount of the withdrawal tax is equal to

> the amount of tax due from the date of entry [in the Forest Croplands program] or the most recent date of renewal, whichever is later … with simple interest thereon at 12 percent per year, less any severance tax and supplemental severance tax or acreage share paid thereon, with interest computed according to the rule of partial payments at the rate of 12 percent per year.

Sec. 77.10(2)(a)1.

¶8 Fourth, if at the end of the contract period land enrolled in the Forest Croplands program is not enrolled in that program's successor, the Managed Forest program, the landowner is required to pay a ten percent severance tax on the remaining timber on the land "in the same manner as if the stumpage had been cut." WIS. STAT. § 77.03. The DNR refers to this fourth type of tax as the "termination severance tax."

II. Factual background[4]

¶9 The property at issue in this case (hereinafter, "the Real Estate") is located in Sawyer County and is currently owned by the Tribe, which is a federally recognized Indian tribe.[5] On October 8, 1962, a previous owner of the Real Estate, the Owens-Illinois Glass Company, filed a petition to enroll it in the Forest Croplands program. The petition was approved, and the Real Estate was enrolled in the program effective January 1, 1963. At that time, each Forest

[4] The background facts set forth in this section are drawn from the DNR's complaint and the attached documents and are undisputed for purposes of this appeal.

[5] According to the DNR, the Real Estate is "situated within the boundaries of the Tribe's reservation" but is "not held in trust or restricted status by the United States for the benefit of the Tribe, a member of the Tribe, or a tribal corporation, and it is not subject to federal restrictions against alienation or encumbrance of Indian lands." The Tribe does not dispute these assertions.

Croplands contract had a statutorily prescribed length of fifty years. *See* WIS. STAT. § 77.03 (1963-64).

¶10 In 1992 and 1993, the Tribe purchased the Real Estate from Futurewood Corporation. On October 15, 1992, and May 24, 1993, two "Transfer of Ownership—Forest Crop Law" forms were executed regarding the Real Estate.[6] *See* WIS. STAT. § 77.10(1)(b) (discussing procedure for transfer of ownership of land enrolled in the Forest Croplands program). Both forms designated the Tribe as the grantee and were signed by a tribal representative. Each form stated:

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

¶11 The transfer forms were submitted to the DNR, which subsequently executed transfer orders permitting the Real Estate to remain enrolled in the Forest Croplands program. Each order stated the Tribe "has petitioned [the DNR] to continue Forest Crop Law designation for the parcel, agreed to comply with the terms of the Forest Crop Law, and certified an intent to practice sound forestry on the land."

¶12 In April 2011, the DNR gave the Tribe written notice that the Real Estate's enrollment in the Forest Croplands program would expire on

[6] Although the deeds transferring ownership of the Real Estate to the Tribe list Futurewood Corporation as the grantor, the "Transfer of Ownership—Forest Crop Law" forms list Johnson Timber Corporation as the grantor. This discrepancy is not relevant to any of the issues raised in this appeal. Moreover, we observe the "Our History" section of Futurewood's website indicates that Futurewood was founded in 1988 and "grew from" Johnson Timber. *See* http://futurewoodcorp.com/our-history/ (last visited November 21, 2017).

December 31, 2012. The notice advised the Tribe that it had two options: (1) enroll the Real Estate in the Managed Forest program; or (2) allow the Real Estate to expire from the Forest Croplands program. The notice further advised that, if the Tribe chose the second option, the Real Estate would be placed on the general property tax roll and the Tribe would be required to pay a "termination tax" that would be calculated "based on the volume of the standing timber multiplied by 10% of the average timber value in [the] area." The Tribe did not respond to this notice or apply to enroll the Real Estate in the Managed Forest program prior to the June 1, 2012 enrollment deadline.

¶13 In November 2012, the DNR hired a private forestry services company to conduct a volume estimate of the standing timber on the Real Estate. Based on that volume estimate, the DNR determined the amount of the "termination severance tax" that would be due upon expiration of the Tribe's Forest Croplands contract was $74,819.74.

¶14 In April 2013, the DNR sent the Tribe a notice indicating that its Forest Croplands contract had expired and the Real Estate had not been enrolled in the Managed Forest Program. Attached to the notice was an invoice stating the Tribe owed a "termination tax" of $74,819.74, which was due by May 31, 2013. The Tribe did not pay the termination tax. In October 2013, the DNR notified the Tribe that the April 2013 invoice was past due. The DNR sent the Tribe a revised invoice in the amount of $85,931.44—comprised of the termination tax, a ten percent penalty for non-payment, and interest calculated at a rate of one percent per month. Once again, the Tribe failed to pay.

