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

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**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**

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**ORDER  
(Partial Dismissal of Claims)**

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**INTRODUCTION**

The Court must determine whether to narrow the focus of the instant action through preliminary dismissal of unmeritorious or redundant claims. The Court deems that it must attempt to limit the scope of the inquiry given the condensed timeframe for consideration of this action under the CONSTITUTION OF THE HO-CHUNK NATION, ART. [hereinafter CONSTITUTION] VIII, Sec. 7. The Court dismisses several of the plaintiffs' claims for the reasons stated below.

## PROCEDURAL HISTORY

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3 The plaintiffs, Chloris Lowe, Jr. and Stewart J. Miller, by and through Attorney Gary J.  
4 Montana, initiated the current action by filing the *Complaint for Declaratory and Injunctive Relief*  
5 [hereinafter *Complaint*] accompanied by a *Motion to Appear Specially* on October 25, 2000.  
6 Consequently, the Court issued a *Summons* accompanied by the above-mentioned *Complaint* on October  
7 25, 2000, and delivered the documents by personal service to the defendants.<sup>1</sup> The Court also notified  
8 the parties of the date, time and location of the *Pre-Trial Hearing* in accordance with *Election R. Civ. P.*  
9 2. *See Notice (Pre-Trial Hearing)* (HCN Tr. Ct., Oct. 25, 2000).

11 On October 30, 2000, the defendants, by and through Ho-Chunk Nation Department of Justice  
12 [hereinafter DOJ] Attorney John S. Swimmer, filed the *Defendants' Answer* [hereinafter *Answer*] in a  
13 timely fashion, serving such document on the plaintiffs via first class mail. Following receipt of the  
14 *Answer*, the Court issued the October 30, 2000 *Order (Discovery Period)* to inform the parties of their  
15 obligations under *Election R. Civ. P. 7*. The Court convened the *Pre-Trial Hearing* on November 1,  
16 2000 at 8:00 A.M. CST. The following parties appeared at the *Hearing*: Stewart J. Miller, Attorney  
17 Gary J. Montana, plaintiffs' counsel, and Attorney John S. Swimmer, defendants' counsel.  
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24 \_\_\_\_\_  
25 <sup>1</sup> The Supreme Court of the Ho-Chunk Nation [hereinafter HCN Supreme Court] adopted the *Interim Rules of Civil*  
26 *Procedure for Use in Election Challenges* [hereinafter *Election R. Civ. P.*] for the October 14, 2000 Special Redistricting  
27 Election. *See Order* (HCN S. Ct., Oct. 14, 2000). The *Election R. Civ. P.* direct the Court to serve *Summons* upon the  
Attorney General of the Ho-Chunk Nation and on the Ho-Chunk Nation Election Board Chairperson. *Election R. Civ. P. 2.*

1 **APPLICABLE LAW**

2  
3 **CONSTITUTION OF THE HO-CHUNK NATION**

4 **Article III – Organization of the Government**

5 Section 1. Sovereignty. The Ho-Chunk Nation possesses inherent sovereign powers by virtue of  
6 self-government and democracy.

7 Section 2. Branches of Government. The government of the Ho-Chunk Nation shall be composed  
8 of four (4) branches: General Council, Legislature, Executive, and Judiciary.

9 Section 4. Supremacy Clause. This Constitution shall be the supreme law over the territory and  
10 within the jurisdiction of the Ho-Chunk Nation.

11 **Article V – Legislature**

12 Section 1. Composition of the Legislature.

13 (b) The Legislature shall be composed of Representatives from the following Districts, subject to  
14 Section 4 of this Article: the Black River Falls District, consisting of Clark, Eau Claire and Jackson  
15 counties, which shall elect three (3) members; the Wisconsin Dells District, consisting of Wood, Juneau,  
16 Adams, Columbia, and Sauk counties, which shall select three (3) members; and the La Crosse-Tomah  
17 District, consisting of La Crosse, Monroe, Vernon, and Crawford counties, which shall elect one (1)  
18 member; and the Wittenberg District, consisting of Marathon and Shawano counties, which shall elect  
19 one (1) member; and three (3) members which shall be elected at-large from outside the Districts listed  
20 above.

