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

**Dallas White Wing,**  
Plaintiff,

v.

Case No.: **CV 04-99**

**Ho-Chunk Nation General Council; Alvin  
Cloud, in his official capacity as Acting  
Chair of the General Council; Judy  
Whitehorse-Hilmer, in her official capacity  
as Secretary of the General Council; and  
Wade Blackdeer, Myrna Thompson,  
Christine Romano, Gerald Cleveland,  
Sharon Whiterabbit, Kathyleen Lonetree  
Whiterabbit, John Dall, Tracy  
Thundercloud, Elliot Garvin, and Clarence  
Pettibone, in their official capacities as  
Legislators in the Ho-Chunk Nation  
Legislature; and the Ho-Chunk Nation  
Election Board through Mary Ellen Dumas,  
in her official capacity as Chair of the  
Election Board,**  
Defendants.

**ORDER  
(Regarding Settlement Conference)**

**INTRODUCTION**

The Court has informed the non-presiding judge, Chief Judge Todd R. Matha, of the scheduled September 19, 2005 *Settlement Conference*. This judge recognizes the obvious merit in convening a mediation session, but respectfully questions the authority of the General Council's legal representative to accept settlement terms. In the absence of such conferred authority, this Judge questions the appropriateness of entertaining settlement at this juncture.

1 **APPLICABLE LAW**

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

4 **Art. III - Organization of the Government**

5 **Sec. 3. Separation of Functions.** No branch of government shall exercise the powers and  
6 functions delegated to another branch.

7 **Art. IV - General Council**

8 **Sec. 3. Powers Retained by the General Council.**

9 (a) The General Council retains the power to set policy for the Nation.

10  
11 (b) The General Council retains the power to review and reverse actions of the  
12 Legislature except those enumerated in Section 4 of this Article. The General Council shall  
13 return such reversals to the Legislature for reconsideration consistent with the action of the  
14 General Council. The General Council retains the power to review and reverse decisions of the  
15 Judiciary which interpret actions of the Legislature. The General Council does not retain the  
16 power to review and reverse decisions of the Judiciary which interpret this Constitution.

17 **Sec. 5. Annual Meetings.** The People shall meet in General Council at least one time  
18 each year, which shall be called by the President, and at other times provided in Section 6 of this  
19 Article. Notice shall be provided by the President for all Annual Meetings of the General  
20 Council.

21 **Art. VI - Executive**

22 **Sec. 2. Powers of the President.** The President shall have the power:

23 (l) To execute, administer, and enforce the laws of the Ho-Chunk Nation necessary to  
24 exercise all powers delegated by the General Council and the Legislature, including but not  
25 limited to the foregoing list of powers.

26 **Art. VII - Judiciary**

27 **Sec. 7. Powers of the Supreme Court.**

28 (b) The Supreme Court shall have the power to establish written rules for the  
Judiciary, including qualifications to practice before the Ho-Chunk courts, provided such rules  
are consistent with the laws of the Ho-Chunk Nation.

1 DEPARTMENT OF JUSTICE ESTABLISHMENT AND ORGANIZATION ACT OF 2001, 1  
2 HCC § 8

3 Subsec. 3. Mission. The Ho-Chunk Nation Department of Justice shall protect the legal  
4 rights and interests of the Nation and the collective rights and interests of Tribal Members. In  
5 doing so, the Department shall safeguard the interests of the Nation, enhance the sovereignty of  
6 the Nation, and exercise stewardship over those resources committed to it by the Nation and  
7 foreign jurisdictions.

8 Subsec. 4. Functions. The Department of Justice shall:

- 9 a. Defend the sovereignty of the Ho-Chunk Nation.
- 10 b. Provide expert legal advice and competent representation for all Branches of the  
11 Nation on those matters that concern the Nation's interests and welfare.
- 12 c. Represent the Nation in Tribal, State, and Federal forums.
- 13 d. Coordinate all available and necessary professional resources required to carry out  
14 its mission.

15 HO-CHUNK NATION PLANNING COMMITTEE ESTABLISHMENT ACT, 1 HCC § 15<sup>1</sup>

16 Subsec. 2. Purpose. This Act establishes and organizes a Planning Committee to assist the  
17 Office of the President with the logistical and administrative planning of a duly called General  
18 Council Meeting.

19 Subsec. 3. Power. The Planning Committee shall be vested solely with the singular power to  
20 plan and prepare for Annual and Special Meetings of the General Council.

