IN THE
HO-CHUNK NATION TRIAL COURT

Robert A. Mudd, **Enrollment No. 439A005914**, Plaintiff, v. **Ho-Chunk Nation Legislature: Elliot Garvin, Clarence Pettibone, Tracy Thundercloud, Wade Blackdeer, Dallas Whitewing, Gerald Cleveland, Sr., Christine Romano, Myrna Thompson, George Lewis, Kathyleen Whiterabbit, Sharyn Whiterabbit,** Defendants.	Case No.: **CV 03-01**

ORDER
(Final Judgment)

INTRODUCTION

The Court must determine whether the CONSTITUTION OF THE HO-CHUNK NATION (hereinafter CONSTITUTION) permits a gradual phasing-in of redistricting and reapportionment over the next two (2) general elections. The Court deems such an implementation scheme antithetical to the constitutional structure, and accordingly enjoins its occurrence. The analysis of the Court follows below.

PROCEDURAL HISTORY

The plaintiff, Robert A. Mudd, initiated the current action by filing the *Expedited Complaint for Declaratory & Injunctive Relief* with the Court on January 2, 2003. Consequently, the Court issued a *Summons* accompanied by the above-mentioned pleading on January 2, 2003, and delivered the documents by personal service to the defendants' representative, Ho-Chunk Nation Department of Justice (hereinafter DOJ).[1] The *Summons* informed the defendants of the right to file an *Answer* within twenty (20) days of the issuance of the *Summons* pursuant to *HCN R. Civ. P.* 5(A)(2).[2] The *Summons* also cautioned the defendants that a *default judgment* could result from failure to file within the prescribed time period.

Prior to the filing of a responsive pleading, the plaintiff filed the January 15, 2003 *Amended Complaint for Declaratory & Injunctive Relief* (hereinafter *Amended Complaint*). This filing prompted the Court to enter its January 17, 2003 *Order (Preliminary Injunction Hearing*), wherein the Court extended the response period and scheduled a *Preliminary Injunction Hearing/Scheduling Conference*. The defendants, by and through DOJ Attorney Michael P. Murphy, timely filed its *Answer* on January 27, 2003. The defendants filed a follow-up correspondence on January 28, 2003, to correct an oversight in its responsive pleading.

The Court convened the *Hearing/Conference* on January 29, 2003 at 1:30 p.m. CST. The following parties appeared at the *Preliminary Injunction Hearing/Scheduling Conference*: Robert A. Mudd, plaintiff, and DOJ Attorney Michael P. Murphy, defendants' counsel. The

---

[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).

[2] The Court afforded the defendants twenty (20) days to respond to the initial pleading since a plaintiff may only seek expedited consideration of a motion, *see HCN R. Civ. P.* 19(C), and the plaintiff failed to incorporate a proper request for a preliminary injunction into his pleading. *See Order (Prelim. Inj. Hr'g)* CV 03-01 (Jan. 17, 2003).

Court denied the plaintiff's request for a preliminary injunction since the plaintiff could not satisfy either the second or third prongs of the well-established test for granting such injunctions.[3] *See Prelim. Inj. Hr'g* (LPER at 7, Jan. 29, 2003, 03:18:53 CST). However, the impact of this ruling was mitigated by the agreement of the parties to accelerate the instant case due to the impending General Election. *Id.* at 8-9, 03:37:06 CST.

The parties concurred with the Court's assessment that the case should convert into a summary judgment action due to the absence of any material disputed facts. *Id.* at 7, 03:23:26 CST; *see also HCN R. Civ. P.* 55. The Court, therefore, established relevant timelines for the motion process, including the scheduling of a *Motion Hearing*.[4] *Prelim. Inj. Hr'g* (LPER at 9, 03:40:24 CST). The Court subsequently entered its January 30, 2003 *Order (Requiring Traditional Court Consultation)* in response to the plaintiff's integration of tradition and custom into his standing argument. The parties attended the regularly scheduled Traditional Court session on February 3, 2003, culminating in the articulation of two (2) statements of tradition and custom, respectively designated as TRAD. CT. RES. 02-03-03A, 02-03-03B. *See infra* pp. 5-6.

On February 4, 2003, the defendants timely filed the *Motion for Summary Judgment* and accompanying *Brief in Support of Motion for Summary Judgment* (hereinafter *Summary Judgment Brief*). *See HCN R. Civ. P.* 18. The plaintiff filed the *Response to Defendant's* [*sic*] *Motion for Summary Judgment* on February 6, 2003. *Id.*, Rule 19(B). The Court convened the *Motion Hearing* on February 7, 2003 at 9:00 a.m. CST. The following parties appeared at the

---

[3] Prior to rendering the ruling, the Court made discretionary disclosures to the parties in order avoid the appearance of impropriety. *See id.* at 5, 02:47:25 CST; *see also Ho-Chunk Nation Rules of Judicial Ethics*, § 4-2(C). Neither party responded by moving for recusal of the presiding judge. *Id.*

[4] The Court also removed a cause of action from the proceeding, Cause of Action C, *Am. Compl.* at 7-8, ruling that the intended and logical interaction between two (2) constitutional provisions negated the need to call a secretarial election for the purpose of inserting the redistricting/reapportionment results into the CONSTITUTION. *See Prelim. Inj. Hr'g* (LPER at 6, 03:04:10 CST); *see also* CONST., ART. V, §§ 1(b), 4.

Motion Hearing: Robert A. Mudd, plaintiff, and DOJ Attorney Michael P. Murphy, defendants' counsel.

APPLICABLE LAW

CONSTITUTION OF THE HO-CHUNK NATION (approved Nov. 1, 1994)

Article V – Legislature

Section 1. Composition of the Legislature.

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

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.

Section 6. Terms of Office. Members of the Legislature shall serve four (4) year terms which shall be staggered. Legislators shall represent their respective Districts until their successors have been sworn into office except if the Legislator has been successfully removed or recalled in accordance with this Constitution. Members of the Legislature shall be elected by a majority of the eligible voters from their respective Districts.

Section 8. Meetings. The Legislature shall hold regular monthly meetings. The Legislature may hold special meetings as necessary. Members of the Legislature shall hold and attend regularly scheduled meetings in their respective Districts. Failure to attend such District meetings on a regular basis may constitute grounds for removal or recall. The Legislature shall not schedule a special meeting at the same time as a regularly scheduled District meeting.

Article VII – Judiciary

Section 5. Jurisdiction of the Judiciary.

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

Article VIII - Elections

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

Article IX - Removal, Recall and Vacancies

Section 6. District Recall of Legislators. A member of the Legislature shall be removable by a recall vote called by a petition of thirty (30) percent of all eligible voters of the District which elected such member of the Legislature. A petition shall be submitted to the Election Board, which shall hold a Special Election not less than thirty (30) days and not more than ninety (90) days from the date a petition is duly submitted. If the Election Board fails to hold such Special Election within ninety (90) days, any eligible voter of the Nation may request the Tribal Court to order such Special Election.