21 Section 4. Redistricting or Reapportionment. The Legislature shall have the power to redistrict or  
22 reapportion including changing, establishing, or discontinuing Districts. The Legislature shall maintain  
23 an accurate census for the purposes of redistricting or reapportionment. The Legislature shall redistrict  
24 and reapportion at least once every five (5) years beginning in 1995, in pursuit of one-person/one-vote  
25 representation. The Legislature shall exercise this power only by submitting a final proposal to the vote  
26 of the people by Special Election which shall be binding and which shall not be reversible by the  
27 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.

24 **Article VI – Judiciary**

25 Section 5. Jurisdiction of the Judiciary.

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

7 Article VIII – Elections

8 Section 1. General Elections. General Elections shall be held on the first Tuesday in June of odd  
9 numbered years. Offices of the Legislature, Executive, and Judiciary shall be filled at General  
10 Elections.

11 Section 3. Election Code. The Legislature shall enact an Election Code governing all necessary  
12 election procedures at least one hundred and twenty (120) days before the election.

13 Section 4. Election Board. The Legislature shall enact a law creating an Election Board. The  
14 Election Board shall conduct all General and Special Elections. At least sixty (60) days before the  
15 election, the Election Board may adopt rules and regulations governing elections. Election Board  
16 members shall serve for two (2) years. Election Board members may serve more than one term. The  
17 Legislature may remove Election Board members for good cause.

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

20 Section 7. Challenges of Election Results. Any member of the Ho-Chunk Nation may challenge the  
21 results of any election by filing suit in Tribal Court within ten (10) days after the Election Board  
22 certifies the election results. The Tribal Court shall hear and decide a challenge to any election within  
23 twenty (20) days after the challenge is filed in Tribal Court.

24 Article X – Bill of Rights

25 Section 1. Bill of Rights.

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

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

29 AMENDED AND RESTATED HO-CHUNK NATION ELECTION ORDINANCE

30 Article IV – Elective Offices and Terms

31

1 Section 4.01. Legislature

2 (a). Districts Defined. The Legislature shall be composed of the eleven (11) Representatives  
3 elected from the following Districts as listed in Article V, Section 1 (b) of the  
4 Constitution, which states: *Supra*.

5 (b). Legislative Districts. Until modified in accordance with Article V, Section 4 of the  
6 Constitution, the Districts shall be:

<u>District</u>		<u>Number of Legislators</u>
District 1:	Black River Falls	3
District 2:	Tomah/La Crosse	1
District 3:	Wittenberg	1
District 4:	Wisconsin Dells/Rapids	3
District 5:	At-Large	3

11 Article V – Qualifications

12 Section 5.05. Residency Requirement for Legislators.

13 (a). A candidate for Legislature shall be eligible to run for office in the District in which the  
14 candidate has resided for at least one (1) year immediately prior to filing the petition  
15 declaring his or her candidacy.

16 (b). ‘Residency’ is defined as the physical address stated on the periodic Address  
17 Verification Forms solicited by the Nation’s Office of Tribal Enrollment with respect to  
18 per capita distributions, except in the case of candidates in military service or full-time  
19 registered students, ‘Residency’ shall be the last physical address of such person before  
20 he or she entered the military service or school.

19 Article VIII – Eligible Voters

20 Section 8.02. Residency Requirements.

21 (a). A voter shall be eligible to vote in the District in which the voter has resided for at least  
22 three (3) months.

