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**IN THE
HO-CHUNK NATION TRIAL COURT**

3 **Gerald Cleveland, Jr.,**
4 Plaintiff,

5 v.

Case No.: **CV 08-36**

6 **Elliot Garvin, Roberta Decorah, and**
7 **Douglas Greendeer, in their capacity as**
8 **check signers for the Ho-Chunk Nation**
9 **Legislature,**
Defendants.

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**ORDER
(Regarding Discovery)**

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INTRODUCTION

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16 The Court must determine whether to grant the defendants' motion to compel discovery.
17 The defendants served interrogatories upon several non-parties who subsequently declined to
18 provide timely answers. The Court holds that the defendants must utilize a different discovery
19 method when attempting to elicit information from non-parties.
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PROCEDURAL HISTORY

23 On December 5, 2008, the defendants, by and through Legislative Counsel Huma Ahsan,
24 served the *Request for Interrogatories & Requests for Documents* (hereinafter *Discovery*
25 *Request*) upon several non-parties, Lisa J. Flick, Caralee Murphy, Jeriah J. Rave, and Anne M.
26 Thundercloud. The defendants subsequently filed the *Motion to Compell* [sic] *Discovery from*
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1 *Jeriah Rave, Anne Thundercloud, Lisa Flick, & Caralee Murphy* on December 18, 2008.¹ A
2 *Motion for Clarification* was submitted on the same day by Ho-Chunk Nation Attorney General
3 Sheila D. Corbine.² The defendants later re-filed a *Motion to Compell* [sic] *Discovery from*
4 *Jeriah Rave, Anne Thundercloud, Lisa Flick, & Caralee Murphy* (hereinafter *Motion to Compel*
5 *II*) on December 30, 2008.
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7 8 **APPLICABLE LAW**

9 10 **CONSTITUTION OF THE HO-CHUNK NATION**

11 **Art. I - Territory and Jurisdiction**

12 **Sec. 1. Territory.** The territory of the Ho-Chunk Nation shall include all lands held by
13 the Nation or the People, or by the United States for the benefit of the Nation or the People, and
14 any additional lands acquired by the Nation or by the United States for the benefit of the Nation
15 or the people, including but not limited to air, water, surface, subsurface, natural resources and
16 any interest therein, notwithstanding the issuance of any patent or right-of-way in fee or
17 otherwise, by the governments of the United States or the Ho-Chunk Nation, existing or in the
18 future.

19 **Sec. 2. Jurisdiction.** The jurisdiction of the Ho-Chunk Nation shall extend to all territory
20 set forth in Section 1 of this Article and to any and all persons or activities therein, based upon
21 the inherent sovereign authority of the Nation and the People or upon Federal law.

22 **Art. IV - General Council**

23 **Sec. 2. Delegation of Authority.** The General Council hereby authorizes the legislative
24 branch to make laws and appropriate funds in accordance with Article V. The General Council
25 hereby authorizes the executive branch to enforce the laws and administer funds in accordance
26 with Article VI. The General Council hereby authorizes the judicial branch to interpret and
27 apply the laws and Constitution of the Nation in accordance with Article VII.

28 ¹ The Court declined to directly address the motion at the December 18, 2008 *Status Hearing* due to its apparent
premature filing date. *Status Hr'g* (LPER, Dec. 18, 2008, 03:08:45 CST) (citing *Ho-Chunk Nation Rules of Civil*
Procedure (hereinafter *HCN R. Civ. P.*), Rules 32, 34) (requiring responses to discovery requests within a period of
twenty-five (25) days after receipt).

² Procedural rules do not expressly permit non-parties to file motions. *See, e.g., HCN R. Civ. P.* 19(A). However,
the Court did generally inquire about the reasons why the Ho-Chunk Nation Department of Justice abstained from
providing the defendants legal representation, while acknowledging that a conflict of interest could serve to
disqualify the department. LPER, 03:14:04 CST. Attorney General Corbine informed the Court of such a conflict
within a December 23, 2008 correspondence.

1 Art. VII - Judiciary

2 Sec. 4. Powers of the Judiciary. The judicial power of the Ho-Chunk Nation shall be
3 vested in the Judiciary. The Judiciary shall have the power to interpret and apply the
4 Constitution and laws of the Ho-Chunk Nation.