III. Procedural background

¶15 In November 2015, the DNR filed the instant lawsuit, naming as defendants both the Tribe and the "Timber and Wood Products" located on the Real Estate.[7] The DNR's complaint asserted three causes of action. First, the DNR sought a declaratory judgment that the Tribe was liable for the termination severance tax of $74,819.74, plus a ten-percent penalty for non-payment and interest calculated at a rate of one percent per month. Second, the DNR requested a money judgment against the Tribe in that amount. Third, the DNR sought a judgment of replevin entitling it to possession of the timber and wood products located on the Real Estate, "or such portion of the [timber and wood products] as is required to satisfy the Termination Severance Tax in full."

¶16 The Tribe moved to dismiss, asserting its sovereign immunity barred the DNR's claims. In response, the DNR argued the Tribe had waived its sovereign immunity by executing transfer of ownership forms indicating the Tribe agreed "to comply with the terms of the Forest Crop Law and the contract applicable to the said lands." In the alternative, the DNR argued that, even if the Tribe's sovereign immunity barred the DNR from asserting in personam claims against the Tribe, it did not bar the DNR's in rem claim seeking possession of the timber and wood products located on the Real Estate. The circuit court rejected both of these arguments and issued a written decision and order dismissing the DNR's claims. The DNR now appeals.

[7] The DNR's complaint defined the "timber and wood products" located on the Real Estate to include "standing trees, cut timber, stumpage, or other wood products located on such property or traceable to such property."

STANDARD OF REVIEW

¶17 A motion to dismiss based on sovereign immunity challenges a court's personal jurisdiction. ***Hoops Enters., III, LLC v. Super W., Inc.***, 2013 WI App 7, ¶6, 345 Wis. 2d 733, 827 N.W.2d 120 (2012); *see also* ***Pries v. McMillon***, 2010 WI 63, ¶20 n.11, 326 Wis. 2d 37, 784 N.W.2d 648. Where, as here, the underlying facts are essentially undisputed, whether the circuit court properly granted a motion to dismiss for lack of personal jurisdiction based on sovereign immunity is a question of law that we review independently. *See* ***CleanSoils Wis., Inc. v. DOT***, 229 Wis. 2d 600, 605, 599 N.W.2d 903 (Ct. App. 1999).

DISCUSSION

I. Waiver of the Tribe's sovereign immunity

¶18 The United States Supreme Court has explained that Indian tribes are "domestic dependent nations" that exercise "inherent sovereign authority." ***Michigan v. Bay Mills Indian Cmty.***, 134 S. Ct. 2024, 2030 (2014) (quoting ***Oklahoma Tax Comm'n v. Citizen Band Potawatomi Tribe of Okla.***, 498 U.S. 505, 509 (1991) (***Potawatomi***)). Although tribes are "subject to plenary control by Congress … they remain 'separate sovereigns pre-existing the Constitution.'" ***Id.*** (quoting ***Santa Clara Pueblo v. Martinez***, 436 U.S. 49, 56 (1978)). As such, absent congressional action to the contrary, Indian tribes retain "their historic sovereign authority." ***Id.*** One of the core aspects of that authority is the "common law immunity from suit traditionally enjoyed by sovereign powers." ***Id.*** (quoting ***Santa Clara Pueblo***, 436 U.S. at 58). "Suits against Indian tribes are thus barred by sovereign immunity absent a clear waiver by the tribe or congressional abrogation." ***Potawatomi***, 498 U.S. at 509.

¶19 Here, the DNR argues the Tribe waived its sovereign immunity with respect to the claims asserted in the DNR's complaint. A strong presumption exists against waiver of tribal sovereign immunity. ***Demontiney v. United States ex rel. Dep't of Interior, Bureau of Indian Affairs***, 255 F.3d 801, 811 (9th Cir. 2001). A tribe's waiver of sovereign immunity "cannot be implied but must be unequivocally expressed." ***Santa Clara Pueblo***, 436 U.S. at 58 (quoting ***United States v. Testan***, 424 U.S. 392, 399 (1976)). However, the use of specific words, such as the phrase "sovereign immunity," is not required in order to effect a valid waiver. *See* ***C & L Enters., Inc. v. Citizen Band Potawatomi Indian Tribe of Okla.***, 532 U.S. 411, 420-21 (2001) (citing ***Sokaogon Gaming Enter. Corp. v. Tushie-Montgomery Assocs., Inc.***, 86 F.3d 656, 659-60 (7th Cir. 1996)). Rather, waiver may be found when it is "expressed in a way that could not unfairly surprise a tribe." ***Building Inspector & Zoning Officer of Aquinnah v. Wampanoag Aquinnah Shellfish Hatchery Corp.***, 818 N.E.2d 1040, 1048 (Mass. 2004).

