IN THE
HO-CHUNK NATION TRIAL COURT

Mr. Chloris Lowe, Jr., **Enrollment #439A001593;** **Mr. Stewart J. Miller,** **Enrollment #439A002566,** Plaintiffs, v. **Ho-Chunk Nation Legislature Members Elliot Garvin, Gerald Cleveland, Myrna Thompson, Dallas White Wing, and Clarence Pettibone in their official capacity and individually; and Ho-Chunk Nation Election Board,** Defendants.	Case No.: **CV 00-104**

ORDER
(Determining Constitutionality of the Proposed Redistricting/Reapportionment Scenario)

INTRODUCTION

The Court must determine whether the legislatively approved redistricting/ reapportionment proposal, Scenario E, satisfies the appellate standard. The Court performed this inquiry at the November 15, 2001 *Hearing*. This *Order* memorializes the decision rendered at that *Hearing*.

PROCEDURAL HISTORY

The Court recounts the procedural history in significant detail in its *Order (Determining Constitutionality of the Proposed Redistricting/Reapportionment Scenario)*, CV 00-104 (HCN Tr. Ct., Nov. 1, 2001) [hereinafter *Constitutionality IV*]. For purposes of this decision, the Court notes that the Ho-Chunk Nation Legislature [hereinafter Legislature] timely submitted HCN LEGISLATURE RESOLUTION [hereinafter HCN LEG. RES.] 10-30-01A with attached Scenario E and relevant area meeting minutes on November 9, 2001. *See Constitutionality IV* at 7. The Court then convened the pre-scheduled *Hearing* on November 15, 2001 at 9:00 A.M. CST. *See id.* The following parties appeared at the *Hearing*: defendants' counsel, Ho-Chunk Nation Department of Justice [hereinafter DOJ] Attorneys Michael P. Murphy and Wendi A. Huling. The plaintiffs failed to appear, and did not provide the Court with prior notice explaining their non-attendance. The Court continued to hold the *Hearing* as permitted by the *Ho-Chunk Nation Rules of Civil Procedure* [hereinafter *HCN R. Civ. P.*], Rule 44(C).

APPLICABLE LAW

CONSTITUTION OF THE HO-CHUNK NATION

Article V – Legislature

Section 4. Redistricting or Reapportionment. The Legislature shall have the power to redistrict or reapportion including changing, establishing, or discontinuing Districts. The Legislature shall maintain an accurate census for the purposes of redistricting or reapportionment. The Legislature shall redistrict and reapportion at least once every five (5) years beginning in 1995, in pursuit of one-person/one-vote representation. The Legislature shall exercise this power only by submitting a final proposal to the vote of the people by Special Election which shall be binding and which shall not be reversible by the General Council. Any

redistricting or reapportionment shall be completed at least six (6) months prior to the next election, and notice shall be provided to the voters.

HO-CHUNK NATION RULES OF CIVIL PROCEDURE

Rule 44. Presence of Parties and Witnesses.

(C) Failure to Appear. If any party fails to appear at a hearing or trial for which they received proper notice, the case may be postponed or dismissed, a judgement may be entered against the absent party, or the Court may proceed to hold the hearing or trial.

Rule 58. Amendment to or Relief from Judgement or Order.

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

(B) Motion for Reconsideration. Upon motion of the Court or by motion of a party made not later than ten (10) calendar days after entry of judgement, the Court may amend its findings or conclusions or make additional findings or conclusions, amending the judgement accordingly. The motion may be made with a motion for a new trial. If the Court amends the judgement, the time for initiating an appeal commences upon entry of the amended judgement. If the Court denies a motion filed under this rule, the time for initiating an appeal from the judgement 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 entry of judgement, 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 an appeal from judgement commences in accordance with the Rules of Appellate Procedure.

(C) Erratum Order or Reissuance of Judgement. Clerical errors in a court record, including the *Judgement* or *Order*, may be corrected by the Court at any time.

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

Rule 61. Appeals.

Any *final Judgement* or *Order* of the Trial Court may be appealed to the Ho-Chunk Nation Supreme Court. The *Appeal* must comply with the Ho-Chunk Nation *Rules of Appellate Procedure*, specifically *Rules of Appellate Procedure*, Rule 7, Right of Appeal. All subsequent

actions of a *final Judgement* or Trial Court *Order* must follow the HCN *Rules of Appellate Procedure*.

