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

Ronald Kent Kirkwood,
Plaintiff,

v.

Case No.: **CV 04-33**

**Francis Decorah, in his official capacity as
Director of Ho-Chunk Nation Housing
Department, and all predecessor directors,
in their official capacity; Levi Thunder, Iris
Cleveland, Donald Greengrass, Mike Goze,
and Frank Johnson, in their official
capacity as members of the Housing Board
of the Ho-Chunk Nation, and their
predecessors; and Wade Blackdeer, Elliot
Garvin, Clarence Pettibone, Tracy
Thundercloud, Dallas WhiteWing, Gerald
Cleveland, Sr., Christine Romano, Myrna
Thompson, John Dall, Kathyleen
Whiterabbit, and Sharyn Whiterabbit, in
their official capacity as Legislators of the
Ho-Chunk Nation, and all predecessor
Legislators,**
Defendants.

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**ORDER
(Partially Granting Plaintiff's Motion for Summary Judgment)**

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INTRODUCTION

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The Court must determine whether to grant the plaintiff's motion for summary judgment. The Court enters a decision partially in favor of the plaintiff, but requires further discovery and submission of legal memoranda to fully address some remaining issues. The below discussion reflects the Court's careful examination of this case.

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PROCEDURAL HISTORY

The Court recounts the procedural history in significant detail in its October 18, 2004 *Order (Granting Plaintiff's Motion)*. For purposes of this decision, the Court notes that defendants submitted its *Defendants' Answer to Request for Admissions, Request for Production of Documents & Answer to Interrogatories* (hereinafter *Defendants' Discovery Response*) on October 27, 2004. The plaintiff filed his November 4, 2004 *Motion for Summary Judgment* prior to the imposed deadline. *Order (Granting Pl.'s Mot.)* at 6. Likewise, the plaintiff filed his November 10, 2004 *Response to Defendant's [sic] Motion for Summary Judgment* prior to the imposed deadline. *Id.* Conversely, the defendants failed to file a written response to the plaintiff's dispositive motion. *See Ho-Chunk Nation Rules of Civil Procedure* (hereinafter *HCN R. Civ. P.*), Rule 19(B).

The Court informed the parties of the date and time of the *Motion Hearing/Pre-Trial Conference* in its previous order. *Order (Granting Pl.'s Mot.)* at 6. The Court convened the *Hearing/Conference* on November 12, 2004 at 9:00 a.m. CST. The following parties appeared at the proceeding: Ronald K. Kirkwood, plaintiff; Attorney James C. Ritland, plaintiff's counsel; and Ho-Chunk Nation Department of Justice Attorney Wendi A. Huling, defendants' counsel.

APPLICABLE LAW

CONSTITUTION OF THE HO-CHUNK NATION

Preamble

We the People, pursuant to our inherent sovereignty, in order to form a more perfect government, secure our rights, advance the general welfare, safeguard our interests, sustain our culture, promote our traditions and perpetuate our existence, and secure the natural and self-evident right to govern ourselves, do ordain and establish this Constitution for the Ho-Chunk Nation.

1 Art. V - Legislature

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

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

4 (r) To protect and foster Ho-Chunk religious freedom, culture, language, and traditions;

5 Art. VI - Judiciary

6 Sec. 5. Jurisdiction of the Judiciary.

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

14 Sec. 6. Powers of the Tribal Court.

15 (a) The Trial Court shall have the power to make findings of fact and conclusions of law.
16 The Trial Court shall have the power to issue all remedies in law and in equity including
17 injunctive and declaratory relief and all writs including attachment and mandamus.

18 Art. X - Bill of Rights

19 Sec. 1. Bill of Rights.

20 (a) The Ho-Chunk Nation, in exercising its powers of self-government, shall not:

21 (8) deny to any person within its jurisdiction the equal protection of its laws or
22 deprive any person of liberty or property without due process of law;

23 Art. XI - Statutes and Resolutions

24 Sec. 1. Statutes. All final decisions of the Legislature on matters of permanent interest
25 shall be embodied in statutes. Such enactments shall be available for inspection by members of
26 the Nation during normal business hours.