¶20 The DNR argues the Tribe clearly and unequivocally waived its immunity with respect to the claims at issue in this case by executing "Transfer of Ownership—Forest Crop Law" forms regarding the Real Estate in 1992 and 1993. The DNR emphasizes that both of those forms stated the Tribe "agree[d] to comply with the terms of the Forest Crop Law and the contract applicable to the said lands." The DNR contends that, by agreeing to comply with the terms of the Forest Croplands Law, the Tribe agreed to subject itself to state court actions enforcing that law.

¶21 The law is clear, however, that "[t]here is a difference between the right to demand compliance with state laws and the means available to enforce them." ***Kiowa Tribe of Okla. v. Manufacturing Techs., Inc.***, 523 U.S. 751, 755

(1998). Consistent with that principle, courts throughout the country have repeatedly held that a tribe's mere agreement to comply with a particular law does not amount to an unequivocal waiver of the tribe's sovereign immunity. *See, e.g.*, ***Nanomantube v. Kickapoo Tribe in Kan.***, 631 F.3d 1150, 1153 (10th Cir. 2011) (holding a tribe's agreement to comply with Title VII of the Civil Rights Act of 1964 did not constitute "an unequivocal waiver of tribal sovereign immunity"); ***E.F.W. v. St. Stephen's Indian High Sch.***, 264 F.3d 1297, 1304 (10th Cir. 2001) ("The fact that the Tribes agreed to act in accordance with state law to some degree and in essence adopt state law is simply not an express waiver of their tribal sovereignty with respect to their actions taken under that law."); ***Sanderlin v. Seminole Tribe of Fla.***, 243 F.3d 1282, 1289 (11th Cir. 2001) (holding a tribe's contractual promise to comply with an anti-discrimination provision of the Rehabilitation Act "merely convey[ed] a promise not to discriminate" and "in no way constitute[d] an express and unequivocal waiver of sovereign immunity"); ***Cohen v. Little Six, Inc.***, 543 N.W.2d 376, 380 (Minn. Ct. App. 1996) (holding a tribal corporation did not waive its sovereign immunity by registering as a foreign corporation and thereby agreeing to be "subject to the laws of [Minnesota]"); ***Sheffer v. Buffalo Run Casino, PTE, Inc.***, 315 P.3d 359, 371 (Okla. 2013) (holding a tribe did not waive its sovereign immunity by applying for and accepting a liquor license—which required the tribe to agree not to violate federal, state, or municipal law—because by doing so the tribe merely promised to comply with those laws, not to subject itself to lawsuits).

¶22 The DNR argues this case is distinguishable from those cited in the previous paragraph because the Forest Croplands Law, with which the Tribe agreed to comply, contains provisions setting forth enforcement mechanisms. Specifically, the DNR cites WIS. STAT. § 77.07(1) (2011-12), which provided that

an owner of land enrolled in the Forest Croplands program "shall be personally liable for any severance tax because of any wood products cut therefrom" and that any such severance tax "shall also be a lien on such wood products wherever situated and in whatever form." The DNR also cites § 77.07(2) (2011-12), which required the DNR to report "any unpaid severance tax" to the attorney general, who "shall thereupon proceed to collect the same … by suit against the owner and by attachment or other legal means to enforce the lien."

¶23 Based on these provisions, the DNR argues that, by agreeing to comply with the Forest Croplands Law, the Tribe "agreed that it could be sued in state court to collect unpaid severance tax and/or to enforce the statutory lien on the Timber." We disagree. WISCONSIN STAT. § 77.07(1) (2011-12), merely states that a landowner is personally liable for any severance tax and that such tax constitutes a lien on any wood products traceable to the owner's property. So, while the statute makes the Tribe liable for the payment of the severance tax, it does not state that the landowner consents to be sued in order to enforce any lien or personal liability. Moreover, we agree with the Tribe's position that § 77.07(2) (2011-12), is "simply a delegation of authority by the State Legislature to the Wisconsin Attorney General to proceed with certain collection efforts. Nothing in this provision states that the property owner consents to this enforcement or that the property owner consents to suit in Wisconsin state courts."