FINDINGS OF FACT

1. The Court incorporates by reference *Findings of Fact* 2 and 3 from the May 4, 2001 *Order (Determining Constitutionality of the Proposed Redistricting/Reapportionment Scenario)* [hereinafter *Constitutionality III*] at 5-6.

2. The parties received proper notice of the November 15, 2001 *Hearing*.

3. The defendants presented evidence indicating that Scenario E represents the culmination of continued discussion and debate within area meetings. *See Defendants' Notice and Submission of Revised Redistricting Scenario E (Dated 10-30-01)*, CV 00-104 (Nov. 9, 2001) [hereinafter *Defendants' Submission*], Attachs. 2-9.

4. The defendants continued to utilize the most recent demographic figures as prepared by the Ho-Chunk Nation Office of Tribal Enrollment. The citation to May 1, 2000 figures within HCN LEG. RES. 10-30-01A proves in error. *See Hearing* (Log of Proceedings Electronically Recorded [hereinafter *LPER*] at 1, Nov. 15, 2001, 09:11:18 CST).

5. A mathematical or typographical error appears on the face of Scenario E, and the Court incorporates the appropriate corrections into the below *Findings of Fact*.

6. Scenario E divides the State of Wisconsin into four (4) Districts with a fifth District encompassing all areas beyond the geographical boundaries of Wisconsin. The population calculation for Districts 3 and 5 appear in error, and the Court shall reflect the corrected figures in its synopsis. The five (5) Districts contain the following proportion of enrolled tribal members

to legislative representative(s), including the rounded percentage deviation from the ideal legislative apportionment of 556 constituents per legislative representative.

District 1: 1,239 enrolled members

3 Legislators

Ratio: 1 Legislator for 413 enrolled members

Deviation: -26%

District 2: 562 enrolled members

1 Legislator

Ratio: 1 Legislator for 562 enrolled members

Deviation: +1%

District 3: 575 enrolled members

1 Legislator

Ratio: 1 Legislator for 575 enrolled members

Deviation: +3%

District 4: 1,881 enrolled members

3 Legislators

Ratio: 1 Legislator for 627 enrolled members

Deviation: +13%

District 5: 1,859 enrolled members

3 Legislators

Ratio: 1 Legislator for 620 enrolled members

Deviation: +11%

7. The following chart represents a comparative analysis of the No Action or No Change Scenario (the *status quo* derived from the CONSTITUTION, ART. V, Sec. 4) and Scenario E:

	No Action or No Change Scenario	**Scenario E**
District 1 Apportionment: Legislator to Eligible Voters and Deviation from Ideal	1:391 (-30%)	1:413 (-26%)
District 2 Apportionment: Legislator to Eligible Voters and Deviation from Ideal	1:552 (-1%)	1:562 (+1%)
District 3 Apportionment: Legislator to Eligible Voters and Deviation from Ideal	1:216 (-61%)	1:575 (+3%)
District 4 Apportionment: Legislator to Eligible Voters and Deviation from Ideal	1:387 (-30%)	1:627 (+13%)
District 5 Apportionment: Legislator to Eligible Voters and Deviation from Ideal	1:1,004 (+81%)	1:620 (+11%)
Maximum Disparity between Legislative Districts	Districts 5 & 3 (142%)	Districts 1 & 4 (39%)
Minimum Disparity between Legislative Districts	Districts 2 & 1 or 4 (29%)	Districts 2 & 3 (2%)

8. On September 12, 2001, participants at a District I area meeting voted to clarify the language contained on the Special Election ballot. *Defendants' Submission*, Attach. 6 at 2. The Court earlier required the following option to appear on the ballot: "'I reject [Scenario ___], and direct the Ho-Chunk Nation Legislature to submit a different final redistricting/reapportionment proposal for vote by the eligible voters . . . .'" *Constitutionality III* at 14.

9. The defendants, by and though DOJ Attorney Michael P. Murphy, expressed that one (1) month would constitute a "generous [period of] time" to submit a different final redistricting/ reapportionment proposal for judicial review in the event that the electorate rejects Scenario E. *Hearing* (*LPER* at 4, Nov. 15, 2001, 09:28:37 CST).

