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

Gerald Cleveland, Jr.,
Plaintiff,

v.

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

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

**ORDER
(Denying Motion to Quash)**

INTRODUCTION

The Court must determine whether to grant the defendants' motion to quash. The defendants assert that the individuals subpoenaed to appear at a deposition maintain sovereign immunity from suit. The Court disagrees with this assertion as a principle of law, and furthermore holds that the defendants have not effectively pled a defense of official immunity.

PROCEDURAL HISTORY

The Court recounts the procedural history in significant detail within its previous judgment. *Order (Regarding Disc.)*, CV 08-36 (HCN Tr. Ct., Jan. 6, 2009) at 1-2. For purposes of this decision, the Court notes that the defendants, by and through Legislative Counsel Humayun Ahsan, informed the Court on January 8, 2009, that it had served discovery requests upon three (3) Executive Branch employees. *Def.'s [sic] Req. for Interrogs. & Def.'s [sic] Reqs. for Docs.*, CV 08-36 (Jan. 8, 2009); *see also Ho-Chunk Nation Rules of Civil Procedure* (hereinafter *HCN*

1 R. Civ. P.), Rules 32, 34. Also on January 8, 2009, the defendants requested that the Court issue
2 two (2) *Subpoena(s) to Appear for Deposition* and a *Subpoena Duces Tecum*. See Order
3 (*Regarding Disc.*) at 7-9; see also HCN R. Civ. P. 33. The plaintiff, by and through Attorney
4 Mark L. Goodman, likewise submitted four (4) *Subpoena(s) to Appear for Deposition* on January
5 12, 2009.¹ *Id.*

7 However, on January 16, 2009, the defendants filed the *Motion to Quash Subpoena for*
8 *Representative Garvin, Greengrass, Decorah & Judge Thompson & Motion to Dismiss*
9 (hereinafter *Motion to Quash* and *Motion to Dismiss*, respectively) accompanied by Defendant's
10 [*sic*] *Brief in Support of Motion to Quash & Motion to Dismiss* (hereinafter *Defendants' Brief*).
11 See HCN R. Civ. P. 18. Consequently, the Court issued its January 19, 2009 *Order (Motion*
12 *Hearing)* and *Notice(s) of Hearing*, which informed the parties of the date, time and location of
13 the *Motion Hearing*.² On January 23, 2009, the plaintiff submitted a *Reply to Defendants'*
14 *Motion to Quash & to Dismiss*. See HCN R. Civ. P. 19(B).

17 The Court convened the *Motion Hearing* on January 27, 2009 at 8:30 a.m. CST. The
18 following parties appeared at the *Hearing*: Gerald L. Cleveland, Jr., plaintiff; Attorney Mark L.
19 Goodman, plaintiff's counsel; and Legislative Counsel Huma Ahsan, defendants' counsel. The
20 Court announced a decision from the bench, and the defendants expressed an intent to appeal the
21 judgment.³ *Mot. Hr'g* (LPER, Jan. 27, 2009, 09:19:01, 09:26:49 CST).

24
25 ¹ The parties had earlier agreed to schedule a series of depositions to occur on Tuesday, January 27, 2009, and the
26 plaintiff informed defendants' counsel that he anticipated deposing the three (3) named defendants. *Status Hr'g*
(LPER at 4-5, Jan. 6, 2009, 01:38:06 CST). Plaintiff's counsel specifically inquired of defendants' counsel whether
the defendants would be available for deposition on January 27, 2009. *Id.* at 5, 01:42:55 CST.

27 ² The Court obliged the defendants' request that it schedule a motion hearing to occur on January 27, 2009. *Mot. to*
Quash at 2; *Defs.' Br.* at 9.

28 ³ Despite service of subpoenas upon the defendants and plaintiff's earlier inquiry regarding availability, defendants'
counsel informed the Court after its ruling that the defendants were attending a legislative meeting in Minneapolis,
MN, and, therefore, unavailable for deposition. LPER, 09:27:03 CST. The defendants never previously indicated a
conflict with the legislative schedule. *Defs.' Br.*

1 **APPLICABLE LAW**

2
3 **CONSTITUTION OF THE HO-CHUNK NATION**

4 **Art. IV - General Council**

5 Sec. 2. Delegation of Authority. The General Council hereby authorizes the legislative
6 branch to make laws and appropriate funds in accordance with Article V. The General Council
7 hereby authorizes the executive branch to enforce the laws and administer funds in accordance
8 with Article VI. The General Council hereby authorizes the judicial branch to interpret and
9 apply the laws and Constitution of the Nation in accordance with Article VII.

10 **Art. V - Legislature**

11 Sec. 2. Powers of the Legislature. The Legislature shall have the power:

12 (b) To establish Executive Departments, and to delegate legislative powers to the Executive
13 Branch to be administered by such Departments, in accordance with the law; any Department
14 established by the Legislature shall be administered by the Executive; the Legislature reserves
15 the power to review any action taken by virtue of such delegated power;

16 (d) To authorize expenditures by law and appropriate funds to the various Departments in an
17 annual budget;

18 Sec. 13. Budget. The Legislature shall enact an annual budget. The budget shall include
19 an appropriation of operating funds for each branch of government. The Legislature shall not
20 appropriate funds which have not been authorized by law. No item shall be included in the
21 budget if it is not authorized by law.