Article XII – Sovereign Immunity

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

Section 2. Suit Against Officials and Employees. Officials or employees of the Ho-Chunk Nation who act beyond the scope of their duties or authority shall be subject to suit in equity only 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.

HO-CHUNK NATION TRADITIONAL COURT RESOLUTION 02-03-03A

The Warrior in the eyes of the Traditional Court is called a He ruška, this person has followed in the footsteps of warriors before him and as such he is held in the highest esteem. Throughout time the He ruška has been called upon to protect his fireplace, his home and way of life. This

act of being a He ruška has always reincarnated itself in the defense of the family, the clan, the fireplace, customs, traditions, and our people.

HO-CHUNK NATION TRADITIONAL COURT RESOLUTION 02-03-03B

The Traditional Court is in agreement that the eldest male of the family has certain rights and responsibilities; as the elder (xoke) he is considered the spokesperson of his fireplace.

UNITED STATES CODE

Title 25 - Indians

Section 476. Organization of Indian tribes; constitution and by-laws and amendment thereof; special election.

(a) Adoption; effective date. Any Indian tribe shall have the right to organize for its common welfare, and may adopt an appropriate constitution and bylaws, and any amendments thereto, which shall become effective when --

(1) ratified by a majority vote of the adult members of the tribes or tribes at a special election authorized and called by the Secretary under such rules and regulations as the Secretary may prescribe; and

(2) approved by the Secretary pursuant to subsection (d) of this section.

(d) Approval or disapproval by Secretary; enforcement.

(1) If an election called under subsection (a) results in the adoption by the tribe of the proposed constitution and bylaws or amendments thereto, the Secretary shall approve the constitution and bylaws or amendments thereto within forty-five days after the election unless the Secretary finds that the proposed constitution and bylaws or any amendments are contrary to applicable laws.

HO-CHUNK NATION RULES OF JUDICIAL ETHICS

Article IV - Diligence and Impartiality

Section 4-2. Conflict of Interest/Recusal.

C. At the judge or justice's discretion, if there is a fact or issue which may require a disclosure to prevent the appearance of impropriety, that information must be disclosed to the parties. If the parties do not respond in the form of a Motion for Recusal, there is no basis for the judge or justice to recuse.

Comment: A judge or justice may discern that certain facts or information should be provided to the parties in a case to avoid an appearance of impropriety. Examples are extended family

relationships, attorney-client relationships, working relationships and situations which may raise an appearance of impropriety.

HO-CHUNK NATION RULES OF CIVIL PROCEDURE

Rule 5. Notice of Service of Process.

(A) Definitions.

(2) Summons - The official notice to the party informing him/her that he/she is identified as a party to an action or is being sued, that an *Answer* is due in twenty (20) calendar days (See HCN R. Civ. P. 6) and that a *Default Judgment* may be entered against them if they do not file an *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.

Rule 18. Types of Motions.

Motions are requests directed to the Court and must be in writing except for those made at trial. *Motions* based on factual matters shall be supported by affidavits, references to other documents, testimony, exhibits or other material already in the Court record. *Motions* based on legal matters shall contain or be supported by a legal memorandum, which states the issues and legal basis relied upon by the moving party. The *Motions* referenced within these rules shall not be considered exhaustive of the *Motions* available to the litigants.

Rule 19. Filing and Responding to Motions.

(B) Responses. A *Response* to a written *Motion* must be filed at least one (1) day before the hearing. If no hearing is scheduled, the *Response* must be filed with the Court and served on the other parties within ten (10) calendar days of the date the *Motion* was filed. The party filing the *Motion* must file any *Reply* within three (3) calendar days.

(C) Motions for Expedited Consideration. Any *Motion* which requires action within five (5) calendar days shall be accompanied by a *Motion for Expedited Consideration*. The *Motion for Expedited Consideration* shall state the reasons why the accompanying *Motion* should be heard prior to the normal time period, and what efforts the party has made to resolve the issue with the opposing party prior to filing the *Motion for Expedited Consideration*.

Rule 27. The Nation as a Party.

(B) Civil Actions. When the Nation is filing a civil suit, a writ of mandamus, or the Nation is named as a party, the *Complaint* should identify the unit of government, enterprise or name of the official or employee involved. The *Complaint*, in the case of an official or employee being sued, should indicate whether the official is being sued in his or her individual or 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 Ho-Chunk Nation Court, or Ho-Chunk Nation Law.

Rule 31. Required Disclosures.

(5) judicial notice shall be taken of and required disclosures shall be made of official documents, public documents, documents subject to public inspection, document and materials of non-executive session, governmental minutes and recordings of a governmental body pursuant to the HCN OPEN MEETINGS ACT OF 1996.

Rule 53. Relief Available.

Except in a *Default Judgment*, the Court is not limited to the relief requested in the pleading and may give any relief it deems appropriate. The Court may only order such relief to the extent allowed by Ho-Chunk Nation enactments. The Court may order any party to pay costs, including attorney's fees, filing fees, costs of service and discovery, jury and witness costs. Findings of fact and conclusions of law shall be made by the Court in support of all final judgments.

Rule 55. Summary Judgment.

Any time after the date an *Answer* is due or filed, a party may file a *Motion for Summary Judgment* on any or all of the issues presented in the action. The Court will render summary judgment in favor of the moving party if there is no genuine issue as to material fact and the moving party is entitled to judgment as a matter of law.

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

(A) Relief from Judgment. A *Motion to Amend* or for relief from judgment, including a request for a new trial shall be made within ten (10) calendar days of the filing of judgment. 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 judgment, the Court may amend its findings or conclusions or make additional findings or conclusions, amending the judgment accordingly. The motion may be made with a motion for a new trial. If the Court amends the judgment, the time for initiating an appeal commences upon entry of the amended judgment. If the Court denies a motion filed under this rule, the time for initiating an appeal from the judgment 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 filing of such motion, and 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 judgment commences in accordance with the Rules of Appellate Procedure.

(C) Motion to Modify. After the time period in which to file a *Motion to Amend* of a *Motion for Reconsideration* has elapsed, a party may file a *Motion to Modify* with the Court. The *Motion* must be based upon new information that has come to the party's attention that, if true, could have the effect of altering or modifying the judgment. Upon such motion, the Court may modify the judgment accordingly. If the Court modifies the judgment, the time for initiating an appeal 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) calendar days after the filing of such motion, and the Court does not decide the motion or the judge does not sign an order denying the motion, the motion is considered denied. The time for initiating an appeal from judgment commences in accordance with the Rules of Appellate Procedure.

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

(E) Grounds for Relief. The Court may grant relief from judgments 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)(i) or (ii); did not have proper service and did not appear in the action; or (4) the judgment has been satisfied, released, discharged or is without effect due to a judgment earlier in time.

Rule 61. Appeals.

Any final *Judgment* 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 *Judgment* or Trial Court *Order* must follow the HCN *Rules of Appellate Procedure*.