23 (b). ‘Residency’ is defined as the physical address stated on the periodic address verification  
24 forms solicited by the Nation’s Office of Tribal Enrollment with respect to per capita  
25 distributions; except in the case of voters in military service or full-time registered  
26 students, ‘Residency’ shall be the last physical address of such person before he or she  
27

1 entered the military service or school.

2 TRIBAL ENROLLMENT AND MEMBERSHIP ACT OF 1995

3 Section 6. Application for Enrollment.

4 (e) All rights, benefits, privileges and immunities of Membership shall take effect immediately  
5 upon timely approval of an application by the Office of Tribal Enrollment. PROVIDED, That  
6 such approval shall not be retroactive.

7 HO-CHUNK NATION RULES OF CIVIL PROCEDURE

8 Rule 57. Entry and Filing of Judgements.

9 All judgements must be signed by the presiding trial court judge. All signed judgements shall be  
10 deemed complete and entered for all purposes after the signed judgement is filed with the Clerk. A copy  
11 of the entered judgement shall be mailed to each party within two (2) calendar days of filing. The time  
12 for taking an appeal shall begin running from the date the judgement is filed with the Clerk. Interest on  
a money judgement shall accrue from the date the judgement is filed with the Clerk at a rate set by the  
Legislature or at five (5) per cent per year if no rate is set.

13 Rule 61. Appeals.

14 Any *final Judgement* or *Order* of the Trial Court may be appealed to the Ho-Chunk Nation Supreme  
15 Court. The *Appeal* must comply with the Ho-Chunk Nation *Rules of Appellate Procedure*, specifically  
16 *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*.

17 INTERIM RULES OF CIVIL PROCEDURE FOR USE IN ELECTION CHALLENGES

18 Rule 2. A party may initiate an action by filing the required summons and complaint along with a  
19 \$35.00 filing fee. Service of the *Complaint*, *Summons* and any *Notice* of a hearing shall be made on the  
20 Attorney General of the Ho-Chunk Nation *and* on the Chair or (*sic*) the Election Board within two (2)  
21 days of the date of filing in the Trial Court. The plaintiff shall attach to the Complaint a list of contact  
22 information for the purposes of *Service of Process*. The list shall include the day phone number,  
evening phone number, fax number and address of all named plaintiffs and their counsel, if retained.  
23 Those parties not having access to a phone or a fax are excused from this requirement but must provide  
the Court with a reliable alternative means of contacting them.

24 Rule 7. All documents and things, answers to interrogatories, and responses to requests for admission  
25 requested during discovery shall be provided to the requesting party within three (3) days unless  
otherwise ordered by the Court. Depositions will be conducted as the parties agree or as ordered by the  
Court. For the purposes of this election procedure, the three days means calendar days.

1 Rule 8. The final judgment of the Trial Court is appealable to the Ho-Chunk Supreme Court. The  
notice of appeal shall be filed and served within five (5) days of entry of the judgement.

2 Rule 9. The appellants (*sic*) brief shall be filed and served within ten days of the date of the notice of  
3 appeal. Any responding brief shall be filed within ten days of service of appellants (*sic*) brief. Further  
4 briefs may be permitted in the discretion of the Chief Justice of the Supreme Court. The appellant at  
their own cost must obtain a copy or (*sic*) the transcript and provide a copy to the respondent.

5 INDIAN CIVIL RIGHTS ACT OF 1968

6 Section 1302. Constitutional Rights.

7  
8 No Indian tribe in exercising powers of self-government shall –

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

11  
12 **FINDINGS OF FACT**

13  
14 1. The parties received proper notice of the November 1, 2000 *Pre-Trial Hearing*.

15 2. The co-plaintiff, Chloris A. Lowe, Jr., is an enrolled member of the Ho-Chunk Nation, Tribal  
16 ID# 439A001593, and resides at 2821 West 6<sup>th</sup> St., Wilmington, DE. The co-plaintiff, Stewart J. Miller,  
17 is an enrolled member of the Ho-Chunk Nation, Tribal ID# 439A002566, and resides at 225 Larkin St.,  
18 Madison, WI.