27 Sec. 2. Resolutions. All final decisions on matters of temporary interest where a formal
28 expression is needed shall be embodied in a resolution, noted in the minutes, and shall be
available for inspection by members of the Nation during normal business hours.

1 Art. XII - Sovereign Immunity

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

6 Sec. 2. Suit Against Officials and Employees. Officials or employees of the Ho-Chunk
7 Nation who act beyond the scope of their duties or authority shall be subject to suit in equity only
8 for declaratory and non-monetary injunctive relief in Tribal Court by persons subject to its
9 jurisdiction for purposes of enforcing rights and duties established by this constitution or other
10 applicable laws.

11 TRIBAL ENROLLMENT AND MEMBERSHIP ACT OF 1995

12 Sec. 6. Application for Enrollment.

13 (e) All rights, benefits, privileges, and immunities of Membership shall take effect
14 immediately upon timely approval of an application by the Office of Tribal Enrollment.
15 PROVIDED, [t]hat such approval shall not be retroactive.

16 ELDER PROTECTION ACT OF 2001 (4 HCC § 1)

17 Sec. 2. Purpose.

18 The purpose of this act is to establish Tribal law to protect the Elders of the Ho-Chunk
19 Nation from abuse, neglect, and exploitation. The Ho-Chunk Nation honors, protects, and
20 respects its Elders. Our Elders possess unique and irreplaceable stores of knowledge, skill, and
21 experience that enhance and enrich the lives of the entire Nation. The interests of the Nation,
22 now and in the future, our advanced when our Elders can be confident they can be protected
23 from abuse, neglect, and exploitation and are free to fully participate in the activities and
24 proceedings of the Nation.

25 HOME OWNERSHIP AND BENEFIT HOUSING PROGRAM FOR THE GENERAL
26 WELFARE OF ELDERS ACT, 8 HCC § 7

27 Subsec. 1. Authority.

28 f. Legislative Resolution 11/07/95D, Medical Care and Priority Housing for the Ho-
Chunk SH OG LA, proclaimed that the Elder's years are limited and their housing needs are
critical and that housing for all of the Elders shall have priority over all other segments of the
Ho-Chunk population.

Subsec. 2. Findings. The Legislature of the Ho-Chunk Nation states the following findings.

1 e. The mortality rate of Ho-Chunk Elders is such that, using an age of sixty (60)
2 years to qualify as an Elder, many Elders will not live long enough to fully enjoy the benefits of
3 the Nation's Elder housing programs.

4 Subsec. 5. Goals. The goals of the Home Ownership and Benefit Housing Program for the
5 General Welfare of Elders are as follows.

6 a. Establish a priority system to ensure those Tribal Elders with the greatest need are
7 served the earliest.

8 Subsec. 6. Elder Age Policy. Due to the life expectancy of a Ho-Chunk Elder, the qualifying
9 ages for the Home Ownership and Benefit Housing Program for the General Welfare of Elders
10 are age fifty-five (55) for Elders and age seventy (70) for Elite Elders. Unless specifically
11 exempted, the minimum age of Elder and Elite Elder for other programs administered by the
12 Nation remain at age sixty (60) and eighty (80), respectfully.

13 Subsec. 7. Definitions.

14 i. "Elder" means any individual fifty-five (55) years of age or more and is an
15 enrolled Tribal member of the Ho-Chunk Nation for a minimum of five (5) years.

16 Subsec. 8. Application and Eligibility.

17 c. Eligibility. The HOP staff, or their assigns, shall review applications for program
18 eligibility prior to final approval by the HBOD. To be eligible for any of the HOP Elder
19 Housing Assistance Plans, the Applicant must meet the following criteria.

20 (1) Be an enrolled member of the Ho-Chunk Nation, for a period of five (5)
21 [years], as defined by the Constitution of the Ho-Chunk Nation.

22 Subsec. 9. Priority and Ranking.

23 a. Elder Priority. Elders shall be qualified for assistance under this Act upon
24 reaching age 55, if all eligibility and priority criteria are met, and if funding is available.