5 Sec. 5. Jurisdiction of the Judiciary.

6 (a) The Trial Court shall have original jurisdiction over all cases and controversies, both
7 criminal and civil, in law or in equity, arising under the Constitution, laws, customs and
8 traditions of the Ho-Chunk Nation, including cases in which the Ho-Chunk Nation, or its
9 officials and employees, shall be a party. Any such case or controversy arising within the
10 jurisdiction of the Ho-Chunk Nation shall be filed in the Trial Court before it is filed in any other
11 court. This grant of jurisdiction by the General Council shall not be construed to be a waiver of
12 the Nation's sovereign immunity.

13 Sec. 7. Powers of the Supreme Court.

14 (b) The Supreme Court shall have the power to establish written rules for the Judiciary,
15 including qualifications to practice before the Ho-Chunk courts, provided such rules are
16 consistent with the laws of the Ho-Chunk Nation.

17 HO-CHUNK NATION JUDICIARY ESTABLISHMENT & ORGANIZATION ACT, 1 HCC §
18 1

19 Subsec. 4. Jurisdiction. The Ho-Chunk Judiciary shall exercise jurisdiction over all matters
20 with the power and authority of the Ho-Chunk Nation including controversies arising out of the
21 Constitution of the Ho-Chunk Nation; laws, statutes, ordinances, resolutions, and codes enacted
22 by the Legislature; and such matters arising under enactments of the Legislature or the customs
23 and traditions of the Ho-Chunk Nation. The jurisdiction extends over the Nation and its
24 territory, persons who enter its territory, its members, and persons who interact with the Nation
25 or its members wherever found.

26 Subsec. 7. Subpoenas. Any Judge of the Trial Court, and if authority is delegated by the
27 Chief Trial Judge of the Clerk of Court, shall have authority to issue subpoenas to compel
28 attendance of witnesses or the production of documents or things. The failure to comply with a
subpoena shall subject the person not complying to the contempt power of the Court. A person
present in court may be required by the Court to testify in the same manner as if a subpoena was
issued.

29 CONTEMPT ORDINANCE, 2 HCC § 5

30 Subsec. 3. Declaration of Policy. The Ho-Chunk Nation, mindful that the Judiciary
represents a fundamental aspect of Tribal sovereignty, recognizes that the Nation's Courts retain
the inherent authority to exercise the power of contempt. The contempt power established herein

1 will preserve the dignity and decorum of the Judicial Branch, secure compliance with orders and
2 procedures, and protect the due process rights of those appearing before the Courts.

3 HO-CHUNK NATION RULES OF CIVIL PROCEDURE

4 Ch. 1 - Introduction to the Rules

5 Rule 2. Liberal Construction.

6 These rules shall be liberally construed to secure a just and speedy determination of every action.
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8 Ch. III - General Rules for Pleading

9 Rule 19. Filing and Responding to Motions.

10 (A) Filing. *Motions* may be filed by a party with any pleading or at any time after their first
11 pleading has been filed. A copy of all written *Motions* shall be delivered or mailed to other
12 parties at least five (5) calendar days before the time specified for a hearing on the *Motion*.
13 *Motions for Extension of Time* and *More Definite Statement* may be filed before the initial
14 pleading.

15 (B) Responses. A *Response* to a written *Motion* must be filed at least one (1) day before the
16 hearing. If no hearing is scheduled, the *Response* must be filed with the Court and served on the
17 other parties within ten (10) calendar days of the date the *Motion* was filed. The party filing the
18 *Motion* must file any *Reply* within three (3) calendar days.

19 Ch. V - Discovery

20 Introduction. Discovery is the process used among parties to uncover evidence relevant to the
21 action, including identity of persons having knowledge of facts. Discovery may take place
22 before an action has been filed and may be used for the purpose of preserving testimony or other
23 evidence which might otherwise be unavailable at the time of trial. Discovery may include
24 written interrogatories, depositions, and requests for the production of documents and things. It
25 is the policy of the Court to favor open discovery of relevant material as a way of fostering full
26 knowledge of the facts relevant to a case by all parties. It is the intent of these rules that
27 reasonably open discovery will encourage settlement, promote fairness and further justice.
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29 Rule 32. Interrogatories.