22 **Art. VI - Executive**

23 Sec. 2. Powers of the President. The President shall have the power:

24 (a) To executed and administer the laws of the Ho-Chunk Nation;

25 (d) To administer all Departments, boards, and committees created by the Legislature;

26 **Art. VII - Judiciary**

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

1 Sec. 5. Jurisdiction of the Judiciary.

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

7 Art. XII - Sovereign Immunity

8 Sec. 1. Immunity of Nation from Suit. The Ho-Chunk Nation shall be immune from suit
9 except to the extent that the Legislature expressly waives its sovereign immunity, and official
10 and employees of the Ho-Chunk Nation acting within the scope of their duties or authority shall
11 be immune from suit.

11 Sec. 2. Suit Against Officials and Employees. Officials and employees of the Ho-Chunk
12 Nation who act beyond the scope of their duties or authority shall be subject to suit in equity only
13 for declaratory and non-monetary injunctive relief in Tribal Court by persons subject to its
14 jurisdiction for purposes of enforcing rights and duties established by this constitution or other
15 applicable laws.

15 HO-CHUNK NATION DEPARTMENT OF JUSTICE ESTABLISHMENT &
16 ORGANIZATION ACT OF 2001, 1 HCC § 8

17 Subsec. 4. Functions. The Department of Justice shall:

- 18 a. Defend the sovereignty of the Nation.
- 19 b. Provide expert legal advice and competent representation for all Branches of the
20 Nation on those matters that concern the Nation's interests and welfare.
- 21 c. Represent the Nation in Tribal, State, and Federal forums.

22 TRIAL CLAIMS ACT OF 2006, 2 HCC § 17

23 Subsec. 2. Purpose.

24 c. An administrative claims procedure that requires the presentation of a claim to an
25 administrative body, before entering into negotiations with the Legislature, will reduce litigation
26 against the Nation, protect the Nation's assets, and expedite the payment of legitimate claims and
27 money damages due to governmental entities arising from breaches of compact, contract or the
28 negligent acts of the Nation's employees.

1 d. The purpose of this Act is to establish an administrative procedure by which any
2 Federal, State, or local public entity who believes the Nation owes them money as a result of a
3 breach of compact, contract or damage are required to submit an administrative claim to the
4 Claims Against Nation Administrative Board to allow it to consider the merits of the claim and
5 either approve or reject the claim as a precondition of entering into binding negotiation with the
6 Legislature.

5 Subsec. Scope.

6 a. This Act is intended to provide a forum for the Nation to be made aware of
7 potential claims against it prior to the Legislature entering into binding negotiations with a
8 sovereign entity.

9 Subsec. 6. Claims Subject to Filing Requirements.

10 a. All claims against the Nation, its officers, agents and employees, or any of its
11 business enterprises brought by a claimant for money or damages or for an alleged breach of a
12 compact or contract, shall be presented to a Claims Against Nation Administrative Board and
13 acted upon as a prerequisite to the claimant entering into binding negotiation with the Legislature
14 as further provided in this Act. All such claims shall be presented as required by this Act and in
15 the time periods specified therein.

14 HO-CHUNK NATION RULES OF CIVIL PROCEDURE

15 Ch. II - Beginning an Action

16 Rule 6. Answering a Complaint. A party against whom a *Complaint* has been made shall
17 have twenty (20) calendar days from the date the *Summons* is issued, or from the last date of
18 service by publication, to file an *Answer* with the Clerk of Court. The *Answer* shall use short and
19 plain statements to admit, admit in part, or deny each statement in the *Complaint*, assert any and
20 all claims against the other parties arising from the same facts or circumstances as the *Complaint*
21 and state any defenses to the *Complaint*. The *Complaint* must contain the full names of all
22 parties and any counsel. The *Answer* must be signed by the party or his or her counsel and
23 contain their full names and addresses, as well as a telephone number at which they may not be
24 contacted. An *Answer* shall be served on other parties and may be served by mail. A *Certificate*
25 of *Service* shall be filed as required by Rule 5(B).

24 Rule 7. Defenses and Counterclaims.

25 A defense that alleges new facts excusing the conduct of the defendants if statements in the
26 *Complaint* are true must be affirmatively stated. *Counterclaims* arising from the same facts or
27 circumstances as alleged in the *Complaint* shall be raised in the *Answer*. If a party fails to raise
28 such *Counterclaims*, he/she shall be forever barred from bringing them to the Court in a future
action. Other claims against parties in the action may also be raised in the *Answer*. A party may
file a response to counterclaims raised in the *Answer*, but is not required to do so.

1 Rule 8. Requests to Appear before the Traditional Court.

2 (A) Requests to Transfer Case to Traditional Court. Whenever a party or parties have a right to
3 be heard by the Trial Court, a party may request to appear before the Traditional Court on
4 matters related to custom and tradition of the Ho-Chunk Nation. All parties involved in the
5 dispute must voluntarily consent to appear before the Traditional Court and to be bound by its
6 decision. A party or parties that bring an action before the Trial Court may elect to appear before
7 the Traditional Court at any time.

8 (B) Requests for Assistance on Matters of Custom and Tradition. Upon a motion of the Court of
9 by a party, the Trial Court may request assistance from the Traditional Court on matters relating
10 to custom and tradition of the Nation, pursuant to the HO-CHUNK NATION JUDICIARY
11 ESTABLISHMENT AND ORGANIZATION ACT, 1 HCC § 1.12.

12 Ch. III - General Rules for Pleading

13 Rule 18. Types of Motions.

14 *Motions* are requests directed to the Court and must be in writing except for those made in Court.
15 *Motions* based on factual matters shall be supported by affidavits, references to other documents,
16 testimony, exhibits or other material already in the Court record. *Motions* based on legal matters
17 shall contain or be supported by a legal memorandum, which states the issues and legal basis
18 relied on by the moving party. The *Motions* referenced within these rules shall not be considered
19 exhaustive of the *Motions* available to litigants.