25 b. Annual Ranking of Applications. The applications shall be reviewed by HOP on
26 an annual basis to determine ranking. As part of the annual ranking, a lottery shall be conducted
27 to prioritize applications with the same age and equal scores, to the extent necessary to determine
28 the applicants selected for home projects during the following fiscal year. The application
lottery process shall be overseen by the HBOD.

c. Elder Point Criteria. [incorporates HCN LEG. RES. 08-06-03A appearing below]

1 HO-CHUNK NATION LEGISLATIVE RESOLUTION 08-06-03A

2 NOW THEREFORE BE IT RESOLVED, that the Elder Point Criteria shall be amended:

3 c. Elder Point Criteria

4 (1) Any approvals prior to the effective date of this policy shall not be effected by the
5 implementation of these new guidelines.

6 (2) Applicants shall be prioritized for HOP Projects based upon the number of points
7 assigned by the HOP Program Application on the basis of the following criteria:

8 Points Criteria

9 100 Points shall be provided to Ho-Chunk Nation enrolled applicant
10 whose enrollment date is 1978, or prior; and

11 5 Points shall be provided to Ho-Chunk Nation enrolled applicant
12 per year beginning in 1979, and for every year of enrollment
13 thereafter;

14 100 Points shall be provided to Ho-Chunk Nation enrolled applicants
15 who are actively serving or have actively served in the United
States Armed Forces as demonstrated through a DD214 Form.

16 50 Points shall be provided to Ho-Chunk Nation enrolled applicants
17 with a 40% or more official military disability received during
18 official military duty or related official activity.

19 (3) The points claimed in an application shall be re-certified annually on the
20 anniversary date of the application. Failure of an applicant to submit re-certification will make
the applicant ineligible for annual ranking points.

21 BE IT FURTHER RESOLVED, that the Ho-Chunk Nation Legislature hereby adopts the
22 amended Elder Appoint [*sic*] Criteria for the Elder Home Ownership Program Policy set forth
hereinabove.

23 HO-CHUNK NATION LEGISLATIVE RESOLUTION 06-06-00E

24 WHEREAS, the Nation adopted the Sha Og La [*sic*] Resolution 11/07/95-D to give Elders
25 priority over all others in order to fulfill their housing needs; and

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1 WHEREAS, the Nation adopted the Amendment to Home Ownership Policy Eligibility
2 Requirements 08/18/98-B to restrict participation to those members whom have been enrolled for
3 a period of not less than five (5) years, including the Elders; and

4 WHEREAS, the Nation finds that the needs of the Elders identified in the original Elder Housing
5 Strategic Plan have been met, but that an additional fifty-five (55) Elders approved for Housing
6 and twelve (12) Elders with pending files for approval, meeting the five (5) year enrollment
7 restriction by July 1, 2000, are in need of appropriate funds; and

8 WHEREAS, the Nation adopts a plan to fund these sixty-seven (67) Elder Housing Strategic
9 Plan files at \$125,000.00 each for a total of \$8,375,000.00 using the balance of restricted funds
10 in the approximate amount of \$2,800,000.00, and the remaining approximate amount of
11 \$5,600,000.00 to be paid from the General Revenue in equal quarterly payments during the next
12 fiscal year.

13 NOW THEREFORE IT BE RESOLVED, that the Ho-Chunk Nation hereby adopts the Amended
14 Appropriation to Extend the Elder Housing Strategic Plan to approve the funding of these 67
15 additional Elders in need of Housing.

16 HO-CHUNK NATION LEGISLATIVE RESOLUTION 08-18-98B

17 WHEREAS, a revision of those manuals [for the Nation's New Home Construction, Mortgage,
18 Refinancing, and Existing Home Purchase programs under the Nation's Home Ownership
19 Program]is currently under consideration by the Legislature and in draft form provides for a
20 restriction on eligibility for participation in the Home Ownership Program to those Members
21 who have been enrolled for a period of not less than five years;

22 WHEREAS, it is the sense of the Legislature that the restriction on participation in the Home
23 Ownership Program to Members who have been enrolled for at least five years is consistent with
24 the will of the majority of Tribal Members and is an appropriate revision to the Home Ownership
25 Manual; and

26 WHEREAS, prior to the completion and Legislative approval of the revised Home Ownership
27 Manual it is necessary to select a new pool of approved files so that the Program can continue
28 pending final approval of the entire new Manual; and

