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

**Timothy G. Whiteagle and Gretchen
Eagleman,**
Plaintiffs,

v.

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

**Alvin Cloud, Chair of the General Council,
in his official capacity; Roberta Funmaker,
General Council Secretary, in her official
capacity; and Ho-Chunk Nation General
Council Planning Committee,**
Defendants.

**ORDER
(Granting Defendants' Motion to Dismiss)**

INTRODUCTION

The Court must determine whether to grant the defendants' motion to dismiss. The institutional defendant retains sovereign immunity from suit, whereas the individual defendants retain no continuing official authority. The Court, therefore, cannot redress the plaintiffs' alleged harm, and consequently enters a dismissal without prejudice.

PROCEDURAL HISTORY

The plaintiffs, Timothy G. Whiteagle and Gretchen Eagleman, initiated the current action by filing a *Complaint for Declaratory Judgments* (hereinafter *Complaint*) with the Court on January 16, 2004. Consequently, the Court issued a *Summons*, accompanied by the *Complaint*,

1 on January 19, 2004, and delivered the documents by personal service to the defendants'
2 representative, the Ho-Chunk Nation Department of Justice (hereinafter DOJ).¹ See *HCN R. Civ.*
3 *P. 5(C)(1)*. The *Summons* informed the defendants of the right to file an *Answer* within twenty
4 (20) days of the issuance of the *Summons* pursuant to *HCN R. Civ. P. 5(A)(2)*. The *Summons*
5 also cautioned the defendants that a *default judgment* could result from failure to file within the
6 prescribed time period.
7

8 The defendants, by and through DOJ Attorney Michael P. Murphy, timely filed the
9 *Defendants' Answer* on February 9, 2004. The Court then set a *Scheduling Conference* for
10 March 16, 2004 at 3:00 p.m. CST, and mailed *Notice(s) of Hearing* to the parties on February 13,
11 2004. The following parties attended the *Scheduling Conference*: Attorney Tracey L. Schwalbe,
12 plaintiffs' counsel (by telephone), and DOJ Attorney Michael P. Murphy, defendants' counsel.²
13 The Court entered the *Scheduling Order* on March 19, 2004, setting forth the timelines and
14 procedures to which the parties should adhere prior to *Trial*.³
15
16

17 On May 13, 2004, the plaintiffs filed their *Amended Complaint*. The Court entered its
18 *Order (Responsive Pleading Deadline)* on May 14, 2004, in order to inform the defendants of
19 their right to respond. The Court also issued a *Summons* on the same date, providing the DOJ the
20

21
22 ¹ The *Ho-Chunk Nation Rules of Civil Procedure* (hereinafter *HCN R. Civ. P.*) permit the Court to serve the initial
23 pleading upon the DOJ when the plaintiff/petitioner names as a party either a unit of government or enterprise or an
24 official or employee being sued in their official or individual capacity. *HCN R. Civ. P. 27(B)*.

25 ² Attorney Murphy informed the Court that his office intended to secure outside counsel, Attorney Mark L.
26 Goodman, to defend the suit, but that the DOJ would enter a limited appearance for purposes of scheduling the case.
27 *Scheduling Conference* (LPER at 1, Mar. 16, 2004, 03:00:39 CST).

28 ³ The presiding judge made two (2) discretionary disclosures as encouraged by applicable ethical rules. *HCN*
Judicial R. of Ethics, § 4-2(C). First, the judge informed the parties that his spouse is the second cousin (*hicqk*) of
defendant Roberta Funmaker. *Scheduling Conference* (LPER at 1-2, 03:01:00 CST). Second, the judge informed
the parties that he attended the October 11, 2003 Annual General Council Meeting in his individual capacity as an
enrolled tribal member. *Id.* at 2, 03:03:29 CST. The judge further related that he abstained from voting at the
meeting and delivered no public comments. *Id.*; see also *Jacob Lonetree v. Robert Funmaker, Jr. et al.*, SU 00-16
(HCN S. Ct., Jan. 12, 2001) at 1-2 (asserting that members of the Judiciary are not required to forego
constitutionally protected rights as tribal members). Neither party responded by filing a motion for recusal. *HCN*
Judicial R. of Ethics, § 4-2(C).

1 opportunity to accept or decline representation of the added defendant, the Ho-Chunk Nation
2 General Council Planning Committee (hereinafter GCPC).

3
4 The defendants, by and through Attorney Mark L. Goodman, timely filed the *Answer to*
5 *Amended Complaint* on May 14, 2004. The defendants also filed a *Motion to Dismiss*
6 accompanied by the required memorandum of law (hereinafter *Defendants' Brief*). See HCN R.
7 *Civ. P.* 18. In response, the Court entered the May 17, 2004 *Order (Motion Hearing)*. The order
8 informed the parties of the Court's decision to convene a motion hearing for the purpose of
9 entertaining the *Motion to Dismiss*. The order set forth the date, time and location of the *Motion*
10 *Hearing*, which the Court scheduled in conjunction with the *Pre-Trial Conference*, and alerted
11 the plaintiffs to their legal rights and obligations in relation to the proceeding.

12
13 Prior to the hearing, the Court received the timely May 26, 2004 *Plaintiffs' Brief in*
14 *Opposition to Defendants' Motion to Dismiss*. See HCN R. *Civ. P.* 19(B). The Court convened
15 the *Pre-Trial Conference/Motion Hearing* on May 27, 2004 at 1:30 p.m. CDT. The following
16 parties appeared at the *Conference/Hearing*: Timothy G. Whiteagle, plaintiff; Attorney Tracey
17 L. Schwalbe, plaintiffs' counsel; Attorney Mark L. Goodman, individual defendants' counsel; and
18 DOJ Attorney Michael P. Murphy, GCPC counsel.
19
20

21 **APPLICABLE LAW**

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

23 **Art. II - Membership**

24
25 Sec. 5. Membership Code. The Legislature shall have the power to enact laws not
26 inconsistent with this Article to govern membership. Removal of any person who is not eligible
27 for membership from the Membership Roll shall be done in accordance with the Membership
28 Code, provided, that such removal is approved by at least a two-thirds (2/3) vote of the General
Council.

1 Sec. 6. Appeals. Any person who has been rejected for enrollment or who has been
2 removed from the tribal roll shall have the right to appeal to the Judiciary for a remedy in equity
3 consistent with this Constitution.

4 Art. IV - General Council

5 Sec. 1. Powers of the General Council. The People of the Ho-Chunk Nation hereby grant
6 all inherent sovereign powers to the General Council. All eligible voters of the Ho-Chunk
7 Nation are entitled to participate in the 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 (b) The General Council retains the power to review and reverse actions of the Legislature
11 except those enumerated in Section 4 of this Article. The General Council shall return such
12 reversals to the Legislature for reconsideration consistent with the action of the General Council.
13 The General Council retains the power to review and reverse decisions of the Judiciary which
14 interpret actions of the Legislature. The General Council does not retain the power to review and
15 reverse decisions of the Judiciary which interpret this Constitution.

16 (c) The General Council retains the power to propose amendments in accordance with
17 Article XIII, including those which reverse decisions of the Judiciary interpreting this
18 Constitution.

19 (d) The General Council retains the power to establish its own procedures in accordance with
20 this Constitution.

