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,
Isaac Greyhair, Dallas White Wing, Kevin Greengrass,
and Clarence Pettibone in their official capacity and
individually; and Ho-Chunk Nation Election Board,

Defendants.

Case No.: **CV 00-104**

ORDER

(Implementation of Appellate Standard)

INTRODUCTION

The Court must offer direction to the parties concerning the intervening interpretation of the HO-CHUNK NATION CONSTITUTION [hereinafter CONSTITUTION], ART. V § 4 by the Supreme Court of the Ho-Chunk Nation [hereinafter HCN Supreme Court]. The Court provided the necessary guidance at the March 23, 2001 *Hearing on Remand*. This *Order* proves, in part, a memorialization of that *Hearing*.

PROCEDURAL HISTORY

The Supreme Court remanded the instant case for proceedings consistent with the appellate decision. *Chloris Lowe, Jr. and Stewart Miller v. Ho-Chunk Nation Legislature Elliot Garvin, et al.*, SU 00-17 (HCN S. Ct., Mar. 13, 2001) p. 8. In response, the Court mailed *Notice(s) of Hearing* to the parties on March 14, 2001, informing them of the date, time and location of the *Hearing on Remand*. The Court convened the *Hearing* on March 23, 2001 at 10:30 A.M. CST. The following parties appeared at the *Hearing on Remand*: Attorney Gary J. Montana, plaintiffs' counsel; District 1 Legislator Elliot Garvin; District 1 Legislator Isaac Greyhair; and Ho-Chunk Nation Department of Justice [hereinafter DOJ] Attorney John S. Swimmer, defendants' counsel. Others in attendance included: District 5 Legislator Kathyleen Lonetree-Whiterabbit, District 5 Legislator Karen Martin, DOJ Attorney Michael Murphy, DOJ Attorney Michael Wacker and DOJ Paralegal Edward Littlejohn.

APPLICABLE LAW

CONSTITUTION OF THE HO-CHUNK NATION

Article IV – General Council

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

Section 3. Powers Retained by the General Council.

(b) The General Council retains the power to review and reverse actions of the Legislature except those enumerated in Section 4 of this Article. The General Council shall return such reversals to the Legislature for reconsideration consistent with the action of the General Council. The General Council retains the power to review and reverse decisions of the Judiciary which interpret actions of the Legislature. The General Council does not retain the power to review and reverse decisions of the Judiciary which interpret this Constitution.

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.

Article VI – Judiciary

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

Article VIII – Elections

Section 5. Eligible Voters. Any member of the Ho-Chunk Nation who is at least eighteen (18) years old and who meets all the requirements established by the Ho-Chunk Nation shall be eligible to vote.

Article X – Bill of Rights

Section 1. Bill of Rights.

(a) The Ho-Chunk Nation, in exercising its powers of self-government, shall not:

(8) deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law;

DECISION

At the outset of the instant case, the Court easily surmised that the concepts of redistricting and reapportionment and the derivative principle of one person, one vote did not originate from hoc□k tradition or custom. Rather, the constitutional framers deliberately incorporated those fundamental precepts of representative democracy as acknowledged and articulated by the United States Supreme Court [hereinafter U.S. Supreme Court] into the CONSTITUTION. *Order (Partial Dismissal of Claims)* (HCN Tr. Ct., Nov. 3, 2000) pp. 9-10; *see also Order (Determining Constitutionality of the Proposed Redistricting/Reapportionment Scenarios)* (HCN Tr. Ct., Dec. 21, 2000) [hereinafter *Constitutionality II*] p. 11. Neither of the parties have ever attempted to debate this obvious premise. *Constitutionality II*, p. 11.