19 3. The co-defendants, Ho-Chunk Nation Legislature [hereinafter Legislature] Representatives Elliot  
20 Garvin, Gerald Cleveland, Sr., Myrna Thompson, Isaac Greyhair, Dallas WhiteWing, Kevin Greengrass,  
21 and Clarence Pettibone<sup>2</sup>, are duly elected members of a coequal branch of the sovereign Ho-Chunk  
22 Nation government located at the Ho-Chunk Nation Headquarters, W9814 Airport Road, P.O. Box 667,  
23

24  
25 \_\_\_\_\_  
26 <sup>2</sup> Legislator Clarence Pettibone currently serves as President pro tempore through implementation of the CONSTITUTION, ART.

1 Black River Falls, WI 54615. *See* CONSTITUTION, ART. III, Secs. 1, 2.

2 4. The co-defendant, Ho-Chunk Nation Election Board [hereinafter Election Board], is created  
3 pursuant to the CONSTITUTION, ART. VIII, Sec. 4, and located at 4 East Main St., Black River Falls, WI  
4 54615.

5 5. The Legislature passed the following motion at the August 22, 2000 *Regular Meeting*:

6 **Redistricting:**

7 **MOTION** by **Rep. Garvin** to approve placing on the ballot for a primary  
8 election by the Ho-Chunk people to include scenarios 1-C, 12-A, and No  
9 Change. Second by V.P. Pettibone. 6-4 (Rep. Blackdeer, Martin, K.  
Whiterabbit, S. Whiterabbit) – 0 **Motion Carried.**

10 *Plaintiffs' Exhibit A.*

11 6. The Legislature ratified the preceding motion at the August 29, 2000 *Regular Meeting*, stating:

12 **APPROVAL OF MINUTES**

13 ***Legislative Meeting – August 22, 2000***

14 **Motion** by **V.P. Pettibone** to approve the August 22, 2000 Legislative  
15 Meeting minutes with the change on pg. 3 fourth motion concerning  
16 Redistricting – deleting from 1C, the terms matrilineal/patrilineal and  
17 replacing those terms with “any Ho-Chunk Ancestry”. Second by Rep.  
Cleveland. 7-4 (Rep. Blackdeer, Martin, K. Whiterabbit, S. Whiterabbit) –0  
**Motion Carried.**

18 *Plaintiffs' Exhibit B.*

19 7. On or about September 5, 2000, the Election Board posted notice of the October 14, 2000  
20 Special Redistricting Election. *See Plaintiffs' Exhibit C.*

21 8. On October 15, 2000, the Election Board certified the results of the October 14, 2000 Special  
22 Redistricting Election. Scenario 1C garnered 212 votes, 28.42% of the total votes cast. Scenario 12A  
23 garnered 131 votes, 17.56% of the total votes cast. No Action or No Change garnered 403 votes,  
24

25  
26 IX, Sec. 9 (b).

27

1 54.02% of the total votes cast. *See Plaintiffs' Exhibit D.*

2 9. The HCN Supreme Court has established that the reference to the General Election contained in  
3 the CONSTITUTION, ART. VIII, Sec. 3 designates the actual date of the election, “the first Tuesday in June  
4 of odd numbered years.” CONSTITUTION, ART. VIII, Sec. 1; *See Ho-Chunk Nation Election Board, Ho-*  
5 *Chunk Nation v. Aurelia Lera Hopinkah*, SU 98-08 (HCN S. Ct., April 7, 1999) pp. 5-6.