DECISION

The Supreme Court of the Ho-Chunk Nation [hereinafter Supreme Court] has announced the standard by which the Court weighs the constitutionality of proposed final redistricting/ reapportionment scenarios. *See Decision*, SU 00-17 (HCN S. Ct., Mar. 13, 2001) at 6. Specifically, "the pursuit of the one-person/one-vote representation requires a diligent, serious and continuous effort." *Id.* (*citing* BLACK'S LAW DICTIONARY 1237 (6th ed. 1990)); *see also* CONSTITUTION OF THE HO-CHUNK NATION, ART. V, § 4. The Legislature may accomplish this pursuit through the presentation of "*any* plan that furthers th[e] objective" of one person, one vote. *Decision* at 6 (emphasis in original).

Scenario E satisfies the appellate standard articulated by the Supreme Court. *See Findings of Fact* 1, 3. **THEREFORE, THE COURT ORDERS** the Ho-Chunk Nation Election Board to hold the Third Special Redistricting Election on or before January 12, 2002. The Election Board shall submit a draft notice and ballot for judicial review on or before December 7, 2001 prior to posting and printing for assurances of clarity. The Election Board may modify the previously used ballot language with the intent of achieving increased understanding among the eligible voters, but must retain its substantive features. The Election Board shall subsequently publish the notice within the *Hoc□k Worak* within a sufficient period of time to allow dispersal of the newsletter to the membership prior to the Special Election.

IN ADDITION, on or before March 1, 2002, the defendants shall submit a different final redistricting/reapportionment proposal for judicial review in the event that the electorate rejects Scenario E. The Court then shall convene a *Hearing* on March 6, 2002 at 1:30 P.M. CST to allow the defendants the opportunity to advocate on behalf of the proposal. The Court

establishes this tentative timeline in order to avoid extensions purportedly necessitated by insufficient notification.

The parties retain the right to file a timely post judgment motion with this Court in accordance with *HCN R. Civ. P.* 58, Amendment to or Relief from Judgement or Order.[1] Otherwise, "[a]ny *final Judgement* or *Order* of the Trial Court may be appealed to the Ho-Chunk Nation Supreme Court. The *Appeal* must comply with the Ho-Chunk Nation *Rules of Appellate Procedure* [hereinafter *HCN R. App. P.*], specifically [*HCN R. App. P.*], Rule 7, Right of Appeal." *HCN R. Civ. P.* 61. The appellant "shall within thirty (30) calendar days after the day such judgment or order was rendered, file with the [Supreme Court] Clerk of Court, a Notice of Appeal from such judgment or order, together with a filing fee of thirty-five dollars ($35 U.S.)." *HCN R. App. P.* 7(b)(1). "All subsequent actions of a *final Judgement* or Trial Court *Order* must follow the [*HCN R. App. P.*]." *HCN R. Civ. P.* 61.

IT IS SO ORDERED this 19th day of November, 2001 by the Ho-Chunk Nation Trial Court located in Black River Falls, WI within the sovereign lands of the Ho-Chunk Nation.

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

Honorable Todd R. Matha
Associate Trial Court Judge

[1] The Supreme Court earlier emphasized that it "is not bound by the federal or state laws as to standards of review." *Louella A. Kelty v. Jonette Pettibone and Ann Winneshiek, in their official capacities*, SU 99-02 (HCN S. Ct., Sept. 24, 1999) at 2. The Supreme Court, therefore, has voluntarily adopted an abuse of discretion standard "to determine if an error of law was made by the lower court." *Daniel Youngthunder, Sr. v. Jonette Pettibone, Ann Winneshiek, Ona Garvin, Rainbow Casino Mgmt.*, SU 00-05 (HCN S. Ct., July 28, 2000) at 2; *see also Coalition for a Fair Gov't II v. Chloris A. Lowe, Jr. and Kathyleen Lone Tree-Whiterabbit*, SU 96-02 (HCN S. Ct., July 1, 1996) at 7-8; and *JoAnn Jones v. Ho-Chunk Nation Election Bd. and Chloris Lowe*, CV 95-05 (HCN S. Ct., Aug. 15, 1995) at 3. The Supreme Court accepted the following definition of abuse of discretion: "any unreasonable, unconscionable and arbitrary action taken without proper consideration of facts and law pertaining to the matter submitted." *Youngthunder, Sr.*, SU 00-05 at 2 *quoting* BLACK'S LAW DICTIONARY 11 (6th ed. 1990). Regarding findings of fact, the Supreme Court has required an appellant to "demonstrate[ ] clear error with respect to the factual findings of the trial court." *Coalition II*, SU 96-02 at 8; *but see Anna Rae Funmaker v. Kathryn Doornbos*, SU 96-12 (HCN S. Ct., Mar. 25, 1997) at 1-2.