In light of the foregoing, the Court impressed upon the parties the need to "become well-versed in the [U.S.] Supreme Court precedent . . . regard[ing] . . . reapportionment and redistricting, that being *Baker v. Carr* and its progeny." *Pre-Trial Hearing* Transcript (Nov. 1, 2000) p. 7; *see also Order (Partial Dismissal of Claims)* pp. 10-11. The Court intentionally identified this specific line of cases since they relate to state legislative redistricting/reapportionment instead of the federal congressional model. *Order (Partial Dismissal of Claims)* p. 10. The Court clearly held the federal redistricting/reapportionment cases inapplicable for purposes of the present inquiry. *Id.*; *see also Constitutionality II*, pp. 12-13. The Court, however, feels compelled to briefly outline both models to emphasize the points at which they diverge and to provide the necessary context against which to assess the superseding appellate standard.

The U.S. Supreme Court derived subject matter jurisdiction, in part, over federal congressional and state legislative redistricting/reapportionment challenges by means of the federal Equal Protection

Clause.[1]

> Since the achieving of a fair and effective representation of all citizens is concededly the basic aim of legislative apportionment, we conclude that the Equal Protection Clause guarantees the opportunity for equal participation by all voters in the election of . . . legislators. Diluting the weight of votes because of place of residence impairs basic constitutional rights under the Fourteenth Amendment just as much as invidious discrimination based upon factors such as race. . . .

Reynolds v. Sims, 377 U.S. 533, 565-66 (1964). Additionally, the U.S. Supreme Court critically examined the "by the People" phrase within Article I to arrive at the appropriate standards in the federal congressional context.[2] *Wesberry v. Sanders*, 376 U.S. 1, 7-18 (1964).

The well-known principle of one person, one vote actually originated from the U.S. Supreme Court's historical analysis of the "by the People" phrase, and was not intended to directly apply in the context of state legislative redistricting/reapportionment. *Id.*, *see also Reynolds*, 377 U.S. at 559-61, 572-76. In fact, the U.S. Supreme Court explicitly found "the federal analogy inapposite and irrelevant to state legislative districting schemes," *Reynolds*, 377 U.S. at 573, distinguishing constitutionally required redistricting/reapportionment of the federal House of Representatives from its state counterpart on several grounds. First, prior to the creation of the Union, colonial governments based legislative representation "completely, or predominantly, on population." *Id.* Second, the system of representation existing in the federal House of Representatives was borne out of "compromise and concession indispensable to the establishment of our federal republic." *Id.*, p. 574. Third, the colonial governments possessed independent sovereign status, and fully acknowledged the resulting divestiture of such status

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[1] "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 2.

[2] "The House of Representatives shall be composed of Members chosen every second Year by the People of the several States. . . ." U.S. CONST. art. I, § 2, cl. 1.

by inclusion in the United States of America. The bicameral structuring of the federal Congress proved instrumental in gaining complete, albeit at times grudging, support from the colonial sovereigns. *Id*., p. 574-75. This history differs entirely from that of political subdivisions existing in a state or trust communities within the Ho-Chunk Nation. The principle of one person, one vote lies at the core of the federal experiment, and should not be implanted into the state legislative or tribal redistricting/ reapportionment context.

So, why would the tribal framers incorporate "one-person/one-vote" within the constitutional provisions relating to redistricting/reapportionment? *See* CONSTITUTION, ART. V § 4. As indicated above, the U.S. Supreme Court did not deem importation of this unique federal principle into the state legislative context as appropriate. Instead, the U.S. Supreme Court determined that the federal "Equal Protection Clause demand[ed] no less than *substantially equal* state legislative representation for all citizens, of all places as well as of all races." *Reynolds*, 377 U.S. at 568 (emphasis added). This principle proved less demanding than one person, one vote. "[T]he overriding objective must be *substantial equality* of population among the various districts, so that the vote of any citizen is *approximately equal* in weight to that of any other citizen. . . ." *Id*., p. 579 (emphasis added). However, as a result of the one person, one vote catchphrase passing into the common vernacular, the U.S. Supreme Court later subsumed the state legislative principle of substantially equal into its federal counterpart. In 1986, the U.S. Supreme Court pronounced that "[s]ince *Baker v. Carr*, 369 U.S. 186 (1962), we have consistently adjudicated equal protection claims in the legislative districting context regarding inequalities in population between districts. In the course of these cases, we have developed

and enforced the 'one person, one vote' principle. See *e.g.*, *Reynolds v. Sims*, 377 U.S. 533 (1964)."[3] *Davis v. Bandemer*, 478 U.S. 109, 118 (1986) (The *Davis* Court addressed a state legislative political gerrymandering claim.). The convergence of the two (2) principles serves to confuse the inquiry in a limited manner since the crucial difference between the federal congressional and state legislative contexts remains within the remedy phase.