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21 <sup>1</sup> At its October 21, 2000 Annual Meeting, the Ho-Chunk Nation General Council (hereinafter General Council)  
22 adopted a resolution for the apparent purpose of establishing a policy whereby the General Council Planning  
23 Committee ("GCPC"), as then comprised, would continue to serve its "traditional function[ ]" of "arranging the  
24 annual [and] special General Council meetings." GEN. COUNCIL RES. 10-21-00A; *see also* CONSTITUTION OF THE  
25 HO-CHUNK NATION (hereinafter CONSTITUTION), ART. IV, § 3(a). Prior to this action, the Ho-Chunk Nation  
26 Legislature (hereinafter Legislature) drafted the HCN PLANNING COMM. ESTABLISHMENT ACT (hereinafter GCPC  
27 ESTABLISHMENT ACT), and posted it for public comment until October 23, 2000. GCPC ESTABLISHMENT ACT, § 15  
28 at 4. The Legislature enacted the GCPC ESTABLISHMENT ACT on February 13, 2001. *Id.* Subsequently, Matthew J.  
Mullen, Tribal ID# 439A003208, proposed a resolution to reverse the GCPC ESTABLISHMENT ACT at the October  
27, 2001 Annual General Council Meeting in order to increase GCPC membership to its earlier level as recognized  
in GEN. COUNCIL RES. 10-21-00A. *Gen. Council Meeting Mins.* (Oct. 27, 2001) at 6; *see also* CONST., ART. IV, §  
3(b). The resolution failed due to lack of quorum. *Id.* Most recently, David A. Hanson, Tribal ID# 439A001185,  
proposed a similar resolution to reverse the GCPC ESTABLISHMENT ACT at the October 11, 2003 Annual General  
Council Meeting. GEN. COUNCIL RES. 10-11-03E. The General Council passed this resolution, which also purports  
to "replace the language of the Act of the Legislature of February 13, 2001" with an amended version that vests  
substantially greater authority in the GCPC. *Id.* at 2. For example, the GCPC would maintain power to "carry[ ] out  
directives of the General Council" and "assist the President" in his or her "execut[ion], administ[r]ation[,], and  
enforce[ment of] the laws of the Ho-Chunk Nation." *Id.* at 3-4 (referencing CONST., ART. VI, § 2(l)). As of the  
entrance of this order, the Legislature has not rescinded the GCPC ESTABLISHMENT ACT.

1 Subsec. 4. Functions.

2 a. Once the President announces the date, time, and location/site of a duly called  
3 General Council Meeting, the Planning Committee shall make the necessary arrangements at that  
4 location, i.e., room reservations, food preparation, seating, clean-up, and any further preparation  
deemed necessary for the planning of a General Council.

5 b. The General Council, upon reaching the necessary quorum of twenty (20) percent  
6 shall establish the General Council agenda. The Planning Committee has no independent  
7 authority to set the General Council agenda and no authority to change the location of the  
General Council without the consent of the President.

8 Subsec. 7. Meetings.

9 c. The Planning Committee shall only conduct meetings after the President has  
10 determined a date, time, and location/site for the General Council.

11 d. The time period that the Planning Committee can exercise its authority is upon the  
12 announcement by the President of a General Council Meeting, but not more than the 45-day  
13 period immediately prior to the date of the General Council Meeting, and the 30-day period  
14 immediately after that General Council Meeting. During this period the Committee shall plan,  
prepare for, and facilitate the General Council and to reconcile Committee finances.

15 Subsec. 9. General Council. The role of the Planning Committee during the conduct of a  
16 General Council shall be limited to ensuring that the logistics and administrative support is  
provided for as planned.

17 HO-CHUNK NATION RULES OF JUDICIAL ETHICS

18 Art. IV - Diligence and Impartiality

19 Sec. 4-2. Conflict of Interest/Recusal.

20 (A) A judge or justice shall recuse him/herself in any matter before the court in which he or  
21 she has a direct personal or financial interest pursuant to HCN Constitution, Article VII, Section  
22 13.

23 1. Direct Personal Interest is defined as, but not limited to the following:

24 (b) The judge or justice has a personal bias or prejudice concerning a party; or  
25 personal knowledge of disputed evidentiary facts;

26 (B) A judge or justice may recuse him/herself on his or her own discretion to avoid the  
27 appearance of impropriety.

1 *Comment: The HCN Rules of Appellate Procedure at Rule 4 allow judges and justices to make a*  
2 *discretionary recusal.*

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

6 *Comment: A judge or justice may discern that certain facts or information should be provided to*  
7 *the parties in a case to avoid an appearance of impropriety. Examples are extended family*  
8 *relationships, attorney-client relationships, working relationships and situations which may*  
9 *raise an appearance of impropriety.*

9 (D) A judge or justice may be recuse upon a Motion for Recusal by the party(ies) to avoid the  
10 appearance of impropriety.

11 *Comment: Judges and justices will need to seriously consider recusals. However, a judge or*  
12 *justice should look to case law and the HCN Constitution in determining whether recusal is*  
13 *warranted. Such factors as remoteness in time, the wishes of the parties,[and] the level of*  
14 *impropriety may be considered in making recusal decisions.*

## 14 RULES OF PROFESSIONAL CONDUCT FOR ATTORNEYS

### 15 SCR 20:1.2. Scope of Representation.

16 (a) A lawyer shall abide by a client's decisions concerning the objectives of representation,  
17 subject to paragraphs (c), (d) and (e), and shall consult with the client as to the means by which  
18 they are to be pursued. A lawyer shall inform a client of all offers of settlement and abide by a  
19 client's decision whether to accept an offer of settlement of a matter. In a criminal case or any  
20 proceeding that could result in deprivation of liberty, the lawyer shall abide by the client's  
21 decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial  
22 and whether the client will testify.

