

IN THE
HO-CHUNK NATION TRIAL COURT

SEP 27 2013

M. Swindle
Clerk of Court/Assistant

General Council Agency,
Petitioner,

v.

Case No.: CV 12-83

Ho-Chunk Nation Legislature and Ho-
Chunk Nation Office of the President,
Individually and In Their Official
Capacities
Respondents,

ORDER

(Denying Motion for Temporary Restraining Order)

INTRODUCTION

The Court must determine whether to grant the injunctive relief requested by the Office of the President in the *Motion for Ex Parte Temporary Restraining Order and Preliminary Injunction* (hereinafter *Motion*). The Court declines to grant the *motion*, as the *Respondent* has failed to establish all of the elements required for such a remedy.

PROCEDURAL HISTORY

In the underlying pending legal action, the General Council Agency (hereafter GCA) seeks a determination of its authority to independently employ legal counsel. The GCA sued the Office of the President and the Ho-Chunk Nation Legislature, who have argued, *inter alia*, that

1 no such independent authority exists. That matter has not yet been decided by the Trial Court
2 and the Court declines to do so in this Order.¹

3 The *Motion* filed by the Office of the President asserts that the GCA is engaging in
4 conduct that constitutes a risk of irreparable harm to the General Council by seeking to utilize the
5 services of Attorney John Swimmer, particularly during the upcoming September 28, 2013
6 General Council meeting. *Respondent*, Office of the President, by its counsel seeks a *Temporary*
7 *Restraining Order* that would prohibit the General Council Agency (hereafter GCA) from:
8

- 9 1. Allowing Attorney John S. Swimmer from acting as legal counsel for the GCA or
10 General Council;
- 11 2. Order the GCA to comply with contracting legal requirements for employing legal
12 counsel;
- 13 3. Order the GCA to follow the Appropriations & Budget Process Act, 2 HCC § 4;
- 14 4. Order the GCA to follow the tribal law mandating the three (3) bid process; and
- 15 5. Any other relief the Court deems appropriate.

16 APPLICABLE LAW

17 CONSTITUTION OF THE HO-CHUNK NATION

18 ARTICLE IV - GENERAL COUNCIL

19 Section 1. Powers of the General Council.

20 The People of the Ho-Chunk Nation hereby grant all inherent sovereign powers to the
21 General Council. All eligible voters of the Ho-Chunk Nation are entitled to participate in General
22 Council.

23 Section 2. Delegation of Authority.

24 The General Council hereby authorizes the legislative branch to make laws and
25 appropriate funds in accordance with Article V. The General Council hereby authorizes the
26 executive branch to enforce the laws and administer funds in accordance with Article VI. The
27 General Council hereby authorizes the judicial branch to interpret and apply the laws and
28 Constitution of the Nation in accordance with Article VII.

¹ The Parties have submitted supplemental briefs, responsive motions and requests for extension of time to reply. The most recent was received August 8, 2013. The Court will schedule a Motion/Status Hearing in the case in chief as a part of this order.

1 Section 3. Powers Retained by the General Council.

2 (a) The General Council retains the power to set policy for the Nation. This policy shall
3 be resolutions proposed and approved at Annual Meetings and Special Meetings, by a majority
4 vote of the qualified voters of the Ho-Chunk Nation General Council. This policy shall be made
5 into laws, including codes, ordinances, resolutions and statutes by the Legislative Branch of the
6 Ho-Chunk Nation within forty-five (45) days after a majority vote of the qualified voters of the
7 Ho-Chunk Nation General Council at Annual Meetings and Special Meetings. The Executive
8 Branch shall enforce this policy within sixty (60) days of the majority vote of the qualified voters
9 of the Ho-Chunk Nation General Council. In the event that this policy is not enacted by the
10 Legislative Branch or enforced by the Executive Branch within fifteen (15) days of the
11 aforementioned deadlines, the Ho-Chunk Nation General Council shall file suit in the Ho-Chunk
12 Nation Tribal Court against elected officials of the Ho-Chunk Nation branch of government.
13 The Supreme Court of the Ho-Chunk Nation shall have original jurisdiction within fifteen (15)
14 days of filing date of suit.