With regards to state legislative redistricting/reapportionment, "the Equal Protection Clause requires that a State make an honest and good faith effort to construe districts . . . as nearly of equal population as is practicable." *Reynolds*, 377 U.S. at 577 *cited with approval in Order (Granting Plaintiffs' Motion for Summary Judgment)* p. 13. With regards to federal congressional redistricting/reapportionment, the U.S. Supreme Court has held that, "construed in its historical context,

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[3] If the Court had merely referred to BLACK'S LAW DICTIONARY for the purpose of discharging its authority to interpret the CONSTITUTION, it would have confronted incomplete and improper definitions of the principle.

> **one-person, one-vote rule.** *Constitutional law*.
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> The principle that the Equal Protection Clause requires legislative voting districts to have about the same population. *Reynolds v. Sims*, 377 U.S. 533 (1964). – Also termed *one-man, one-vote rule*. See APPORTIONMENT.
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> BLACK'S LAW DICTIONARY 1116 (7th ed. 1999) (parallel cites omitted).
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> **one person, one vote.** Expression used to describe state legislative districting which gives equal legislative representation to all citizens of all places. The rule was established in Reynolds v. Sims, 377 U.S. 533, 568, which required that the seats in both houses of a bicameral state legislature be apportioned on a population basis. Gray v. Sanders, 372 U.S. 368; Wesberry v. Sanders, 376 U.S. 1; Baker v. Carr, 369 U.S. 186. *See also* Apportionment; Reapportionment.
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> BLACK'S LAW DICTIONARY 1116 (6th ed. 1990) (parallel cites omitted).

The 1999 definition clearly mixes the federal and state redistricting/reapportionment contexts by providing that the one person, one vote principle requires "districts to have *about the same* population," BLACK'S LAW DICTIONARY 1116 (7th ed. 1999), or "approximately equal." *Reynolds*, 377 U.S. 579. The 1990 definition improperly relegates the principle only to state legislative districting, and miscites U.S. Supreme Court caselaw by directing the readers attention to page 568 of the *Reynolds* decision wherein there exists no mention of one person, one vote. Instead, the discussion on page 568 contains the pronouncement of the "substantially equal" language solely utilized for state redistricting/reapportionment. BLACK'S LAW DICTIONARY 1116 (6th ed. 1990).

the command of Art. I, § 2, that Representatives be chosen 'by the People of the several States' means that as nearly as is practicable one man's vote in a congressional election is worth as much as another's." *Wesberry*, 376 U.S. at 7-8. The most important distinction between the seemingly identical standards occurs at this point. The standard applied in the federal congressional model ends at "as nearly as is practicable" which has, in turn, led the U.S. Supreme Court to equate the standard with absolute equality. *Mahan v. Howell*, 410 U.S. 315, 320 (1973) *quoting Kirkpatrick v. Preisler*, 394 U.S. 526, 531 (1969). "[T]he Court in *Wesberry v. Sanders* . . . recognized no excuse for the failure to meet the objective of equal representation for equal numbers of people in congressional districting other than the practical impossibility of drawing equal districts with mathematical precision." *Mahan*, 410 U.S. at 322. Again, this treatment derives from the U.S. Supreme Court focusing on the "by the People" language of Article I viewed through its unique historical context. *See Reynolds*, 377 U.S. at 560. The Court, as stated above, disavowed any reliance on the federal congressional standard, and did not apply any standard with the intent of achieving absolute equality or mathematical precision.

