

**FILED**  
IN THE HO-CHUNK NATION  
~~TRIAL~~/SUPREME COURT

MAR 15 2011

*T. Pettibone*  
Clerk of Court/~~Assistant~~

IN THE  
HO-CHUNK NATION SUPREME COURT

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**Chloris Lowe, Jr. and  
Stewart J. Miller,  
Appellees,**

v.

**DECISION**  
Case No. SU00-17

**Ho-Chunk Nation Legislature Members  
Elliot Garvin, Gerald Cleveland, Sr., Myrna Thompson,  
Isaac Greyhair, Dallas White Wing, Kevin Greengrass,  
and Clarence Pettibone in their official capacity and  
individually; and the Ho-Chunk Nation Election Board,  
Appellants.**

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Heard before Chief Justice Mary Jo B. Hunter, Associate Justice Rita A. Cleveland and Justice Pro Tempore Kim Vele.

CASE SUMMARY

This case began when the Appellees, Chloris Lowe, Jr. and Stewart J. Miller, by and through their counsel, Gary J. Montana filed a Complaint for Declaratory and Injunctive Relief on October 25, 2000. The Appellees are enrolled members of the Ho-Chunk Nation (hereinafter HCN). They questioned the actions of certain members of the HCN Legislature who were named as the defendants below. The Defendants below are now appealing this matter. They are the Appellants above.

The Appellees, Lowe and Miller, took issue with the legislative vote taken on August 22, 2000. That vote passed a motion for three options to be placed on the ballot of a Special Election held on October 14, 2000. The Special Election was held to address the requirement of HCN Constitution, Article V, Section 4 which required the Legislature to redistrict and/or reapportion at least once every five (5) years. The Appellees claimed below that the options approved by the HCN Legislature violated the HCN Constitution.

The Appellants filed a Notice of Appeal on December 28, 2000. They appealed from a December 21, 2000 Order (Determining Constitutionality of the Proposed Redistricting/Reapportionment Scenarios) signed by the Honorable Todd R. Matha, Associate Judge of the Ho-Chunk Nation Trial Court. The Appellants also filed a Motion for Expedited Consideration of Appeal. The Appellees did not file a response to either pleading. On January 4, 2001, this Court issued a Scheduling Order which granted the stay requested by the Appellants and ordered that Associate Justice Debra C. Greengrass be recused from hearing the appeal.

On January 5, 2001, the Appellants filed the Appellants' Motion for Clarification which sought additional language in the Court's Scheduling Order as to the effect of the stay of Judge Matha's Order.<sup>1</sup> On January 8, 2001, the Appellants filed their Appellants' Brief. On January 10, 2001, the Appellants filed Appellants' Motion for Expedited Consideration of Motion for Clarification. The Appellees did not file any responsive pleadings to either of these motions. On January 12, 2001, this Court issued its Amended Scheduling Order which outlined "[T]hat the Election Board will be permitted a period of not less than fifteen (15) nor more than thirty (30) days after this Court issues its decision on this case to provide notice to membership and hold any Special Election that may be required."

On or about January 16, 2001, the HCN Legislature appointed Justice Pro Tempore Kim Vele to fill the vacancy from Justice Greengrass' recusal.<sup>2</sup> On January 19,

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<sup>1</sup> The Court again notes that the necessary language was not offered in the prayer for relief when the counsel for the Appellants filed the Notice of Appeal. The Court is not in a position at the initial filing to assess what the effects of a stay will be on the pending matter as the lower court file is not prepared until after an appeal is accepted. Therefore, it is crucial that counsel apprise the Court of the potential effects of a Stay so that decisions and orders may be made accordingly.

<sup>2</sup> In cases where an appointment of a Justice Pro Tempore from the HCN Legislature occurs, a two to three week delay on the case also occurs as the HCN Constitution requires that a full Court hear appeals. HCN

2001, the Appellees filed their brief titled Responsive Memorandum Submitted by and on Behalf of Appellees, Chloris Lowe, Jr., and Stewart J. Miller, duly enrolled members of the Ho-Chunk Nation. On February 6, 2001, this Court issued an Order Scheduling Oral Argument for Saturday, February 17, 2001. Oral arguments were heard on February 17, 2001 and the Court issued this decision that **reverses** in part and **affirms** in part the Order of Judge Matha.