¶24 The Tenth Circuit's decision in ***Nanomantube*** is instructive on this point. The plaintiff in that case filed an employment discrimination action against his former employer, the Kickapoo Tribe in Kansas. ***Nanomantube***, 631 F.3d at 1151. He argued the tribe had waived its sovereign immunity based on the following sentence in an employee handbook: "The Golden Eagle Casino will comply with the provisions of Title VII of the Civil Rights Act of 1964 and 1991,

and the Tribal Employment Rights Ordinance of the Kickapoo Tribe in Kansas." ***Id.*** at 1152. The Tenth Circuit concluded the tribe's "agreement to comply with Title VII, without more, [did not constitute] an unequivocal waiver of tribal sovereign immunity." ***Id.*** at 1153. The court observed the tribe "simply agreed to comply with the provisions of Title VII, with no reference to any forum where this agreement could be enforced." ***Id.*** The court further explained, "Although some ambiguity may be created by the fact that Title VII includes jurisdictional and enforcement provisions, this ambiguity falls well short of creating an unequivocal expression of waiver." ***Id.***

¶25 The same is true here. The statutory provisions the DNR cites, at most, create ambiguity as to whether the Tribe consented to suit by executing the transfer of ownership forms and thereby agreeing to comply with the Forest Croplands Law. Any ambiguity in that regard, however, is insufficient to constitute an "unequivocal expression of waiver." *See* ***id.*** This is particularly true given the "strong presumption" that exists against waivers of tribal sovereign immunity. *See* ***Demontiney***, 255 F.3d at 811.

¶26 The DNR cites two cases in support of its argument that the Tribe waived its sovereign immunity by executing the transfer of ownership forms. However, both cases are distinguishable. The DNR first cites ***C & L Enterprises***, in which a tribe entered into a contract containing the following arbitration clause:

> All claims or disputes between the Contractor [C & L] and the Owner [the Tribe] arising out of or relating to the Contract, or breach thereof, shall be decided by arbitration in accordance with the Construction [I]ndustry Arbitration Rules of the American Arbitration Association currently in effect unless the parties mutually agree otherwise …. The award rendered by the arbitrator shall be final, and judgment may be entered upon it in accordance with applicable law in any court having jurisdiction thereof.

C & L Enters., 532 U.S. at 415 (alterations in ***C & L Enters.***). The American Arbitration Association rules referenced in the contract provided: "Parties to these rules shall be deemed to have consented that judgment upon the arbitration award may be entered in any federal or state court having jurisdiction thereof." ***Id.*** The United States Supreme Court concluded the tribe "clearly consented to arbitration and to the enforcement of arbitral awards in Oklahoma state court" by executing the above contract, thereby waiving its sovereign immunity from suit. ***Id.*** at 423.

¶27 Here, in contrast, the transfer of ownership forms the Tribe executed did not contain any language committing the Tribe to any particular procedure for the resolution of disputes or indicating that disputes would be resolved in a particular forum. Moreover, as noted above, any ambiguity created by provisions in the Forest Croplands Law related to the collection of unpaid taxes is insufficient to support a conclusion that the Tribe unequivocally waived its sovereign immunity. *See* ***Nanomantube***, 631 F.3d at 1153.

¶28 The DNR also relies on ***Building Inspector & Zoning Officer of Aquinnah***. In that case, a tribe entered into a settlement agreement providing it would hold certain lands "*in the same manner, and subject to the same laws, as any other Massachusetts corporation*." ***Building Inspector & Zoning Officer of Aquinnah***, 818 N.E.2d at 1043. The Supreme Judicial Court of Massachusetts interpreted this as a clear waiver of the tribe's sovereign immunity. ***Id.*** at 1048-49. First, the court observed that the words "in the same manner" conveyed "a special, known, and obvious meaning. These words are used by the United States and by the Commonwealth to waive sovereign immunity." ***Id.*** at 1049. Second, the court noted the tribe had expressly agreed to be treated as a Massachusetts corporation, and the Massachusetts statutes specified that a corporation "may, in

its corporate name, sue and be sued." ***Id.*** (quoted source omitted). Neither of these factors is present in the instant case.