CONSTITUTION AND BYLAWS OF THE WISCONSIN WINNEBAGO NATION (approved Mar. 19, 1963)

Article V - Nominations and Elections

Section 4. At three year intervals beginning in 1965, the business committee shall study the population distribution of the tribal membership and as necessary make provision for redistricting so as to insure equitable representation on the business committee. Changes in election districts shall be completed at least six months in advance of the following election, and appropriate notice of such changes shall be provided [to] the tribal membership within 30 days after approval by the Secretary of the Interior.

FINDINGS OF FACT

The parties stipulated that "no genuine issue as to material fact" exists within the instant case, thereby rendering the matter capable of resolution through summary judgment. *HCN R. Civ. P.* 55; *see also Prelim. Inj. Hr'g* (LPER at 7, 03:23:26 CST). The following undisputed facts reflect common assertions of the parties and references to "documents subject to public inspection." *HCN R. Civ. P.* 31(A)(5).

1. The parties received proper notice of the February 7, 2003 *Motion Hearing*.

2. The plaintiff, Robert A. Mudd, is an enrolled member of the Ho-Chunk Nation, Tribal ID# 439A005914, and resides within District I. The plaintiff is the eldest male within his extended *hocąk* family. Each member of the plaintiff's family resides in District I with the exception of his sister, Mary Ellen Allowan, Tribal ID# 439A006224, who resides in District V. The plaintiff is a combat veteran of the Vietnam War, serving as a paratrooper in the 101st Airborne Division. The plaintiff's tour of duty extended for a year and a half, and he received the Bronze Star for bravery in combat. *See Mot. Hr'g* (LPER at 1, Feb. 7, 2003, 09:08:21 CST).

3. The defendants are individual members of the Ho-Chunk Nation Legislature (hereinafter Legislature), which, as a governmental body, conducts business at the Ho-Chunk Nation Headquarters, W9814 Airport Road, P.O. Box 667, Black River Falls, WI.

4. A majority of eligible voters ratified the CONSTITUTION on September 17, 1994. Ada E. Deer, Assistant Secretary - Indian Affairs, approved the CONSTITUTION on November 1, 1994. *See* 25 U.S.C. § 476(a)(1-2).

5. The first special redistricting/reapportionment election under CONSTITUTION, ART. V, § 4 occurred on December 19, 1995. *See Mark Stroessner v. HCN Election Bd. et al.*, CV 95-25

(HCN Tr. Ct., Jan 4, 1996). The eligible voters chose to retain the *status quo*, and "[n]o election challenge was received by the Clerk of Court . . . ." *Id*. at 1. The Court, however, indicated the following: "the Ho-Chunk Legislature now must go back and present a new redistricting plan for a vote of the Ho-Chunk people . . . ." *Id*. at 1-2.

6. The Legislature refrained from presenting any subsequent redistricting/reapportionment proposal to the electorate during the period of time from 1996-1999. *See Chloris Lowe, Jr. et al. v. HCN Legislature Members Elliot Garvin et al.*, CV 00-104 (HCN Tr. Ct., Dec. 14, 2000) at 13 n.1.

7. The second special redistricting/reapportionment election occurred on October 14, 2000, and likewise produced a vote to retain the *status quo*. *Id.* at 9-10. In defense of the special election results, the defendants asserted that

> [t]he Legislature fulfilled its Constitutional duty to pursue one person, one vote. To the extent that the Legislature cannot enact a final proposal without a Special Election, the Legislature fulfilled its duty. The Legislature adopted three proposals and submitted them to the vote of the people. The people rejected the two redistricting proposals and chose to keep the status quo. Thus, the Legislature fulfilled its duty and enacted the express policy mandated by the people of the Ho-Chunk Nation.

Id., *Defs.' Br. in Supp. of Mot. for Summ. J.* (Nov. 8, 2000) at 6.

8. A period of protracted litigation ensued, ultimately resulting in the passage of redistricting/reapportionment Scenario E on January 12, 2002. *See Demetrio D. Abangan et al. v. HCN Election Bd.*, CV 02-08, -10 (HCN Tr. Ct., Feb. 12, 2002). The outcome of this fourth special redistricting/reapportionment election became conclusively final on July 22, 2002, after the passage of the appellate timeframe.[5] *Id.*, CV 02-08, -10 (HCN Tr. Ct., June 21, 2002).

---

[5] The Court entered a total of twenty-five (25) orders within three (3) separate cases comprising the redistricting/ reapportionment litigation. *See supra*; *see also Chloris Lowe, Jr. v. HCN Legislature et al.*, CV 00-99.

9. Legislators currently represent the districts established by CONSTITUTION, ART. V, § 1(b) as follows: District I (Legislators Elliot Garvin, Clarence Pettibone and Tracy Thundercloud), District II (Wade Blackdeer), District III (Dallas Whitewing), District IV (Gerald Cleveland, Sr., Christine Romano and Myrna Thompson) and District V (George Lewis, Kathyleen Whiterabbit and Sharyn Whiterabbit). *See supra* p. 4.

10. Scenario E accomplishes the following redistricting/reapportionment:

> District I (3 Legislators): Barron, Buffalo, Chippewa, Clark, Dunn, Eau Claire, Jackson, Pepin, Pierce, Polk, Rusk, St. Croix and Trempeleau Counties
>
> District II (1 Legislator): Crawford, Grant, Iowa, La Crosse, Lafayette, Monroe, Richland and Vernon Counties
>
> District III (1 Legislator): Ashland, Bayfield, Brown, Burnett, Calumet, Door, Douglas, Florence, Fond du Lac, Forest, Iron, Kewaunee, Langlade, Lincoln, Manitowoc, Marathon, Marinette, Menominee, Oconto, Oneida, Outagamie, Portage, Price, Sawyer, Shawano, Sheboygan, Taylor, Vilas, Washburn, Waupaca, Waushara and Winnebago Counties
>
> District IV (3 Legislators): Adams, Dane, Dodge, Green, Green Lake, Jefferson, Juneau, Kenosha, Marquette, Milwaukee, Ozaukee, Racine, Rock, Sauk, Walworth, Washington, Waukesha and Wood Counties
>
> District V (3 Legislators): All area outside the State of Wisconsin

11. On October 29, 2002, Legislative Counsel William A. Boulware, Jr. presented a memorandum entitled, "Status Report and Up-Date on HCN Redistricting Implementation," to the Legislature. *Defs.' Answer*, Ex. C. The memorandum proposes the following method of implementation.

> Five representatives will have their terms expire in June 2003. Those Legislators up for re-election would have to run in the new districts. Hold-over Legislators or those not up for election or election challenges in 2003 will not be effected by the new district lines until the 2005 elections, when all remaining legislators will be affected. While all the districts will change in 2003, only the new district lines will affect the Legislators up for re-election.

> Each Legislator, under the constitution [*sic*], will represent the district, which elected him or her. So for example, District IV, Representative Romano will continue to serve as representative for the current District IV until the end of her term. At which time Rep. Romano, upon her re-election or the election of her successor, will be elected and serve in the new district. Yet, Representative Thompson is up for election in 2003. Thus, Representative Thompson or her successor will immediately represent the newly drawn district.