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

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

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

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

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

28 (g) General Council Branch delegates authority to General Council Agency to select, hire
manage and supervise General Council Branch personnel to accomplish the tasks mandated by
General Council.

Section 4. Excepted Powers.

The General Council does not retain the power to review actions relating to the hiring or
firing of personnel.

ARTICLE V - LEGISLATURE

Section 2. Powers of the Legislature.

1 The Legislature shall have the power:

2 (j) To authorize and appropriate funds to employ legal counsel in accordance with
3 applicable law;

4 ARTICLE VI - EXECUTIVE

5 Section 1. Composition of the Executive Branch.

6 (a) The Executive power of the Ho-Chunk Nation shall be vested in the President of the
7 Ho-Chunk Nation.

8 (b) The Executive Branch shall be composed of any administrative Departments created
9 by the Legislature, including a Department of the Treasury, Justice, Administration, Housing,
10 Business, Health, and Social Services, Education, Labor, and Personnel, and other Departments
11 deemed necessary by the Legislature. Each Department shall include an Executive Director, a
12 Board of Directors, and necessary employees. The Executive Director of the Department of
13 Justice shall be called the Attorney General of the Ho-Chunk Nation. The Executive Director of
14 the Department of the Treasury shall be called the Treasurer of the Ho-Chunk Nation.
[Amendment III adopted May 6, 2009 by operation of law which separated the Department of
Health and Social Services into two (2) separate departments - Department of Health and the
Department of Social Services.]

15 Section 2. Powers of the President.

16 The President shall have the power:

17 (a) To execute and administer the laws of the Ho-Chunk Nation, including the right to
18 veto within fourteen (14) calendar days any action of the Legislature unless overturned by the
19 Legislature pursuant to Article V Section 2(y). The President cannot retroactively veto
20 Legislation passed before enactment of this Amendment;

21 (g) To select and hire personnel in accordance with applicable law;

22 (h) To preside over meetings of the Legislature;

23 (i) To cast the deciding vote in the Legislature in case of a tie;

24 (j) To call Annual and Special Meetings of the General Council;

25 (k) To represent the Ho-Chunk Nation on all matters that concern its interests and
26 welfare;

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

4 HO-CHUNK NATION RULES OF CIVIL PROCEDURE

5 Rule 5. Notice of Service of Process.

6 (H) Emergency Notice. This section governs cases of emergency where the Court may need to
7 conduct a hearing that requires less than forty-eight (48) hours notice to the parties. In cases of
8 emergency, upon motion of a party or sua sponte, the Court can provide notice of a hearing less
9 than forty-eight (48) hours prior to the hearing. In cases of emergency, the Court may provide
10 notice by telephone with written confirmation or by telephone and fax at least forty-eight (48)
11 hours in advance. Documentation of the call or fax shall be included in the record.

12 1. Notice by Telephone-When the parties are notified by telephone, documentation of the
13 telephone call shall be filed in the record. Documentation of the call shall include who made the
14 call, the name of the person to whom the Notice was directed, the telephone number called, the
15 date and time of the call, and the name given by the person receiving the call.

16 2. Notice by Fax-When the parties are notified by fax, a call must be made confirming receipt of
17 the fax. Documentation of the call must be included in the record. Documentation of the call
18 shall include the name of the party 10 HCN Rules of Civil Procedure (12/17/11 revised)
19 confirming receipt of the fax notice, the time of the confirmation call, and a copy of the time-
20 stamped fax.