20 Rule 19. Filing and Responding to Motions.

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

25 Ch. V - Discovery

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

1 Rule 32. Interrogatories.

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

5 Rule 33. Depositions.

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

10 Rule 34. Requests for Documents and Things.

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

14
15 **FINDINGS OF FACT⁴**

16 1. The Court incorporates by reference *Findings of Fact* 1-2 as enumerated in a previous
17 decision. *Order (Regarding Disc.)* at 1-2.

18 2. On August 6, 2008, the defendants filed the initial responsive pleading in which the
19 following defense is asserted: "The HCN Constitution provides that officials and employees of
20 the Ho-Chunk Nation acting within the scope of their duties shall be immune from suit." *Defs.*
21 *Answer*, CV 08-36 (Aug. 6, 2008) (citing CONSTITUTION OF THE HO-CHUNK NATION (hereinafter
22 CONSTITUTION), ART. XII, § 1).

23 3. On December 1, 2008, the plaintiff alleged in his amended pleading that the defendants
24 acted outside the scope of their duties or authority. *Am. Compl.*, CV 08-36 (Dec. 1, 2008) at 5.
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⁴The Court includes the below cursory findings to illustrate the dearth of relevant facts available in the instant case due, in part, to the absence of any meaningful discovery conducted by the parties.

1 4. On December 11, 2008, the defendants filed the amended responsive pleading in which
2 they reiterate the above defense. *Defs.' Am. Answer*, CV 08-36 (Dec. 11, 2008) at 2.

3
4 5. On January 16, 2009, the defendants offered the following clarification of the above-
5 asserted defenses:

6 The problem in this case is that the Government officials the Plaintiff has
7 served with unsigned subpoenas are protected and shielded by Sovereign
8 immunity, which they and the Ho-Chunk Legislature have not expressly
9 waived. If the Court were to require these government officials to testify,
10 the Court would in fact be forcing the Defendant's [*sic*] to waive the very
11 defense they are asserting. . . . Therefore, since the Defendant's [*sic*] were
12 protected by the doctrine of Sovereign Immunity when the subpoenas
13 were served, the defendants move that the plaintiff's subpoenas be
14 quashed. Further, since the plaintiff will not be able to overcome the
15 sovereign immunity barrier, he can not thusly force or compel testimony
16 from these protected government officials: Representative Greengrass,
17 Garvin, Decorah and Judge Thompson. Thusly, the Court should quash
18 the subpoenas for Representative Greengrass, Garvin, Decorah and Judge
19 Thompson.

20 *Def's.' Br.* at 14-15. The defendants cite two (2) external authorities to corroborate the assertion
21 that "[t]ribal immunity does protect tribal officials when acting in their official capacity and
22 within their scope of authority." *Id.* at 14 (citing *Davis v. Littell*, 398 F.2d 83, 84-85 (9th Cir.
23 1968);⁵ *Niagara Power Corp. v. Tonawanda Band of Seneca Indians*, 862 F. Supp. 995, 1002,
24 (W.D.N.Y. 1994)).⁶

25 ⁵ In *Davis*, the Ninth Circuit Court of Appeals was called upon to determine whether the Navajo Nation possessed
26 the authority to, and actually did, confer absolute executive immunity upon the General Counsel for the tribe.
27 *Davis*, 398 F.2d at 84-85. The *Davis* Court answered this question in the affirmative by surmising that although the
28 Navajo Nation had "not done so in its Tribal Code, nor, so far as we are informed, by any decision of its Tribal
Court," the Navajo Code did include a provision suggesting that "under such circumstances [it would] be guided by
federal or appropriate state law," which recognized absolute executive immunity. *Id.* at 84. The *Davis* decision
does not stand for the proposition that a tribal official shares the sovereign immunity of the tribe, and also does not
address absolute legislative or judicial immunities.

⁶ The federal district court does not address official immunity in the slightest within its brief decision, which merely
"adopts the proposed findings of the [Magistrate Judge's] Report and Recommendation" without any legal analysis.
Niagara Power Corp., 862 F. Supp. at 998. "Accordingly, for the reasons set forth in Magistrate Judge Heckman's
Report and Recommendation[, which remain entirely unknown], the Court . . . dismiss[e]d the action for lack of
federal question jurisdiction, and in the alternative, for lack of subject matter jurisdiction based on foreign
immunity." *Id.* One cannot discern from the opinion the application, manner or extent of the tribal defendants'
foreign immunity.

1 6. The defendants cite no other tribal authority for its contention that the defendants and
2 Traditional Court member Preston L. Thompson, Jr. maintain sovereign immunity, and,
3 therefore, cannot be subject to deposition.
4

5 7. On January 12, 2009, the plaintiff mailed unsigned copies of the *Subpoenas(s) to Appear*
6 *for Deposition* to the defendants, thereby affording a greater degree of notice, but the presiding
7 judge subsequently affixed his signature to these documents prior to directing judicial
8 administrative staff to perform personal service.
9

10 8. President Wilfrid Cleveland directed the issuance of a check made payable to the plaintiff
11 in the amount of \$5,000.00 on or about April 17, 2008, and on two (2) subsequent occasions,
12 deducting said amount from an Executive Branch sponsorship line item. *Mot. Hr'g* (LPER,
13 08:55:12 CST); *Defs.' Br.* at 2; *Am. Compl.* at 3; *Aff. of Wilfrid Cleveland*, CV 08-36 (Nov. 12,
14 2008) at 2-3.
15