Id. at 1. Concerning candidacy issues, the memorandum elaborates on the foregoing discussion.

> All the district boundaries will change in 2003. The new district lines will affect the Legislators up for re-election, because their constituency base will have changed. All other legislators not up for re-election will retain their current constituencies and will continue to serve their existing district base. Five representatives will have their terms expire in June 2003. Those Legislators or candidates seeking office will run in the new districts. Hold-over Legislators or those not up for election in 2003 will not be effected by the new district lines. . . .
>
> During the transition period, hold-over legislators will continue to meet the residency requirement because they are still within the district lines from which they were originally elected. However, upon the expiration of the terms of Representative S. Whiterabbit and G. Lewis, Rep. Whiterabbit, if seeking another term in 2005[,] would have to seek office in District I, while Representative Lewis would have to seek office in District IV. This would leave to [*sic*] vacancies in District V, for which the voters of the new district lines will have to fill in the 2005 elections.

Id. at 2. The memorandum also discusses legislative participation at area meetings.

> All Legislators will still be required to attend their respective district/area meetings. The Legislators who are not up for election in 2003 will continue to attend the district/area meetings they currently attend. While, the members of the Legislature or their successors who are elected in 2003 will have the obligation to attend the district or area meetings within the newly drawn district lines.

Id. at 2-3. Finally, Legislative Counsel Boulware provides a simple summation of the memorandum, and offers a suggestion regarding the effective date of the implementation.

> The Nation will essentially be functioning off of two district maps.
>
> A. Pre-2001 Districts
>
> B. Post-2002 Districts . . . .

> [I]mplementation should, if conservative, be in place for the primary, voter registration, and candidates' petition by November 2002. Redistricting cannot be implemented retroactively but prospectively for the 2003 elections. Thus, it becomes effective 6 months before the next General Election for the purposes of voter registration and candidates seeking election.

Id. at 4-5.

12. On November 8, 2002, the Legislature noted its formal agreement with the above implementation scheme, "approv[ing] the attached memo dated October 29, 2002 from Legislative Counsel William Boulware, subject: Status Report and Up-Date on HCN Redistricting Implementation, as the Nation's Implementation Plan for elections to be conducted under the new Legislative Districts." HCN LEG. RES. 11-08-02C.

13. Prior to presenting the implementation memorandum, the *Hocąk Worak* printed an article revealing the methodology employed by Legislative Counsel Boulware. John Kozlowicz, *New Districts Set, Next Step: Implementing these Boundaries*, HOCĄK WORAK, Aug. 28, 2002, at 1. The article does not indicate whether the Legislature authorized the reproduction of Legislative Counsel Boulware's work product, but no subsequent retractions or clarifications appeared in the newsletter. The author writes:

> [s]tressing that "no one will be represented by a person they did not have a chance to vote for", [*sic*] Legislative Counsel William Boulware recently presented to the Legislature ideas explaining how the Nation can best govern during the transition. He noted that because the redistricting is not expected to be fully implemented until after the 2005 elections, until then, the Nation will be functioning off two maps. In a letter to the Legislature, Boulware wrote that he, attorney Michael Murphy and Representative George Lewis met in May with Peter Cannon of the Wisconsin Legislative Reference Bureau seeking information on how the states and [C]ongress execute redistricting. (Wisconsin is currently undergoing redistricting, having lost a seat in [C]ongress following the 2000 Census.) The Legislature was presented the two ways they could go about the process.
>
> The Florida Model would require that each legislator vacate office and seek election in the new district. Boulware noted that while this

> sounds simple, there are problems. He explained that the Ho-Chunk Nation Constitution stipulates that a legislator, unless removed or recalled, is guaranteed to serve a four-year term. Forcing the legislator to vacate the seat would be a violation of the Constitution, he wrote. He also believes the possibility of electing an entirely new Legislature could result in a loss of institutional knowledge, possibly hindering government operations.
>
> Boulware favors the Wisconsin Plan used by most states. Under this plan[,] new districts and representation are phased in over time. Within Ho-Chunk government, next year five legislative seats are up for election. Under the Wisconsin Plan, those seeking the positions would not run in the new districts, those not legislators [*sic*] not up for election would retain their current constituencies. For example in Area IV, one seat, currently filled by Representative Myrna Thompson, is up for election in 2003. Thompson, or her successor[,] will would [*sic*] represent members in the new area, including Milwaukee and Madison, while Gerald Cleveland and Christine Romano, the other two legislators currently serving Area IV members[,] would continue to represent only the people in the current structure. When their terms expire, candidates would run in the new district.
>
> Legislators not up for election in 2003 will continue to attend the same area meetings. Those elected or re-elected will be obligated to attend meetings held within the new district lines. Like the current structure requires, legislators will have to live within the district in which they were elected and serve [*sic*].
>
> The Legislature plans on having a plan in place by January 3, 2003, satisfying the Constitutional requirement that redistricting be done at six months prior to the next General Election. It is hoped that for the purpose of voter registration and candidate's petition that the Election Board have a plan in place by December 3, 2002.

Id.

14. The defendants claim that no constitutional history exists on the issue of redistricting/ reapportionment implementation. *Mot. Hr'g* (LPER at 5, 09:51:21 CST); *Summ. J. Br.* at 14.

15. At the *Motion Hearing*, the defendants' counsel, DOJ Attorney Michael P. Murphy, did not realize that, under the implementation plan, holdover legislators would only represent constituents residing within the districts that elected such legislators. *Mot. Hr'g* (LPER at 4-5,

09:39:02 CST). Defendants' counsel instead believed that the holdover legislators would begin to serve the newly established districts. *Id.*; *see also* Defs.' Ex. D.

16. The April 19, 2003 General Primary Election timeline sets the Official Nomination Petition deadline for February 18, 2003. *See Official Notice of Election* (Jan. 13, 2003). The Ho-Chunk Nation Election Board (hereinafter Election Board) must "post the final list of candidates for each elective office at the ten (10) Polling Places and in other appropriate locations at least thirty (30) calendar days before the date of the election[,]" or by March 20, 2003. HO-CHUNK NATION ELECTION ORDINANCE, § 8(h).

DECISION

The Court must examine two (2) preliminary issues prior to discussing the redistricting/ reapportionment concern presented by the instant case. Specifically, the Court must resolve issues pertaining to standing and sovereign immunity. The plaintiff must overcome the assertion of these defenses in order for the Court to proceed to the merits of his cause(s) of action.

I. DOES THE PLAINTIFF SUFFICIENTLY ALLEGE A PERSONAL INJURY CAPABLE OF PROVIDING HIM THE REQUISITE STANDING TO MAINTAIN SUIT?