21 Rule 19. Filing and Responding to Motions

22 (A) Motion. Motions may be filed by a party with any pleading or at any time after their first
23 pleading has been filed. A copy of all written Motions shall be delivered or mailed to other
24 parties at least five (5) calendar days before the time specified for a hearing on the Motion. A
25 Response to a written Motion must be filed at least one day before the hearing. If no hearing is
26 scheduled, the Response must be filed with the Court and served on the other parties within ten
27 (10) calendar days of the date the Motion was filed. The party filing the Motion must file any
28 Reply within three (3) calendar days.

(B) Motions for Expedited Consideration. Any Motion which requires action prior to the
normal time period identified in part "A" above shall be accompanied by a Motion for Expedited
Consideration. The Motion shall state (1) the reasons why the Motion should be heard prior to
the normal time period allowed to respond, and (2) what efforts the party has made to resolve the
issue with the opposing party prior to filing the Motion for Expedited Consideration.

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

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

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

14 (C) Procedure. The application for an injunction or restraining order made to the Court shall not
15 be heard except upon notice to such other persons as may be defendants in the action, unless the
16 Court is of the opinion that irreparable loss or damage will result to the applicant unless a
17 temporary restraining order is granted.

18 (D) Time. The Court may grant such temporary restraining order at any time before a hearing
19 and determination of the application for an interlocutory injunction. However, such temporary
20 restraining order shall be effective only for thirty (30) calendar days unless extended after notice
21 and hearing thereon, or upon written consent of the parties or their attorneys.

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

23 (A) Relief from Judgment. A *Motion to Amend* or for relief from judgment, including a request
24 for a new trial shall be made within ten (10) calendar days of the filing of judgment. The *Motion*
25 must be based on an error or irregularity which prevented a party from receiving a fair trial or a
26 substantial legal error which affected the outcome of the action.

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

(C) Motion to Modify. After the time period in which to file a *Motion to Amend* or a *Motion for
Reconsideration* has elapsed, a party may file a *Motion to Modify* with the Court. The *Motion*
must be based upon new information that has come to the party's attention that, if true, could

1 have the effect of altering or modifying the judgment. Upon such motion, the Court may modify
2 the judgment accordingly. If the Court modifies the judgment, the time for initiating an appeal
3 commences upon entry of the modified judgment. If the Court denies a motion filed under this
4 rule, the time for initiating an appeal from the judgment commences when the Court denies the
5 motion on the record or when an order denying the motion is entered, whichever occurs first. If
6 within thirty (30) calendar days after the filing of such motion, and the Court does not decide the
7 motion or the judge does not sign an order denying the motion, the motion is considered denied.
8 The time for initiating an appeal from judgment commences in accordance with the Rules of
9 Appellate Procedure.

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

12 (E) Grounds for Relief. The Court may grant relief from judgments or orders on motion of a
13 party made within a reasonable time for the following reasons: (1) newly discovered evidence
14 which could not reasonably have been discovered in time to request a new trial; or (2) fraud,
15 misrepresentation or serious misconduct of another party to the action; or (3) good cause if the
16 requesting party was not personally served in accordance with Rule 5(c)(1)(a)(i) or (ii); did not
17 have proper service and did not appear in the action; or (4) the judgment has been satisfied,
18 released, discharged or is without effect due to a judgment earlier in time.

19 Rule 61. Appeals.

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

24 APPROPRIATIONS AND BUDGET PROCESS ACT, 2 HCC § 4

25 3. Declaration of Policy.

26 a. The President is charged with the responsibility to submit proposed budgets to the
27 Legislature according to law in order for the Executive Branch to receive uninterrupted
28 funding.

b. The Legislature may not fund programs if it determines that such funding would result
in duplication of existing programs and services to the Ho-Chunk Nation members.

c. Funds appropriated under this Act may only be used for the specific purpose for which
they have been appropriated.

d. It shall be unlawful for any person to violate any provision of this Act.

e. It shall be unlawful for any person to order, coerce, command, or attempt to persuade
any other person to violate any provision of the Act.