30 A party may submit interrogatories (written questions) to other parties. The requesting party
31 must receive the responding party's written answers, under oath, within twenty-five (25)
32 calendar days of receiving them. The responding party must include facts he/she knows, facts
33 available to him/her, and give opinions, if requested.

1 Rule 33. Depositions.

2 A party may take a deposition (testimony, under oath and recorded) of a deponent (another party
3 or witness) after giving at least five (5) calendar days notice of the time and place where the
4 deposition will occur to all parties and the deponent. All parties may ask the deponent questions.
5 Depositions may take place by telephone and be recorded stenographically, by tape recording or
6 by other means if the parties agree or the Court so orders.

6 Rule 34. Requests for Documents and Things.

7 A party may request another party to produce any documents or things within his/her possession
8 or control for the purpose of inspection and/or copying. This includes permission to enter onto
9 land for testing. The responding party must make the documents or things available to the
10 requesting party within twenty-five (25) calendar days of the date of receiving the request.

10 Rule 37. Non-Compliance.

11 If a party fails to appear or respond as requested under these rules, a party may request or the
12 Court may *sua sponte* issue an *Order* requiring a response and imposing costs, attorney's fees,
13 and sanctions as justice requires in order to secure compliance.

14 Rule 38. Power to Compel.

15 The Court retains the inherent authority to compel disclosure of material it has cause to believe is
16 relevant to the matter before it.

17 Ch. VI - Trials

18 Rule 42. Scheduling Conference.

19 *Scheduling Order.* The Court may enter a scheduling order on the Court's own motion or on the
20 motion of a party. The *Scheduling Order* may be modified by motion of a party upon showing
21 of good cause or by leave of the Court.

22 Rule 44. Presence of Parties and Witnesses.

23 (A) Subpoenas. Subpoenas may be used to cause a witness to appear and give testimony. If a
24 party wishes to have a subpoena issued by the Court, he/she shall furnish a properly prepared
25 subpoena, including information necessary for service of process, at least ten (10) calendar days
26 before trial. Service will be completed at least three (3) calendar days prior to hearing or trial.
27 When service has been completed, the Court shall mail proof of service to all parties. When
28 service of the subpoena will not be through the Court, the requesting shall present the properly
prepared subpoena to the Court for signature in time to ensure proper service before the hearing
or trial and shall return proof of service to the Court prior to the trial. If a party does not timely
request a subpoena, he/she shall not be entitled to a postponement because of absence of the
witness. If the subpoena has been timely issued, the Court may, in its discretion, postpone the

1 hearing or trial. A person who fails to appear after being subpoenaed may be held in contempt of
2 court.

3 FINDINGS OF FACT

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5 1. The plaintiff, Gerald L. Cleveland, Jr., is an enrolled member of the Ho-Chunk Nation,
6 Tribal ID# 439A00335, and resides at S2833 Decorah Road, Baraboo, WI 53913. *Am. Compl.*,
7 CV 08-36 (Dec. 1, 2008) at 1.

8 2. The defendant, Elliot S. Garvin, is a duly elected legislative representative for District I.
9 The defendant, Roberta M. Decorah, is a duly elected legislative representative for District II.
10 The defendant, Douglas G. Greengrass, is a duly elected legislative representative for District III.

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12 3. On December 5, 2008, the defendants served their *Discovery Request* upon four (4) non-
13 parties to the instant suit. Lisa J. Flick, Caralee Murphy, Jeriah J. Rave, and Anne M.
14 Thundercloud are enrolled members of the Ho-Chunk Nation with respective Tribal
15 Identification Numbers 439A005885, 439A001817, 439A006209, and 439A002273. Each
16 identified tribal employee allegedly participates on or in conjunction with the Ho-Chunk Nation
17 Community Relations Committee, an Executive Branch sub-entity that independently considers
18 charitable funding requests from available resources within the Department of Business. *See*
19 CHARITABLE REQUEST ACT, 4 HCC § 8.5a, d, 7d; *see also* LPER, 03:07:38 CST.
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22 4. None of the identified tribal employees filed discovery responses on or before December
23 30, 2008. *See HCN R. Civ. P. 32, 34.*

24 5. The defendants proposed interpreting the term, “party,” to include “any person.” LPER,
25 03:20:27 CST (citing *HCN R. Civ. P. 32, 34*).