16 9. Thereafter, one or more of the defendants refused to sign the check on at least three (3)
17 occasions. *Defs.' Br.* at 2-3; *Defs.' Am. Answer* at 1-2; *Am. Compl.* at 3-4; *Aff. of Wilfrid*
18 *Cleveland* at 2-3.
19

20 10. The defendants proffered the following justifications for refusing to sign the check:

21 a. On April 21, 2008, the Ho-Chunk Nation Traditional Court pronounced its
22 recommendation "that to sponsor or fund special projects within the meaning of traditions does
23 not include pow-wows or other activities away from our country."⁷ *Aff. of Representative*
24 *Roberta Decorah*, CV 08-36 (Dec. 30, 2008) at 1; *Aff. of Representative Elliot Garvin*, CV 08-36
25

26 _____
27 ⁷ The accompanying affidavits refer to the Traditional Court proclamation as an "Order," but this seems to
28 misconstrue the character of this document, which internally refers to itself as a recommendation. The Traditional
Court has never exercised jurisdiction over the present case, and neither the parties nor the Court formally sought
assistance from the Traditional Court in connection with this action. *See HCN R. Civ. P.* 8(A-B). Nonetheless, the
characterization of the Traditional Court decision should not detract from its authoritativeness, provided that the
funding request relied entirely upon an erroneous depiction of tradition and custom, which is unknown.

1 (Dec. 30, 2008) at 1; *Aff. of Representative Douglas Greengrass*, CV 08-36 (Dec. 29, 2008) at
2 1.⁸

3 b. The defendants maintain that the Legislature has the constitutional “power to
4 review any action” of the Executive Branch by virtue of an unspecified delegation of legislative
5 power.⁹ *Id.* (quoting CONST., ART. V, § 2(b)).

7 11. The Court has no evidence demonstrating the number of times, if any, that the Legislature
8 has “sponsor[ed] or fund[ed] special projects . . . , includ[ing] pow-wows or other activities away
9 from our country.” *Aff(s). of Representative(s) Decorah, Garvin & Greengrass* at 1.

11 12. Prior to the presidential directive, the Community Relations Committee denied the
12 funding request. *Def’s.’ Br.* at 2. The defendants contend that the Committee was created by the
13 Ho-Chunk Nation Legislature since a draft version of its by-laws indicates that “[t]he
14 Community Relations Fund was created by the Ho-Chunk Nation Legislature” *Mot. Hr’g*
15 (LPER, 08:55:53 CST) (citing *Def’s.’ Br.*, Attach. B at 1). No evidence exists demonstrating the
16 finality of the by-laws or whether the President would lack authority to modify or bypass the
17 draft, or final, procedures.

19 13. Moreover, the defendants are unaware if the President could independently allocate
20 funds from the Executive Branch sponsorship line item in question. *Id.*, 08:55:29 CST. The
21

22 ⁸ Each affiant asserts that he or she is “a traditional person, who lives by traditions and customs that were reserved
23 to us through the centuries.” *Aff(s). of Representative(s) Decorah, Garvin & Greengrass* at 1-2.

24 ⁹ The Court has never sanctioned the oft-presented constitutional interpretation that the Legislature maintains
25 authority to review, scrutinize and possibly reverse Executive Branch decisions merely on the basis that it budgeted
26 a source of funds, which the Legislature is compelled to do. *See Clarence Pettibone v. HCN Legislature et al.*, CV
27 01-84 (HCN Tr. Ct., May 15, 2002) at 14 n.3; *see also* CONST., ART. V, § 13. While the Legislature holds the power
28 “[t]o authorize expenditures by law and appropriate funds . . . in an annual budget,” the Court is unaware of whether
the Legislature has delegated this power to the President, *i.e.*, has the President received legislative authorization to
enact statutes regarding funding expenditures? The Constitution does not contain any check signing provisions, and
Legislator Lawrence L. Walker, Jr. also acknowledged that “the Nation does not have standing operating procedures
on the authority and the procedures of what Legislators can and can not do regarding the signing of checks.” *Aff. of*
Representative Lawrence Walker, CV 08-36 (Dec. 30, 2008) at 1. However, the Ho-Chunk Nation General Council
has clearly “authorize[d] the executive branch to . . . administer funds.” CONST., ART. IV, § 2; *see also* *Parmenton*
Decorah v. HCN Legislature et al., CV 99-08 (HCN Tr. Ct., July 1, 1999) at 10.

1 defendants nonetheless earlier argued that “[t]he President does not have the authority to usurp
2 the retained appropriation powers of the Legislature by forcing the legislatively created
3 Community Relations Committee to commit an act, which is in direct violation of its own
4 procedures and by-laws.”¹⁰ *Id.*, 08:41:18 CST.

6 14. The defendants presented no constitutional history to aid in interpreting Article XII of the
7 CONSTITUTION.

9 DECISION

10 The Court shall summarily address some of the grounds for the defendants’ *Motion to*
11 *Dismiss* since the Court regards the dispositive motion as premature for reasons made apparent
12 by the above factual findings. The President may indeed possess the authority to direct the
13 issuance of checks from the sponsorship line item. At this point, none of the parties have this
14 information, possibly because the discovery process has failed to yield any demonstrable results.
15 Also, the defendants have apparently relied upon the CRC by-laws for refusing to sign the check,
16 but the Court remains unaware of whether these by-laws are presently in effect or binding upon
17 the actions of the President. These facts could drastically impact the outcome of this case.