The Court analyzed its standing jurisprudence at length in two (2) recent decisions, and directs the parties' attention to those cases for further discussion of the basic principles touched on in this opinion. *Daniel W. Green v. Real Estate Manager, Home Ownership Program, in his official capacity*, CV 00-108 (HCN Tr. Ct., Dec. 31, 2002); *Clarence Pettibone v. HCN Legislature et al.*, CV 01-84 (HCN Tr. Ct., May 15, 2002). For purposes of the present inquiry, the Court has adopted the federal three-part test for determining the existence of constitutional

standing under the Ho-Chunk Case or Controversy Clause. *Id*; *see also* CONST., ART. VII, § 5(a). Only the first prong is distinctly at issue here, namely: whether the plaintiff has demonstrated """that he[/she] personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant[.]""" *Pettibone*, CV 01-84 at 10 (citations omitted). The defendants contend that the plaintiff has failed to articulate the presence of a personal injury, but the Court does not join in this assessment.

The plaintiff questions the constitutionality of the implementation scheme, focusing on the requirement to *complete* "redistricting [and] reapportionment . . . at least six (6) months prior to the next election." CONST., ART. V, § 4; *see also Amend. Compl.* at 5-7. The plaintiff argues that the failure to fully implement Scenario E results in a diminution of his right to an equally weighted vote. *Amend. Compl.* at 7; *see also* CONST., ARTS. V, § 4, X, § 1(a)(8). In essence, the Legislature has not satisfied its constitutional obligation to redistrict and reapportion by advocating a partial, bifurcated implementation of Scenario E.

A plaintiff may undoubtedly suffer a personal injury as a consequence of a constitutional violation. *Pettibone*, CV 01-84 at 13. All federal redistricting/reapportionment case law flows form this elementary proposition. In the seminal case of *Baker v. Carr*, the United States Supreme Court concluded that

> [i]t would not be necessary to decide whether appellants' allegations of impairment of their votes by the 1901 apportionment will, ultimately, entitle them to any relief, in order to hold that they have standing to seek it. If such impairment does produce a legally cognizable injury, they are among those who have sustained it. They are asserting "a plain, direct and adequate interest in maintaining the effectiveness of their votes[.]" *Coleman v. Miller*, 307 U.S. [433, 438 (1939)] . . . . "The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury." *Marbury v. Madison*, 1 Cranch 137, 163 [(1803)].

Baker v. Carr, 369 U.S. 186, 208 (1962). The Ho-Chunk Nation Supreme Court (hereinafter Supreme Court) expressed its agreement with this premise, stating that a "'denial of constitutionally protected rights demands judicial protection; our oath and our office requires no less of us.'" *Chloris Lowe, Jr. et al. v. HCN Legislature Members Elliot Garvin et al.*, SU 00-17 (HCN S. Ct., Mar. 13, 2001) at 8 (quoting *Reynolds v. Sims*, 377 U.S. 533, 566 (1964)).

The plaintiff maintains that District IV is and will continue to be malapportioned since the CONSTITUTION requires an uncompromised implementation of Scenario E. In other words, although a District IV resident is entitled to only three (3) legislative representatives, six (6) legislators currently claim a constituency in common areas under Scenario E: Legislators Gerald Cleveland, George Lewis, Christine Romano, Myrna Thompson, Kathyleen Whiterabbit and Sharyn Whiterabbit. Following the General Election, this number will reduce to five (5) since the District V seat held by Kathyleen Whiterabbit will only represent a constituency outside the State of Wisconsin.

The plaintiff's personal injury rests in the diminution of his right to vote due to the overrepresentation in District IV. Admittedly, the plaintiff, a District I resident, is likewise overrepresented, but not to the same extent as certain members residing in District IV. Moreover, the plaintiff may assert, as a personal injury, harm that befalls his family, his clan and the tribal membership.

The Traditional Court pronounced two (2) principles of tradition and custom, which inform the standing inquiry. First, the eldest male relative "is considered the spokesperson of his fireplace" or extended *hocąk* family. TRAD. CT. RES. 02-03-03B. Second, a combat veteran is expected to render "defense of the family, the clan, the fireplace, customs, traditions, and our people." TRAD. CT. RES. 02-03-03A. The latter concept obviously encompasses an expanded

scope of responsibility. The Court shall limit its brief analysis to this tradition and custom, but either pronouncement has the effect of modifying the first prong of the adopted test for standing. More appropriately, the Court now recognizes that the preceding concepts of tradition and custom have always been the law of the Ho-Chunk Nation.

In light of the foregoing, the plaintiff may characterize an abstract harm, constitutional or otherwise, as a personal injury if suffered by any member of the tribe. This fundamental notion represents the reason why a young man or woman places him or herself in harm's way in the first instance. Having accepted that grave responsibility, the Nation imparts upon the combat veteran the honor and privilege of affording defense to the tribe in the future. The plaintiff purports to assume this role in the instant case, and, therefore, maintains standing to sue under tradition and custom, as well as under the previously utilized incomplete standing test.

II. DO THE DEFENDANTS POSSESS SOVEREIGN IMMUNITY FROM SUIT?

The Court previously dismissed the Ho-Chunk Nation as a named party to the action. *See Mot. Hr'g* (LPER at 1, 09:06:12 CST). The Supreme Court has clearly articulated that "[s]uits based upon the legal argument that someone has acted outside of their authority specifically name the individual(s)." *Chloris A. Lowe, Jr. v. Ho-Chunk Nation et al.*, SU 97-01 (HCN S. Ct., June 13, 1997) at 4; *see also* CONST., ART. XII. A failure to do so will most likely result in a dismissal in the absence of a properly executed waiver of sovereign immunity. *See Lowe, Jr.*, CV 00-99 (HCN Tr. Ct., Oct. 19, 2000) at 8-9. However, a plaintiff may permissibly seek an equitable remedy, in the form of declaratory and injunctive relief, if the plaintiff alleges that named defendants have exceeded the scope of their constitutional authorities. *See Roy J. Rhode v. Ona M. Garvin, as Gen. Manager of Rainbow Casino*, CV 00-39 (HCN Tr. Ct., Aug. 24,

2001) at 14-15 (citing *Millie Decorah, as Fin. Dir. of the Ho-Chunk Nation et al. v. Joan Whitewater*, SU 98-02 (HCN S. Ct., Oct. 26, 1998) at 4).

As an extension of the above standing rationale, "[u]nder our constitutional system, certain rights are protected against governmental action and, if such rights are infringed by the actions of officers of the Government, it is proper that the courts have the power to grant relief against those actions." *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 704 (1949). The CONSTITUTION incorporates a provision enabling the plaintiff to submit his cause(s) of action for judicial redress. CONST., ART. XII, § 2. Therefore, the Court may entertain this suit against the individually named Legislators.

III. DOES THE LEGISLATIVE REDISTRICTING/ REAPPORTIONMENT IMPLEMENTATION SCHEME VIOLATE THE CONSTITUTION?

To begin, the Court must seek to reconcile the various constitutional provisions at issue in the instant case. No one constitutional requirement can be robbed of its intent and/or meaning without offending the CONSTITUTION as a whole. Because the defendants did not heed this admonition, the proposed legislative implementation of Scenario E is constitutionally unsound.