1 f. An officer or employee of the Nation may not:

2 (1) Make or authorize an expenditure or obligation exceeding an amount available
3 in an appropriation or to fund such expenditures or obligations.

4 (2) Involve the Nation in a contract of obligation for the payment of money before
5 an appropriation is made for such contract or obligation unless authorized by law.

6 6. Budget Modifications

7 c. General Council.

8 (1) Minor Budget Modification. A minor budget modification may be made
9 whenever required. Each proposed minor budget modification shall contain full
10 documentation and written justification for the modifications.

11 (a) Any proposed minor budget modification of less than \$15,000 for the
12 General Council Branch may be approved by the Chairman with a motion
supported by a majority vote of General Council Agency.

13 (b) Any proposed minor budget modification of more than \$15,000 for the
14 General Council Branch must be submitted through the Executive Branch
15 Treasurer to the Legislature for approval.

16 (2) Major Budget Modification. Any proposed major budget modification for the
17 General Council Branch must be submitted by General Council Agency to the
18 Chair of the Finance Committee for its review and recommendation. Each budget
modification shall contain full documentation and written justification for the
19 modifications.

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

21 4. Functions. The Department of Justice shall:

22 a. Defend the sovereignty of the Ho-Chunk Nation.

23 b. Provide expert legal advice and competent representation for all Branches of the
24 Nation on those matters that concern the Nation's interests and welfare.

25 c. Represent the Nation in Tribal, State, and Federal forums.

26 d. Coordinate all available and necessary professional resources required to carry out its
27 mission.
28

1 e. Ensure prosecutorial enforcement of the Nation's laws.

2 f. Provide for effective communication and dissemination of Tribal information to the
3 Tribal population.

4
5 **FINDINGS OF FACT**

6 1. The Ho-Chunk Nation General Council Agency (GCA) is currently the *Plaintiff* in
7 litigation concerning its authority to independently employ legal counsel. The GCA sued the
8 Office of the President and the Ho-Chunk Nation Legislature, who have argued, *inter alia*, that
9 no such independent authority exists. That matter has not yet been decided by the Trial Court.
10 *GCA v Ho-Chunk Nation Legislature & Ho-Chunk Nation Office of the President, individually*
11 *and in their official capacities, HCN Tr. Ct, CV12-83.*

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13 2. The Ho-Chunk Nation Annual General Council meeting is to be held on September 28,
14 2013.

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16 3. The Office of the President seeks extraordinary relief in the form of a Temporary
17 Restraining Order as against the Ho-Chunk Nation General Council Agency related to the hiring
18 of legal counsel by the GCA. *Motion by HCN Office of President for Ex Parte Temporary*
19 *Restraining Order and Preliminary Injunction and Notice and Motion for Expedited*
20 *Consideration at 3; and Affidavit in Support of Motion with Exhibits.* The relief sought includes
21 a prohibition for the GCA from allowing Attorney John S. Swimmer to act a legal counsel for
22 the GCA or General Council.
23

24 4. The Court sought to protect the rights of the parties by having an emergency hearing on
25 September 26, 2013 at 2:30 p.m. *Notices of Telephonic Hearing, September 25, 2013.* The
26 parties received notification by fax and telephonic confirmation. As an interested party,
27 Attorney John Swimmer was also notified of the Telephonic Hearing.
28

1 defend the General Council from the alleged harm by arguing to remove him from the
2 proceedings.