### ISSUES

- I. Does Judge Matha's Order violate the Separation of Power doctrine provided by the Ho-Chunk Nation Constitution?
- II. Are redistricting and reapportionment plans approved by a majority of the Ho-Chunk Nation electorate nonjusticiable issues that are specifically delegated to the HCN Legislature?
- III. Does the remedy provided by Judge Matha exceed the scope of his constitutionally delegated authority?
- IV. Does the Ho-Chunk Nation Constitution clearly presume the contained existence of more than one (1) district?
- V. Is the standard by which the Trial Court proposes to review proposals submitted by the Legislature authorized by and consistent with the Ho-Chunk Nation Constitution?

### DISCUSSION

- I. Does Judge Matha's Order violate the Separation of Power doctrine provided by the Ho-Chunk Nation Constitution?

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Const., Art. VII, Sec. 14. During the appointment process, the Court is unable to hear (or decide) cases without the third Justice.

The Ho-Chunk Nation Constitution, at Article III, Section 2, states that there are four branches of government. The Judiciary is one of the branches.

In Article VII of the HCN Constitution, the powers of the Trial Court are defined. In Article VII, Section 6, subpart (b), the Constitution states that “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.” In this case, Judge Matha did exactly that which is allowed by the HCN Constitution.

Judge Matha heard the case before him on the issues as to the options on the ballot of the Special Election. Judge Matha then issued his December 21, 2000 Order which, as it is titled, determined the constitutionality of the proposed redistricting/reapportionment scenarios. Judge Matha is empowered by the HCN Constitution to decide whether or not laws of the Ho-Chunk Nation are in agreement with the Constitution. In this case, the act of the HCN Legislature was a motion which determined which scenarios would be on the ballot. That legislative action was based upon requirements of the HCN Constitution for redistricting and/or reapportionment. Therefore, it was within the purview of Judge Matha’s duties as a trial court judge and did not violate the Separation of Powers doctrine of the HCN Constitution. Affirmed.

- II. Are redistricting and reapportionment plans approved by a majority of the Ho-Chunk Nation electorate nonjusticiable issues that are specifically delegated to the HCN Legislature?

For the reasons stated above, the redistricting and reapportionment plans approved by the HCN Legislature may be reviewed by the Judiciary branch as an issue of whether or not a particular action passes constitutional muster. HCN Const., Art. VII, Sec. 6, Sub.

(6). Although this Court is not required to adopt the holdings of the U.S. Supreme Court, the case of *Baker v. Carr*, 377 U.S. 533, 84 S. Ct. 1362 (1964) does provide some guidance for this Court. Appellant argued that if the *Baker* test is applied to this case, the matter will be found to be a nonjusticiable issue. This Court is not persuaded by the arguments to that effect. This is not a controversy that involves a political question as enunciated by the U.S. Supreme Court. However, this Court is not adopting the *Baker* criteria in assessing this case. Rather, this Court is looking to the plain language of the HCN Constitution, which clarifies the roles of the various branches of government.

In this case, the HCN Constitution does provide that the HCN Legislature is to approve a plan for redistricting and reapportionment. HCN Const., Art. V, Sec. 4. The HCN Constitution also designates that the Judiciary is the branch of government that shall “interpret and apply the Constitution and laws of the Ho-Chunk Nation.” HCN Const., Art. VII, Sec. 4. Therefore, the approval of the plan is within the power of the HCN Legislature. The ability to review the election challenge as to the plan approved by the HCN Legislature is within the powers granted to the Judiciary by the HCN Constitution. The special delegation to the HCN Legislature is subject to judicial review within an election challenge where that is the basis for the challenge.

III. Does the remedy provided by Judge Matha exceed the scope of his constitutionally delegated authority?

Some of the remedy ordered by Judge Matha does exceed the scope of his authority. Judge Matha orders that the plan must pursue the one person/one vote standard as nearly as practicable. It is the phrase “as nearly as practicable” which places Judge Matha

outside the boundaries of his authority. The HCN Constitution requires that the HCN Legislature redistrict and reapportion “in pursuit of one-person/one-vote representation.” HCN Const., Art. V, Sec. 4.

Pursuit is defined as an “activity that one pursues or engages in seriously and continually...” in Black’s Law Dictionary. It is an effort that is made with a high degree of effort to achieve a particular point. In this instance, the pursuit of the one-person/one-vote representation requires a diligent, serious and continuous effort.