1 **DECISION**

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3 The Court is directed to liberally construe the procedural rules “to secure a just and
4 speedy determination of every action.” *HCN R. Civ. P. 2*. However, the Court cannot interpret
5 words or phrases in such a way as to wholly divorce them from the terminology deliberately
6 selected by the Ho-Chunk Nation Supreme Court (hereinafter Supreme Court). *See*
7 *CONSTITUTION OF THE HO-CHUNK NATION* (hereinafter *CONSTITUTION*), ART. VII, § 7(b); *see*
8 *also Ho-Chunk Hous. Auth. v. Martha Martinez*, CV 02-04 (HCN Tr. Ct., July 18, 2003) at 8.
9 The Court has liberally interpreted the relevant rules in the past to ensure “open discovery of
10 relevant material as a way of fostering full knowledge of the facts,” but the Court must insist
11 upon employing different discovery techniques in this instance. *HCN R. Civ. P.*, Ch. V, Intro.;
12 *see also Ronald K. Kirkwood v. Francis Decorah, in his official capacity as Dir. of HCN Hous.*
13 *Dep’t*, CV 04-33 (HCN Tr. Ct., Oct. 18, 2004) at 5.

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16 The defendants’ *Discovery Request* consists of interrogatories and requests for
17 documents, which may only be served upon other parties. *HCN R. Civ. P. 32, 34*. The *Federal*
18 *Rules of Civil Procedure* likewise restrict the usage of these discovery mechanisms. *FED. R. CIV.*
19 *P. 33(a)(1), 34(a)*. A party to federal litigation may not serve interrogatories upon a non-party to
20 a suit.³ *United States v. Lot 41, Berryhill Farm Estates*, 128 F.3d 1386, 1397 (10th Cir. 1997).
21 Similarly, a party to federal litigation may not serve a request for documents upon a non-party.
22 *Hobley v. Burge*, 433 F.3d 946, 952 (7th Cir. 2006).

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25 Alternatively, both tribal and federal rules do not impose party restrictions upon
26 deposition practice. *Compare HCN R. Civ. P. 33, with FED. R. CIV. P. 30(a)(1)*. “A party has a

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28 ³ The Fourth Circuit Court of Appeals has simply characterized interrogatories served upon a non-party as
“depositions upon written questions,” thereby not impeding a legitimate, albeit mislabeled, discovery attempt.
Watson v. Lowcountry Red Cross, 974 F.2d 482, 484 n.3 (4th Cir. 1992) (citing *FED. R. CIV. P. 31*). However, the
HCN R. Civ. P. do not incorporate this discovery device.

1 general right to compel any person to appear at a deposition, through issuance of a subpoena if
2 necessary.” *CSC Holdings, Inc. v. Redisi*, 309 F.3d 988, 993 (7th Cir. 2002); *see also Goodyear*
3 *Tire & Rubber Co. v. Jamaica Truck Tire Serv. Co., Inc.*, 66 F.2d 91, 93 (7th Cir. 1933).
4 Regarding production of documents, courts may issue a subpoena *duces tecum* (Lat. “bring with
5 you”) against a non-party, and this Court has previously employed this device. *See, e.g., Joyce*
6 *Warner v. Ho-Chunk Nation et al.*, CV 04-72 (HCN Tr. Ct., Mar. 3, 2002) (directing the
7 Personnel Department Executive Director to produce employment documents); *see also Hobley*,
8 433 F.3d at 949.
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11 Rule 44 instructs that “[s]ubpoenas may be used to cause a witness to appear and give
12 testimony.” *HCN R. Civ. P.* 44. The earlier deposition rule offers a basic definition of the term
13 “deposition,” *i.e.*, “testimony, under oath and recorded.” *Id.*, Rule 33. Consequently, a party can
14 request that the Court issue a subpoena to force a recalcitrant non-party to offer deposition
15 testimony.⁴ In most instances, the Court would hope that non-parties comply with the initial
16 party request.
17

