

1 *Motion to Dismiss of [sic] Counterclaim* on May 12, 2006.¹ *See id.* at 8. On May 17, 2006, the
2 plaintiffs filed a timely reply. *Id.*

3 The Court convened the *Pre-Trial Conference/Motion Hearing* on May 23, 2006 at 9:00
4 a.m. CDT. *Id.* at 9. The following parties appeared at the *Conference/Hearing*: Ho-Chunk
5 Nation Department of Justice (hereinafter DOJ) Attorney Michael P. Murphy, plaintiffs' counsel,
6 and Brian Newlun, defendant's agent. The Court dismissed the defendant's counterclaim from
7 the bench.²

9 The Court convened *Trial* on June 13, 2006 at 9:00 a.m. CDT. *Id.* The following parties
10 appeared at *Trial*: DOJ Attorney Michael P. Murphy, plaintiffs' counsel, and Brian Newlun,
11 defendant's agent. At *Trial*, the plaintiffs agreed to present the Court with statutory law cited to
12 during the proceeding, which the DOJ subsequently submitted on September 28, 2006. *Trial*
13 (LPER, June 13, 2006, 05:02:49 CDT).

14 **APPLICABLE LAW**

15 **CONSTITUTION OF THE HO-CHUNK NATION**

16 **Art. V - Legislature**

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

18 (a) To make laws, including codes, ordinances, resolutions, and statutes;

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¹ The defendant earlier asserted a counterclaim within its October 13, 2005 responsive pleading. *Answer & Affirmative Defenses to Compl.*, CV 05-82 (Oct. 13, 2005); *see also Ho-Chunk Nation Rules of Civil Procedure* (hereinafter *HCN R. Civ. P.*), Rule 7. On March 13, 2006, the plaintiffs filed the *Plaintiffs' Response in Opposition to Motion to Dismiss & Counterclaims*, which constituted a motion in regards to the counterclaim. *See HCN R. Civ. P.* 18.

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² The Court dismissed the defendant's counterclaim against the plaintiffs for money damages due to the presence of sovereign immunity from suit and the absence of a legislative waiver of such immunity. *Pre-Trial Conference/Mot. Hr'g* (LPER at 6-8, May 23, 2006, 09:17:07 CDT) (citing CONSTITUTION OF THE HO-CHUNK NATION (hereinafter CONSTITUTION), ARTS. VII, § 5, XII, § 2); *see also Millie Decorah, as Fin. Dir. of the HCN,, et al. v. Joan Whitewater*, SU 98-02 (HCN S. Ct., Oct. 26, 1998) at 4.

1 (i) To negotiate and enter into treaties, compacts, contracts, and agreements with other
2 governments, organizations, or individuals;

3 Art. VI - Executive

4 Sec. 1. Composition of the Executive.

5 (b) The Executive Branch shall be composed of any administrative Departments created by
6 the Legislature, including a Department of the Treasury, Justice, Administration, Housing,
7 Business, Health and Social Services, Education, Labor, and Personnel, and other Departments
8 deemed necessary by the Legislature. Each Department shall include an Executive Director, a
9 Board of Directors, and necessary employees. The Executive Director of the Department of
Justice shall be called the Attorney General of the Ho-Chunk Nation. The Executive Director of
the Department of Treasury shall be called the Treasurer of the Ho-Chunk Nation.

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

11 (a) To execute and administer the laws of the Ho-Chunk Nation;

12 (k) To represent the Ho-Chunk Nation on all matters that concern its interests and welfare;

13 (l) To execute, administer, and enforce the laws of the Ho-Chunk Nation necessary to
14 exercise all powers delegated by the General Council and the Legislature, including but not
15 limited to the foregoing list of powers.

16 Art. VII - Judiciary

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

20 Sec. 5. Jurisdiction of the Judiciary.

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

26 Art. XII - Sovereign Immunity

27 Sec. 1. Immunity of Nation from Suit. The Ho-Chunk Nation shall be immune from suit except
28 to the extent that the Legislature expressly waives its sovereign immunity, and officials or

1 employees of the Ho-Chunk Nation acting within the scope of their duties or authority shall be
2 immune from suit.

