

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

3 **Marlene C. Cloud, Cinnamon Lonetree-**
4 **Wininga, Yona Montelongo and Chase**
5 **Roman,**
6 Plaintiffs,

7 v.

Case No.: **CV 06-31**

8 **Ho-Chunk Nation, Ho-Chunk Casino Hotel**
9 **& Convention Center, Ho-Chunk Nation**
10 **Business Department, John Stoddard,**
11 **Angie Lowe, Lisa Nichols and Mary Kate**
12 **Thurrow,**
13 Defendants.

14 **ORDER**
15 **(Granting Motion to Dismiss in Part)**

16 **INTRODUCTION**

17 The Court must determine whether to grant the defendants' request to dismiss the instant
18 case. The Court dismisses the causes of action against the governmental entities on the grounds
19 of an asserted sovereign immunity from suit, thereby removing any claim for retroactive
20 monetary damages. The Court, however, denies the dismissal request against the individually
21 named defendants since the Court deems that it may grant equitable relief in certain employment
22 cases regardless of whether a grievant proceeds through the administrative grievance structure.
23 The analysis of the Court follows below.

24 **PROCEDURAL HISTORY**

25
26
27 The plaintiffs, Marlene C. Cloud, Cinnamon J. Lonetree-Wininga, Yona Montelongo and
28 Chase Roman, by and through Attorney Mark L. Goodman, initiated the current action by filing

1 the *Complaint* with the Court on May 5, 2006. Consequently, the Court issued a *Summons*
2 accompanied by the above-mentioned *Complaint* on May 5, 2006, and delivered the documents
3 by personal service to the defendants' representative, Ho-Chunk Nation Department of Justice
4 (hereinafter DOJ).¹ The *Summons* informed the defendants of the right to file an *Answer* within
5 twenty (20) days of the issuance of the *Summons* pursuant to *HCN R. Civ. P. 5(A)(2)*. The
6 *Summons* also cautioned the defendants that a *default judgment* could result from failure to file
7 within the prescribed time period.

8
9 The defendants, by and through DOJ Attorney Michael P. Murphy, filed its *Answer* on
10 May 25, 2006. The Court reacted by mailing *Notice(s) of Hearing* to the parties on June 16,
11 2006, informing them of the date, time and location of the *Scheduling Conference*. The Court
12 convened the *Conference* on July 25, 2006 at 2:30 p.m. CDT. The following parties appeared at
13 the *Scheduling Conference*: Marlene C. Cloud, Cinnamon J. Lonetree-Wininga, Yona
14 Montelongo and Chase Roman, plaintiffs; Attorney Mark L. Goodman, plaintiffs' counsel; and
15 DOJ Attorney Michael P. Murphy, defendants' counsel. The Court entered the *Scheduling*
16 *Order* on July 26, 2006, setting forth the timelines and procedures to which the parties should
17 adhere prior to trial.

18
19 In accordance with the *Scheduling Order*, the Court convened a *Pre-Trial Conference* on
20 October 24, 2006 at 1:30 p.m. CDT. The following parties appeared at the *Conference*:
21 Attorney Mark L. Goodman, plaintiffs' counsel, and DOJ Attorney Brian T. Stevens, defendants'
22 counsel. The parties mutually requested a continuance of the matter, and subsequently sought
23 and received four (4) additional continuances. *See, e.g., Pre-Trial Conference* (LPER at 3, Oct.
24
25
26

27
28 ¹ The *Ho-Chunk Nation Rules of Civil Procedure* (hereinafter *HCN R. Civ. P.*) permit the Court to serve the *Complaint* upon the DOJ when the plaintiff/petitioner names as a party either a unit of government or enterprise or an official or employee being sued in their official or individual capacity. *HCN R. Civ. P. 27(B)*.

1 24, 2006, 01:40:33 CDT). Ultimately, the Court convened a second *Scheduling Conference* on
2 February 21, 2007, which both parties' counsel attended, resulting in the February 27, 2007
3 *Amended Scheduling Order*.

4
5 Thereafter, the defendants filed a *Motion to Dismiss* on April 27, 2007, incorporating a
6 legal memorandum. *See HCN R. Civ. P.* 18. In response, the Court entered the May 1, 2007
7 *Order (Motion Hearing)*. The order informed the parties of the Court's decision to convene a
8 hearing for the purpose of entertaining the motion. The order set forth the date, time and
9 location of the *Motion Hearing*, which the Court scheduled in conjunction with the *Pre-Trial*
10 *Conference*, and alerted the plaintiffs to their right to respond.