21 (e) The General Council retains the power to call a Special Election.

22 (f) Actions by the General Council shall be binding.

23 Sec. 4. Excepted Powers. The General Council does not retain the power to review
24 actions relating to the hiring or firing of personnel.

25 Sec. 5. Annual Meetings. The People shall meet in General Council at least one time
26 each year, which shall be called by the President and at other times as provided in Section 6 of
27 this Article. Notice shall be provided by the President for all Annual Meetings of the General
28 Council.

Sec. 7. Procedures. Twenty (20) percent of the eligible voters of the Nation present in
General Council shall constitute a quorum. Each action of the General Council shall require the
presence of a quorum. The President shall call all Annual and Special General Council
Meetings, except those meetings called pursuant to Article IX, Section 2. When a quorum is
attained, the General Council shall select either the President or another person to conduct the
meeting. A secretary shall be appointed to record the minutes of an [*sic*] General Council

1 meetings, including any votes taken. The secretary shall transmit the minutes of General Council
2 meetings to the Legislature.

3 Art. V - Legislature

4 Sec. 2. Powers of the Legislature. The Legislature shall have the power:

5 (a) To make laws, including codes, ordinances, resolutions, and statutes;

6 Art. VI - Executive

7
8 Sec. 2. Powers of the President. The President shall have the power:

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

12 Art. VII - Judiciary

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

16 Sec. 5. Jurisdiction of the Judiciary.

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

24 Sec. 6. Powers of the Tribal Court.

25 (a) The Trial Court shall have the power to make findings of fact and conclusions of law.
26 The Trial Court shall have the power to issue all remedies in law and in equity including
27 injunctive and declaratory relief and all writs including attachments and mandamus.

28 (b) The Trial Court shall have the power to declare the laws of the Ho-Chunk Nation void if
such laws are not in agreement with this Constitution.

1 Sec. 7. Powers of the Supreme Court.

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

5 Art. VIII - Elections

6 Sec. 2. Special Elections. Special Elections shall be held when called for by the General
7 Council, the Legislature, or by this Constitution or appropriate ordinances. In all Special
8 Elections, notice shall be provided to the voters.

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

12 Art. IX - Removal, Recall and Vacancies

13 Sec. 1. General Council Removal of Legislators. The General Council may remove any
14 member of the Legislature for malfeasance. No vote by the General Council to remove a
15 member of the Legislature shall take place before such Legislator has been given reasonable
16 notice of the impending action and has had a reasonable opportunity to be heard.

17 Sec. 2. General Council Removal of the President. The General Council may remove the
18 President for malfeasance. No vote by the General Council to remove the President shall take
19 place before such President has been given reasonable notice of the impending action and has
20 had a reasonable opportunity to be heard.

21 Sec. 5. Recall by General Council. The President, Legislators, and Members of the
22 Judiciary shall be removable by recall vote at a Special Election requested by the General
23 Council. At the request of the General Council, the Election Board shall hold a Special Election
24 not less than thirty (30) days and not more than ninety (90) days from the date of the General
25 Council request. If the Election Board fails to hold such Special Election within ninety (90)
26 days, any eligible voter of the Nation may request the Tribal Court to order such Special
27 Election. In any Special Election, no more than three (3) persons shall be subject to recall vote.

28 Art. XII - Sovereign Immunity

 Sec. 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.

 Sec. 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

1 jurisdiction for purposes of enforcing rights and duties established by this constitution or other
2 applicable laws.

3 Art. XIII - Amendments

4 Sec. 2. Requests for a Secretarial Election. It shall be the duty of the Secretary of the
5 Interior to call and hold an election on any proposed amendment to this Constitution at the
6 request of two thirds (2/3) of the entire Legislature, at the request of the General Council, or
7 upon presentation of a petition by thirty (30) percent of the eligible voters of the Ho-Chunk
8 Nation.

9 DEPARTMENT OF ADMINISTRATION ESTABLISHMENT AND ORGANIZATION ACT
10 OF 2001 (1 HCC § 2)

11 Sec. 3. Mission. The Ho-Chunk Nation Department of Administration shall provide the
12 support services and staff necessary for effective operation of the Executive, Legislative,
13 Judicial, and General Council Branches of government. In doing so, the Department shall
14 safeguard the interests of the Nation, enhance the sovereignty of the Nation, and exercise
15 stewardship over those resources committed to it by the Nation and foreign jurisdictions.

16 Sec. 4. Functions. The Department of Administration shall:

- 17 e. Provide technical support for all areas of the Nation's operations.

18 Sec. 5. Internal Organization.

19 c. The Department shall maintain a current Organizational Chart. The
20 Organizational Chart shall accompany its annual budget submission and any budget
21 modifications during the fiscal year in accordance with the Nation's *Appropriations and Budget
22 Process Act*.

23 HO-CHUNK NATION PLANNING COMMITTEE ESTABLISHMENT ACT (1 HCC § 15)⁴

24 _____
25 ⁴ At its October 21, 2000 Annual Meeting, the General Council adopted a resolution for the apparent purpose of
26 establishing a policy whereby the GCPC, as then comprised, would continue to serve its "traditional function[]" of
27 "arranging the annual [and] special General Council meetings." GEN. COUNCIL RES. 10-21-00A; *see also* CONST.,
28 ART. IV, § 3(a). Prior to this action, the Ho-Chunk Nation Legislature (hereinafter Legislature) drafted the HCN
PLANNING COMM. ESTABLISHMENT ACT (hereinafter GCPC ESTABLISHMENT ACT), and posted it for public
comment until October 23, 2000. GCPC ESTABLISHMENT ACT, § 15 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

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

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

6 Subsec. 4. Functions.

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

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

15 Subsec. 7. Meetings.

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

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

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

26 HO-CHUNK NATION RULES OF JUDICIAL ETHICS

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

28 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.

Council" and "assist the President" in his or her "execut[ion], administ[ration], and enforce[ment of] the laws of the
Ho-Chunk Nation." *Id.* at 3-4 (referencing CONST., ART. VI, § 1(l)). As of the entrance of this order, the
Legislature has not rescinded the GCPC ESTABLISHMENT ACT.

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

4 HO-CHUNK NATION RULES OF CIVIL PROCEDURE

5 Rule 5. Notice of Service of Process.

6 (A) Definitions.

7
8 (2) Summons - The official notice to the party informing him/her that he/she is identified
9 as a party to an action or is being sued, that an *Answer* is due in twenty (20) calendar days (See
10 HCN R. Civ. P. 6) and that a *Default Judgment* may be entered against them if they do not file an
11 *Answer* in the prescribed time. It shall also include the name and location of the Court, the case
12 number, and the names of the parties. The *Summons* shall be issued by the Clerk of Court and
13 shall be served with a copy of the filed *Complaint* attached.

12 (C) Methods of Service of Process

13 (1) Personal Service. The required papers are delivered to the party in person by the
14 bailiff, or when authorized by the Court, a law enforcement officer from any jurisdiction, or any
15 other person not a party to the action who is eighteen (18) years of age or older and of suitable
16 discretion.