The defendants' actions have rendered the redistricting/reapportionment provision nonsensical. Their litigation position requires them to argue that they have completed reapportionment despite advocating in favor of malapportionment for another two (2) years; a malapportionment that has already existed for at least two (2) years, if not decades. *See Lowe, Jr.*, CV 00-104 (HCN Tr. Ct., Dec. 14, 2000) at 13 n.2; *see also* WIS. WINN. CONST., ART. V, § 4 (predecessor provision). The defendants have attempted to allay the concerns of the membership by depicting the implementation scheme as undoubtedly reasonable when compared to the similar prevailing practice in the State of Wisconsin. Unfortunately, this proposition has

absolutely no merit. Finally, the inevitable and foreseeable consequences of the implementation scheme pose real, not merely theoretical, problems concerning the right to vote, and the dilution thereof.

The plaintiff argues that the defendants needed to fully implement Scenario E on or before December 3, 2002, six (6) months prior to the June 3, 2002 General Run-off Election. *Am. Compl.* at 5-6; *see also* CONST., ARTS. V, § 4, VIII, § 1. The plaintiff continues by arguing that the sitting legislators needed to assume representation of new districts on or before December 3, 2002, regardless of the residency of said legislators. *Am. Compl.* at 7; *see also Mot. Hr'g* (LPER at 3, 09:26:32 CST). In essence, the plaintiff favors seemingly literal compliance with the redistricting/reapportionment provision. However, the constitutional framers could not have expected that the provision would function in this regard.

The CONSTITUTION was adopted against a backdrop of federal regulations pertaining to secretarial elections. *See e.g.*, 25 U.S.C. § 476. The constitutional framers, therefore, must have anticipated a delay between the certification of the secretarial election results on September 17, 1994, and the approval of a constitutional document by the Secretary of the Interior or designee. The Secretary had a maximum statutory period of forty-five (45) days in which to formally rule upon the CONSTITUTION, and Ada E. Deer, Assistant Secretary - Indian Affairs, used the full allocation of time prior to formally approving the CONSTITUTION on November 1, 1994. *Id.* § 476(d)(1).

Given these facts, the Legislature would have needed to perform the following steps prior to December 6, 1994, six (6) months prior to the June 6, 1995 General Run-off Election: formulate a final redistricting/reapportionment proposal; submit the final proposal to the voters; and successfully defend the proposal against election challenges, assuming the voters accepted

the proposal at the polls. The plaintiff's interpretation would have afforded the Legislature only thirty-five (35) days to accomplish the foregoing tasks. Based upon experience, such a timeframe would have proven clearly inadequate. Additionally, the above speculative chain of events would have required holding a redistricting/reapportionment election in 1994, despite the CONSTITUTION's call for the election in 1995. CONST., ART. V, § 4.

Other constitutional difficulties undermine the plaintiff's position, but the Court shall address those concerns when reviewing the defendants' argument. Both implementation proposals suffer from substantially similar defects, and accordingly must fail. Suffice it to say, the Court concurs with the plaintiff's objection to the gradual phase-in of Scenario E, but disagrees with the alternative interpretation proposed by the plaintiff.

The defendants' implementation scheme requires that the Ho-Chunk Nation simultaneously operate under two (2) redistricting/reapportionment scenarios from 2003 to 2005. It is important to note, no constitutional authority expressly supports this proposal. Also, the Court has neither located any foreign case law in agreement with this scheme, nor have the defendants brought any to its attention.[6] These deficiencies, particularly the former, have exposed the unsound constitutional foundation upon which the implementation scheme rests.

First, the defendants contend that because the redistricting/reapportionment provision does not indicate how implementation should occur, the Court should read the provision as limited to only those acts prior to and inclusive of the special redistricting/reapportionment election. *Summ. J. Br.* at 13-14; *Defs. Answer* at 8-9. The Court perceives this argument to be a variation of an earlier presented unsuccessful argument. *See supra* p. 11. In *Lowe, Jr.*, the

---

[6] The Court recognizes that foreign case law would constitute only persuasive authority, but the Court would be remiss if it declined to review opinions wherein foreign courts have confronted and resolved comparable issues,

defendants contended that legislative responsibility ended with the calling of a special election, and that the results of the election did not necessarily have to accomplish redistricting or reapportionment. The Court rebuffed that argument, ruling that certain legislators "plac[ed] a *per se* unconstitutional scenario on the October 14, 2000 Special Redistricting Election ballot since a 'No Action or No Change' scenario *cannot* by definition *effectuate redistricting or reapportionment*." *Lowe, Jr.*, CV 00-104 (HCN Tr. Ct., Nov. 13, 2000) at 9 (emphasis added). The Court characterized the legislative responsibility to redistrict and reapportion as "absolute and unambiguous." *Id*.

The defendants now contend that the Legislature has the discretion to partially redistrict and reapportion or, more succinctly, redistrict and reapportion in two (2) phases. The Court cannot comprehend how the terms "redistrict" and "reapportion," along with the related terminology, "changing, establishing, or discontinuing," are susceptible to the proposed implementation scheme. CONST., ART. V, § 4. Each term denotes a previous circumstance or condition that no longer subsists. Does one reapportion a district by also maintaining the earlier apportionment? Does one discontinue a district while preserving its existence? Reasonable minds cannot reach different conclusions on these self-evident questions, and, on this basis alone, the implementation scheme is unconstitutional.

Second, the bifurcated implementation scheme will result in a very real and practical diminution of the right to vote. For example, a resident of Dane County will be able to actively participate and vote at area meetings in Chicago, Madison, Milwaukee, Minneapolis/St. Paul, Wisconsin Dells and Wisconsin Rapids. Why? The Dane County member will simultaneously

---

especially given the acknowledged importation of foreign concepts of representative democracy into the CONSTITUTION. *See Lowe, Jr.*, CV 00-104 (HCN Tr. Ct., Mar. 30, 2001) at 4.

reside in Districts IV and V. On the other hand, a resident of Wood County could only actively participate and vote at Wisconsin Dells and Wisconsin Rapids area meetings.

One might argue that residents in close proximity to Madison will not venture to an area meeting in Wisconsin Dells, but the Court is not erecting attenuated lines of causation. The above situation poses an immediate and realistic possibility under the proposed implementation scheme, and the Court must weigh the constitutionality of its occurrence when the only contingent event is a scheduled General Run-off Election. Perhaps an example pertaining to legislative representation will prove more illustrative of this point. A resident of Brown County can anticipate representation from three (3) legislators following the General Run-off Election: holdover Legislators George Lewis and Sharyn Whiterabbit and the newly elected District III representative. However, a resident of Marathon County will only receive representation from a single District III Legislator.

The inequality becomes even more pronounced when examining the relative voting rights of the holdover District V Legislators themselves. For example, Legislator Sharyn Whiterabbit will vote as a representative of District V at legislative sessions with the intention of expressing her and her constituents' wishes. At the same time, Legislator Whiterabbit can expect representation through District I Legislators since she will become a District I resident upon the General Run-off Election. Apart from the conflicts inherent in such a situation, Legislator Whiterabbit's right to vote would expand twofold.