21 (c) A lawyer may limit the objectives of the representation if the client consents after  
22 consultation.

## 24 FINDINGS OF FACT

- 26 1. The parties received proper notice of the September 1, 2005 *Pre-Trial Conference*.  
27 2. The presiding judge makes the following discretionary disclosure to avoid the appearance  
28 of impropriety. *See Ho-Chunk Nation Rules of Judicial Ethics, § 4-2(C)*. The plaintiff, Dallas R.

1 White Wing, is the maternal uncle (*tega*) of the presiding judge's spouse, Katie A. Funmaker-  
2 Matha.

3  
4 3. On August 31, 1996, the Ho-Chunk Nation Supreme Court adopted the State of  
5 Wisconsin *Rules of Professional Conduct for Attorneys. In Re Adoption of Rules of Prof'l*  
6 *Conduct for Att'ys* (HCN S. Ct., Aug. 31, 1996).

7 4. On September 1, 2005, the plaintiff requested "an additional thirty (30) days to try to  
8 mediate a resolution of this issue . . . with respect to the powers of the General Council . . . ."  
9 *Pre-Trial Conference* (LPER, Sept. 1, 2005, 01:49:32 CDT).

10  
11 5. On September 1, 2005, the Court notified the parties that the designated agents attending  
12 the September 19, 2005 *Settlement Conference* must possess full settlement authority. *Id.*,  
13 02:09:41 CDT.

14 6. On or before September 14, 2005, the parties must submit settlement briefs to the non-  
15 presiding judge. *Scheduling Order*, CV 04-99 (HCN Tr. Ct., Sept. 8, 2005) at 5.

16  
17 7. On or before September 16, 2005, the parties must inform the Court of whether each  
18 intends to voluntarily participate in the *Settlement Conference*. LPER, 01:54:59 CDT.

19 8. On September 17, 2005, the General Council will convene its annual meeting. *See*  
20 CONST., ART. IV, § 5.

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22 9. The GCPC *may* assert that it maintains authority to negotiate on behalf of the General  
23 Council. *See supra* note 1, at 3.<sup>2</sup>

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26 <sup>2</sup> At the 2003 Annual Meeting, the General Council adopted a contemporaneous resolution, which appears to  
27 conflict, in some respects, with the proposed changes to the GCPC ESTABLISHMENT ACT as incorporated into GEN.  
28 COUNCIL RES. 10-11-03E. *See* GEN. COUNCIL RES. 10-11-03L (advocating the creation of an Office of the General  
Council "for the purpose of enforcing the wishes of the General Council"). The tribal newsletter published job  
descriptions for the Office of General Council prior to the Annual General Council Meeting in response to a  
previous General Council resolution that also purportedly created the Office of General Council. *Office of Gen.*

1 **DECISION**

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3 The Court harbors serious doubt as to whether the General Council, or its agents, has  
4 conferred settlement authority upon its appointed legal representative, and Attorney Michael P.  
5 Mullen, Sr. likely shares this concern. See LPER, 01:51:44 CDT. The Judiciary has never  
6 directly addressed the scope of authority maintained by either the GCPC or Office of the General  
7 Council as currently composed under the laws of the Nation. Perhaps, the General Council's  
8 legal representative may exercise some level of prosecutorial discretion under the auspices of his  
9 appointment, provided that the appointment arose from the Ho-Chunk Nation Department of  
10 Justice. DEP'T OF JUSTICE ESTABLISHMENT & ORG. ACT OF 2001, 1 HCC § 8.4a-d. Regardless,  
11 any such appointee must remain mindful of his or her professional responsibilities as related to  
12 pursuing settlement. SCR 20:1.2(a, c).  
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15 Only the General Council can either consent to an offer of settlement or delegate an  
16 individual or entity to do so on its behalf. See CONST., ART. III, § 3 (defining separation of  
17 powers). The Court shall not preside over a *Settlement Conference* unless the General Council's  
18 legal representative can unequivocally state that the General Council has authorized its agent to  
19 fully participate in settlement negotiations. If not already conferred, the legal representative may  
20 seek such authority from the General Council at its September 17, 2005 Annual Meeting.  
21

22 **IT IS SO ORDERED** this 13<sup>th</sup> day of September 2005, by the Ho-Chunk Nation Trial  
23 Court located in Black River Falls, WI within the sovereign lands of the Ho-Chunk Nation.  
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25  
26 \_\_\_\_\_  
27 Honorable Todd R. Matha  
28 Chief Trial Court Judge

\_\_\_\_\_  
*Council, HOCAK WORAK, Feb. 12, 2003, at 7 (quoting GEN. COUNCIL RES. 10-27-01F).*

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