16 Rule 18. Types of Motions.

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

22 Rule 19. Filing and Responding to Motions.

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

26 Rule 27. The Nation as a Party.

27 (B) Civil Actions. When the Nation is filing a civil suit, a writ of mandamus, or the Nation is
28 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

1 sued, should indicate whether the official or employee is being sued in his or her individual or
2 official capacity. Service can be made on the Ho-Chunk Nation Department of Justice and will
3 be considered proper unless otherwise indicated by these rules, successive rules of the Ho-Chunk
Nation Court, or Ho-Chunk Nation Law.

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

5 (A) Relief from Judgment. A *Motion to Amend* or for relief from judgment, including a request
6 for a new trial shall be made within ten (10) calendar days of the filing of judgment. The *Motion*
7 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.

8 (B) Motion for Reconsideration. Upon motion of the Court or by motion of a party made not
9 later than ten (10) calendar days after entry of judgment, the Court may amend its findings or
10 conclusions or make additional findings or conclusions, amending the judgment accordingly.
11 The motion may be made with a motion for a new trial. If the Court amends the judgment, the
12 time for initiating an appeal commences upon entry of the amended judgment. If the Court
13 denies a motion filed under this rule, the time for initiating an appeal from the judgment
14 commences when the Court denies the motion on the record or when an order denying the
15 motion is entered, whichever occurs first. If within thirty (30) days after the filing of such
16 motion, and the Court does not decide a motion under this Rule or the judge does not sign an
17 order denying the motion, the motion is considered denied. The time for initiating an appeal from
18 judgment commences in accordance with the Rules of Appellate Procedure.

19 (C) Motion to Modify. After the time period in which to file a *Motion to Amend* or a *Motion for*
20 *Reconsideration* has elapsed, a party may file a *Motion to Modify* with the Court. The *Motion*
21 must be based upon new information that has come to the party's attention that, if true, could
22 have the effect of altering or modifying the judgment. Upon such motion, the Court may modify
23 the judgment accordingly. If the Court modifies the judgment, the time for initiating an appeal
24 commences when the Court denies the motion on the record or when an order denying the
25 motion is entered, whichever occurs first. If within thirty (30) calendar days after the filing of
26 such motion, and the Court does not decide the motion or the judge does not sign an order
27 denying the motion, the motion is considered denied. The time for initiating an appeal from
28 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.

1 Rule 60. Emergency Order, Temporary Restraining Order and Ex Parte Temporary
2 Restraining Order.

3 (A) Emergency Order. The Court may enter an *Emergency Order* without a hearing if it appears
4 from the *Complaint*, affidavits and sworn testimony that irreparable harm will result without the
5 *Order*. The *Order* will expire in thirty (30) calendar days unless extended by the Court for good
6 cause. A hearing on the matters contained in the *Order* will be held prior to its expiration. The
7 removal of a child from its residence by the Department of Social Services or equivalent agency
8 and the imminent destruction of records or property essential to the case are examples of matters
9 which may require an *Emergency Order*.

10 (B) Temporary Restraining Order. When it appears from a party's pleading that a party is
11 entitled to judgment and any part thereof consists in restraining some act, the commission or
12 continuance of which during the litigation would injure the party, or when during the litigation it
13 shall appear that a party is doing or threatens or is about to do, or is procuring or suffering some
14 act to be done in violation of the rights of another party and tending to render the judgment
15 ineffectual, a temporary injunction may be granted to restrain such act.

16 Rule 61. Appeals.

17 Any final *Judgment* or *Order* of the Trial Court may be appealed to the Ho-Chunk Nation
18 Supreme Court. The *Appeal* must comply with the Ho-Chunk Nation *Rules of Appellate*
19 *Procedure*, specifically *Rules of Appellate Procedure*, Rule 7, Right of Appeal. All subsequent
20 actions of a final *Judgment* or Trial Court *Order* must follow the HCN *Rules of Appellate*
21 *Procedure*.

22 **RELEVANT LAW**

23 UNITED STATES CODE OF FEDERAL REGULATIONS

24 Tit. 25 - Indians; Ch. 1 - Bureau of Indian Affairs, Department of the Interior

25 Subch. F - Tribal Government; Pt. 81 - Tribal Reorganization under a Federal Statute

26 Sec. 81.4. Assistance from the Department of the Interior.

27 Representatives of the Department of the Interior will cooperate with and offer advice
28 and assistance (including the proposing of amendments), to any tribe in drafting a constitution
and bylaws, an amendment, a charter or charter amendment, or in revocation of constitutions.
Any payments that might be necessary to non-Bureau staff assisting in the conduct of the
election shall be made from tribal funds.

1 Sec. 81.5. Request to Call Election.

2 (d) The Secretary shall authorize the calling of an election on the adoption of
3 amendments to a constitution and bylaws or a charter when requested pursuant to the amendment
4 article of those documents. The election shall be conducted as prescribed in this part unless the
5 amendment article of the constitution and bylaws or the charter provides otherwise, in which
6 case the provisions of those documents shall rule where applicable.

7 (f) Any authorization not acted upon within 90 days (tribes in Alaska shall be granted
8 120 days) from the date of issuance will be considered void. Notification of the election date as
9 provided for in § 81.14 shall constitute the action envisioned in this section. Extension of an
10 authorization may be granted upon a valid and reasonable request from the election board.
11 Copies of authorizations shall be furnished the requesting tribe or petitioners.

12 (g) In those instances where conflicting proposals to amend a single constitutional or
13 charter provision are submitted, that proposal first received by the officer in charge, if found
14 valid, shall be placed before the voters before any consideration is given other proposals. Other
15 proposals shall be considered in order of their receipt; provided, they are resubmitted following
16 final action on the initial submission. This procedure shall also apply in those instances where
17 new or revised constitutions are at issue.

18 Sec. 81.22. Contesting of Election Results.

19 Any qualified voter, within three days following the posting of the results of an election,
20 may challenge the election results by filing with the Secretary through the officer in charge the
21 grounds for the challenge, together with substantiating evidence. If in the opinion of the
22 Secretary, the objections are valid and warrant a recount or new election, the Secretary shall
23 order a recount or a new election. The results of the recount or new election shall be final.

24 **FINDINGS OF FACT**

25 1. The parties received proper notice of the May 27, 2004 *Pre-Trial Conference/Motion*
26 *Hearing*.

27 2. The plaintiff, Timothy G. Whiteagle, is an enrolled member of the Ho-Chunk Nation,
28 Tribal ID# 439A002569, and resides at 4929 Kappus Drive, Eau Claire, WI 54701. The
plaintiff, Gretchen Eagleman, is an enrolled member of the Ho-Chunk Nation, Tribal ID#
439A000771, and resides at 649 Elm Street, Black River Falls, WI 54615.