¶29 Ultimately, neither ***C & L Enterprises*** nor ***Building Inspector & Zoning Officer of Aquinnah*** convinces us that, under the specific circumstances of this case, the Tribe clearly waived its sovereign immunity by executing transfer of ownership forms stating it agreed to comply with the Forest Croplands Law. Without more, the Tribe's mere agreement to comply with that law is insufficient to demonstrate an unequivocal waiver of the Tribe's sovereign immunity, particularly in view of the strong presumption against such waiver. Stated differently, the transfer of ownership forms and Forest Croplands Law do not express a waiver of the Tribe's sovereign immunity "in a way that [w]ould not unfairly surprise" the Tribe. *See* ***Building Inspector & Zoning Officer of Aquinnah***, 818 N.E.2d at 1048.

II. The DNR's in rem claim

¶30 The DNR next argues the Tribe's sovereign immunity, even if not waived, only bars the DNR from asserting in personam claims against the Tribe and does not bar the DNR from asserting an in rem claim against the timber and wood products located on the Real Estate. As the DNR correctly notes, the distinction between personal—or in personam—jurisdiction and in rem jurisdiction is well established:

> If a court's jurisdiction is based on its authority over the defendant's person, the action and judgment are denominated "in personam" and can impose a personal obligation on the defendant in favor of the plaintiff. If jurisdiction is based on the court's power over property within its territory, the action is called "in rem" or "quasi in rem." The effect of a judgment in such a case is limited to the property that supports jurisdiction and does not impose

> a personal liability on the property owner, since he is not before the court.

Shaffer v. Heitner, 433 U.S. 186, 199 (1977). The DNR notes that sovereign immunity deprives a court of personal jurisdiction over the sovereign.[8] *See* ***Pries***, 326 Wis. 2d 37, ¶20 n.11. The DNR asserts personal jurisdiction is not required for an in rem claim. Consequently, the DNR argues tribal sovereign immunity does not bar an in rem claim against property owned by a tribe.

¶31 The DNR cites several cases from other states in support of its position.[9] 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.

¶32 For instance, the Tribe relies on ***Oneida Indian Nation of New York v. Madison County***, 401 F. Supp. 2d 219 (N.D.N.Y. 2005), *aff'd in part, vacated in part, rev'd in part*, 665 F.3d 408 (2d Cir. 2011). There, the Oneida Indian Nation owned real property located in Madison County, New York. ***Id.*** at 223. The County assessed taxes against the Nation's property and instituted a

[8] Our supreme court has expressly stated that sovereign immunity deprives a court of personal jurisdiction. *See* ***Pries v. McMillon***, 2010 WI 63, ¶20 n.11, 326 Wis. 2d 37, 784 N.W.2d 648; ***Lister v. Board of Regents of Univ. Wis. Sys.***, 72 Wis. 2d 282, 296, 240 N.W.2d 610, (1976). However, courts in other jurisdictions have held that sovereign immunity goes to subject matter jurisdiction, rather than personal jurisdiction. *See, e.g.*, ***Doe v. United States***, 853 F.3d 792, 796 (5th Cir. 2017); ***Douglas Indian Ass'n v. Central Council of Tlingit & Haida Indian Tribes of Alaska***, 403 P.3d 1172, 1178 (Alaska 2017); ***Machado v. Taylor***, 163 A.3d 558, 562 (Conn. 2017); ***Texas Dep't of Parks & Wildlife v. Miranda***, 133 S.W.3d 217, 224 (Tex. 2004).

[9] *See* ***Miccosukee Tribe of Indians of Fla. v. Department of Envtl. Prot.***, 78 So. 3d 31 (Fla. Dist. Ct. App. 2011); ***Cass Cty. Joint Water Res. Dist. v. 1.43 Acres of Land in Highland Twp.***, 643 N.W.2d 685 (N.D. 2002); ***Lundgren v. Upper Skagit Indian Tribe***, 389 P.3d 569 (Wash. 2017); ***Anderson & Middleton Lumber Co. v. Quinault Indian Nation***, 929 P.2d 379 (Wash. 1996).

foreclosure action in state court after the Nation failed to pay. ***Id.*** The Nation moved for summary judgment, asserting, among other things, that its sovereign immunity barred the foreclosure action. ***Id.*** at 227. The district court agreed, specifically rejecting the County's argument that sovereign immunity was inapplicable because the foreclosure action was a proceeding in rem. ***Id.*** at 229-30. The court explained:

> It is of no moment that the state foreclosure suit at issue here is *in rem*. What is relevant is that the County is attempting to bring suit against the Nation. The County cannot circumvent Tribal sovereign immunity by characterizing the suit as *in rem*, when it is, in actuality, a suit to take the tribe's property.