3 Additionally, *Respondent* has failed to show the likelihood of the alleged harm. It is not
4 certain that the General Council will reach the quorum required to convene. It is possible that its
5 members will not seek advice from Attorney Swimmer, or that he will be removed from the
6 proceedings as described above. The Court also remains mindful of the fact that the advice of an
7 attorney is just one factor that the General Council membership may consider. As with any
8 client, General Council members can best determine how to utilize such advice. Furthermore,
9 the harm is speculative. The *Respondent* does not and cannot know whether the hiring
10 irregularities and unauthorized actions alleged by *Respondent* will truly cause a perception of
11 illegitimacy within the Nation. In several cases the Court has declined to grant injunctions
12 against actions at General Council on the grounds of ripeness and the general inability to know,
13 ahead of time, the actions the General Council will take. *See, e.g., Mary Ellen Blackdeer*
14 *Anwash v. Ho-Chunk Nation Office of Tribal Enrollment, Order (Denying Emergency Motion)*
15 *CV 12-72 (HCN Tr. Ct., Sept. 25, 2013); Jenna Littlegeorge v. Ho-Chunk Nation Office of*
16 *Tribal Enrollment, et al., CV 09-100, CV 10-13 (HCN Tr. Ct., Sept. 8, 2010).* Although it does
17 not do so here, the Court does note the inherent unpredictability of General Council actions
18 demonstrated by these cases.
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22 Finally, this Court is not convinced that the nature of the alleged harm truly constitutes
23 harm. Whatever the legitimacy of Attorney Swimmer's hiring or presence may be, no party has
24 alleged a deficiency in the quality of his legal skills or expertise. Parties agreed at hearing that
25 Attorney Swimmer has performed in this exact capacity more than once at past General
26 Councils. In other words, *Respondent* has not alleged that the General Council is in danger of
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1 5. The General Council is not a party to this action, and the Office of the President has not
2 demonstrated or proven knowledge as to whether or not irreparable harm will occur if the TRO is
3 not granted.

4 6. The Participants at the telephonic hearing were: (personally), Wendi Huling, Rebecca
5 Maki-Wallander of the Ho-Chunk Nation Department of Justice for the Office of the President;
6 Ms. Libby Fairchild, Executive Director of Personnel; Marvin Decorah, Sr. General Council
7 Agency Chair; Rosetta Hunt, GCA Secretary-Treasurer; and by telephone, Ms. Muriel
8 Whiteagle-Lee, Vice-Chair, GCA; Michael Murphy for the Ho-Chunk Nation Legislature; and
9 John Swimmer, making a special appearance, and appearing for himself.
10

11 DECISION

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14 The *Motion* claims that where the issue of authority to independently employ legal
15 counsel remains undecided, recently revealed actions taken by the GCA to secure and utilize
16 legal counsel threaten harm. Specifically, that procedural issues and alleged irregularities
17 relating to the GCA hiring of Mr. Swimmer and the expenditure of funds for his services as legal
18 counsel to the GCA on an LTE basis exist--and therefore threaten the legitimacy of the acts of
19 the General Council if he were to render legal advice. The risk that General Council, and,
20 according to the *Respondent*, the Nation, would suffer irreparable harm is therefore argued to be
21 a justification for issuance of an Emergency Order, pursuant to *HCN R. Civ. P. 60(A)*. This
22 alleged harm together with the imminent proceedings of the General Council, fulfill *HCN R. Civ.*
23 *P. 19(B)* standard for expedited consideration.
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1 At this juncture, the Court limits its focus to the *Motion*, and whether the facts alleged
2 therein justify granting a temporary restraining order.² It is well settled that in evaluating
3 requests for preliminary injunctions, a party must show that (1) they have no adequate remedy at
4 law; (2) the threatened injury to the plaintiff outweighs the harm of issuing an injunction; (3) the
5 plaintiff has a reasonable likelihood of success on the merits; and (4) granting the injunction
6 serves the public interest. See *HCN Election Bd. v. Aurelia Lera Hopinkah*, SU 98-08 at 8 (HCN
7 S.Ct., Apr. 7, 1999); *Coalition for a Fair Gov't II v. Chloris Lowe, Jr., et al.*, CV 96-22 (HCN
8 Tr. Ct. July 23, 1996); *Tracy Thundercloud v. HCN Election Bd.*, CV 95-16 (HCN Tr. Ct., Aug.
9 28, 1995); and *Joyce Warner et al v. HCN Election Bd.*, CV 95-03-06, -09-10 (HCN Tr. Ct., July
10 3, 1995). Each of these factors is analyzed.