20 Regardless, the defendants contend that the plaintiff’s alleged injury is not traceable to
21 the defendants’ actions, arguing that “[t]he problem here with the Plaintiff’s case is that
22 ultimately he is seeking the Court to compel the Legislature to appropriate [the] monetary
23 amount of \$5,000, which he is not entitle [*sic*] to because his request was process [*sic*] and
24 denied.” *Def’s.’ Br.* at 22 (citing *Pettibone*, CV 01-84 at 10). Yet, as reflected above, the CRC
25

27 ¹⁰ In this case, the defendants directly challenge the authority of the President, and the Court cannot ascertain why he
28 selects not to join the litigation. *Mot. Hr’g* (LPER, 08:54:37 CST). Attorney General Sheila D. Corbine has already
acknowledged in a December 23, 2008 correspondence that “the core set of facts and actions in this case touch on
separation of powers issues . . . , deriv[ing] directly from competing actions taken by [the] Executive Branch and the
Legislative Branch.”

1 denial may not prove dispositive in this case. Moreover, in most instances, a plaintiff easily
2 satisfies a standing inquiry at a motion to dismiss phase, especially prior to any meaningful
3 discovery. *See, e.g., Warth v. Seldin*, 422 U.S. 490, 501 (1975); *NCAA v. Califano*, 622 F.2d
4 1382, 1392 (10th Cir. 1980) (requiring that pleading allegations relating to standing be favorably
5 construed when considering a motion to dismiss).
6

7 The defendants additionally assert that the plaintiff suffered no injury when the
8 defendants' actions denied him the receipt of \$5,000.00. *Defs.' Br.* at 21 (citing *Pettibone*, CV
9 01-84 at 10). The defendants conclude that "[t]he Plaintiff was intending to go th[e] Pow-wow
10 prior to contacting the Legislature." *Id.* The Court fails to see how this or similar observations
11 tend to negate the alleged deprivation. The plaintiff believed that the expected contribution from
12 the Office of the President would assist in offsetting costs of attendance and participation, and
13 this harm has not necessarily ceased because the plaintiff alternatively provided for these costs.
14 The Court has insufficient facts to render such a determination.
15

16 The defendants' remaining arguments for the *Motion to Dismiss* coincide with the
17 grounds for the *Motion to Quash* with a single exception. The defendants argue that the Court
18 cannot entertain the instant suit since the plaintiff failed to adhere to the dictates of the TRIAL
19 CLAIMS ACT OF 2006. *Defs.' Br.* at 17-20. The Court has not had previous occasion to review
20 this relatively recent piece of legislation. Several constitutional questions arise when examining
21 this statute, but the Court will refrain from a thorough critique. For purposes of responding to
22 the dispositive motion, the Court will simply note a few glaring internal inconsistencies within
23 the statute. In the "Purpose" subsection, the Legislature clearly denotes that the "administrative
24 claims procedure" exists to handle "legitimate claims and money damages due to governmental
25 entities," *i.e.*, "any Federal, State, or local public entity." TRIAL CLAIMS ACT OF 2006, 2 HCC §
26
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1 17.2c-d. Likewise, the intended scope of the act is “to provide a forum for the Nation to be made
2 aware of potential claims against it prior to the Legislature entering into binding negotiations
3 with a sovereign entity.” *Id.*, § 17.3a. These foundational subsections appear to directly
4 contradict the later “*Claims Subject to Filing Requirements*” subsection. *Id.*, § 17.6a. The Court,
5 therefore, questions the application of the statute to this fact situation since the statute itself
6 proves entirely unclear.

8 Turning to the *Motion to Quash*, the defendants insist that they maintain sovereign
9 immunity from suit, and consequently cannot be compelled to submit to a deposition. The
10 defendants also assert this defense on behalf of Traditional Court member Preston L. Thompson,
11 Jr.¹¹ As reflected above, the defendants cited two (2) federal cases in support of this proposition,
12 neither of which even prove persuasive on the limited, and largely unrelated, issues discussed
13 within each. *Supra* notes 5-6. The Court accordingly begins its examination with the text of the
14 constitutional sovereign immunity article.

17 Article XII simultaneously addresses several components of the doctrine of immunity,
18 which can be principally divided into sovereign and official categories with absolute and
19 qualified immunities falling under the latter category. CONST., ART. XII, §§ 1-2. The first
20 category of immunity, sovereign immunity, is found in Section 1, namely: “The Ho-Chunk
21 Nation shall be immune from suit except to the extent that the Legislature expressly waives its
22 sovereign immunity” *Id.*, § 1. This immunity extends to the separate branches and sub-
23 entities of the tribe. *Timothy G. Whiteagle et al. v. Alvin Cloud, Chairman of the Gen. Council of*

26 ¹¹ The Court earlier questioned the absence of the Ho-Chunk Nation Department of Justice since it is charged with
27 providing legal counsel for both tribal entities and officials. *Order (Regarding Disc.)* at 2 n.2; *see also* DOJ
28 ESTABLISHMENT & ORG. ACT OF 2001, 1 HCC § 8.4a-c. The DOJ has previously facilitated the appointment of
outside counsel when confronted with a conflict of interest, and this may have been the better practice in this
instance. The Court questions the authority of Legislative Counsel to assert immunity on behalf of a member of the
Judiciary when not under an obligation to “[p]rovide . . . competent representation for all Branches of the Nation.”
Id., § 8.4b.