Id. at 229.[10]

¶33 Another federal district court reached a similar conclusion in ***Cayuga Indian Nation of New York v. Seneca County, New York***, 890 F. Supp. 2d 240 (W.D.N.Y. 2012). There, Seneca County attempted to collect ad valorem property taxes on real property owned by the Cayuga Indian Nation. ***Id.*** at 241. After the Nation refused to pay the taxes, the County initiated foreclosure proceedings. ***Id.*** The Nation asserted its sovereign immunity barred the foreclosure proceedings, and the district court agreed. ***Id.*** at 241, 248. As in ***Oneida Indian Nation***, the court rejected the County's assertion that sovereign

[10] The Second Circuit initially affirmed the district court's decision that the Nation's sovereign immunity barred the County's foreclosure action. *See* ***Oneida Indian Nation of N.Y. v. Madison Cty., Oneida Cty., N.Y.***, 605 F.3d 149, 151 (2d Cir. 2010), *vacated and remanded sub nom.* ***Madison Cty., N.Y. v. Oneida Indian Nation of N.Y.***, 562 U.S. 42 (2011). The United States Supreme Court granted certiorari, but while the case was pending before the Supreme Court, the Nation waived its sovereign immunity. *See* ***Madison Cty., N.Y.***, 562 U.S. at 42. The Supreme Court therefore vacated the Second Circuit's decision and remanded for further proceedings. ***Id.*** at 43.

immunity was inapplicable because foreclosure actions are proceedings in rem. ***Id.*** at 247-48.

¶34 The Tribe also relies on ***Hamaatsa, Inc. v. Pueblo of San Felipe***, 388 P.3d 977 (N.M. 2016). In that case, Hamaatsa, a neighboring property owner, sued the Pueblo, asserting the right to use a road traversing the Pueblo's property. ***Id.*** at 979-80. The New Mexico Supreme Court concluded the Pueblo's sovereign immunity barred Hamaatsa's suit. ***Id.*** at 979. The court rejected Hamaatsa's argument that sovereign immunity did not apply because Hamaatsa had asserted an in rem claim. ***Id.*** at 985. The court explained, "[I]n the context of tribal sovereign immunity there exists no meaningful distinction between *in rem* and *in personam* claims." ***Id.***

¶35 The contrary cases the DNR cites rely in large part on the United States Supreme Court's decision in ***County of Yakima v. Confederated Tribes & Bands of the Yakima Indian Nation***, 502 U.S. 251 (1992) (***Yakima***).[11] In that case, Yakima County had imposed an ad valorem tax on real property and an excise tax on sales of real property. ***Id.*** at 256. In 1987, the County "proceeded to foreclose on properties … for which ad valorem and excise taxes were past due, including a number of reservation parcels in which the [Yakima Indian Nation] or its members had an interest." ***Id.*** The Nation therefore commenced an action for declaratory and injunctive relief, "contending that federal law prohibited these taxes on fee-patented lands held by the [Nation] or its members." ***Id.***

[11] *See* ***Miccosukee Tribe***, 78 So. 3d at 33-34; ***Cass Cty.***, 643 N.W.2d at 691-92; ***Lundgren***, 389 P.3d at 573; ***Anderson & Middleton Lumber Co.***, 929 P.2d at 383-85.

¶36 The Supreme Court concluded the County had authority to impose ad valorem taxes on the Nation's property "because the jurisdiction is *in rem* rather than *in personam*." ***Id.*** at 264-65. The Court reasoned, "Liability for the ad valorem tax flows exclusively from ownership of realty on the annual date of assessment. The tax, moreover, creates a burden on the property alone." ***Id.*** at 266 (citation omitted). In contrast, the Court concluded the County had no authority to impose an excise tax on sales of the Nation's property because that tax was not imposed on the property itself. ***Id.*** at 268-70.

¶37 The cases the DNR cites interpreted ***Yakima*** as holding that tribal sovereign immunity bars in personam claims against a tribe, but not in rem claims against the tribe's property. *See, e.g.*, ***Cass Cty. Joint Water Res. Dist. v. 1.43 Acres of Land in Highland Twp.***, 643 N.W.2d 685, 691 (N.D. 2002); ***Lundgren v. Upper Skagit Indian Tribe***, 389 P.3d 569, 573 (Wash. 2017). However, we agree with the ***Cayuga Indian Nation*** court that ***Yakima*** does not "stand[] for the proposition that tribal sovereign immunity from suit is inapplicable to *in rem* proceedings." ***Cayuga Indian Nation***, 890 F. Supp. 2d at 247. Rather, ***Yakima***'s "use of the terms *in rem* and *in personam* pertained to the difference between the *imposition*, not collection, of taxes on a piece of land, as opposed to an individual." ***Cayuga Indian Nation***, 890 F. Supp. 2d at 247.