"The standard in each case is described in the 'as nearly as practicable' language used in *Wesberry v. Sanders*, *supra*, and *Reynolds v. Sims*, *supra*. But, as we have previously indicated, the latitude afforded to States in legislative redistricting is somewhat broader than that afforded to them in congressional redistricting." *Mahan*, 410 U.S. at 327. In fact, the latitude may be significantly broader depending on the circumstances.[4] Why? In state legislative redistricting/reapportionment, the U.S. Supreme Court employs a rational basis analysis for determining whether the state can supply

[4] The U.S. Supreme Court permitted Niobrara County in the State of Wyoming to retain a state legislative representative despite an eighty-nine percent (89%) deviation from the ideal state legislative apportionment existing in that county since the State satisfied a rational basis review. *Brown v. Thompson*, 462 U.S. 835 (1983). This scenario markedly contrasts with the experience of the State of New Jersey which could not maintain a federal congressional redistricting scheme that permitted an average 0.1384% deviation from the ideal federal congressional apportionment. *Karcher v. Daggett*, 462 U.S. 725 (1983).

"legitimate considerations incident to the effectuation of a rational state policy" as a justification for an unreasonable deviation from an ideal legislative apportionment. *Reynolds*, 377 U.S. at 579 *cited with approval in Order (Granting Plaintiffs' Motion for Summary Judgment)* p. 13.[5] And, in state legislative redistricting/reapportionment, the inquiry appropriately begins with determining "substantial equality" rather than "one person, one vote" as traditionally, and properly, viewed. Ultimately, application of the rational basis standard of review in determining whether a state has offered a scenario in furtherance of "as nearly as practicable" reapportionment provides the greatest level of deference to the legislative body. It is clearly improper to sever the rational basis analysis from a discussion of the state redistricting/reapportionment standard as the result would be the inapposite and irrelevant federal congressional standard of absolute equality.

The Court never applied the federal congressional standard of absolute equality, but yet one would not get this impression from the defendants' arguments on appeal. The defendants contended that the Court

> misconstrue[d] the Article V, section 4 Constitutional provision that the Legislature shall have the power to redistrict or reapportion 'in pursuit of one-person/one-vote representation.' In his November 13, 2000 Order, Judge Matha imposes a new constitutional standard. 'The Legislature must propose redistricting and reapportionment scenarios which approach the one person/one vote objective as nearly as <u>practicable</u>. *Order* at 13., emphasis added. It is this language 'nearly as practicable' that creates a new standard wholly unsupported by the Constitution.

Notice of Appeal, SU 00-17 (Dec. 28, 2000) p. 4. In actuality, the defendants misconstrued, and

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[5] Specifically, the Court required that "[t]he Legislature must propose redistricting and reapportionment scenarios which approach the one person/one vote objective as nearly as practicable. Minor deviations may occur due to permissible reliance on pre-existing state subdivision boundaries, and the importance of maintaining contiguity. The Legislature must justify the existence of larger divergences 'based on legitimate considerations incident to the effectuation of . . . rational . . . polic[ies].'" *Order (Granting Plaintiffs' Motion for Summary Judgment)* p. 13 (internal citations and footnote omitted).

continue to misconstrue, the remedy articulated by the Court. "Appellants continue to argue that the Ho-Chunk Nation Constitution identifies the standard at issue as 'in pursuit of' one person/one vote. This standard is clearly identified in the Ho-Chunk Nation Constitution. However, in its place the Court has adopted the 'as nearly as practicable' standard identified in *Baker*."[6] *Appellants' Brief*, SU 00-17 (Jan. 8, 2001) p. 4. The defendants later stress that the Court determined "that 'one person/one vote' is an absolute mandate based on federal precedent." *Id*., p. 7. Of course, the above-discussion contradicts the claimed imposition of any absolute mandates, especially in light of the deferential rational basis analysis. However, the defendants fail to even mention the rational basis standard or the associated terminology of "rational policies" and "legitimate considerations" in its *Notice of Appeal, Appellants' Brief* or February 17, 2001 *Oral Argument*.