1 Oct. 11, 2003, in his official capacity, et al., SU 04-06 (HCN S. Ct., Jan. 3, 2005) at 6; *Chloris A.*
2 *Lowe, Jr. v. Ho-Chunk Nation et al.*, SU 97-01 (HCN S. Ct., June 13, 1997) at 3-4. However,
3 this immunity does not automatically extend to encompass individuals.
4

5 That being said, the second clause of Section 1 provides that “officials and employees of
6 the Ho-Chunk Nation acting within the scope of their duties or authority shall be immune from
7 suit.” CONST., ART. XII, § 1. The constitutional text does not indicate whether this form of
8 immunity is either sovereign or official, but a line of federal case law does allow the immunity of
9 the sovereign to extend to certain actions of its officials and employees. These cases typically
10 involve complicated factual scenarios focusing upon an absence of alleged wrongful conduct by
11 the individual defendant, *Larson v. Domestic & Foreign Corp.*, 337 U.S. 682, 686 (1949), or,
12 more usually, a request of significant monetary damages payable from the state treasury for past
13 harms perpetrated by individual officers whose course of conduct was subsequently adjudged to
14 offend previously vested rights. *Edelman v. Jordan*, 415 U.S. 651, 668 (1974).
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17 Oft-cited admonitions have arisen from these cases, such as:

18 If the denomination of the party defendant by the plaintiff were the sole
19 test of whether a suit was against the officer individually or against his
20 principal, the sovereign, our task would be easy. . . . [I]t has long been
21 established that the crucial question is whether the relief sought in a suit
22 nominally addressed to the officer is relief against the sovereign.

23 *Larson*, 337 U.S. at 687. Similarly, “[w]hen the action is in essence one for the recovery of
24 money from the state, the state is the real, substantial party in interest and is entitled to invoke its
25 sovereign immunity from suit even though individual officers are nominal defendants.”
26 *Edelman*, 415 U.S. at 663 (quoting *Ford Motor Co. v. Dep't of Treas.*, 323 U.S. 459, 464
27 (1945)).¹² The Court, however, could not locate a single case involving a charitable contribution
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¹² These rationales have also appeared in federal case law regarding Indian tribes. See, e.g., *Cook v. AVI Casino Enters., Inc.*, 548 F.3d 718, 726-27 (9th Cir. 2008).

1 initially approved by the sovereign, but subsequently withheld by sovereign actors. In such an
2 instance, the Court questions whether the relief sought could be properly regarded as a
3 retroactive damage award. And, as discussed below, the plaintiff may select to amend his
4 pleading after the conclusion of discovery, including the request for relief.
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6 The defendants were unrelenting in their assertion that they maintained sovereign
7 immunity from suit. The defendants, however, did not present anything resembling the above
8 discussion. First and foremost, the Court must be capable of determining whether an official or
9 employee has acted in conformance with his or her constitutional or statutory scope of authority.
10 CONST., ART. XII, § 1. The Court cannot discern whether an official or employee remains
11 underneath the umbrella of sovereign immunity absent meaningful fact-finding, which has not
12 occurred in this case. The plaintiff wishes to depose the defendants in an effort to deduce facts
13 that might substantiate his legal theory. The defendants, alternatively, wish to deny this ability,
14 and force the Court to resolve a constitutional case on uncertain and incomplete facts. Tribal
15 attorneys uniformly assert that an official is acting within the scope of his or her duties and
16 authority, but this assertion is seldom accepted at face value. A judicial determination must
17 occur, which does not necessarily focus upon the intent of the official or employee. *See Idaho v.*
18 *Coeur d'Alene Tribe*, 521 U.S. 261, 312 (1997) (Souter, J., dissenting).
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22 Moreover, the Supreme Court has never held that the second clause in Section 1 refers to
23 a species of sovereign immunity. Instead, the Supreme Court has suggested that Section 1
24 references official immunity, and Section 2 incorporates an exception to this type of immunity.
25 *Lowe, Jr.*, SU 97-01 at 4 n.2. In choosing to cite *Davis*, the defendants likewise introduce a
26 species of official immunity into the examination. The defendants confusingly choose to rely
27 upon a case dealing with absolute executive immunity, but the federal courts have recognized
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1 several forms of official absolute immunity. Most importantly, however, the Ho-Chunk
2 Judiciary has never recognized the constitutional presence of any form of absolute immunity.

3 Relevant for our purposes, the doctrine of absolute legislative immunity, as it pertains to
4 the United States Congress, is founded in the Speech and Debate Clause.¹³ *Eastland v. U.S.*
5 *Serviceman's Fund*, 421 U.S. 491, 503, -07 (1975); *Barr v. Matteo*, 360 U.S. 564, 569 (1959).
6 Specifically, “for any Speech or Debate in either House, [the Senators and Representatives] shall
7 not be questioned in any other Place.” U.S. CONST., art. I, § 6, cl. 1. Our constitutional text
8 contains no such clause, so any claim of absolute legislative immunity must derive from some
9 other source.
10