6  
7 10. The parties did not raise any objections to the Court’s various rulings at the November 1, 2000  
8 *Pre-Trial Hearing.*

9  
10 **ORDER**

11  
12  
13 The Court must begin by establishing the rather obvious premise that the Legislative Branch is  
14 structured and serves as the most visible embodiment of a representative democracy. The Court deems  
15 that the principles which underlie and uphold this constitutional structure were not conceived in a  
16 vacuum, but devised by the importation of fundamental values and protections afforded the citizenry of  
17 the United States of America under the Constitution of the United States. Individuals are guaranteed  
18 “[a]ll rights, benefits, privileges and immunities” once approved for membership in the Ho-Chunk  
19 Nation. TRIBAL ENROLLMENT AND MEMBERSHIP ACT OF 1995, Sec. 6 (e). Specifically, the  
20 CONSTITUTION insures the right to vote to those members meeting minimal requirements.  
21 CONSTITUTION, ART, VIII, Sec. 5; *See also* AMENDED AND RESTATED HO-CHUNK NATION ELECTION  
22 ORDINANCE [hereinafter ELECTION ORDINANCE], ART. VIII, Sec. 8.02 (a). Those eligible voters elect  
23 “representatives” from the five (5) districts of the Ho-Chunk Nation. CONSTITUTION, ART. V, Sec. 1 (b);  
24 *See also* ELECTION ORDINANCE, ART. IV, Sec. 4.01 (a), (b). The representatives and the voters must  
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1 establish residency within the respective district in order to campaign or vote. ELECTION ORDINANCE,  
2 ART. V, Sec. 5.05 and ART. VIII, Sec. 8.02. Residency requirements are presumably instituted to  
3 promote a familiarization with the special interests and needs among fellow members in a district. The  
4 resulting commonality of goals and aspirations within a segment of the membership is intended to lead  
5 to effective representation arising from that identifiable group. Lastly, the “one-person/one-vote”  
6 principle assures relative equality in the legislative process which undertakes to accommodate the  
7 foregoing through just and fair compromise. CONSTITUTION, ART. V, Sec. 4.  
8

9 The preceding discussion pertaining to the model of representative democracy existing in the  
10 Ho-Chunk Nation renders the analysis contained in *Baker v. Carr* and its progeny persuasive authority.  
11 See *Baker v. Carr*, 369 U.S. 186 (1962); See also *Brown v. Thompson*, 462 U.S. 835 (1983) and  
12 *Reynolds v. Simms*, 377 U.S. 533 (1964). This line of cases addressed specific instances of state  
13 legislative apportionment, and whether the status quo proved violative of the one-person/one-vote  
14 principle found in those state constitutions and implicit in the federal Equal Protection Clause. The  
15 Court, however, holds the federal redistricting/reapportionment cases (*e.g. Karcher v. Daggett*, 462 U.S.  
16 725 (1983)) inapposite for the same reasons articulated by the United States Supreme Court. *Reynolds*,  
17 377 U.S. at 572-77. The Court must emphasize that the above federal cases are not controlling in this  
18 jurisdiction,  
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21  
22 and the parties may attempt to reasonably distinguish them from the instant case. The Court shall now  
23 proceed to present the rationale for dismissing a number of the plaintiffs’ claims.  
24

25 **I. Does the plaintiffs’ inclusion of Scenarios 1C and 12A in their**  
26 **Complaint’s request for declaratory relief present a case or**  
27 **controversy under the CONSTITUTION, ART. VI, Sec. 5 (a)?**

1           The defendants argued in their *Answer* that since the membership voted against adoption of  
2 Scenarios 1C and 12A in the October 14, 2000 Special Redistricting Election that that action  
3 consequently prevented the Court from considering the respective constitutionality of each based upon  
4 defenses of mootness and/or ripeness. These two (2) defenses derive from the Court’s authorization to  
5 exercise jurisdiction “over all cases and controversies, both criminal and civil, in law or in equity,  
6 arising under the Constitution, laws, customs and traditions of the Ho-Chunk Nation.” CONSTITUTION,  
7 ART. VII, Sec. 5 (a).<sup>3</sup> Essentially, mootness and ripeness relate to timing: a claim asserted too late is  
8 moot and a claim asserted too early is not ripe for adjudication. Each defense, therefore, falls under the  
9 general rubric of justiciability.  
10