¶38 In other words, as the New Mexico Supreme Court explained in ***Hamaatsa***, ***Yakima*** involved a tribe's "sovereign authority," rather than its sovereign immunity. ***Hamaatsa***, 388 P.3d at 985. "Tribal sovereign authority and tribal sovereign immunity are distinct doctrines with different origins and purposes." ***Id.*** at 984. A tribe's sovereign authority "concerns the extent to which a tribe may exercise jurisdictional authority over lands the tribe owns to the exclusion of state jurisdiction." ***Id.*** It is "inherently distinct from the notion of

tribal sovereign immunity—the plenary right to be free from having to answer a suit." ***Id.*** at 985. While ***Yakima*** held that the Nation's *sovereign authority* did not bar the County from imposing ad valorem property taxes on the Nation's land, it did not address whether the Nation's *sovereign immunity* prohibited the County from filing suit in order to collect those taxes. ***Hamaatsa***, 388 P.3d at 985; *see also* ***Cayuga Indian Nation***, 890 F. Supp. 2d at 247-48. As noted above, the United States Supreme Court has elsewhere held, when discussing tribal sovereign immunity, that "[t]here is a difference between the right to demand compliance with state laws and the means available to enforce them." *See* ***Kiowa Tribe***, 523 U.S. at 755.

¶39 Thus, here the Tribe's sovereign authority did not bar the DNR from imposing the termination severance tax on the Tribe and making the Tribe liable for its payment. However, the Tribe's sovereign immunity prevents the DNR from filing suit against the Tribe or its "Timber and Wood Products" to collect those taxes. In other words, while the Tribe's property is not synonymous with Tribe for purposes of the imposition of the tax, the property at issue is synonymous with the Tribe for purposes of collection.

¶40 Cases involving the sovereign immunity of state, federal, and foreign governments further persuade us that the Tribe's sovereign immunity precludes the DNR's in rem claim.[12] For instance, in ***Zych v. Wrecked Vessel Believed to be the Lady Elgin***, 960 F.2d 665, 666 (7th Cir. 1992), the plaintiff brought an in rem

[12] The United States Supreme Court has looked to cases involving the sovereign immunity of state, federal, and foreign governments when analyzing tribal sovereign immunity. *See, e.g.*, ***Lewis v. Clarke***, 137 S. Ct. 1285, 1290-91 (2017); ***C & L Enters. v. Citizen Band Potawatomi Indian Tribe of Okla.***, 532 U.S. 411, 421 n.3 (2001); ***Kiowa Tribe of Okla. v. Manufacturing Techs., Inc.***, 523 U.S. 751, 759 (1998).

action seeking to establish his ownership of a shipwreck he located while diving in Lake Michigan. The Seventh Circuit concluded Eleventh Amendment sovereign immunity "applies to admiralty *in rem* proceedings" and "there is no general *in rem* exception to principles of sovereign immunity." ***Id.*** at 669. The court further stated a judgment "declaring that the state possesses no interest in a particular property is a judgment 'against one of the United States' for constitutional purposes." ***Id.***

¶41 Thereafter, in ***California v. Deep Sea Research, Inc.***, 523 U.S. 491 (1998), the United States Supreme Court addressed a similar *in rem* admiralty claim involving a historic shipwreck. The Court held that a state's sovereign immunity bars *in rem* admiralty proceedings only where the property at issue is both owned and possessed by the state. ***Id.*** at 507. The Court cited a prior case involving federal sovereign immunity, which held that "proceedings *in rem* to enforce a lien against property of the United States are only forbidden in cases where, in order to sustain the proceeding, the possession of the United States must be invaded under process of the court." ***Id.*** (quoting ***The Davis***, 77 U.S. 15, 20 (1869)). The Court further noted its "jurisprudence respecting the sovereign immunity of foreign governments has likewise turned on the sovereign's possession of the res at issue." ***Id.*** (citing ***The Pesaro***, 255 U.S. 216, 219 (1921)).