11
12 In 1951, the United States Supreme Court first extended a common law version of
13 legislative immunity to state legislators. *Tenny v. Brandhove*, 341 US 367 (1951). The *Tenny*
14 Court held state legislators absolutely immune from civil suits provided they acted within “the
15 sphere of legitimate legislative activity.” *Id.* at 376. Legislative immunity is the freedom of the
16 legislator from not only the results of litigation, but also the burden of defending themselves.
17 *Dombrowski v. Eastland*, 387 US 82, 85 (1967). If immunity from civil liability attaches to an
18 action, then legislators receive immunity from testifying as well. *2BD Assocs. Ltd. P’ship v.*
19 *County Comm’rs for Queen Anne’s County*, 896 F. Supp. 528, 531 (D. Md. 1995).
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21
22 When determining whether to accept a claim of absolute legislative immunity, courts
23 focus upon the nature of the legislator’s actions. A state legislator does not receive legislative
24 immunity for decidedly administrative actions. *Id.* at 532. Instead, “[a] local governmental body
25 acts in a legislative capacity when it engages in the process of adopting prospective legislative-
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28 ¹³ The federal courts acknowledge the presence of several forms of official absolute immunity. *See Harlow v. Fitzgerald*, 457 U.S. 800 (1982) (upper-echelon Executive Branch immunity); *Nixon v. Fitzgerald*, 457 U.S. 731 (1982) (presidential immunity); *Imbler v. Pachtman*, 424 U.S. 409 (1976) (prosecutorial immunity); *Pierson v. Ray*, 386 U.S. 547 (1967) (judicial immunity).

1 type rules.” *Roberson v. Mullins*, 29 F.3d 132, 135 (4th Cir. 1994); *see also Brown v.*
2 *Griesenauer*, 970 F.2d 431, 437 (8th Cir. 1992); *Acevedo-Cordero v. Cordero-Santiago*, 958
3 F.2d 20, 23 (1st Cir. 1992); *Hughes v. Tarrant County*, 948 F.2d 918, 921 (5th Cir. 1991);
4 *Crymes v. DeKalb County*, 923 F.2d 1482, 1485 (11th Cir. 1991); *Ryan v. Burlington County*,
5 889 F.2d 1286, 1290-91 (3rd Cir. 1989); *Haskell v. Washington Township*, 864 F.2d 1266, 1278
6 (6th Cir. 1988); *Cinevision Corp. v. Burbank*, 745 F.2d 560, 580 (9th Cir. 1984) *cert. denied*, 471
7 U.S. 1054 (1985).

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9 One court suggests two (2) tests for determining whether or not an action is legislative:

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11 The first test focuses on the nature of the facts used to reach the given
12 decision; if those facts are “generalizations concerning a policy or state of
13 affairs,” then the decision is legislative. On the other hand, if those facts
14 are specific, such as those relating to particular individuals or situations,
15 then the decision is administrative. The second test focuses on the
16 “particularity of the impact of the state of action.” If the action establishes
17 general policy, it is legislative; if, on the other hand, it “single[s] out
18 specifiable individuals and affect[s] them differently from others,” the
19 action is administrative. Those tests for differentiating between
administrative and legislative acts are set forth in the article in connection
with requirements of procedural due process in an administrative as
opposed to a legislative setting, and are formulated to be “responsive in all
cases to the due process interests in efficiency, representation and
dignity.”

20 *2BD Assocs. Ltd. P’ship*, 896 F. Supp at 533 (citations omitted). The Court shall refrain from
21 employing either of these tests in the present case.¹⁴ As stated earlier, the Court has never
22 recognized the existence of absolute legislative immunity from suit, and, if not premised on a
23 constitutional provision, then the Court must find the concept within the Nation’s common law.
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28 ¹⁴ The Court shall likewise refrain from determining whether Traditional Court member Thompson enjoys absolute
judicial immunity from offering deposition testimony. Not only has the Court never recognized this defense, the
Traditional Court acted in an advisory capacity on April 21, 2008, and not in connection with a pending case or
controversy.

1 The Court has not performed a full-scale adoption of another jurisdiction’s common law.
2 Rather, the Court develops its own common law on the basis of articulated tradition and
3 custom.¹⁵ *See, e.g., Dorothy G. Decorah v. Kim L. Whitegull*, CV 02-17 (HCN Tr. Ct., Mar. 1,
4 2002); *see also* CONST., ART. VII, § 5(a). The defendants have not presented an argument that a
5 corollary to absolute legislative immunity existed in tribal tradition and custom. Additionally,
6 neither party has received an opportunity to argue whether the act in question represented a
7 legislative or administrative decision.
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9
10 Despite the foregoing, the Supreme Court may have hinted at a third interpretation of
11 Section 1 based upon its plain language. *Lowe, Jr.*, SU 97-01 at 4 n.2. The Supreme Court has
12 repeatedly espoused a straightforward textual approach to constitutional interpretation. *See, e.g.,*
13 *Chloris Lowe, Jr. et al. v. HCN Legislature Members Elliot Garvin et al.*, SU 00-17 (HCN S. Ct.,
14 Mar. 13, 2001) at 6; *HCN Election Bd. et al. v. Aurelia L. Hopinkah*, SU 98-08 (HCN S. Ct.,
15 Apr. 7, 1999) at 4. Quite simply, tribal employees maintain official immunity from suit unless
16 the plaintiff establishes that the individuals have “act[ed] beyond the scope of their duties or
17 authority.” CONST., ART. XII, § 2. In that instance, a plaintiff could receive “declaratory and
18 non-monetary injunctive relief.” *Id.*
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21 Whether the officials or employees act under the umbrella of sovereign immunity or
22 possess some form of general official immunity from suit, the Court still must engage in fact-
23 finding to deduce the presence of an alleged constitutional or statutory violation. Yet, the
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26 ¹⁵ In certain instances, the Court has adopted common law defenses to equitable claims since the CONSTITUTION
27 confers “original jurisdiction over . . . cases and controversies . . . in equity” upon the Judiciary. CONST., ART. VII,
28 § 5(a). For example, in 1997, the Court adopted the common law doctrine of laches. *Steve B. Funmaker v. JoAnn*
Jones et al., CV 97-72 (HCN Tr. Ct., Nov. 26, 1997) at 14; *see also HCN Gaming Comm'n v. Wallace Johnson*, SU
98-05 (HCN S. Ct., Oct. 21, 1998) (accepting the Court’s adoption of the doctrine of laches). These cases, however,
preceded the Judicial Branch’s seminal decision regarding the constitutional scope of its subject matter jurisdiction.
Ho-Chunk Nation v. Harry Steindorf et al., CV 99-82 (HCN Tr. Ct., Feb. 11, 2000), *aff’d*, SU 00-04 (HCN S. Ct.,
Sept. 29, 2000).