11
12 Prior to convening the *Motion Hearing*, the plaintiffs filed a timely *Response to*
13 *Defendants' Motion to Dismiss* (hereinafter *Plaintiffs' Response*). *Id.*, Rule 19(B). The Court
14 convened the *Pre-Trial Conference/Motion Hearing* on May 15, 2007 at 1:30 p.m. CDT. The
15 following parties appeared at the *Conference/Hearing*: Marlene C. Cloud and Cinnamon J.
16 Lonetree-Wininga, plaintiffs; Attorney Mark L. Goodman, plaintiffs' counsel; and DOJ Attorney
17 Brian T. Stevens, defendants' counsel. The defendants later filed corroborative documentation
18 on May 18, 2007, pursuant to judicial request. *Pre-Trial Conference/Mot. Hr'g* (LPER at 13,
19 May 15, 2007, 02:08:29 CDT).
20
21

22 APPLICABLE LAW

23 CONSTITUTION OF THE HO-CHUNK NATION

24 Art. III - Organization of the Government

25
26 Sec. 4. Supremacy Clause. This Constitution shall be the supreme law over all territory
27 and persons within the jurisdiction of the Ho-Chunk Nation.
28

1 Article VI - Executive

2 Sec. 1. Composition of the Executive.

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

8 Art. VII – Judiciary

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

12 Sec. 5. Jurisdiction of the Judiciary.

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

18 Sec. 6. Powers of the Tribal Court.

19 (a) The Trial Court shall have the power to make findings of fact and conclusions of law.
20 The Trial Court shall have the power to issue all remedies in law and in equity including
21 injunctive and declaratory relief and all writs including attachment and mandamus.

22 Art. XII - Sovereign Immunity

23 Sec. 1. Immunity of Nation from Suit. The Ho-Chunk Nation shall be immune from suit except
24 to the extent that the Legislature expressly waives its sovereign immunity, and officials or
25 employees of the Ho-Chunk Nation acting within the scope of their duties or authority shall be
26 immune from suit.

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

1 DEPARTMENT OF BUSINESS ESTABLISHMENT AND ORGANIZATION ACT OF 2001,
2 1 HCC § 3

3 Sec. 5. Internal Organization.

4 c. The Department shall maintain a current Organizational Chart. The
5 Organizational Chart shall accompany its annual budget submission and any budget
6 modifications during the fiscal year in accordance with the Nation's *Appropriations and Budget
Process Act*.

7 EMPLOYMENT RELATIONS ACTION OF 2004, 6 HCC § 5

8 Ch. I - General Provisions

9 Subsec. 4. Responsibilities.

10 b. Departments and Units.

11 (1) Each department, division, or unit of the Nation with the approval and
12 consultation of the Executive Director of the Department of Personnel may develop,
13 implement, and revise as necessary internal procedures and operating rules pertaining to
14 the unique operational requirements of the work unit for efficient and effective
15 performance. Advance notice of internal unit procedures and rules shall be provided to
employees and must be posted in public places to serve as notice to all employees.

16 Ch. V - Work Rules and Employee Conduct, Discipline, and Administrative Review

17 Subsec. 33. Grievances.

18 a. Employees may seek administrative and judicial review only for alleged
19 discrimination and harassment.

20 c. Performance Evaluations may not be grieved, and may not be reviewed under the
21 administrative review process or judicially.

22 d. Candidates for employment may file a complaint with the Department of
23 Personnel regarding the interview and selection process and may elect to file a complaint directly
24 with the Grievance Review Board.

25 Subsec. 34. Administrative Review Process.

26 a. Policy.

27 (2) Employees are entitled to grieve suspensions or terminations to the Board.
28 The Board will be selected from a set pool of employees and supervisors with grievance
training, who will review a case and determine whether to uphold the discipline.

1 (3) Following a Board decision, the employee shall have the right to file an
2 appeal with the Ho-Chunk Nation Trial Court (Court).

3 Subsec. 35 Judicial Review.

4 a. Waiver of Sovereign Immunity. Pursuant to Article XII of the Constitution of the
5 Ho-Chunk Nation, the Ho-Chunk Nation Legislature expressly waives the sovereign immunity of
6 the Ho-Chunk Nation in the limited manner described herein. This waiver shall be strictly
7 construed.