1 3. The defendant, Alvin Cloud, is an enrolled member of the Ho-Chunk Nation, Tribal ID#
2 439A000365. The October 11, 2003 General Council selected Mr. Cloud as its Chairperson.
3 *Gen. Council Mins.* (Oct. 11, 2003) at 1; *see also* CONST., ART. IV, § 7. The defendant, Roberta
4 R. Funmaker, is an enrolled member of the Ho-Chunk Nation, Tribal ID# 439A000917. Mr.
5 Cloud appointed Ms. Funmaker as the General Council Secretary. *Id.*
6

7 4. The defendant, GCPC, is a duly constituted entity of the Ho-Chunk Nation. *See supra*
8 note 4, at 7-8. As of October 11, 2003, the following enrolled members of the Ho-Chunk Nation
9 comprised the GCPC: Ervin Funmaker, Tribal ID# 439A002930 (Dist. I Rep.); David A.
10 Hanson, Tribal ID# 439A001185 (Dist. II Rep.); Wayne Funmaker, Tribal ID# 439A000928
11 (Dist. III Rep.); Roberta R. Funmaker, Tribal ID# 439A000917 (Dist. IV Rep.); and Rosetta R.
12 Hunt, Tribal ID# 439A002126 (Dist. V Rep.). Defs.' Ex. M (*Defs.' Resp. to Pls.' Interrogs. &*
13 *Req. for Prod. Of Docs.*) at 2.
14

15 5. In 1997, Ho-Chunk Nation Management & Information Services (hereinafter MIS)
16 assisted with facilitating the voting process and tabulating the ballots taken at the January 11,
17 1997 Special General Council Meeting. *Gen. Council Mins.* (Jan. 11, 1997), Ex. A(1). MIS is a
18 division within the Ho-Chunk Nation Department of Administration located on trust lands at
19 W9814 Airport Road, Black River Falls, WI 54615. *See* DEP'T OF ADMIN. ESTABLISHMENT &
20 ORG. ACT OF 2001, § 2(5)(c); [http:// www.ho-chunknation.com/government/executive/org_chart.](http://www.ho-chunknation.com/government/executive/org_chart.htm)
21 [htm](http://www.ho-chunknation.com/government/executive/org_chart.htm) (last visited July 19, 2004) (on file with Admin. Dep't).
22

23 6. In 2000, MIS facilitated the voting process by electronic means at the October 21, 2000
24 Annual General Council Meeting, registering each vote on six (6) substantive issues after
25 discussion of the relevant resolutions. An average number of 1,140 participants voted on each
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1 resolution, requiring an average of forty (40) minutes for each vote.⁵ *Gen. Council Mins.* (Oct.
2 21, 2000) at 3-7. After completing the second resolution, Charles H. Davis, Tribal ID#
3 439A000446, inquired whether MIS could conduct simultaneous voting on the remaining
4 resolutions. *Id.* at 4. MIS personnel responded in the negative. *Id.* at 5.

6 7. In 2001, MIS was prepared to facilitate the voting process by electronic means at the
7 October 27, 2001 Annual General Council Meeting, but only conducted electronic voting on two
8 (2) of fifteen (15) substantive issues.⁶ *Gen. Council Mins.* (Oct. 27, 2001) at 3-10. After
9 completing the electronic vote on the first resolution, Chairperson Long inquired of the General
10 Council whether the voting should continue by electronic or other means. "[A]pproximately 25
11 [adult tribal members] raised their hand[s]" in favor of electronic voting, whereas an
12 overwhelming majority favored utilizing hand votes. *Id.* at 3. Consequently, Secretary Karen L.
13 Martin, Tribal ID# 439A002220, repeatedly made the following notation throughout the
14 recorded minutes: *Note: Secretary cannot certify the authenticity of hand votes cast.*⁷ *Id.* at 3-
15 10 (emphasis in original).
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20 ⁵ For purposes of the above calculations, the Court considers the two (2) resolutions pertaining to ineligible tribal
21 member removal as one (1) action since voted upon simultaneously. *Gen. Council Mins.* at 5.

22 ⁶ Chairperson Douglas Long, Tribal ID# 439A003243, interrupted roll call "[a]fter conferring with [DOJ Attorneys]
23 Wendy Helgemo and Wendi Huling" and informed the General Council "that by using the electronic voting system,
24 we would be able to ensure that quorum is maintained." *Gen. Council Mins.* at 2.

25 ⁷ Pertaining to voting, the Court earlier pronounced that "[t]o be granted a presumption of validity, a body politic
26 must follow procedural guidelines which are easily understandable and subject to verification. It is not necessary
27 that they be the same each time, but that the procedures be clear and hopefully have some ability to be easily
28 verified." *Coalition for Fair Gov't II et al. v. Chloris A. Lowe, Jr. et al.*, CV 96-22, -24 (HCN Tr. Ct., Jan. 3, 1997)
at 29. The Court equated vote verification with consistent counting of affirmative and negative votes and
abstentions, focusing on the need to confirm total votes cast. *Id.* at 36-38. The Court also stressed the need for
neutrality in voting methodology. *Id.* at 36, 41. The Court deliberately declined to either prescribe or sanction a
particular form of voting for substantive issues, but did not object to using voice votes "for minor procedural items."
Id. at 42. Instead, the Court reiterated that "[u]nless procedures are changed, so that substantial decisions of the
General Council can be objectively verified, the resulting disbelief that such votes were valid and the instability
accompanying such disbelief will undermine the strength and unity of the Ho-Chunk Nation." *Id.* at 45. The Court,
however, never discredited the use of hand votes, and neither the Court nor the CONSTITUTION places a duty upon
the presiding Secretary to independently certify or verify the authenticity of vote tallies. *See* CONST., ART. IV, § 7.

1 8. In 2002, MIS facilitated the voting process by electronic means at the November 16,
2 2002 Annual General Council Meeting. At the beginning of the meeting, Chairperson Alvin
3 Cloud, Tribal ID# 439A000365, introduced an MIS representative "who outlined the voting
4 process." *Gen. Council Mins.* (Nov. 16, 2002) at 1. Participating members cast electronic votes
5 on all substantive issues following the presentation of the final resolution. At the conclusion of
6 the meeting, Gloria J. Visintin, Tribal ID# 439A003116, "ma[de] a motion that the Ho-Chunk
7 2002 General Council adjourn when the final vote is cast and members can then receive their
8 \$100.00." *Id.* at 3. Emma M. Snowball, Tribal ID# 439A000528, seconded the motion, which
9 passed upon a unanimous hand vote. *Id.*

12 9. On October 11, 2003, the General Council convened its Annual Meeting at the Ho-Chunk
13 Hotel & Convention Center located in Baraboo, WI. The General Council achieved the
14 constitutionally required quorum of "[t]wenty (20) percent of the eligible voters of the Nation,"
15 CONST., ART. IV, § 7, 920 adult tribal members, at or around 12:28 p.m. CST. *Gen. Council*
16 *Mins.* (Oct. 11, 2003) at 1; *see also* CONST., ART. VIII, § 5.

18 10. Prior to the Annual Meeting, the GCPC performed its function of "assist[ing] the Office
19 of the President with . . . logistical and administrative planning." GCPC ESTABLISHMENT ACT, §
20 15(2). The GCPC entered into contractual arrangements for the following services:
21 maintenance, security, childcare and provision of drum group. Defs.' Ex. A-D (*HCN Serv.*
22 *Provider Agreement(s)*).