18 While the text of Rule 44 seems to place a limiting construction on the Court’s subpoena
19 power, the Court deems that it may issue subpoenas outside of a testimonial context. To begin,
20 Rule 44, entitled “Presence of Parties and Witnesses,” appears within the *Trial* chapter and,
21 therefore, logically focuses upon individual appearances. Yet, the scope of the judicial subpoena
22 power clearly extends beyond this litigation phase as determined above and as acknowledged
23 since the formation of the Judiciary.⁵ The Ho-Chunk Nation Legislature has consistently
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26 ⁴ The Court unquestionably exercises personal jurisdiction over the identified deponents since each is a tribal
27 member employee. *See* CONST., ART. I, §§ 1-2; HCN JUDICIARY ESTABLISHMENT & ORG. ACT (hereinafter
28 JUDICIARY ACT), 1 HCC § 1.4

⁵ The Judiciary formed with the passage of the *Ho-Chunk Nation Judiciary Act of 1995* on March 22, 1995, and the
subpoena provision within the establishment act precedes the adoption of the *HCN R. Civ. P.* on May 11, 1996.
HCN JUDICIARY ACT OF 1995, § 5. This provision remains unchanged within the current incarnation of the
JUDICIARY ACT, which was enacted on April 6, 2005.

1 observed that “[a]ny Judge of the Trial Court . . . shall have the authority to issue subpoenas to
2 compel attendance of witnesses or the production of documents or things.” JUDICIARY ACT, §
3 1.7.
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5 In doing so, the Legislature did not create, but rather recognized an inherent authority
6 flowing from the constitutional delegation of the judicial power.⁶ See CONST., ARTS. IV, § 2, VI,
7 § 4. ““The inherent powers of . . . courts are those which “are necessary to the exercise of all
8 others.””” *Chloris Lowe, Jr. v. HCN Legislature Members Elliot Garvin et al.*, CV 00-104 (HCN
9 Tr. Ct., Mar. 22, 2004) at 21 (quoting *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 764 (1980)
10 (quoting *United States v. Hudson*, 11 U.S. 32, 34 (1812))); see also *State v. Holmes*, 315 N.W.2d
11 703, 709 (Wis. 1982). More specifically,
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13 “[t]he right to resort to means competent to compel the production of
14 written, as well as oral, testimony seems essential to the very existence
15 and constitution of a Court of common law, which receives and acts upon
16 both descriptions of evidence, and could not possibly proceed with due
effect without them.”

17 *Wilson v. United States*, 221 U.S. 361, 372 (1911) (quoting *Amey v. Long*, 103 Eng. Rep. 653,
18 658 (K.B. 1808)) (tracing the origin of a subpoena *duces tecum*).⁷

19 In the instant case, the defendants would be well-advised to seek subpoenas from the
20 Court for those deponents from whom they also wish to obtain documents. The defendants may
21 effect service of process, and must abide by the timeframes within the relevant rule. *HCN R.*
22 *Civ. P.* 44(A). As a result, the Court must deny the defendants’ *Motion to Compel II*. The Court
23 expects that this decision clarifies the procedural requirements and that this case can now
24 proceed to a timelier disposition.
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27 ⁶ The Legislature, as well as the Supreme Court, has explicitly acknowledged the presence of inherent judicial
powers. CONTEMPT ORDINANCE, 2 HCC § 5.3; *HCN R. Civ. P.* 38.

28 ⁷ The CONSTITUTION confers authority upon the Court to award both legal and equitable remedies. CONST., ART.
VII, § 5(a); see also generally *Kirkwood*, CV 04-33 (HCN Tr. Ct., Feb. 11, 2005) at 14-17 (analyzing the historical
distinction between actions at law and equity).

Ho-Chunk Nation Court System
P.O. Box 70
Black River Falls, WI 54615
(715) 284-2722 or 800-434-4070



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IT IS SO ORDERED this 6th day of January 2009, by the Ho-Chunk Nation Trial Court located in Black River Falls, WI within the sovereign lands of the Ho-Chunk Nation.

Honorable Todd R. Matha
Chief Trial Court Judge