3 HO-CHUNK NATION LEGISLATIVE RESOLUTION 05-11-99J

4 NOW, THEREFORE, BE IT RESOLVED, that in the course of procurement of goods and
5 services by the Executive pursuant to a Legislatively approved budget appropriation, the
6 following contracting responsibilities shall apply:

7 1. The Department procuring goods or services for its program(s) or administration and/or
8 the Property and Procurement Division of the Treasury Department, as appropriate, shall use
9 reasonable efforts to determine that the selected vendor is a reliable and responsible source of
10 supply;

11 2. The Department of Justice shall review and approve each contract as to legal form and
12 shall note such approval on the contract or an appended memorandum; provided that Department
13 of Justice review of a contract shall not be required if the contract is drawn upon an [*sic*]
14 purchase order form or form of contract previously approved by Justice without textual
15 modification or supplementation; and

16 3. The Treasury Department shall assure that each contract is complete and fully executed
17 prior to processing any deposit or payment due under a contract; and

18 BE IT FURTHER RESOLVED, that the Executive Directors of the respective Departments
19 responsible for contract administration described above shall be responsible to the President and
20 Legislature for carrying out the foregoing responsibilities by their Departmental staff, and that
21 any failure to observe the foregoing responsibilities by a Departmental staff or Executive
22 Director shall be subject to appropriate discipline under the Nation's Personnel Policies and
23 Procedures; and

24 HO-CHUNK NATION LEGISLATIVE RESOLUTION 07-15-97C

25 WHEREAS, the Legislature finds that the Nation enters into a large number of contracts for
26 goods and services and that in order to fulfill its constitutional mandates, it must create a feasible
27 method of delegating signator [*sic*] authority to the Executive; and

28 WHERAS, the Legislature has deemed it necessary to monitor the Nation's contractual
obligations in a manner which would allow open discussion of contracts with full disclosure; and

WHEREAS, the Legislature wishes to now revise the delegation of signature authority to the
Executive Branch as stated in this Resolution.

NOW, THEREFORE BE IT RESOLVED, that the Ho-Chunk Nation Legislature hereby
establishes this contract signature policy on and after the date of this resolution and delegates
signature authority to the President of the Ho-Chunk Nation and/or his designee(s) for all

1 contracts for goods or services specified within a Legislatively approved annual departmental
2 budget and for all grant requests and agreements for which the Legislature has approved or
3 budgeted any financial commitment that may be required on behalf of the Ho-Chunk Nation;
4 except that agreements to be funded from a contract services line item shall remain subject to a
\$5,000 per fiscal year aggregate limit for each service vendor, with the Vice President to sign all
such contracts exceeding the \$5,000 limit.

5 HO-CHUNK NATION RULES OF CIVIL PROCEDURE

6 Rule 7. Defenses and Counterclaims.

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8 A defense that alleges new facts excusing the conduct of the defendant if statements in the
9 *Complaint* are true must be affirmatively stated. *Counterclaims* arising from the same facts or
10 circumstances as alleged in the *Complaint* shall be raised in the *Answer*. If a party fails to raise
11 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.

12 Rule 18. Types of Motions.

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

17 Rule 58. Amendment to or Relief from Judgment or Order.

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19 (A) Relief from Judgment. A *Motion to Amend* or for relief from judgment, including a request
20 for a new trial shall be made within ten (10) calendar days of the filing of judgment. The *Motion*
21 must be based on an error or irregularity that prevented a party from receiving a fair trial or a
substantial legal error that affected the outcome of the action.

22 (B) Motion for Reconsideration. Upon motion of the Court or by motion of a party made not
23 later than ten (10) calendar days after entry of judgment, the Court may amend its findings or
24 conclusions or make additional findings or conclusions, amending the judgment accordingly.
25 The motion may be made with a motion for a new trial. If the Court amends the judgment, the
26 time for initiating an appeal commences upon entry of the amended judgment. If the Court
27 denies a motion filed under this Rule, the time for initiating appeal from the judgment
28 commences when the Court denies the motion on the record or when an order denying the
motion is entered, whichever occurs first. If within thirty (30) days after the filing of such
motion, and the Court does not decide a motion under this Rule or the judge does not sign an
order denying the motion, the motion is considered denied. The time for initiating the appeal
from judgment commences in accordance with the *Rules of Appellate Procedure*.