The plain language of the HCN Constitution does not impose a requirement that the HCN Legislature use the *best* plan to promote this objective, but *any* plan that furthers that objective. It is for the HCN Legislature to determine which of many choices may further the Constitutional requirement of one-person/one-vote representation. The Trial Court’s imposition of a higher standard than that required by the Constitution’s plain language, and its use of this standard to determine which plans best met the objectives, resulted in an unconstitutional infringement on the legislature’s authority and duty to adopt and present any plan that furthers the one-person/one-vote representation requirement.

Judge Matha exceeded the scope of his authority in applying the standard of “nearly as practicable” to decide which of the HCN Legislature’s proposed plans fulfilled the standard of the pursuit of the one-person/one-vote representation requirement pursuant to the HCN Constitution. The lower court’s order as to the “nearly as practicable” standard is reversed.

- IV. Does the Ho-Chunk Nation Constitution clearly presume the contained existence of more than one (1) district?

The HCN Constitution clearly states that “the Legislature shall exercise this power [to redistrict and reapportion] only by submitting a **final proposal** to the vote of the People by Special Election...” HCN Const., Art. V., Sec. 4. (emphasis added) The language states that a final proposal shall be submitted. It is not stated as a plural. The language of the Constitution clearly requires one proposal that will be in pursuit of the one-person/one-vote representation.

Article V, Section 1 (b) of the HCN Constitution illustrates the districts from which the legislative representatives will be composed of, “subject to Section 4 of this article”. Article V, Section 4, gives the Legislature the power to redistrict or reapportion including changing, establishing, or discontinuing districts, through the submission of a “final proposal” (emphasis added) provided that the redistricting and reapportionment pursues one-person/one vote representation. The HCN Constitution does not restrict a single district provided it pursues one-person/one-vote representation.

- V. Is the standard by which the Trial Court proposes to review proposals submitted by the Legislature authorized by and consistent with the Ho-Chunk Nation Constitution?

The Appellant argued that the HCN Constitution plainly set forth the standard as “in pursuit of one-person/one-vote representation.” This Court agrees with that standard as the correct standard that should be applied to the final proposal submitted by the HCN Legislature. It is clear that Judge Matha was attempting to provide a

different standard for the proposals in pursuit of the one-person/one-vote representation than was required by the HCN Constitution.

Therefore, any final proposal submitted by the HCN Legislature must be in pursuit of one-person/one-vote representation. Judge Matha has provided guidance as to what plans do not pursue or further that plan. The HCN Legislature is advised to be guided by the advice of the lower court as to the type of plans that do not pass constitutional muster.

The U.S. Supreme Court in *Reynolds v. Sims*, 377 U.S. 533, (1964) stated “[A] denial of constitutionally protected rights demands judicial protection; our oath and our office require no less of us.” This Court agrees with that view of our duty to protect the rights of all the voters of the Ho-Chunk Nation no matter where they may live. The HCN Constitution defines ‘Eligible Voters’ as “Any member of the Ho-Chunk Nation...” The Constitution did not designate only voters who reside within certain areas. Therefore, those who have taken an oath of office are required to uphold the Ho-Chunk Nation Constitution. Nowhere is the responsibility greater than in the duty of the HCN Legislature to submit a plan of redistricting or reapportionment that pursues the one-person/one-vote representation. The alternative of “nearly as practicable” is not within the HCN Constitution and should not have been applied. The requirement of “nearly as practicable” is reversed.

#### CONCLUSION

This matter is reversed and remanded to the Trial Court. The Trial Court Judge should proceed with the matter below in accordance with this Decision. The stay of the December 21, 2000 Order signed by the Honorable Todd Matha is lifted.

Reversed in part. Affirmed in part. Dated this 13<sup>th</sup> day of March 2001.

EGI HESKEKJET.

Rita A. Cleveland

Hon. Rita A. Cleveland, Associate Justice

Kimberly M. Vele

Hon. Kim Vele, Justice Pro Tempore

Mary Jo B. Hunter

Hon. Mary Jo B. Hunter, Chief Justice

Ito-Chunk Nation Supreme Court

MAR 14 2001

T. Pettibone  
Clerk of Court/Assistant

CERTIFICATE OF SERVICE

I, Tari Pettibone, Clerk of the Ho-Chunk Nation Supreme Court, do hereby certify that on the date set forth below I served a true and correct copy of the **Decision** file in Case No. **SU-00-17** By the United States Postal Service, upon all person listed below:

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Date: March 14, 2001

Tari Pettibone  
Tari Pettibone, Clerk of Court  
Ho-Chunk Nation Supreme Court