The defendants may argue that since the inequalities will spread more or less over each district that the cumulative effect will still yield an improvement over the *status quo*. Yet, the constitutional framers could not have intended that the redistricting/reapportionment provision effectuate gradual change by means of the unanticipated interaction between two (2) districting

plans. Furthermore, the electorate could not have anticipated the impact of their votes since the Legislature did not reveal the implementation scheme until after the special election. This factor, likewise, undermines the sanctity of the voting franchise. In conclusion, the noted implications of the proposed implementation scheme[7] cannot withstand constitutional scrutiny lest a member's right to vote possess no intrinsic, meaningful value.

Finally, while the voters received no notice of the implementation scheme prior to casting their votes in the January 12, 2002 Special Redistricting/Reapportionment Election, one (1) article did appear in the *Hocąk Worak* explaining the scheme over seven (7) months later. In that article, Legislative Counsel William A. Boulware, Jr. is credited with stating that the implementation scheme follows the majority position utilized by Wisconsin. Unfortunately, this statement is patently false. The Office of the Attorney General of the State of Wisconsin has clearly articulated the state senate method of implementation.

> Holdover senators are responsible for inhabitants of the new district. . . . In reapportioning "members" as well as "districts," and in permitting senators having two years left on the term for which they were elected to continue to serve in newly created districts without standing for election in 1982, the court recognized the proposition that such senators are responsible *to the inhabitants of the district to which their numbers correspond, that is the new district,* and not to the inhabitants of the district from which they were elected.

71 Op. Att'y Gen. Wis. 157, 160 (1982) (emphasis in original) (citing *Wis. State AFL-CIO v. Elections Bd.*, 1982 U.S. Dist. LEXIS 12964 (E.D. Wis. 1982)).

Federal case law on the subject is in accord with Wisconsin practice. *See e.g.*, *Donatelli v. Mitchell*, 2 F.3d 508 (3d Cir. 1993); *Republican Party of Or. v. Keisling*, 959 F.2d 144 (9th Cir. 1992), *cert. denied*, 504 U.S. 914 (1992); *Ferrell v. Oklahoma*, 339 F. Supp. 73 (W.D. Okla.

---

[7] The implementation scheme will also produce another unacceptable anomaly. Due to the overlapping of districts, a legislator could initiate and sign a recall petition for a legislator of another district. *See* CONST., ART. IX, § 6.

1972), *aff'd*, 406 U.S. 939 (1972); *Pate v. El Paso County, Texas*, 337 F. Supp. 95 (W.D. Tex. 1970), *aff'd*, 400 U.S. 806 (1970). In each instance, the state assigned holdover representatives to new districts in which either some or all of the voters did not participate in the election of the representatives. *Id*. The State of Pennsylvania presents the most extreme example.

In *Donatelli*, State Senator Frank Pecora had to physically move across the state in order to represent his newly assigned constituency. "[T]he new 44th district had no connection to the old 44th district in western Pennsylvania, other than being assigned the number 44." *Donatelli*, 2 F.3d at 511. Nonetheless, the court employed the following reasoning in addressing the plaintiffs' claim of an unconstitutional burden on their right to vote.

> While the plaintiffs' argument may have some appeal, it has no constitutional basis. Plaintiffs' claim that their right to vote for a state senator under Pennsylvania law has been infringed because they have been "assigned" a senator who was not elected by their district, or any significant portion of it. But the right they seek to protect -- their right to vote on an equal basis with other Pennsylvania citizens -- is an individual right. To the extent that a voter in the new 44th district has been temporarily disenfranchised after the reapportionment, he or she is in the same situation as any other temporarily disenfranchised voter in the state, regardless of whether all or some of his or her neighbors within the same senatorial district are similarly disenfranchised.

Id. at 516 (citations omitted). The court reached this conclusion in light of the commonly-held understanding that "[i]t is impossible, where Senate District boundaries are changed, to avoid having some voters represented by a Senator for whom they had no opportunity to support or oppose." *Ferrell*, 339 F. Supp. at 82; *see also Donatelli*, 2 F.3d at 515. The reassignment of representatives is in most instances an inevitable consequence of redistricting and reapportionment.[8]

---

[8] The parties should avoid unduly relying upon certain federal cases identified by the Court as dealing with the general subject matter involved in the instant case. *See Prelim. Inj. Hr'g* (LPER at 9-10, 03:47:57 CST). In particular, the Sixth and Seventh Circuit Courts of Appeals entered decisions that, at first glance, appear to sanction

The *Hocąk Worak* article references the minority position in which a state convenes a special election to replace representatives residing in different districts following decennial redistricting and reapportionment. The above cases represent the alternative majority position in which the states have declined to follow this course due to the presence of constitutionally required staggered terms of set duration. The proposed implementation scheme advocates taking a different route, wherein the combined effort of the Legislature and the electorate to redistrict and reapportion only proceeds halfway. This feature distinguishes it from the two (2) prevailing implementation methods, and, as noted above, renders the proposed implementation scheme unconstitutional.

Therefore, the Court declares the action approved by the defendants in HCN LEG. RES. 11-08-02C as null and void and enjoins its implementation. The consequences of this ruling are as follows:

1) The Election Board shall decline to accept any further Official Nomination Petitions filed for the vacated legislative seats in District I and District IV, and return any such Petitions already filed to the petitioners;[9]

2) The Election Board shall decline to certify any individuals for candidacy on the basis of Official Nomination Petitions filed for the aforementioned vacated legislative seats;

---

the continued usage of old districts for future general elections, but in each case the issue of staggered terms is absent due to the fact that the voters filled all vacated seats at once. *P.A.C. of Ill. v. Daley*, 976 F.2d 225 (7th Cir. 1992); *French v. Boner*, 963 F.2d 890 (6th Cir. 1992).

[9] "[T]he Court is not limited to the relief requested in the pleading and may give any relief it deems appropriate." *HCN R. Civ. P.* 53. Nevertheless, the Court acknowledges that the plaintiff did not name members of the Election Board in his suit, and consequently an argument exists that the Court has no ability to grant injunctive relief against those individuals. The Court, however, grants this equitable remedy by virtue of one or more of the arguments set forth in an earlier employment decision. *See Karen Raines v. Ho-Chunk Nation*, CV 99-32 (HCN Tr. Ct., Aug. 4, 1999) at 10-11. Also, the decision in the case at bar should be self-executing, and the injunctions directed at the Election Board hypothetically prove unnecessary beyond the purpose of providing clear direction. Finally, the plaintiff would otherwise have retained the ability to seek a preliminary injunction if he perceived resistance to the decision, but the Court wishes to avoid this procedural technicality since time is of the essence.