1 (C) Motion to Modify. After the time period in which to file a *Motion to Amend* or a *Motion for*
2 *Reconsideration* has elapsed, a party may file a *Motion to Modify* with the Court. The *Motion*
3 must be based upon new information that has come to the party's attention that, if true, could
4 have the effect of altering or modifying the judgment. Upon such motion, the Court may modify
5 the judgment accordingly. If the Court modifies the judgment, the time for initiating an appeal
6 commences upon entry of the modified judgment. If the Court denies a motion filed under this
7 Rule, the time for initiating an appeal from the judgment commences when the Court denies the
8 motion on the record or when an order denying the motion is entered, whichever occurs first. If
9 within thirty (30) calendar days after the filing of such motion, and the Court does not decide the
10 motion or the judge does not sign an order denying the motion, the motion is considered denied.
11 The time for initiating an appeal from judgment commences in accordance with the *Rules of*
12 *Appellate Procedure*.

9 (D) Erratum Order or Re-issuance of Judgment. Clerical errors in a Court record, including the
10 *Judgment* or *Order*, may be corrected by the Court at any time.

11 (E) Grounds for Relief. The Court may grant relief from judgments or orders on motion of a
12 party made within a reasonable time for the following reasons: (1) newly discovered evidence
13 which could not reasonably have been discovered in time to request a new trial; (2) fraud,
14 misrepresentation or serious misconduct of another party to the action; (3) good cause if the
15 requesting party was not personally served in accordance with Rule 5(c)(1)(a)(i) or (ii), did not
16 have proper service and did not appear in the action; or (4) the judgment has been satisfied,
17 released, discharged or is without effect due to a judgment earlier in time.

16 Rule 61. Appeals.

17 Any final *Judgment* or *Order* of the Trial Court may be appealed to the Supreme Court. The
18 *Appeal* must comply with the *Rules of Appellate Procedure*, specifically *Rules of Appellate*
19 *Procedure*, Rule 7, Right of Appeal. All subsequent actions of a final *Judgment* or Trial Court
20 *Order* must follow the *Rules of Appellate Procedure*.

21 **FINDINGS OF FACT**

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- 23 1. The parties received proper notice of the June 13, 2006 *Trial*.
 - 24 2. The plaintiff, Ho-Chunk Nation (hereinafter HCN or Nation), is a federally recognized
25 Indian Tribe with principal offices located on trust lands at HCN Headquarters, W9814 Airport
26 Road, P.O. Box 667, Black River Falls, WI. See 70 Fed. Reg. 71194 (Nov. 25, 2005). The
27 plaintiff, HCN Department of Treasury, is an executive department with principal offices
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1 likewise located at HCN Headquarters. *See* CONST., ART. VI, § 1(b). The plaintiff, Ho-Chunk
2 Casino Hotel & Convention Center (hereinafter HCC), is a division within the HCN Department
3 of Business, located at S3214 Highway 12, Baraboo, WI 53913. *See* DEP'T OF BUS.
4 ESTABLISHMENT & ORG. ACT OF 2001, 1 HCC § 3.5c; [http://www.ho-chunknation.com/
5 government/executive/org_chart.htm](http://www.ho-chunknation.com/government/executive/org_chart.htm) (last visited Jan. 3, 2007) (on file with Bus. Dep't).

7 3. The defendant, Corvettes on the Isthmus, is a State of Wisconsin Corporation that
8 maintains a principal address of 300 Progress Drive #B, Cottage Grove, WI 53527, and mailing
9 address of P.O. Box 7515, Madison, WI 53707. *Change of Address*, CV 05-82 (Feb. 23, 2006);
10 *Defs.' Answer* at 1-2; *Compl.* at 2-3.