8 b. There is no judicial review of employee evaluations or disciplinary actions that do
9 not immediately result in suspension or termination.

10 c. Judicial review of a grievance involving suspension, termination, discrimination,
11 or harassment may proceed to the Ho-Chunk Nation Trial Court only after the Administrative
12 Review Process has been exhausted through the Grievance Review Board. An employee may
13 appeal a Board decision to the Trial Court within thirty (30) calendar days of when the Board
14 decision is served by mail.

15 d. Relief.

16 (1) This limited waiver of sovereign immunity allows the Trial Court to award
17 monetary damages for actual wages established by the employee in an amount not to
18 exceed \$10,000, subject to applicable taxation.

19 (2) The Trial Court may grant equitable relief mandating that the Ho-Chunk
20 Nation prospectively follow its own law, and as necessary to directly remedy past
21 violations of the Nation's laws. Other equitable remedies shall only include:

22 (a) an order of the Court to the Executive Director of the Department
23 of Personnel to reassign or reinstate the employee;

24 (b) the removal of negative references from the employee's personnel
25 file;

26 (c) the award of bridged service credit; and

27 (d) the restoration of the employee's seniority.

28 (3) Notwithstanding the remedial powers noted above, the Court shall not
grant any remedies that are inconsistent with the laws of the Ho-Chunk Nation. Nothing
in this limited waiver or within this Act shall be construed to grant a party any legal
remedies other than those included in this section.

1 HO-CHUNK NATION RULES OF CIVIL PROCEDURE

2 Rule 5. Notice of Service of Process.

3 (A) Definitions.

4
5 2. Summons - The official notice to the party informing him/her that he/she is identified
6 as a party to an action or is being sued, that an *Answer* is due in twenty (20) calendar days (*See*
7 *HCN R. Civ. P. 6*) and that a *Default Judgment* may be entered against them if they do not file an
8 *Answer* in the prescribed time. It shall also include the name and location of the Court, the case
number, and the names of the parties. The *Summons* shall be issued by the Clerk of Court and
shall be served with a copy of the filed *Complaint* attached.

9 Rule 18. Types of Motions.

10 *Motions* are requests directed to the Court and must be in writing except for those made in Court.
11 *Motions* based on factual matters shall be supported by affidavits, references to other documents,
12 testimony, exhibits or other material already in the Court record. *Motions* based on legal matters
13 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 *Motions* available to litigants.

14 Rule 19. Filing and Responding to Motions.

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 Rule 27. The Nation as a Party.

20 (B) Civil Actions. When the Nation is filing a civil suit, a writ of mandamus, or the Nation is
21 named as a party, the *Complaint* should identify the unit of government, enterprise or name of
22 the official or employee involved. The *Complaint*, in the case of an official or employee being
23 sued, should indicate whether the official or employee is being sued in his or her individual or
24 official capacity. Service can be made on the Ho-Chunk Nation Department of Justice and will
be considered proper unless otherwise indicated by these rules, successive rules of the Court or
Ho-Chunk Nation Law.

25 **FINDINGS OF FACT**

26
27 1. The parties received proper notice of the May 15, 2007 *Pre-Trial Conference/Motion*
28 *Hearing*.

1 2. The plaintiff, Marlene C. Cloud, is an enrolled member of the Ho-Chunk Nation, Tribal
2 ID# 439A000402, and resides at N1379 Timm Road, Lyndon Station, WI 53944. Since
3 February 13, 2005, the plaintiff has been employed as a Banquet Set-up person at the Ho-Chunk
4 Casino Hotel & Convention Center (hereinafter Convention Center), a division within the Ho-
5 Chunk Nation Department of Business (hereinafter Business Department), located at S3214
6 Highway 12, Baraboo, WI 53913. *See* DEP'T OF BUS. ESTABLISHMENT & ORG. ACT OF 2001, 1
7 HCC § 3.5c; *see also* *Defs.' Answer* at 2; *Compl.* at 1. The plaintiff, Cinnamon J. Lonetree-
8 Wininga, is an enrolled member of the Ho-Chunk Nation, Tribal ID# 439A001524, and resides
9 at 1733 Hemlock Drive, Apt. C, Reedsburg, WI 53959. The plaintiff was employed as a
10 Banquet Coordinator at the Convention Center from August 15, 2004 to June 28, 2006. *Id.*; *see*
11 *also* *Defs' Answer to First Set of Interrogs. & Req. for Docs.*, CV 06-31 (Sept. 7, 2006), Attach.
12 C at 7. The plaintiff, Yona Montelongo, is an enrolled member of the Ho-Chunk Nation, Tribal
13 ID# 439A003971, and maintains a mailing address of P.O. Box 234, Wisconsin Dells, WI 53965.
14 The plaintiff has been employed as a Banquet Porter at the Convention Center since May 8,
15 2005. *Defs.' Answer* at 2; *Compl.* at 1. The plaintiff, Chase Roman, is a non-member, and
16 resides at N1379 Timm Road, Lyndon Station, WI 53944. The plaintiff has been employed as a
17 Banquet Set-up person at the Convention Center since September 5, 2004. *Id.*