The Court clearly applied the deferential rational basis analysis when determining the constitutionality of the proposed redistricting/reapportionment scenarios. In relation to Scenario 30, the Court found "that District I Legislator Isaac Greyhair presented legitimate considerations to justify the negative twenty-three percent (-23%) deviation from the ideal legislative apportionment occurring in District 3." *Order (Determining Constitutionality of the Proposed Redistricting/Reapportionment Scenarios)* (HCN Tr. Ct., Dec. 14, 2000) [hereinafter *Constitutionality I*] p. 16. Similarly, the Court approved Scenario 1E, containing a negative twenty-five percent (-25%) deviation in District 1, by virtue of consistent application of the same rational basis analysis. *Constitutionality II*, p. 10.

Furthermore, the Court abided by the U.S. Supreme Court's lenient application of the one

[6] The phrases "as nearly as practicable" or "as nearly as is practicable" appear nowhere in the 164 page opinion of *Baker v. Carr*, 369 U.S. 186 (1962). In *Baker*, the U.S. Supreme Court "intimated no view as to the proper constitutional standards for evaluating the validity of a state legislative apportionment scheme. Nor did [it] give any consideration to the question of appropriate remedies." *Reynolds*, 377 U.S. at 556. So, the defendants incorrectly cited federal caselaw, thereby misguiding the HCN Supreme Court. *See also Oral Argument*, SU 00-17 (Transcript, Feb. 17, 2001) p. 27, lines 12-16.

person, one vote principle, i.e. substantial equality, when assessing lesser deviations from the ideal legislative apportionment. In Scenario 1E, the Court did not find a positive thirteen percent (+13%) deviation existing in District 4 *prima facie* unconstitutional.[7] *Constitutionality II*, p. 13. Likewise, the Court neither found the positive twelve percent (+12%) deviation existing in District 5 in Scenarios 30 and 1E *prima facie* unconstitutional. *Id*., *see also Constitutionality I*, p. 17. Regardless of the foregoing facts, the defendants consistently characterize the remedy of the Court as mandating mathematical precision, thereby leading the HCN Supreme Court to declare that the Court imposed "a higher standard than that required by the Constitution's plain language. . . ." *Decision*, p. 6. This represents the proper finding when presented with the "as nearly as practicable" language standing alone because such language signifies the federal congressional redistricting/reapportionment standard of absolute equality.

The Court has not previously provided the above primer in constitutional law since the parties were represented by licensed attorneys whom the Court directed, at the beginning of the case, to become familiar with the designated federal precedent. The Court attempted to interpret the "in pursuit of one-person/one vote" provision according to the interpretive guidelines provided by the HCN Supreme Court. CONSTITUTION, ART. V § 4. Specifically,

> 'a court will look at legislative history, written and/or oral, as well as notes, records and other documentation available to interpret meanings.' *JoAnn Jones v. Ho-Chunk Nation Election Board and Chloris Lowe*, CV 95-05 (HCN S. Ct., Aug. 15, 1995) p. 4. However, in the absence of 'legislative history and testimony from the original framers of the HCN Constitution, the

[7] The Court earlier noted that it declined to adopt "the ten percent (10%) maximum deviation standard for determination of *prima facie* unconstitutionality used by the United States Supreme Court since this guideline derives from the particularized experience of that Court." *Order (Granting Plaintiffs' Motion for Summary Judgment)* p. 13, fn. 4 *citing Brown*, 462 U.S. at 842-43. For instance, the *Mahan* Court approved a sixteen percent (16%) deviation for a state legislative redistricting/ reapportionment in the State of Virginia, noting "[w]hile this percentage may well approach tolerable limits, we do not believe it exceeds them." *Mahan*, 410 U.S. at 329. The U.S. Supreme Court delivered this opinion before the pronouncement of the ten percent (10%) standard, but one cannot ascertain the extent to which the presence of legitimate considerations informed the U.S. Supreme Court's decision precisely because one cannot isolate constituent parts of the state legislative redistricting/reapportionment inquiry. *See Id*., pp. 319-20.

> [Court] interprets [a constitutional provision] as to its plain meaning/intent.' *Ho-Chunk Nation Election Board, Ho-Chunk Nation v. Aurelia Lera Hopinkah*, SU 98-08 (HCN S. Ct., April 7, 1999) p. 4.