24 11. According to MIS, 1,611 adult tribal members registered at the Annual Meeting. *Gen.*
25 *Council Mins.* at 12. MIS facilitated the voting process by electronic means, and provided
26 attendees with instructions detailing registration and voting. Defs.' Ex. I. Tribal members
27 registered by swiping newly issued tribal identification cards through devices located at quorum
28

1 tracking workstations, which also monitored the presence of quorum in the meeting by tracking
2 ingress and egress. *Id.* Security personnel performed this latter function in the upper meeting
3 room, which opened to accommodate an unanticipated number of attendees. Defs.' Ex. M at 4-5.
4

5 12. The MIS instructions included the following explanation of the voting methodology:

6 a. Once Quorum is met, ***the General Council meeting is officially in***
7 ***session***. Each resolution will be discussed, the voting worksheet circled
8 according to your Vote preference, then the next Resolution will be
9 discussed and voted upon, until all Resolutions have been discussed and
10 the voting worksheet completed.

11 b. After all the Resolutions have been discussed and the voting
12 worksheet has been completed, automated voting on all Resolutions will
13 open at the voting booth workstations.

14 c. Tribal members will only be able to use the voting workstations
15 along the East wall, with the Elders allowed at any voting workstation,
16 and only the Elders at the North wall voting workstations.⁸

17 d. You will swipe your new Tribal ID card at the voting booth
18 workstation, which will enable the voting options. Using your pre-
19 recorded votes, from the voting worksheet, you will click each
20 corresponding Resolution number, your choice and the "Vote" button.

21 e. When done voting on the voting computer workstation, turn in
22 your hand ballot at the designated collection box. Hand ballots are stored
23 in a sealed container.

24 f. Once done with all your automated votes, you will proceed to the
25 payout workstations. Here, you will swipe your Tribal ID card to confirm
26 that you have already voted, sign a roster with your payroll signature to
27 acknowledge receipt and receive your \$100.00 in cash.

28 Defs.' Ex. I (emphasis in original; numerical designations modified).

13. Following discussion of twenty-six (26) resolutions, Ronald K. Decorah, Tribal ID#
439A000563, "made a motion [at or around 4:50 p.m. CST] that the 2003 Ho-Chunk Nation
General Council Annual Meeting adjourn when the final vote is cast[,] and members can receive

1 their \$100.00." *Gen. Council Mins.* at 11. Timothy W. Hanson, Tribal ID #439A001218,
2 seconded the motion, which passed upon a unanimous hand vote. *Id.*

3
4 14. Tribal members were permitted to leave the meeting area upon receipt of the \$100.00
5 payment. *Defs.' Br.* at 3.

6 15. The final vote cast at the Annual Meeting occurred at or around 8:47 p.m. CST, nearly
7 four (4) hours after voting began. *Gen. Council Mins.* at 12. Neither Chairperson Cloud nor
8 Secretary Funmaker oversaw the casting or tabulation of votes. *Defs.' Br.* at 4.

9
10 16. MIS posted the voting results of the Annual Meeting at the tribal website approximately
11 eighteen (18) hours after the conclusion of voting. *Id.* at 3; *see also* [http:// www.ho-chunknation.](http://www.ho-chunknation.com/government/gc/gc_results_2003.htm)
12 [com/government/gc/gc_results_2003. htm](http://www.ho-chunknation.com/government/gc/gc_results_2003.htm) (last visited July 19, 2004).

13 17. Secretary Funmaker completed the certification section of each resolution sometime after
14 the publication of the vote tallies. GEN. COUNCIL RES. 10-11-03A-Z.

15
16 18. The General Council adopted twenty-three (23) resolutions purportedly in accordance
17 with its reserved powers as illustrated below.

18 a. For example, the following resolution appears to implicate the General Council's
19 ability to establish binding policy. CONST., ART. IV, § 3(a, f); *see also* HCN Op. Att'y Gen. 10-
20 29-03 at 2 (noting that the resolution constitutes a "[p]olicy requiring enactment of law").⁹
21
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25 ⁸ MIS personnel supervised at least sixteen (16) computer voting stations, including four (4) stations dedicated to the
26 elders and disabled. *Defs.' Ex. H* (GC 2003 Duty Stations), J (Gen. Council 2003 Layout).

26 ⁹ At the *Pre-Trial Conference/Motion Hearing*, the GCPC asserted that the issuance of an Attorney General opinion
27 arguably resolved the ripeness concern noted in an earlier case. LPER at 13, May 27, 2004, 02:27:30 CDT (citing
28 *HCN Legislature v. HCN Gen. Council et al.*, CV 01-11 (HCN Tr. Ct., July 24, 2001) at 4-5). The Court does not
join in this assessment of *dicta* contained in the earlier opinion. In that case, the Court characterized the suit as one
in which the "Legislature [was] asking for an advisory opinion." *HCN Legislature*, CV 01-11 at 4. The Court
suggested that the plaintiff could seek such an opinion from the Attorney General, but the entrance of an opinion
would not, in and of itself, render a matter justiciable. The Court clearly stated that a suit could only follow after the
Legislature decides to act in conformance with or in contradiction to a hypothetical Attorney General opinion. *Id.*

1 1a. Gloria J. Visintin, Tribal ID# 439A003316, presented a resolution, which
2 includes the substantive statement

3 that the General Council of the Ho-Chunk Nation pursuant to its
4 constitutional authority, does hereby mandate the Legislature of the Ho-
5 Chunk Nation to appropriate a per cap increase of one thousand
6 (\$1,000.00) dollars to the current amount of three thousand (\$3,000.00)
7 dollars in accordance with the Nation's Per Cap Ordinance, making a total
8 of four thousand (\$4,000.00) dollars in each individual per cap
distribution. This mandate will be effective immediately and will be
applied to the next per capita distribution on February 1, 2004.

9 GEN. COUNCIL RES. 10-11-03A.¹⁰

10 b. For example, the following resolution appears to implicate the General Council's
11 ability to review and reverse legislative actions with the condition that the General Council
12 "return such reversals to the Legislature for reconsideration consistent with the action of the
13 General Council." CONST., ART. IV, § 3(b); *see also* HCN Op. Att'y Gen. 10-29-03 at 3 (noting
14 that the General Council action "[r]equires amendments and enactment of law to take effect").
15

16 1a. David A. Hanson, Tribal ID# 439A001185, presented a resolution, which
17 includes the substantive statement

18 that the General Council hereby REVERSES the Act of the Legislature of
19 February 13, 2001 - Ho-Chunk Nation Planning Committee Establishment
20 Act[,] . . . return[ing] such reversal to the Legislature for reconsideration
21 consistent with the action of the General Council[, and requiring] . . . that
22 the following language repeal and replace the language of the Act of the
Legislature of February 13, 2001 and incorporated accordingly into the
Ho-Chunk Code[.]

23 GEN. COUNCIL RES. 10-11-03E (emphasis in original).¹¹
24

25
26 ¹⁰ The parties directed the Court's attention to this resolution as an instance where the Legislature later embodied the
27 policy in law. LPER at 17-18, 02:46:01 CDT; *see also* CONST., ART. V, § 2(a). In actuality, the Legislature
28 increased the quarterly per capita distribution from \$3,000.00 to \$3,250.00 prior to the Annual General Council
Meeting. LEG. RES. 06-18-03H. The issue of whether the General Council possesses the authority to establish
expenditure levels remains unresolved. *HCN Legislature*, CV 01-11 (HCN Tr. Ct., June 22, 2001).