18 3. The defendant, Ho-Chunk Nation (hereinafter HCN or Nation), is a federally recognized
19 Indian Tribe with principal offices located on trust lands at HCN Headquarters, W9814 Airport
20 Road, P.O. Box 667, Black River Falls, WI. *See* 72 Fed. Reg. 13648 (Mar. 22, 2007). The
21 defendant, Business Department, is an executive department with principal offices located at
22 HCN Headquarters. *See* CONSTITUTION OF THE HO-CHUNK NATION (hereinafter CONSTITUTION),
23 ART. VI, § 1(b). The defendant, John Stoddard, was formerly employed as Executive Manager
24
25
26
27
28

1 of Ho-Chunk Casino. The defendant, Angie Lowe, is employed as Hospitality Director at Ho-
2 Chunk Casino. The defendant, Lisa Nichols, is employed as Food & Beverage Manager at Ho-
3 Chunk Casino. The defendant, Mary Kate Thurow, is employed as Banquet Manager at Ho-
4 Chunk Casino.² *Def.' Answer* at 2; *Compl.* at 2.

6 4. The Convention Center adds a twenty percent (20%) gratuity charge to customer invoices
7 at its banquet facility. *Id.*; *see also Submission of Policy Info.*, Attach. G-J. The Convention
8 Center formerly dispensed a set percentage of the gratuity charge to the plaintiffs, which was
9 designated as “Charge Tips” on the plaintiffs’ weekly pay stubs. *Def.' Answer* at 2-3; *Compl.* at
10 2-3; *see also Pls.' Resp.*, Attach. 1-2. The Convention Center performed the distribution in
11 accordance with established internal policy, which may not have received approval from the
12 Executive Director of the HCN Department of Personnel. *Submission of Policy Info.*, Attach. C-
13 F; *see also* EMPLOYMENT RELATIONS ACT OF 2004 (hereinafter ERA), 6 HCC § 5.4b(1).

15 5. On or around August 2006, the Convention Center adjusted its gratuity charge
16 disbursement policy, resulting in a decrease in the percentage of charge tips afforded to three (3)
17 of the plaintiffs and presumably similarly situated individuals. *Aff. of Marlene Cloud*, CV 06-31
18 (May 8, 2007). The modified internal policy may not have received approval from the Executive
19 Director of the HCN Department of Personnel. ERA, § 5.4b(1). The Convention Center earlier
20 eliminated the payment of charge tips to plaintiff Lonetree-Wininga, following a brief reduction,
21 due to her supervisory status. *Aff. of Cinnamon Lonetree-Wininga*, CV 06-31 (May 8, 2007).

24 6. In the initial pleading, the plaintiffs assert that “[b]ased on [their] status as banquet or
25 food service workers, the Nation is discriminating against them in relation to how it treats other
26 employees, such as bartenders, table games personnel, and other workers at the Casino.” *Compl.*

28 _____
² A factual dispute exists with regards to whether certain individually named defendants exercise(d) supervisory authority over the Convention Center in conjunction with the Casino. *Def.' Answer* at 2.

1 at 3. Regardless, the plaintiffs did not seek administrative review of the alleged claim of
2 discrimination before the Grievance Review Board (hereinafter GRB). *Pls.' Resp.* at 2; *see also*
3 ERA, § 5.33a.

4
5 7. The plaintiffs opted to proceed directly to the Court before filing any administrative
6 grievance with the GRB. *Id.*

7 8. The plaintiffs charge several violations of the ERA by the defendants in conjunction with
8 the modified gratuity charge disbursement policy. *Compl.* at 3-4. The plaintiffs included the
9 following demand within its request for relief: “[f]or such other and further relief as the Court
10 deems just and equitable.” *Id.* at 4.