12 4. On or before May 18, 2003, Katie S. Morehouse, HCC Group Sales Representative,
13 presented the defendant with a document designated as a contract. *Trial* (LPER, June 13, 2006,
14 09:52:22, 11:29:27 CDT); *see also* Pls.' Ex. 1. Ms. Morehouse devised the contract after
15 consulting with the defendant's agents and negotiating terms and pricing structure.³ *Id.*, 11:43:46
16 CDT. Neither party ever affixed a signature to the contract.⁴ *Id.*, 09:54:49, 11:45:10 CDT. Ms.
17 Morehouse testified that she would not seek either a signature or authorization from the General
18 Manager or HCN Department of Business when entering such contracts, having received
19 authority from the Group Sales Representative manager.⁵ *Id.*, 11:50:20 CDT.

22 ³ The DOJ apparently never reviewed the contract or previously approved the format of the contract. *See* HCN LEG.
RES. 05-11-99J.

23 ⁴ The second page of Plaintiffs' Exhibit 2 served as the signatory page to the contract, but neither Ms. Morehouse
24 nor Mr. Newlun affixed their signatures on the designated signature lines. LPER, 10:00:11, 11:45:09 CDT; *see also*
Pls.' Ex. 2 at 2.

25 ⁵ The Court provided the plaintiffs with an opportunity to present evidence of a presidential delegation of signature
26 authority. *See* HCN LEG. RES. 07-15-97C (permitting further presidential delegation of legislative authority). The
27 defendants presumably reviewed six (6) years of governmental documents (1997-2003), and submitted several
28 pieces of legislation that they believed capable of demonstrating "that the Ho-Chunk Hotel and Convention Center
had the authority to enter into agreements with parties." Pls.' Post-Trial Submission, CV 05-82 (Sept. 28, 2006) at 1.
However, while the plaintiffs conclude that "the Ho-Chunk Hotel and Convention Center clearly has the authority to
enter into agreements with parties . . . ," the cited legislative provisions do not support this conclusion. *Id.* at 6. The
plaintiffs offered nothing demonstrating a delegation of presidential signature authority.

1 5. The defendant's agent, Brian Newlun, testified that the parties subsequently agreed upon
2 several verbal revisions to the contract during numerous meetings, but the parties never reduced
3 the alleged revisions to writing. *Id.*, 09:55:24 CDT. Ms. Morehouse corroborated the
4 occurrence of these meetings, and noted some resulting unwritten agreements. *Id.*, 11:57:03
5 CDT.
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7 8 DECISION

9
10 The Ho-Chunk Nation Legislature (hereinafter Legislature) possesses the constitutional
11 authority "[t]o negotiate and enter into . . . contracts, and agreements with other . . .
12 organizations, or individuals." CONST., ART. V, § 2(i). The Legislature may, in turn, delegate its
13 constitutional powers to the Executive Branch. *Id.*, ART. VI, § 2(k). In 1997, the Legislature
14 expressly delegated the foregoing power to the President, declaring:
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16 the Ho-Chunk Nation Legislature hereby establishes this contract signature
17 policy on and after the date of this resolution and delegates signature
18 authority to the President of the Ho-Chunk Nation and/or his designee(s)
19 for all contracts for goods or services specified within a Legislatively
20 approved annual departmental budget and for all grant requests and
agreements for which the Legislature has approved or budgeted any
financial commitment that may be required on behalf of the Ho-Chunk
Nation[.]

21 HCN LEG. RES. 07-15-97C. Nonetheless, the President has apparently neglected to designate
22 Executive Branch employees to sign the type of contracts encountered in this case on his behalf.
23 Or, in the alternative, the President never intended that casino employees negotiate and enter into
24 contracts without presidential signature following DOJ review and approval.
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26 In 2001, the Court articulated the manner in which it assumes subject matter jurisdiction
27 over contractual causes of action involving written contracts between two (2) or more parties as a
28 result of a negotiated agreement. *Ho-Chunk Nation v. B & K Builders, Inc. et al.*, CV 00-91