¹¹ As earlier noted, the Legislature has not rescinded the GCPC ESTABLISHMENT ACT. *Supra* note 4, at 7-8. The
Court shall not speculate about the reason(s) for such inaction. However, the General Council did adopt a

1 c. For example, the following resolution appears to implicate the General Council's
2 ability to propose constitutional amendments. CONST., ART. IV, § 3(c); *see also* HCN Op. Att'y
3 Gen. 10-29-03 at 4 (noting that "[t]he resolution calls for a Secretarial Election").
4

5 1a. Demetrio D. Abangan, Tribal ID# 439A000001, presented a resolution,
6 which includes the substantive statement "that [t]he Ho-Chunk Nation General Council hereby
7 approves for a Secretarial Election an amendment to the Ho-Chunk Nation Constitution, Article
8 VI, Section 2(m), [t]o veto actions of the Legislature[, and that i]t shall require a two-thirds vote
9 of the entire Legislature to override a veto by the President." GEN. COUNCIL RES. 10-11-03G.¹²
10

11 d. For example, the following resolution appears to implicate the General Council's
12 ability to call a Special Election for the purpose of effectuating a removal or recall of an elected
13 official. CONST., ARTS. IV, § 3(e), VIII, § 2, IX, §§ 1-2, 5; *see also* HCN Op. Att'y Gen. 10-29-
14 03 at 3 (noting that the removal constituted an "[a]ct of the General Council [that] took effect
15 upon the vote[, but] may be subject to challenge . . .").
16

17 1a. Parmenton T. Decorah, Tribal ID# 439A000620, presented a resolution,
18 which includes the substantive statement "[t]hat the Ho-Chunk Nation Legislator, District I,
19 Clarence Pierre Pettibone be removed from the Office of Legislator of the Ho-Chunk Nation, on
20 this day of Saturday, October 11, 2003[, and that] . . . the General Council does hereby call for a
21

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23
24 contemporaneous resolution, which appears to conflict, in some respects, with the proposed changes to the GCPC
25 ESTABLISHMENT ACT incorporated into the above resolution. *See* GEN. COUNCIL RES. 10-11-03L (advocating the
26 creation of an Office of the General Council "for the purpose of enforcing the wishes of the General Council"). The
27 tribal newsletter published job descriptions for the Office of General Council prior to the Annual General Council
28 Meeting in response to a previous General Council resolution that also purportedly created the Office of General
29 Council. *Office of Gen. Council*, HOCAK WORAK, Feb. 12, 2003, at 7 (quoting GEN. COUNCIL RES. 10-27-01F).

30 ¹² As of the entrance of this order, the Secretary of the Interior has not conducted any Secretarial Elections since the
31 adjournment of the Annual General Council Meeting. Attorney General Rebecca R. Weise identified seven (7)
32 resolutions that requested constitutional amendments. HCN Op. Att'y Gen. 10-29-03 at 4, 7-8. The Attorney
33 General opined that "[t]here may exist some uncertainty as to who will send requests for election to the Secretary of
34 the Interior since both the Legislature and the General Council may send the request." *Id.* at 4 (citing CONST., ART.
35 XIII, § 2). Indecision on this point may explain the apparent inactivity. *See* 25 C.F.R. §§ 81.4, 81.5(d, f-g) (2004).

1 Special Election to fill the vacated Office of Ho-Chunk Legislator District I." GEN. COUNCIL
2 RES. 10-11-03F.¹³

3
4 19. The plaintiffs presented no evidence whatsoever that any of the defendants sanctioned the
5 voting methodology.

6 20. The plaintiffs presented no evidence whatsoever that any attendee objected to the
7 proposed voting methodology at the General Council Annual Meeting, including the plaintiffs.

8 21. The plaintiffs presented no evidence whatsoever that any attendee requested discussion
9 on the final motion at the General Council Annual Meeting, including the plaintiffs.
10

11 DECISION

12
13 In a recent decision, the Court granted the defendants' motion to dismiss since the
14 plaintiff failed to name a proper party. *Ronald K. Kirkwood v. HCN Hous. Dep't et al.*, CV 03-
15 62 (HCN Tr. Ct., Jan. 26, 2004). The Court emphasized that within this jurisdiction "the naming
16 of parties to a suit [is] an important exercise." *Id.* at 11 (citations omitted). Apart from
17 informing the Court's assumption of personal jurisdiction, the Court examines issues relating to
18 justiciability and sovereign immunity on the basis of the named litigants.
19

20
21 In *Kirkwood*, the named defendants retained sovereign immunity as sub-entities of the
22 Ho-Chunk Nation. *Id.* at 10-12. The Court granted a dismissal since the plaintiff failed to
23 satisfactorily amend his pleading prior to the deadline to do so. *Id.* at 11. The Court, however,
24 dismissed the case without prejudice because "the Court would have arguably exercised subject
25 matter jurisdiction over the dispute but for the improper naming of parties." *Kirkwood*, CV 03-
26

27
28 ¹³ On October 16, 2003, Legislator Pettibone filed a lawsuit challenging his removal. *Clarence Pettibone v. HCN
Gen. Council et al.*, CV 03-77 (HCN Tr. Ct.). The case remains unresolved as of the issuance of this order. The

1 62 (HCN Tr. Ct., Feb. 20, 2004) at 5. Since the dismissal, the plaintiff has re-filed the matter,
2 and the case is scheduled for trial on September 24, 2004. *Kirkwood v. Francis Decorah, in his*
3 *official capacity as Dir. of HCN Hous. Dept. et al.*, CV 04-33 (HCN Tr. Ct.).
4

5 The Court has identified similar shortcomings within the instant case. To begin, the
6 GCPC maintains sovereign immunity from suit unless expressly waived by the Legislature.
7 CONST., ART. XII, § 1; *see also Chloris A. Lowe, Jr. v. HCN Legislature et al.*, CV 97-12 (HCN
8 Tr. Ct., Mar. 21, 1997) at 14, *aff'd*, SU 97-01 (HCN S. Ct., June 12, 1997). The Court realizes
9 that the defendants identified the GCPC as a potential proper party within their responsive
10 pleading, but this holds no legal significance. *Def's.' Answer* at 6. The defendants have no duty
11 to offer assistance to the plaintiffs in this regard. In any event, the Court dismisses the suit
12 against the GCPC on the basis of sovereign immunity.¹⁴
13
14
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16 plaintiffs in the instant case included a cause of action relating to the removal in their initial pleading, but
17 subsequently removed this issue from the litigation. *Am. Compl.* at 3-4; *Compl.* at 7-8.