11
12 9. The plaintiffs never sought a preliminary injunction to disrupt the operation of the
13 modified gratuity charge disbursement policy. *See Marx Adver. Agency, Inc. v. Ho-Chunk*
14 *Nation et al.*, CV 04-16 (HCN Tr. Ct., Sept. 10, 2004) at 11, *aff'd*, SU 04-07 (HCN S. Ct., Apr.
15 29, 2005).

16 17 18 **DECISION**

19
20 The CONSTITUTION imposes the limitations on the Court's subject matter jurisdiction,
21 namely: "over all cases and controversies, both criminal and civil, in law or in equity, arising
22 under the Constitution, laws, customs and traditions of the Ho-Chunk Nation." CONST., ART.
23 VII, § 5(a). The CONSTITUTION does not explicitly impart the Ho-Chunk Nation Legislature
24 (hereinafter Legislature) with the authority to diminish the scope of the above delegation, and the
25 Legislature arguably cannot bar otherwise justiciable causes of action from judicial scrutiny. *See*
26 *Michelle M. Ferguson v. HCN Ins. Review Comm'n/Div. of Risk Mgmt.*, CV 99-20 (HCN Tr. Ct.,
27 Aug. 12, 1999), *aff'd*, SU 99-10 (HCN S. Ct., Nov. 15, 1999).

1 The denial of the right to appeal by Legislative fiat is a dangerous attempt
2 to insulate governmental actions from review. It could lead to the
3 Legislature supplanting the Judiciary entirely. The independence of the
4 Judiciary would be meaningless if the Legislature could simply exempt all
5 of its decisions from review by adding a "no review clause" to every
6 ordinance. Then the Nation could have an independent judiciary[,] which
7 would be powerless to protect individuals from Legislative or Executive
8 excess.

9 *Id.* at 9.

10 The Court began a recent opinion with the above introductory assertions. *Sherry Wilson*
11 *v. HCN Dep't of Pers.*, CV 05-43 (HCN Tr. Ct., Jan. 4, 2006) at 11, *rev'd on other grounds*, SU
12 06-01 (HCN S. Ct., Sept. 19, 2006). The Court continued in that decision by posing a
13 hypothetical question concerning the propriety of the Legislature statutorily constricting the
14 subject matter jurisdiction of the Court. *Id.* at 12. The Court declined to answer whether the
15 Legislature possessed such power, instead ruling that the plaintiff failed to name a proper party
16 defendant. *Id.* at 13; *see also Wilson*, CV 05-43 (HCN Tr. Ct., Dec. 21, 2006).

17 Regardless, the Court, in *dicta*, construed the ERA as "erect[ing] statutory limitations
18 upon the types of issues appealable to the Court." *Wilson*, CV 05-43 (HCN Tr. Ct., Jan. 4, 2006)
19 at 11-12 (citing ERA, § 5.35c) (footnote omitted). The Court now revisits this preliminary
20 conclusion. To be sure, the Legislature has imposed strict limitations on the scope of issues
21 befitting administrative review by the GRB. *Id.* at 12 (citing ERA, § 5.33a, d, 34a(2)). The
22 Legislature may permissibly limit the breadth of legislative power exercised by an executive
23 administrative agency, but the Legislature cannot similarly diminish the Judiciary's broad
24 constitutional authority to "interpret and apply the . . . laws of the Ho-Chunk Nation." CONST.,
25 ART. VII, § 4. The Supremacy Clause prohibits this infringement upon judicial power. *Id.*, ART.

1 III, § 4. Moreover, the Court does not interpret the ERA as impermissibly limiting its subject
2 matter jurisdiction as it relates to the present cause of action.³

3 Relevant to this case, the Legislature designated claims of discrimination as grievable
4 employment matters, but the plaintiffs determined not to file any such claim before the GRB.
5 ERA, § 5.33a. The plaintiffs consequently have failed to exhaust available administrative
6 remedies in relation to this particular claim.⁴ *Id.*, § 5.35c. More importantly, the Legislature
7 made the applicable limited waiver of sovereign immunity contingent upon completion of the
8 administrative grievance process. *Id.*, § 5.35a. The plaintiffs, therefore, cannot maintain suit
9 against the Nation or its sub-entities, rendering any claim for monetary relief unsupportable. *See*
10 CONST., ART., XII, § 1; *see also Chloris A. Lowe, Jr. v. HCN Legislature et al.*, CV 97-12 (HCN
11 Tr. Ct., Mar. 21, 1997) at 14, *aff'd*, SU 97-01 (HCN S. Ct., June 12, 1997). In this respect, the
12 Court partially grants the defendants' *Motion to Dismiss*.