1 (HCN Tr. Ct., June 20, 2001). The Court shall not repeat the analysis here, but, suffice it to say,
2 that a contract serves as the law of the case, provided that the governmental signatory acted
3 pursuant to a proper delegation of legislative authority. See CONST., ART. VII, § 5(a) (conferring
4 authority upon the Judiciary to resolve "cases and controversies . . . arising under the
5 Constitution, laws, customs and traditions of the Ho-Chunk Nation"). The Court cannot
6 adjudicate a dispute over which it lacks subject matter jurisdiction. *Ho-Chunk Nation v. Harry*
7 *Steindorf et al.*, CV 99-82 (HCN Tr. Ct., Feb. 11, 2000), *aff'd*, SU 00-04 (HCN S. Ct., Sept. 29,
8 2000).
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10 The Court has previously awarded default judgments in simple transactional disputes on
11 the basis of custom and tradition. See, e.g., *Ho-Chunk Nation et al. v. Ashley R. Biesen*, CV 06-
12 100 (HCN Tr. Ct., Nov. 28, 2006) (failing to pay convenience store charges); *HCC et al. v. Orrin*
13 *Cloud*, CV 06-37 (HCN Tr. Ct., Oct. 13, 2006) (failing to pay hotel charges). The Court,
14 however, will not set aside or supplant a negotiated agreement and proceed to resolve a dispute
15 on the basis of an elemental customary principle. *B & K Builders, Inc.*, CV 00-91 at 16-17. In
16 these instances, the parties establish their relative positions after engaging in a negotiation with
17 the intent of establishing respective duties and obligations. The non-governmental agent relies
18 upon the representations of the governmental agent that he or she has the authority to both
19 negotiate and execute a contract. In doing so, the governmental agent is presumed to be acting
20 pursuant to a valid delegation of the legislative power to "negotiate and enter into . . . contracts."⁶
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24 CONST., ART. V, § 2(i). The Court shall not disregard the resulting contractual agreement, but
25 unfortunate consequences exist when the presumption proves faulty.
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28 ⁶ The Court perceives a clear distinction between formal negotiated contracts and routine sales transactions. The legislative power at issue in the present case addresses the former and not necessarily the latter, but a broader interpretation would not change the result of this case.

1 Declaring an absence of subject matter jurisdiction, and, as a consequence, denying the
2 plaintiffs' request for relief may appear to be a harsh result. Yet, the defendant also likely found
3 the denial of its counterclaim as harsh and unfair. Regardless, the CONSTITUTION demands such
4 results. Furthermore, the plaintiffs should not find themselves in this position. The Office of the
5 President could have entered a comprehensive Executive Order regarding signature delegation
6 anytime after 1997. HCN LEG. RES. 07-15-97C. The DOJ could have required Executive
7 Branch departments and divisions to use pre-approved boilerplate contracts. HCN LEG. RES. 05-
8 11-99J. These actions should have proven absolutely necessary after the issuance of the 2001
9 final judgment in *B & K Builders, Inc.*⁷

12 **BASED UPON THE FOREGOING**, the Court denies the plaintiffs' request for relief.
13 The parties retain the right to file a timely post judgment motion with this Court in accordance
14 with *HCN R. Civ. P. 58, Amendment to or Relief from Judgment or Order*. Otherwise, “[a]ny
15 final *Judgment* or *Order* of the Trial Court may be appealed to the Supreme Court. The *Appeal*
16 must comply with the *Rules of Appellate Procedure* [hereinafter *HCN R. App. P.*], specifically
17 *Rules of Appellate Procedure, Rule 7, Right of Appeal.*” *HCN R. Civ. P. 61*. The appellant
18 “shall within sixty (60) calendar days after the day such judgment or order was rendered, file
19 with the Supreme Court Clerk, a *Notice of Appeal* from such judgment or order, together with a
20 filing fee as stated in the appendix or schedule of fees.” *HCN R. App. P. 7(b)(1)*. “All
21 subsequent actions of a final *Judgment* or Trial Court *Order* must follow the [*HCN R. App. P.*].”
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23 *HCN R. Civ. P. 61.*

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⁷ The Nation may be collaterally estopped from challenging the holding in *B & K Builders, Inc.* at this juncture. See *David Abangan v. HCN Dep't of Bus.*, CV 01-08 (HCN Tr. Ct., July 16, 2003) at 18-19.

Ho-Chunk Nation Court System
P.O. Box 70
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(715) 284-2722 or 800-434-4070



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IT IS SO ORDERED this 5th day of January 2007, 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