Order (Recognizing Right to Challenge) (HCN Tr. Ct., Nov. 8, 2000) pp. 8-9. In the absence of constitutional history, the Court interpreted the provision according to its plain intent.[8] The parties have not voiced disagreement concerning the Court's determination of the origin of the relevant constitutional concepts and principle, nor have they attempted to distinguish the federal precedent apart from the defendants' argument regarding justiciability. Furthermore, the Court interpreted the "in pursuit of" language as being consistent with the U.S. Supreme Court's treatment of state legislative redistricting/reapportionment challenges. The Court strongly stands by the reasoned, deliberate and equitable constitutional interpretation reached in this case.[9]

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[8] The Court finds it problematic that the defendants chose to dispute the Court's interpretation while offering forth no constitutional history or testimony of the drafters/framers. The CONSTITUTION received approval from the Assistant Secretary – Indian Affairs on November 1, 1994, and by its own language contemplated redistricting/reapportionment within months of its approval. *See* CONSTITUTION, ART. V § 4. The defendants, however, for reasons unknown, did not wish to place any reliance on presumably available firsthand accounts.

[9] The Court possesses the authority to "interpret and apply the Constitution. . . ." CONSTITUTION, ART. VII § 4; *see also Id*., ART. IV § 2. The HCN Supreme Court may certainly overturn this Court's misinterpretation or misapplication of the CONSTITUTION, and only the HCN Supreme Court can legally characterize this Court's decisions as such. *See Id*., ART. IV § 3 (b). In this regard, Justice *Pro Tempore* Vele recognized the Court's attempted interpretation of the constitutional provision in question. *Oral Argument* (Transcript, Feb. 17, 2001) p. 13, lines 9-11, and pp. 15-16, lines 19-1. Likewise, Chief Justice B. Hunter implicitly acknowledged the Court's performance of its interpretive function. *Id*., p. 25, lines 2-4. The Court then respectfully questions the HCN Supreme Court's characterization of this Court "exceed[ing] the scope of [its] authority." *Decision*, pp. 5-6. If the Court was earnestly attempting to interpret the CONSTITUTION, then it was performing an act decidedly within the scope of its authority. Furthermore, the HCN Supreme Court has previously announced its applicable standard of appellate review: abuse of discretion.

> That is, this Court must review the Trial Courts (*sic*) decision to determine if *an error of law* was made by the lower court. As defined by Black's Law Dictionary, an 'abuse of discretion by [a] trial court is any *unreasonable, unconscionable and arbitrary action* taken without proper consideration of facts and law pertaining to [the] matter submitted.' Black's Law Dictionary, 6th ed., West Publishing Co. (1991) (*sic*)

Daniel Youngthunder, Sr. v. Jonette Pettibone, Ann Winneshiek, Ona Garvin, Rainbow Casino Management, SU 00-05 (HCN S. Ct., July 28, 2000) p. 2 (emphasis added). The Court respectfully fails to comprehend how utilizing standards articulated and refined by the U.S. Supreme Court over the course of nearly forty (40) years represents an unreasonable, unconscionable and arbitrary interpretation of law. Neither the phrase "as nearly as practicable" nor the rational basis analysis appear on the face of the federal Equal Protection Clause; the U.S. Supreme Court offered its interpretation of equal protection in the

The word "pursuit" has no intrinsic qualitative meaning. One can begin an exhaustive pursuit of an objective. One can also begin a haphazard pursuit of an objective. In the present case, the Court required the Legislature to "pursue the one person/one vote standard as nearly as practicable" *as tempered by a rational basis analysis. Decision*, p. 5. The HCN Supreme Court has now grafted the adjectives "diligent, serious and continuous. . ." onto the noun "pursuit" in an attempt to offer meaning to the provision in which it appears.[10] *Id.*, p. 6. However, there exists no commonly accepted definition of "in pursuit of" within legal parlance in relation to redistricting/reapportionment. The defendants maintain that they satisfied the constitutional mandate through active involvement in the deliberative

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context of redistricting/reapportionment. The CONSTITUTION incorporates the principle of one person, one vote derived from the U.S. Supreme Court's interpretation, and this Court does not find it unconscionable to import the remedy uniquely associated with this federally acknowledged principle.