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13 1. As to the question of whether there is an adequate remedy at law, the *Motion* indicates
14 that there is not. *Motion* at 2. This prong of the test requires that the Court examine whether the
15 [plaintiff's] harm can be compensated by money damages. However, the *Respondent* states the
16 Nation's Treasury has remedied concerns relating to the procedural irregularities relating to the
17 payment of Mr. Swimmer through the Nation's Treasury department. *Motion* at 2. This would
18 seem to be a remedy. They acknowledge that the alleged violations of the CONSTITUTION are the
19 subject of the ongoing litigation in the underlying case in chief.

20
21 However, the fundamental issue in the present motion is not whether Attorney Swimmer
22 may or may not represent the General Council generally, but whether doing so at the upcoming
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24
25 ² This Court was inclined to consider the expedited request to hear the Motion, and determined to seek active
26 participation by the interested parties as a means to further protect their rights. In the interests of justice, the Court
27 determined to hold a hearing to allow interested parties to specifically address the Motion's alleged irreparable harm
28 and whether the threshold requirements for issuance of an Emergency Order are met. While the Petitioner sought
an ex parte determination, HCN R. Civ. P, 5(H) specifically contemplates that situations may arise when the Court
may need to conduct a hearing with less than 48 hours notice to the parties. The parties of record received notice
of the hearing by FAX with a confirmation telephone call from the Clerk of Court with documentation to the record.
Additionally, the Court determined that the hearing would be a teleconference to allow for greater ease of
participation by the interested parties.

1 proceedings must be enjoined. Since the alleged harm is a general loss of legitimacy, which
2 cannot be corrected with money damages, the Court finds that *Respondent* succeeds on this
3 prong.

4 2. The moving party must show that the threatened injury to the [plaintiff] outweighs the
5 harm of issuing an injunction as the second prong of the analysis. Here, the expressed concern is
6 that the proceedings of the General Council meeting on September 28, 2013 may somehow be
7 tainted by the presence and participation of an attorney where the authority of the GCA to
8 engage that attorney is in question.³ When questioned as to whether there was an alternative for
9 the GCA if the TRO were to issue, Ms. Huling and Ms. Maki-Wallander suggested the options
10 for alternatives to legal counsel for GCA existed noting that the GCA had access to paralegals
11 and DOJ attorneys. LPER, Sept. 26, 2013, HCN Tr. Ct., CV12-83, 3:11:46 p.m. CST and Id.,
12 3:09:33 p.m. CST. Under the DEPARTMENT OF JUSTICE ESTABLISHMENT ACT, DOJ attorneys
13 have statutory authority to represent the entire Nation. Ms. Huling and Ms. Maki-Wallander do,
14 however, recognize that professional ethical considerations could create complicating factors.
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18 This prong of the test raises several questions. First, it must be determined who the
19 victim of the harm is. Although *Respondent* argues, not unreasonably, that a lack of perceived
20 legitimacy of General Council actions would injure the entire Nation, it is the General Council
21 itself that would most directly suffer the harm. The General Council has the legal authority to
22 exclude non-members of the Ho-Chunk Nation from its proceedings, and has done so in the past.
23 Since Attorney Swimmer is not a member of the Nation, any participants at the General Council
24 who feel that his presence could cast doubt on the legitimacy of its actions have the power to
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27 ³ The Court questions whether issuance of a Temporary Restraining Order (TRO) would have any real effect, given
28 the possibility that some people may take action based on whether the GCA utilizes the selected attorney, while
others would choose to take action if the GCA is enjoined from utilizing the attorney. Additionally, underlying each
General Council is the issue of whether a quorum will even be achieved.

