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, Sr., 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

(Lifting Injunction)

On November 13, 2000, the Court "enjoin[ed] the [Ho-Chunk Nation] Election Board from posting the Official Notice of the General Primary Election pursuant to the AMENDED AND RESTATED HO-CHUNK NATION ELECTION ORDINANCE [hereinafter ELECTION ORDINANCE], ART. VI, Sec 6.01 (a) until otherwise notified by the Court." *Order (Granting Plaintiffs' Motion for Summary Judgment)* (HCN Tr. Ct., Nov. 13, 2000) p. 14. The Court recently addressed this injunction despite the fact that the instant case is pending before the Ho-Chunk Nation Supreme Court [hereinafter Supreme Court]. *Order (Regarding Injunction)* (HCN Tr. Ct., Mar. 5, 2001). The Court felt compelled to take this unprecedented action since neither the Supreme Court nor the parties alerted this Court to the status of

the injunction or the necessity to re-examine its continuing appropriateness under the current circumstances. The Court hereby lifts the injunction for the reason(s) noted in its earlier *Order*. *Id*., pp. 2-3.

The Supreme Court indicated that the issue of the injunction "was not a part of the pending appeal in this case." *Order Denying Motion for Clarification*, SU 00-17 (HCN S. Ct., Mar. 10, 2001) p. 2. The defendants, by and through Attorney John S. Swimmer, apparently "did not seek a stay on (*sic)* the November 13, 2000 *Order*," thereby precluding review of the issue at hand. *Id*. Furthermore, the Supreme Court stated that "the underlying November 13, 2000 *Order* is not before this Court on appeal."[1] *Id*.

The Supreme Court earlier denied a *Notice of Appeal* in the instant case since it designated the appeal as interlocutory in nature. *Order Denying Motion for Reconsideration*, SU 00-15 (HCN S. Ct., Jan. 1, 2001) p. 2. In other words, the Supreme Court deemed the November 13, 2000 *Order* as not satisfying the applicable condition of finality. *Amended Order Denying Appeal*, SU 00-15 (HCN S. Ct., Dec. 18, 2000) p. 2; *see also Interim Rules of Civil Procedure for Use in Election Challenges* [hereinafter *Election R. Civ. P.*], Rule 8. The *Election R. Civ. P.* only explicitly permits an appeal of a "final judgment." *Election R. Civ. P.* 8. The Supreme Court regarded the appealed order as preliminary based on language contained in the same paragraph as the Court's injunction. *Amended Order Denying Appeal*, SU 00-15 at 2. In summation, the Supreme Court stated that it "would prefer to accept appeals after final judgments are rendered which dispose of <u>all</u> the issues." *Id*. (emphasis in original). The

[1] In the November 13, 2000 *Order*, the Court held the "implementation of the 'No Action or No Change' scenario by the eligible voters in the October 14, 2000 Special Redistricting Election as *per se* unconstitutional." *Order (Granting Plaintiffs' Motion for Summary Judgment)* (HCN Tr. Ct., Nov. 13, 2000) p. 14. Consequently, the defendants must assess the propriety of posting the Official Notice of the General Primary Election if the Supreme Court is not considering this Court's determination of unconstitutionality.

Supreme Court later reiterated this point, emphasizing its "concern[ ] with repeated litigation on the same issues." *Order Denying Motion for Reconsideration*, SU 00-15 (HCN S. Ct., Jan. 1, 2001) p. 2.

The *Election R. Civ. P.* do not identify the necessary components of a *Notice of Appeal*, and, therefore, the *Ho-Chunk Nation Rules of Appellate Procedure* [hereinafter *HCN R. App. P.*] provide the relevant guidance. *See Election R. Civ. P.* 1. *HCN R. App. P.* 10 requires an appellant to "identify the party(ies) making the appeal by name and address, and shall identify the final judgment or order being appealed by name and case number," including "a short statement of the reason or grounds for the appeal." *HCN R. App. P.* 10. Additionally, the Supreme Court previously chastised Attorney Swimmer for omitting specific requests for relief. *Amended Scheduling Order*, SU 00-17 (HCN S. Ct., Jan. 12, 2001) pp. 2-3, fn. 3.

Based upon the foregoing, it appears as if the defendants failed to incorporate the pertinent request for relief and/or decision within the pending appeal. Alternatively, the Supreme Court could possibly be indicating that decisions preceding a final judgment are not encompassed within an appeal of a final judgment. The United States Supreme Court explained that the purpose of the condition of finality "is to combine in one review *all stages* of the proceeding that effectively may be reviewed and corrected if and when final judgment results."[2] *Cohen v. Beneficial Loan Corp.*, 337 U.S. 541, 546 (1949) (emphasis added); *see also Cobbledick v. United States*, 309 U.S. 323, 324-26 (1940). In either event, the Court hereby lifts the injunction ordered in the November 13, 2000 *Order (Granting Plaintiffs' Motion for Summary Judgment)*.

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[2] One federal appellate court commented that "[i]t is a well-settled rule of law that an appeal from a final judgment raises all antecedent issues previously decided." *Exxon Corp. v. St. Paul Fire & Marine*, 129 F.3d 781, 784 (5th Cir. 1997) *citing Dickinson v. Auto Center Mfg. Co.*, 733 F.2d 1092, 1102 (5th Cir. 1983). The Court continued by emphasizing that "once a final judgment is entered, all earlier non-final orders affecting that judgment may properly be appealed," thereby placing the onus on the appellant to correctly designate the appealed holdings. *Id*.

IT IS SO ORDERED this 12th 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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Hon. Todd R. Matha
HCN Associate Trial Judge