[10] The HCN Supreme Court admonishes the Court for not applying the plain language of the CONSTITUTION. *Decision*, p. 6. The HCN Supreme Court derives such plain language by referring to a partial definition of "pursuit" found in BLACK'S LAW DICTIONARY, namely, "an 'activity that one pursues or engages in seriously and continually. . . .'" *Id. quoting* BLACK'S LAW DICTIONARY 1237 (6th ed. 1990). The referenced definition appearing in BLACK'S reads in its entirety: "Activity that one pursues or engages in seriously and continually or frequently as vocation or profession or as an avocation. Holman v. Oriental Refinery, 75 N.M. 52, [58,] 400 P.2d 471, 475." BLACK'S LAW DICTIONARY 1237 (6th ed. 1990). The Supreme Court of New Mexico arrived at this definition in the following context:

> In Webster's Third International Dictionary we find 'pursuit' defined as 'an activity that one pursues or engages in seriously and continually or frequently as a vocation or profession or as an avocation.'
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> 'Pursuit' has also been held to be synonymous with 'occupation.' Thompson v. Wiseman, 189 Ark. 852, 75 S.W.2d 393; Dorrell v. Norida Land & Timber Co., 53 Idaho 793, 27 P.2d 960.
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> It is difficult to consider 'labor' either as a vocation or occupation. However, being a gasoline filling station attendant or operator may be so considered. . . . [H]e was disabled from following 'the pursuit in which he was engaged. . . .'

Holman, 75 N.M. at 58. The most recent edition of BLACK'S contains this full definition of pursuit: "**1.** An occupation or pastime. **2.** The act of chasing to overtake or apprehend. See FRESH PURSUIT." BLACK'S LAW DICTIONARY 1250 (7th ed. 1999). With all due respect, how can the HCN Supreme Court expect this Court to consult New Mexico employment law concerning whether a gas station filling attendant is engaged in a pursuit or occupation for purposes of interpreting and applying the *plain language* of the CONSTITUTION in a redistricting/reapportionment election challenge?

process. "The Legislature and the Ho-Chunk people undertook to redistrict/reapportion 'in pursuit of' one person/one vote when they drafted redistricting proposals and submitted them for consideration at Area meetings." *Appellants' Brief*, p. 5. Elaborating on this position, "the Legislature undertook an extensive *process* in its efforts to discharge its duty to reapportion 'in pursuit of' one person/one vote. The Legislature *satisfied this constitutional mandate* by making the *process* as inclusive as possible." *Id*., p. 6 (emphasis added). In support of these statements, the defendants directed the HCN Supreme Court to a WEBSTER'S DICTIONARY definition of pursuit: "[a]n act of (*sic*) instance of pursuing or chasing, or the act of striving." *Id*., p. 15 *quoting* WEBSTER'S II NEW RIVERSIDE UNIVERSITY DICTIONARY 957 (1988). The defendants did not present this definition for consideration below, relying rather on the interpretation of counsel. Alternatively, the plaintiffs noted that the "in pursuit of language" does not evidence any standard. *Oral Argument* (Transcript, Feb. 17, 2001) p. 23, lines 19-20. Regardless of the foregoing discussion, the HCN Supreme Court has announced the plain language interpretation of "in pursuit of one-person/one-vote representation," and the Court and the parties are obligated to abide by this determination.