13
14
15 The mere presence of the Case and Controversy Clause does not presuppose an absence
16 of sovereign immunity from suit as clearly indicated by the constitutional text. *See* CONST., ART.
17 VII, 5(a). A plaintiff, therefore, cannot hope to override this defense by simply alleging a
18 violation of the law. If appropriately raised, the Court is obliged to dismiss the offending action.
19 If not raised, the Court may proceed to award relief to a deserving plaintiff, provided that subject
20 matter jurisdiction over the claim is conclusive.⁵ *See Louella A. Kelty v. Jonette Pettibone et al.*,
21 CV 98-49 (HCN Tr. Ct., Feb. 22, 2006). Likewise, a “failure to exhaust administrative
22
23
24

25 _____
26 ³ The Court declines to comment on the apparent restriction incorporated in the *Judicial Review* subsection since not
implicated by the above facts. ERA, § 5.35b.

27 ⁴ The Ho-Chunk Nation Supreme Court has essentially adopted “the long settled rule of judicial administration that
28 no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has
been exhausted.” *Kenneth L. Twin v. Douglas Greengrass, Exec. Dir. of Admin.*, CV 03-88 (HCN Tr. Ct., May 24,
2004) at 14 n.6 (quoting *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 50-51 (1938)).

1 remedies[, as referenced above,] is not a jurisdictional flaw,' but does provide an additional
2 defense in a resulting civil suit.”⁶ *Twin*, CV 03-88 (HCN Tr. Ct., Oct. 7, 2004) at 11 n.3 (quoting
3 *Gibson v. West*, 201 F.3d 990, 993 (7th Cir. 2000)).

4
5 Despite the partial dismissal, the plaintiffs have properly presented a request for
6 injunctive relief, the granting of which is not contingent on any legislative waiver. *See Hope B.*
7 *Smith v. Ho-Chunk Nation*, SU 03-08 (HCN S. Ct., Dec. 8, 2003) at 10-11; *see also* CONST.,
8 ARTS. VII, 6(a), XII, § 2. The plaintiffs allege continuing ERA violations in their *Complaint*.
9 Requests for declaratory and injunctive relief “are remedies in equity and prospective in nature
10 and are not generally barred by the doctrine of sovereign immunity.” *Robert Mudd v. HCN*
11 *Legislature et al.*, SU 03-02 (HCN S. Ct., Apr. 8, 2003) at 6 n.2. The Legislature may not
12 deprive the Court of subject matter jurisdiction over these equitable causes of action.

13
14 The plaintiffs bear the burden of prosecuting their case. *See Joshua F. Smith, Sr. v. Adam*
15 *Estes et al.*, CV 03-08 (HCN Tr. Ct., Dec. 18, 2003) at 13. The parties may wish to resolve the
16 outstanding issue(s) through summary judgment given the unavailability of monetary relief and
17 the absence of associated arithmetic discrepancies. Regardless, the plaintiffs shall contact the
18 Clerk of Court for purposes of rescheduling the instant case.

19
20 **IT IS SO ORDERED** this 21st day of August 2007, by the Ho-Chunk Nation Trial Court
21 located in Black River Falls, WI within the sovereign lands of the Ho-Chunk Nation.

22
23
24 _____
25 Honorable Todd R. Matha
26 Chief Trial Court Judge

27 ⁵ In an analogous context, the Seventh Circuit Court of Appeals “has held that sovereign immunity is an aspect of
28 the statutory right to relief, rather than of the court's jurisdiction.” *Frey v. EPA*, 270 F.3d 1129, 1135 (7th Cir.
2001).

⁶ A statute of limitation similarly does not represent a jurisdictional barrier, and a failure to assert the defense may
result in a court awarding appropriate relief notwithstanding an otherwise dispositive passage of time. *Twin*, CV 03-
88 (HCN Tr. Ct., Oct. 7, 2004) at 8 (citing *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385 (1982)).