18 ¹⁴ The Court previously noted that "[n]aming a government official *or agency*, which must administer or enact the
19 alleged unconstitutional [*sic*] or statutory provision is critical in a case in order to satisfy the HCN CONST.[.] ART.
20 XII, § 2's requirement that someone be sued only for acting outside the scope of their authority." *HCN Legislature*,
21 CV 01-11 (HCN Tr. Ct., June 22, 2001) at 13-14 (emphasis added). The Court seemingly extended its comment to
22 encompass agencies in an effort to rationalize an earlier injunction imposed against the Ho-Chunk Nation Election
23 Board (hereinafter Election Board). *Id.* (citing *Coalition for Fair Gov't II v. Chloris A. Lowe, Jr. et al.*, CV 96-22
24 (HCN Tr. Ct., May 21, 1996)). However, when the Court granted the preliminary injunction against holding the
25 May 22, 1996 Special Election, the Election Board was not a party defendant. The Election Board did not become a
26 defendant until a subsequent case consolidation. *Coalition for Fair Gov't II*, CV 96-22, -24 (HCN Tr. Ct., July 31,
27 1996). Prior to that time, the plaintiffs had only named the April 27, 1996 Special General Council Meeting
28 Chairperson and Secretary. Perhaps a plaintiff could seek to enjoin a Secretary's transmission of minutes, thereby
disrupting the call for a Special Election. *See* CONST., ARTS. IV, § 7, VIII, § 2. Unfortunately, the Secretary had
transmitted the minutes to the Legislature in early-May 1996, and the tribal newsletter had posted the notice of
election prior to the Court granting the preliminary injunction. *Coalition for Fair Gov't II*, CV 96-22 (HCN Tr. Ct.,
May 21, 1996) at 2; *Notice & Rules of Special Election to Vote on Vacancies of the HCN Legislature*, HO-CHUNK
WO-LDUK, May 4, 1996, at 5. The Court did later grant a permanent injunction against holding the Special Election,
and the Court directed such injunction against the Election Board. *Coalition for Fair Gov't II*, CV 96-22, -24 (HCN
Tr. Ct., Jan. 3, 1997) at 46. The Court now questions the propriety of this and other actions taken in the case, but the
Court's order may be justified due to the fact that the defendants did not adequately assert sovereign immunity. *Id.*
Regardless, the applicable constitutional section addresses suits against officials and employees, not agencies.
CONST., ART. XII, § 2. The Court has since dismissed suits brought against the Election Board for the purpose of
enjoining an election, and will not stray from this practice in the future. *See Chloris Lowe, Jr. v. HCN Legislature et*
al., CV 00-99 (HCN Tr. Ct., Oct. 19, 2000). In the case at bar, the GCPC presented the sovereign immunity defense
at the *Pre-Trial Conference/Motion Hearing*. LPER at 12, 02:24:44 CDT.

1 The Court now turns to the causes of action directed against the remaining defendants.
2 In 2001, the Legislature initiated an action against the Chairperson and Secretary of the October
3 21, 2000 Annual General Council Meeting. The Legislature asked the Court to determine
4 whether the General Council possessed the authority to mandate a specific appropriation of
5 funds. *HCN Legislature*, CV 01-11 (HCN Tr. Ct., June 22, 2001) at 7-8. The Court, however,
6 dismissed the matter due to the absence of a justiciable case or controversy. *Id.* at 14-16. The
7 Court held that the plaintiff did not present a ripe cause of action, meaning that the plaintiff
8 needed first to affirmatively act upon the disputed General Council resolution by either codifying
9 or refusing to codify its terms into law. *Id.* at 15. In addition, the Court held that the defendants
10 retained "no duty that the Court c[ould] affect by a ruling[,] and therefore the Court ha[d] no
11 ability to order any relief to the plaintiff through those parties." *Id.* at 16.

14 Essentially, the Court determined that it could not "prevent [the defendants] by
15 injunction, or otherwise, from doing that which [they] ha[d] no right to do because it [wa]s
16 unconstitutional or illegal." *Id.* at 15. The Court explained:

18 [t]he acts of Robert Funmaker and Darcy Funmaker- Rave as officials of
19 the General Council of October 21, 2000 have been completed. They have
20 no more official acts to do. By the completion of the General Council
21 minutes and the transmission of those minutes to the HCN Legislature
22 they have completed their actions as officers of the General Council. The
23 Court can achieve nothing to redress the alleged wrongs through either
24 official. Therefore there is also a lack of redressability of the plaintiff's
25 alleged harms.

26 *Id.* Upon reconsideration of the above judgment, the Court reiterated that because neither the
27 Chairperson nor Secretary retained "authority to carry out the alleged unconstitutional acts of the
28 General Council . . . [, the Court] could not undo the alleged harm because the Court could not
order the officers to undo the harm." *HCN Legislature*, CV 01-11 (HCN Tr. Ct., July 24, 2001)
at 3.

1 Merging the concepts of ripeness and redressability together, the Court concluded that if
2 it could not "redress the harm by ordering the parties to act or not to act, the case [wa]s not ripe."

3 *Id.* The Court recognized that

4 [w]hile it is true that the Court may issue declaratory judgments, it may do
5 so only where there is a real case and controversy, where there are parties
6 who have standing, and where the issues are ripe for a decision and the
7 Court can actually redress the harm of the plaintiff.

8 *Id.* at 4. In *HCN Legislature*, like the case at bar, the plaintiff requested relief only in the form of
9 declaratory judgments and not injunctions. *Compl. for Declaratory J.*, CV 01-11 (Jan. 19, 2001)
10 at 6-7. Despite this fact, the Court performed an *Ex Parte Young*-type analysis of the claims in
11 order to determine whether it could effectively grant injunctive relief against the named
12 defendants. *HCN Legislature*, CV 01-11 (HCN Tr. Ct., June 22, 2001) at 11-14. For the reasons
13 identified below, this manner of analysis remains appropriate. *See Ex Parte Young*, 209 U.S. 123
14 (1908).

15
16 The Court has long recognized that the CONSTITUTION incorporates the legal fiction
17 pronounced in *Ex Parte Young*. *See e.g., Lowe, Jr.*, CV 97-12 (HCN Tr. Ct., Mar. 21, 1997) at
18 14-18 (citing CONST., ART. XII, § 2). A plaintiff may receive "declaratory and non-monetary
19 injunctive relief," provided that he or she can establish that an individual tribal official or
20 employee has "act[ed] beyond the scope of their duties or authority." CONST., ART. XII, § 2.
21 The Court does not grant declaratory judgments as stand alone forms of relief, but rather declares
22 the proper interpretation or application of law as an inevitable consequence of most case filings.
23
24 *See id.*, ART. VII, §§ 4, 6(a).

1 Federal and state courts likewise refrained from granting declaratory judgments prior to
2 the passage of the Declaratory Judgment Act of 1934,¹⁵ and state adoption of the Uniform
3 Declaratory Judgments Act promulgated in 1921.¹⁶ See *Pub. Serv. Comm'n of Utah v. Wycoff*
4 *Co., Inc.*, 344 U.S. 237, 242 (1952). Both acts served as legislative responses to the *Ex Parte*
5 *Young* decision.¹⁷ On one hand, state officials decried the authority of a "single federal judge to
6 grant *ex parte* interlocutory injunctions against the enforcement of state statutes."¹⁸ *Steffel v.*
7 *Thompson*, 415 U.S. 452, 465 (1974). On the other hand, plaintiffs expressed dissatisfaction
8 with the prospect of needing to establish irreparable harm in order to test the constitutionality of
9 state statutes through the mechanism of a preliminary injunction.¹⁹ *Id.* at 466.
10
11

12
13 ¹⁵ The Act conferred the following discretionary authority:

14 [i]n a case of actual controversy within its jurisdiction, . . . any court of the United States,
15 upon the filing of an appropriate pleading, may declare the rights and other legal relations
16 of any interested party seeking such declaration, whether or not further relief is or could
17 be sought. Any such declaration shall have the force and effect of a final judgment or
18 decree and shall be reviewable as such.

19 28 U.S.C. § 2201(a) (2004).