3) The Election Board shall *immediately* post an amended Official Notice of Election, informing the membership of the availability of two (2) additional District V legislative seats in the April 19, 2003 General Primary Election and June 3, 2003 General Run-off Election and the removal of the single District I and District IV legislative seats from the same elections;[10]

4) The Election Board shall extend the deadline for receipt of Official Nomination Petitions filed by individuals declaring candidacy for the two (2) additional District V legislative seats, leaving sufficient time to certify such candidates prior to the March 20, 2003 deadline to post the final list of candidates;

5) Legislative candidates in the 2003 General Election shall continue to seek office in the districts established by the passage of Scenario E;

6) Holdover legislators completing a four-year term shall continue to hold office following the 2003 General Election, but begin serving the new districts established by the passage of Scenario E upon the administration of the oath of office after the June 3, 2003 General Run-off Election

7) Current District V Legislator George Lewis shall assume the vacated District IV legislative seat upon the administration of the oath of office after the June 3, 2003 General Run-off Election; and

8) Current District V Legislator Sharyn Whiterabbit shall assume the vacated District I legislative seat upon the administration of the oath of office after the June 3, 2003 General Run-off Election.

---

[10] The Election Board must endeavor to avoid the posting of untimely notice and the consequences that arise from such a deficiency. *See e.g.*, *Abangan*, CV 02-08, -10 (HCN Tr. Ct., Feb. 12, 2002).

Unlike the unconstitutional implementation scheme, the above judicial implementation scheme is reconcilable with every constitutional provision. First and foremost, the clear meaning and intent of the redistricting/reapportionment provision is preserved. Second, no malapportionment results from the implementation, thereby avoiding any associated diminution of the right to vote. Third, neither legislators nor members simultaneously reside in more than one (1) district. Fourth, the implementation scheme preserves the holdover legislators' right to a four-year term of office. Finally, the scheme precludes the occurrence of unintended recall possibilities.

The CONSTITUTION requires completion of redistricting and reapportionment "at least six (6) months prior to the next election." CONST., ART. V, § 4. The CONSTITUTION, therefore, explicitly contemplates an implementation structure inclusive of the general election immediately following the special redistricting/reapportionment election. The CONSTITUTION does not contemplate gradual implementation over the course of two (2) general elections.

Also, Scenario E forces a change in the composition of the Legislature. The CONSTITUTION requires that "[t]he Legislature . . . be composed of Representatives from . . . Districts, subject to Section 4 of . . . Article [V]." *Id.*, ART. V, § 1(b). In other words, the constitutional framers believed that the redistricting/reapportionment provision was textually capable of providing the final substitute districting and apportionment scheme. Yet, the defendants argue that "[a]s to implementation, Art. V, Sec. 4 says nothing about how to implement a final proposal that is approved by the voters through Special Election." *Defs.' Answer* at 8. In their estimation, this maneuvering makes a simultaneous dual district system possible. Moreover, the defendants argue that the CONSTITUTION does not even assign the duty of implementation. *Summ. J. Br.* at 14. So, as a logical extension of the defendants' argument,

since the redistricting/reapportionment provision does not address implementation, then it cannot supply the new districting and apportionment scheme required by CONSTITUTION, ART. V, § 1(b).

The Court disagrees with this view. The redistricting/reapportionment provision stands on its own, and the constitutional framers used language in ART. V, § 1(b) that cannot plausibly reference the unforeseeable actions of a third party. The Legislature has a mandatory obligation to redistrict and reapportion, and Scenario E is the outcome of that satisfied obligation. The intended interaction of the constitutional provisions results in the automatic replacement of the constitutionally included scheme with the Scenario E construct. *See supra* p. 12. This fact prevents a partial, bifurcated implementation of Scenario E. The constitutional provision in question must now effectively read: "[t]he Legislature shall be composed of Representatives from the following Districts . . . ," followed by Scenario E, which supplants the original language. CONST., ART. V, § 1(b).

As the federal cases demonstrate, some voters will charge that legislative reassignment serves to deny them a chance to elect their own representatives. In our context, some may also charge that the reassigned legislators do not occupy their offices by virtue of receiving a majority vote. *Id.*, ART. V, § 6. These contentions, however, ignore the fact that redistricting and reapportionment have changed the electoral landscape. The preexisting conditions no longer remain the same, but have transformed. One court appraised this situation as follows:

> [i]t is impossible, where Senate District boundaries are changed, to avoid having some voters represented by a Senator for whom they had no opportunity to support or oppose. We observe, in passing, that this also happens with regard to new registrants who reach the age of 18 years shortly after an election and to people moving from one area to another. Certainly no one would argue that those voters were thereby denied their constitutional rights.

Ferrell, 339 F. Supp. at 82. Another court observed that "[t]o the extent appellants had any expectation of voting for state senate in 1992, they mistakenly failed to take into account the legitimate and inevitable consequences of redistricting following the 1990 census."[11] *Keisling*, 959 F.2d at 145.

The CONSTITUTION requires that a legislator "be elected by a majority of the eligible voters from their respective Districts." CONST., ART. V, § 6. The Supreme Court construed a nearly identical provision as denoting a change in the "manner that a winner [is] chosen." *JoAnn Jones v. HCN Election Bd. et al.*, CV 95-05 (HCN S. Ct., Aug. 15, 1995) at 4. The future reassignment of Legislators George Lewis and Sharyn Whiterabbit does not reverse the results of the 2001 General Election. Those Legislators won election on the basis of securing a majority vote from within District V. Now, however, the respective districts of Legislators Lewis and Whiterabbit will change, and "[a]lthough reapportionment has altered . . . constituencies, their interest in re-election and in doing their jobs well, i.e. representing their districts, remains." *Donatelli*, 2 F.3d at 516. In addition, the constitutional provisions that envision future action must reflect the change effected by redistricting and reapportionment. CONST., ARTS. V, § 6, 8, IX, § 6. The provisions in question merely require that the contemplated actions originate from and pertain to the districts in which a legislator currently holds office.

As a final note, the Court must stress that the seemingly great impact caused by redistricting and reapportionment will most likely diminish in the future, and reflects the consequences of not performing this function in the past. Of course, this depends largely upon whether the Legislature chooses in 2005 to dramatically modify Scenario E. *Id.*, ART. V, § 4.

---

[11] The fact that Districts I, IV and V must elect their respective representatives at a single General Election is not constitutionally suspect and does not destroy continuity within the Legislature. Rather, each district will now receive similar treatment.

However, any such modifications would not affect the Ho-Chunk Nation until the 2007 General Election.

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 Judgment or Order. Otherwise, "[a]ny final *Judgment* or *Order* of the Trial Court may be appealed to the Ho-Chunk Nation Supreme Court.[12] 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 *Judgment* or Trial Court *Order* must follow the [*HCN R. App. P.*]." *HCN R. Civ. P.* 61.

IT IS SO ORDERED this 13th day of February 2003, but *nunc pro tunc* February 7, 2003, from within the sovereign lands of the Ho-Chunk Nation at Black River Falls, WI 54615.

_____

Honorable Todd R. Matha
Associate Trial Court Judge

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

[12] 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 et al.*, 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 et al.*, 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. et al.*, SU 96-02 (HCN S. Ct., July 1, 1996) at 7-8; and *JoAnn Jones v. HCN Election Bd. et al.*, 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.