11  
12           Once the membership voted against Scenarios 1C and 12A, their constitutionality became a moot  
13 issue since courts must generally avoid entertaining claims of which any potential resolution could not  
14 affect the rights of the current litigants. *See DeFunis v. Odegaard*, 416 U.S. 312, 316 (1974). A  
15 concrete case or controversy would have existed during the timeframe after legislative approval but  
16 prior to the election. On the opposite side of the coin, the present case does not truly present an issue of  
17 ripeness. For illustration, the defendants could have raised a ripeness objection had the plaintiffs  
18 attacked the constitutionality of the two (2) scenarios during the legislative deliberation process prior to  
19 approval. In such an instance, the Court would likely refrain from determining a hypothetical cause of  
20 action since a concrete case or controversy would not exist. *See United Public Workers v. Mitchell*, 330  
21 U.S. 75, 89-90 (1947). The plaintiffs have neither alleged nor contended that the Legislature intends to  
22 resurrect such scenarios at a later date.  
23  
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25 \_\_\_\_\_  
26 <sup>3</sup>The Constitution of the United States shares a similar Cases or Controversies Clause. *See* U.S. CONST., ART. III, Sec. 2 (1).  
27

1                   **II. Did the Legislature’s action of placing three (3) scenarios on the**  
2                   **Special Redistricting Election ballot violate the mandate of**  
3                   **submitting a final proposal pursuant to the CONSTITUTION, ART.**  
4                   **V, Sec. 4?**

5                   The Court holds that designating three (3) scenarios as a final proposal without reserving any  
6 subsequent right to amend represents a permissible construction of the constitutional requirement. A  
7 final proposal may reasonably include component parts, and the presence of more than one choice on the  
8 ballot may prove in the best interests of the membership. The Court also notes that the 1995 Special  
9 Redistricting Election ballot included three (3) choices. *See Mark Stroessner v. Ho-Chunk Nation*  
10 *Election Board & Ho-Chunk Nation Legislature*, CV 95-25 (HCN Tr. Ct., Jan. 4, 1996). Ultimately,  
11 this claim becomes largely, if not entirely, irrelevant given the above ruling regarding mootness.

12                   **III. Did the Legislature violate the CONSTITUTION, ART. V, Sec. 4**  
13                   **since certification of the Special Redistricting Election results**  
14                   **occurred less than six (6) months prior to the Notice of Election**  
15                   **for the June 5, 2001 General Election?**

16                   The HCN Supreme Court has interpreted the term “General Election” as referring directly to the  
17 “first Tuesday in June of odd numbered years.” CONSTITUTION, ART. VIII, Sec. 1. In interpreting the  
18 CONSTITUTION, ART. VIII, Sec. 3, the HCN Supreme Court utilized such date as the endpoint in tolling  
19 one hundred and twenty (120) days from the enactment of the original ELECTION ORDINANCE. *See Ho-*  
20 *Chunk Nation Election Board, Ho-Chunk Nation v. Aurelia Lera Hopinkah*, SU 98-08 (HCN S. Ct.,  
21 April 7, 1999) pp. 5-6. Therefore, the Court must accordingly apply the reasoning of the HCN Supreme  
22 Court, and dismiss this claim.

23                   **IV. In the interest of potentially narrowing the scope of review,**  
24                   **should the Court cease to consider the application of the equal**  
25                   **protection and due process clauses set forth in the INDIAN CIVIL**

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1           **IT IS SO ORDERED** this 3<sup>rd</sup> day of November, 2000 at the Ho-Chunk Nation Trial Court in

2 Black River Falls, Wisconsin from within the sovereign lands of the Ho-Chunk Nation.

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6 Hon. Todd R. Matha  
7 HCN Associate Trial Judge

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