¶42 Here, the DNR has attempted to bring the precise type of case against the Tribe that the Supreme Court forbade in ***Deep Sea Research***—that is, a case "where, in order to sustain the proceeding, the possession of the [Tribe] must be invaded under process of the court." ***Id.*** (quoting ***The Davis***, 77 U.S. at 20). The DNR's in rem claim sought a judgment entitling the DNR to possession of the timber and wood products located on the Real Estate, "or such portion of the [timber and wood products] as is required to satisfy the Termination Severance

Tax in full." To that end, the DNR asked the circuit court to issue a writ of assistance directing the Sawyer County Sheriff to: (1) hire a logging company to harvest wood products, including standing timber, from the Real Estate; (2) arrange a private sale of the harvested timber; and (3) collect and distribute the proceeds of the sale. This result would indisputably invade the Tribe's possession of its own property—i.e., the timber and wood products located on the Real Estate. Moreover, harvesting the timber and wood products would require a physical invasion of the Real Estate, which further bolsters a conclusion that allowing the DNR's in rem claim to proceed would invade the Tribe's possession of its own property.

¶43 The DNR argues ***Zych*** and ***Deep Sea Research*** are distinguishable because they involved "potential seizure of government-owned property." The DNR contends that, unlike the plaintiffs in those cases, the DNR "does not seek to seize any property interest owned by the Tribe." The DNR again relies on WIS. STAT. § 77.07(1) (2011-12), which states that the owner of land enrolled in the Forest Croplands program "shall be personally liable for any severance tax because of any wood products cut therefrom, *which tax shall also be a lien on such wood products wherever situated and in whatever form*." (Emphasis added.)

¶44 Based on this statute, the DNR argues the State of Wisconsin "obtained a statutory tax lien upon the Timber" when the Real Estate was enrolled in the Forest Croplands program in 1963. The DNR characterizes this lien as a "property interest in the Timber" and asserts that "[e]very subsequent sale of the Real Estate was subject to the DNR's pre-existing property interest." As a result, the DNR contends that "when Futurewood Corporation sold the Real Estate to the Tribe in 1992-93, it could not and did not convey to the Tribe any ownership of the property interest in the Timber that the State had already owned for

approximately 30 years." The DNR therefore argues its in rem claim does not seek to seize any property owned by the Tribe, but instead "seeks only to enforce the State of Wisconsin's pre-existing property interest in the Timber."

¶45 This argument fails because it rests on the faulty premise that a lien imposed by WIS. STAT. § 77.07(1) (2011-12), arises the moment property is enrolled in the Forest Croplands program. To the contrary, Wisconsin law indicates that a lien cannot exist without an underlying debt:

> [T]he essence of any lien statute … requires the existence of an obligation due the lienholder from the person whose property to which the lien attaches. Nowhere in the Wisconsin statutes does the legislature reflect an intent to allow a lien to be impressed on an individual's property when that person owes no obligation to the lien claimant. Indeed, the creation of lien rights is an attempt to secure payment for debts due the lienholder and to facilitate the satisfaction of that obligation. To suggest that a lien can exist independent of a debt turns the purpose and provisions of a lien statute on its head.

Dorr v. Sacred Heart Hosp., 228 Wis. 2d 425, 438, 597 N.W.2d 462 (Ct. App. 1999).

¶46 Accordingly, the lien imposed by WIS. STAT. § 77.07(1) (2011-12), cannot arise until a severance tax is due under the Forest Croplands Law. The "termination severance tax" at issue in this case only becomes due when a Forest Croplands contract ends and the landowner declines to enroll the subject property in the Managed Forest program. *See* WIS. STAT. § 77.03. In this case, any lien on the wood products located on the Real Estate arose on December 31, 2012, when the Tribe's Forest Croplands contract ended. At that point, the Tribe already owned the wood products located on the Real Estate. Consequently, any lien the DNR acquired did not predate the Tribe's ownership of the timber, and enforcement of the lien would necessarily invade the Tribe's possession of its own

property, a result contrary to United States Supreme Court precedent. *See* ***Deep Sea Research***, 523 U.S. at 507.

¶47 Ultimately, in addition to the authorities cited above, we find persuasive the circuit court's reasoning in dismissing the DNR's in rem claim. As the court correctly noted, allowing in rem claims against tribal property to proceed "would simply circumvent tribal sovereign immunity[,] allowing taking of tribal property." Such a result would be contrary to one of the primary purposes of sovereign immunity—protecting tribal treasuries. *See* ***Runyon ex rel. B.R. v. Association of Vill. Council Presidents***, 84 P.3d 437, 440 (Alaska 2004). This consideration further supports a conclusion that, beyond simply barring in personam claims against a tribe, tribal sovereign immunity also bars in rem claims against the tribe's property.

By the Court.—Order affirmed.

Recommended for publication in the official reports.