20 ¹⁶ The Act conferred the following discretionary authority:

21 [c]ourts of record within their respective jurisdictions shall have power to declare rights,
22 status, and other legal relations whether or not further relief is or could be claimed. . . .
23 The declaration may be either affirmative or negative in form and effect; and such
24 declarations shall have the force and effect of a final judgment or decree When
25 declaratory relief is sought, all persons shall be made parties who have or claim any
26 interest which would be affected by the declaration, and no declaration may prejudice the
27 right of persons not parties to the proceeding.

28 WIS. STAT. § 806.04(1, 11) (2003).

¹⁷ The remedial consequences of a declaratory judgment prove less onerous than a preliminary injunction, the violation of which would constitute contempt of court. Alternatively, violation of a declaratory judgment would prove inappropriate, but not contemptible. *Steffel*, 415 U.S. at 471. A plaintiff typically requests a declaratory judgment in order to serve as a subsequent defense in a foreseeable action initiated by the defendant or similarly situated party. *Pub. Serv. Comm'n of Utah*, 344 U.S. at 248.

¹⁸ In *Ex Parte Young*, the plaintiffs obtained a temporary restraining order from the federal district court without notice and a hearing being afforded to State of Minnesota Attorney General Edward T. Young. *Ex Parte Young*, 209 U.S. at 131. The district court subsequently convened a hearing, and, following presentation of proof entered a preliminary injunction against Attorney General Young, restricting the enforcement of the offending state statutes. *Id.* at 132.

¹⁹ The Court has a well-established standard for preliminary injunctions. A plaintiff must demonstrate that "(1) no adequate remedy [exists] at law; (2) the threatened injury to the petitioner outweighs the harm of the injunction; (3) the petitioner has a reasonable likelihood of success on the merits[;] and (4) granting the injunction serves the public interest." *HCN Election Bd. et al. v. Aurelia L. Hopinkah*, SU 98-08 (HCN S. Ct., Apr. 7, 1999) at 8; see also *HCN Legislature v. Chloris A. Lowe, Jr.*, CV 95-28 (HCN Tr. Ct., Apr. 3, 1996) at 4 (citing *Abbott Labs. v. Mead Johnson & Co.*, 971 F.2d 6, 11 (7th Cir. 1992)) (recognizing presence of "irreparable harm" inquiry in foregoing

1 In the tribal context, the former justification relating to federalism concerns is wholly
2 irrelevant. The latter justification does not hold the same potency since the Court has primarily,
3 and infrequently, utilized preliminary injunctions as tools to forestall impending elections. *See*
4 *e.g.*, *Gerald L. Cleveland, Dist. IV Legislator v. President/Chairman for Gen. Council Mt'g of*
5 *Oct. 11, 2003, et al.*, CV 03-75 (HCN Tr. Ct., Oct. 10, 2003); *Coalition for Fair Gov't II*, CV 99-
6 22 (HCN Tr. Ct., May 21, 1996); *see also HCN R. Civ. P.* 60(A-B). The Court remains unaware
7 of any discontentment with the equitable remedies available to litigants within this jurisdiction.
8 Regardless, neither the Ho-Chunk Nation Supreme Court nor the Legislature has authorized the
9 issuance of declaratory judgments.²⁰ *See* CONST., ARTS. V, § 2(a), VII, § 7(b).

12 Therefore, the Court must dismiss the instant suit on identical grounds set forth in *HCN*
13 *Legislature*. The official functions of Chairperson Cloud and Secretary Funmaker have long
14 since ended, and the Court cannot redress the plaintiffs' alleged harm through such parties. The
15 Court has no ability to enjoin the actions of the named individual defendants in any respect.

17 Assuming *arguendo* that the Ho-Chunk Nation had an enabling act permitting the Court
18 to grant declaratory judgments, the plaintiffs would still need to present a justiciable cause of
19 action. *See e.g.*, *United Pub. Workers of Am. v. Mitchell*, 330 U.S. 75, 88 (1947); *Ashwander v.*
20 *Tenn. Valley Auth.*, 297 U.S. 288, 324-25 (1936); *Loy v. Bunderson*, 107 Wis. 2d 400, 410-11
21 (Wis. 1982) (declining to relax justiciability requirement in declaratory judgment actions). In
22 order to satisfy this prerequisite, the Court would require that the plaintiffs establish standing.

25 test). The Court derived its test from a Seventh Circuit Court of Appeals decision, wherein the court reviewed a
26 district court's assessment of irreparable harm in the context of a temporary restraining order. *Merrill Lynch, Pierce,*
Fenner & Smith, Inc. v. Salvano, 999 F.2d 211, 215 (7th Cir. 1993).

27 ²⁰ The Court's "power to declare the laws of the Ho-Chunk Nation void if such laws are not in agreement with this
28 Constitution" does not evidence a separate source of authority for granting declaratory judgments. CONST., ART.
VII, § 6(b). Moreover, General Council actions do not constitute laws.

1 The adopted test for determining the existence of standing is comprised of three (3) elements: "a
2 plaintiff must "show that he[/she] personally has suffered some actual or threatened injury as a
3 result of the putatively illegal conduct of the defendant," and that the injury "fairly can be traced
4 to the challenged action" and "is likely to be redressed by a favorable decision[.]"" *Clarence*
5 *Pettibone v. HCN Legislature et al.*, CV 01-84 (HCN Tr. Ct., May 15, 2002) at 10 (citations
6 omitted); *see also Daniel W. Green v. Real Estate Manager, Home Ownership Program, in his*
7 *official capacity*, CV 00-108 (HCN Tr. Ct., Dec. 31, 2002) at 9-12. This test derives from the
8 presence of the constitutional Case or Controversy Clause. CONST., ART. VII, § 5(a).
9

10
11 Underlying the test is the basic notion that "the dispute sought to be adjudicated will be
12 presented in an adversary context and in a form historically viewed as capable of judicial
13 resolution." *Pettibone*, CV01-84 at 10 (quoting *Data Processing Serv. v. Camp*, 397 U.S. 150,
14 151-52 (1970)). The Court will not adjudicate a matter that does not seek to define "the legal
15 relations of parties having adverse legal interests." *Pub. Serv. Comm'n of Utah*, 344 U.S. at 242
16 (quoting *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 241 (1937)). Furthermore, "[t]he
17 disagreement must have taken on fixed and final shape so that a court can see what legal issues it
18 is deciding, what effect its decision will have on the adversaries, and some useful purpose to be
19 achieved in deciding them." *Pub. Serv. Comm'n of Utah*, 344 U.S. at 244.
20

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22 As noted above, the case at bar is quite simply not between adversaries. The individual
23 defendants likely hold no greater interest in the resolution of the issues presented than any other
24 eligible voter, and the inability of the Court to provide adequate redress leaves the plaintiffs
25 without standing. The Court also speculates whether the plaintiffs can articulate an actual or
26 threatened injury, but the Court does not need to resolve this issue for purposes of deciding this
27 matter. *See Pettibone*, CV 01-84 at 9-26.
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BASED UPON THE FOREGOING, the Court grants the defendants' motion, and dismisses the instant action without prejudice. 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. 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 5th day of August 2004, by the Ho-Chunk Nation Trial Court located in Black River Falls, WI within the sovereign lands of the Ho-Chunk Nation.

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