The Legislature must endeavor to pursue the objective of one person, one vote representation by means of a "diligent, serious and continuous effort." *Decision*, p. 6. Accordingly, the Court must attempt to objectively determine whether the Legislature has satisfied this obligation.[11] In this regard, the Court shall require evidence proving that the entire membership, as participating through Area meetings, has duly considered any proposed redistricting/reapportionment scenario(s) after being

[11] The Court would have earlier deemed this manner of review as representative of improper intrusion into the political process.

provided adequate notice of the scheduled purpose of the meeting. This requirement derives from the defendant's past assertions that the deliberative process included "extensive Area meeting discussion. . . ." *Order (Granting Plaintiffs' Motion for Summary Judgment)* p. 12 *quoting Defendants' Brief in Support of Notice and Motion for Summary Judgment*, CV 00-104 (Nov. 8, 2000) p. 4. Similarly, the Court shall require all legislative and subcommittee minutes, properly referenced and accompanied by recording, related to the issue of redistricting/reapportionment due to the defendants earlier contention that the deliberative process included "extensive . . . Legislative discussion and debate." *Id*.

The HCN Supreme Court emphasized that the Legislature need not propose "the *best* plan to promote th[e] objective [of one person, one vote], but *any* plan that furthers that objective."[12] *Decision*, p. 6 (emphasis in original). However, the Legislature possesses a vested interest in proposing a viable redistricting/reapportionment from the perspective of the voters since only one proposal may appear on a Special Redistricting Election ballot. *Id*., p. 7. Otherwise, the Legislature would unduly deplete the Ho-Chunk Nation's treasury due to the need for successive elections. The Legislature, therefore, must attempt to discharge its constitutional duty "with a high degree of effort to achieve a particular point," i.e. one person, one vote. *Id*., p. 6.

The Court reluctantly defines the "one-person/one-vote" principle by its plain language, meaning absolute equality. The HCN Supreme Court did not accept the plain intent analysis of the Court, but the Court recognizes that the defendants misstated the standards of the Court as described above. The defendants irrationally contended that despite intentionally focusing only on the phrase "as nearly as

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[12] The Court clearly never required the Legislature to propose only the best plans as substantiated by the above-discussion. Additionally, the plaintiffs offered a more mathematically precise redistricting/reapportionment scenario at the *Hearing on Justifications*, but the Court did not require the Legislature to adopt such scenario. *Hearing on Justifications*, CV 00-104 (Transcript, Dec. 8, 2000) pp. 42-43, lines 18-4.

practicable" on the appeal, "the rational basis standard was a presumed standard."[13] *Hearing on Remand*, CV 00-104 (Log of Proceedings Electronically Recorded, Mar. 23, 2001; 11:48:15) p. 2. The defendants wish to rely upon the rational basis analysis for the purpose of justifying reapportionment deviations due to the existence of legitimate considerations, e.g. preservation of language, tradition, and culture. However, the rational basis analysis cannot be found within the plain language of "in pursuit of one-person/one-vote representation." In any event, the previously mentioned considerations should inform most, if not all, legislative decisions.

The defendants shall submit one or more redistricting/reapportionment proposals for review on or before April 17, 2001. The Court directs the defendants to request additional time if the membership has not had the proper opportunity to view and discuss the proposal(s). Otherwise, the Court shall convene a *Hearing* on April 23, 2001 at 9:00 A.M. CST to allow the defendants the opportunity to advocate on behalf of the proposal(s). The Legislature shall be guided by the HCN Supreme Court's direction for the Judiciary "to protect the rights of all the voters of the Ho-Chunk Nation no matter where they may live." *Decision*, p. 8 *citing Reynolds*, 377 U.S. at 567. The Legislature shall perform its great responsibility with proper recognition of this fact. *Decision*, p. 8.

IT IS SO ORDERED this 30th day of March, 2001 at the Ho-Chunk Nation Trial Court in Black River Falls, Wisconsin from within the sovereign lands of the Ho-Chunk Nation.

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[13] This statement shows a profound misunderstanding of the relevant federal caselaw and basic constitutional analysis. The presence of the fundamental right to equality of a vote, and the non-dilution or debasement thereof, would typically trigger strict scrutiny. This equates with the federal congressional use of one person, one vote. The rational basis inquiry only enters the equation as an indispensable counterpart to the "as nearly as practicable" language jointly utilized within the remedy phase of the unique state legislative redistricting/reapportionment model as consistently applied by the U.S. Supreme Court.

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Hon. Todd R. Matha
HCN Associate Trial Judge