1 defendants seem to desire a construct whereby only the defendants can perform discovery.¹⁶ *But*
2 *see HCN R. Civ. P.*, Ch. V, Intro. As demonstrated above, only the presence of absolute official
3 immunity would preclude attendance at the scheduled depositions. The defendants, however,
4 failed to plead this form of immunity, which, again, does not presently exist in this jurisdiction.
5

6 In concluding the examination of Article XII, the Court has long recognized that Section
7 2 embodies the *Ex Parte Young* doctrine.¹⁷ *See Lonnie Simplot et al. v. HCN Dep't of Health,*
8 *CV 95-26-27, 96-05 (HCN Tr. Ct., Aug. 13, 1999)* at 13 (citing *Ex Parte Young*, 209 U.S. 123
9 (1908)). In order to receive relief, a plaintiff must overcome the substantial hurdle of proving
10 that an official or employee acted *ultra vires*, *i.e.*, beyond his or her powers. When successful, a
11 party may obtain a remedy “in the nature of prospective forward relief, not damages to punish
12 the defendant . . . for . . . past wrongs.” *Hope B. Smith v. Ho-Chunk Nation*, SU 03-08 (HCN S.
13 Ct., Dec. 8, 2003) at 11; *see also Robert A. Mudd v. HCN Legislature: Elliot Garvin et al.*, SU
14 03-02 (HCN S. Ct., Apr. 8, 2003) at 6 n.2.
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16

17 In this regard, the defendants claim that the plaintiff seeks an award of damages, but the
18 Court disagrees with this characterization. To reiterate, President Cleveland may have properly
19 exercised his authority in directing the issuance of the check. Furthermore, the defendants may
20 have lacked authority or discretion to refuse signing the check. The Court currently lacks the
21 necessary facts to determine either of these issues. If the plaintiff succeeds in satisfying his
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24 ¹⁶The defendants did not express any philosophical qualms about seeking to compel Executive Branch employees to
25 submit discovery responses even though such individuals would have similarly possessed sovereign immunity under
26 the defendants’ argument. *Def’s [sic] Mot. to Compell [sic] Disc. from Jeriah Rave, Anne Thundercloud, Lisa Flick,*
27 *& Caralee Murphy*, CV 08-36 (Dec. 30, 2008).

28 ¹⁷Federal courts have permitted a direct claim for money damages against an official under limited circumstances.
An official would raise a defense of qualified or “good faith” immunity to defeat such a cause of action, and a court
would need to assess whether the official’s actions violated a “clearly established” legal duty. *See Harlow*, 457 U.S.
at 818-19. The CONSTITUTION appears to foreclose this type of claim, but, in any event, the plaintiff does not
present a claim for individual liability. “[Q]ualified immunity only immunizes defendants from monetary
damages.” *Williams v. Kentucky*, 24 F.3d 15261541 (6th Cir. 1994); *see also Rivera-Ruiz v. Gonzalez-Rivera*, 983
F.2d 332335 (1st Cir. 1993).

1 burden of proof, then the Court may enjoin the defendants to sign the check. The Court certainly
2 recognizes the monetary character of such a judgment, but does not deem this manner of relief as
3 a damage award against the Nation. *See Ronald K. Kirkwood v. Francis Decorah, in his official*
4 *capacity as Dir. of HCN Hous. Dep't, et al., CV 04-33 (HCN Tr. Ct., July 27, 2006).*
5 Alternatively, the Supreme Court has condoned a litigant's request for a stand alone declaratory
6 judgment. *Whiteagle, SU 04-06 at 10-11.* The President has demonstrated a willingness to
7 reissue the check in question, and a plaintiff routinely receives the ability to amend his or her
8 pleading following the discovery period. *Scheduling Order, CV 08-36 (HCN Tr. Ct., Nov. 18,*
9 *2008) at 4.*

12 In conclusion, the plaintiff has attempted to utilize the discovery process in the same
13 manner as the defendants. There exists not the slightest insinuation that plaintiff's counsel
14 would conduct the depositions in an unnecessarily combative or disrespectful manner. The
15 defendants' assertion of sovereign immunity is premature, and the confused assertion of absolute
16 official immunity is not recognized in this jurisdiction. The Court, therefore, holds that the
17 defendants must comply with the plaintiff's deposition requests, which he must obviously renew
18 due to the previous refusal. The Court accordingly denies the defendants' *Motion to Quash.*

21 **IT IS SO ORDERED** this 2nd day of February 2009, by the Ho-Chunk Nation Trial
22 Court located in Black River Falls, WI within the sovereign lands of the Ho-Chunk Nation.

25 _____
26 Honorable Todd R. Matha
27 Chief Trial Court Judge
28

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