1 receiving incorrect or otherwise faulty legal advice, but rather that they may receive advice that
2 they are, essentially, not entitled to receive.

3 Because of the uncertainties of the alleged harm, as well as the General Council's ability
4 to protect itself, *Respondent* fails on this prong of the test.

5
6 3. As the third prong, the justification for reasonable likelihood of success on the merits, the
7 Affidavit in Support of the Motion is cited as containing facts that would meet this criteria.
8 *Affidavit* at 2-3. However, the focus of the request is on the same or similar issues as are
9 currently the focus of the ongoing litigation; namely the scope of Constitutional authority of the
10 GCA and compliance with the APPROPRIATIONS & BUDGET PROCESS ACT, 2 HCC§ 4.3c. The
11 outcome of this motion would not control the outcome of the ultimate issue. As a result, the
12 Court does not find this prong to carry significant weight in the issue here.

13
14 4. The fourth prong is that granting the injunction serves the public interest. Here the Office
15 of the President urges that any decisions made by the General Council that are the result of legal
16 advice provided by an attorney not legally hired by the Nation would be subject to suit, and the
17 claim is that it jeopardizes the entire General Council meeting and its ability to set policy. LPER
18 3:06:23 p.m. *Respondent* is expressly concerned with the public interest, and therefore succeeds
19 on this prong.
20

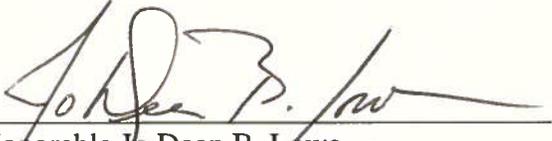
21 CONCLUSION

22 A Temporary Restraining Order or preliminary injunction is an extraordinary remedy.
23 The burden lies with the moving party to demonstrate that each of the four prongs of the test
24 have been met. Absent any one of the four prongs, no injunction should issue. Since the
25 *Respondent* has failed the second prong of the test, their *motion* is hereby denied.
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1 The Courts have the responsibility of interpreting the CONSTITUTION. This is not the duty
2 of the General Council. There can be no mistaking this. However, the importance of
3 constitutional issues requires their careful consideration. The Court declines to reach the
4 questions of constitutional interpretation in the underlying case here in because their complexity
5 requires far more time to deliberate than this emergency action allows. As this Court stated in
6 *Thundercloud v. Ho-Chunk Election Board*, “speeding things up to achieve a desirable end” still
7 may violate the CONSTITUTION, which is “the Supreme Law over all territory and persons within
8 the jurisdiction.”
9

10 The Court will hold a hearing on the pending motions in the case-in-chief on **October 29,**
11 **2013, at 1:30 P.M.** at the Ho-Chunk Nation Trial Court.
12

13 **IT IS SO ORDERED** this 27th day of September 2013, by the Ho-Chunk Nation Trial
14 Court located in Black River Falls, WI within the sovereign lands of the Ho-Chunk Nation.
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17 _____
18 Honorable Jo Deen B. Lowe
19 Chief Trial Court Judge
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CERTIFICATE OF SERVICE

I, Mary Thunder, Clerk of Courts, I do hereby certify that on the date set forth below, I served a true and correct copy of the **ORDER (Denying Motion for Temporary Restraining Order)** in **Case No. CV 12-83** upon all persons listed below:

By Fax:

Attorney John Swimmer
General Council Agency
Fax: (414) 908-9695

Wendi Huling
HCN Department of Justice
Fax: (715) 284-7851

Rebecca Maki-Wallander
HCN Department of Justice
Fax: (715) 284-7851

Michael Murphy
HCN Legislative Office
Fax: (715) 284-3172

Attorney Gary Montana
Osseo, WI
Fax: (715) 597-3508

Dated: September 27, 2013



Mary Thunder, Clerk of Courts
Ho-Chunk Nation Trial Court

CC: Staff Attorney