WHEREAS, the Nation's Housing Board has recommended that the Legislature consider
amending the current Home Ownership Manuals, effective for the applications to be selected for
fiscal year '98-'99, to impose a five year Enrolled Membership requirement on the participants in
the Program to reflect the will of Tribal Membership; and

NOW, THEREFORE BE IT RESOLVED, that the Home Ownership Manuals currently in effect
are amended to require that, as a condition for eligibility to receive home ownership assistance
under the Program, any applicant whose Home Ownership application was not approved prior to

1 July 1, 1998, must have been enrolled for five years prior to the commencement of the fiscal year
2 in which the approval of such applicant's file is considered; and

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4 BE IT RESOLVED FURTHER, that participation in the Home Ownership Program and in other
5 Programs of the Housing Department are [*sic*] not an entitlement, and that the establishment of
6 eligibility criteria for such programs is within the authority of the Legislature, and that nothing
7 contained elsewhere in the statutes and ordinances of the Nation shall be interpreted to limit the
8 effect of the foregoing resolutions.

8 HO-CHUNK NATION LEGISLATIVE RESOLUTION 11/07/95D

9 WHEREAS, one of the primary concerns of the Ho-Chunk expressed by many individuals at
10 gatherings has been the SH OG LA. The concerns have been their welfare, and the desire to
11 continue the journey of life with them. This is in order that the legacy of their wisdom and
12 knowledge be passed on to the young in order to retain the tribal culture, traditions and the Ho-
13 Chunk existence. To demonstrate this, it is proper for the Tribe to provide a safe and healthy
14 environment for the Ho-Chunk SH OG LA by prioritizing and making immediate available
15 housing and medical care programs for them. Therefore be it

14 ****

15 RESOLVED, their years are limited and their housing needs are critical; therefore, the housing
16 for all of the elders shall have priority over all other segments of the Ho-Chunk population.

17 HO-CHUNK NATION RULES OF CIVIL PROCEDURE

18 Rule 19. Filing and Responding to Motions.

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

23 Rule 31. Required Disclosures.

24 (A)(5) judicial notice shall be taken of and required disclosures shall be made of official
25 documents, public documents, documents subject to public inspection, document and materials
26 of non-executive session, governmental minutes and recordings of a governmental body pursuant
27 to the HCN OPEN MEETINGS ACT OF 1996.
28

1 **RELEVANT LAW**

2
3 **BILL PROCESS: AMENDED LEGISLATIVE INTERNAL OPERATING RULES OF 1996¹**

4 Scope of Rules

5 These legislative internal operating rules shall apply only to the development or amendment of
6 the following codes as identified in Article V, Section 3 of the Ho-Chunk Nation Constitution:

7 Membership,

8 Bill Process

9 1. Introduction of a bill.

10 Every bill must be sponsored by a Member of the Legislature.

11 2. Posting or publishing a bill to inform the public.

12 Each bill introduced shall be distributed to each Area office and to the Executive Branch. . . .
13 The Secretary of the Legislature shall conform each bill to a legislatively-approved standard bill
14 format which shall include a statement whether the proposed bill amends or repeals an existing
15 law, and a statement of the fiscal impact of the bill.

16 3. The Vice President may assign a bill to a legislative Committee or Committees, or the
17 Legislature may proceed on any bill without assignment to any Committee.

18 The Legislature may establish a deadline for Committee action or may require a Committee to
19 hold a hearing or field hearings on an assigned bill. . . . If the Vice President does not assign a
20 bill to a Committee, the Legislature may hold hearings on the bill. The Legislature or a
21 Committee shall provide the public reasonable notice of a hearing in accordance with the
22 Nation's Open Meetings Law. . . . The Executive shall be provided a reasonable opportunity to
23 comment on all bills introduced to the Legislature. If the Vice President does not assign a bill to
24 a Committee, the Vice President may specify the number of days the record be held open; if the
25 Legislature assigns the bill to a Committee, the Chairperson of the Committee may specify the
26 number of days that the record be held open.

24 6. A bill shall be enacted into law upon a majority vote of the Legislature.

25 7. All statutes and ordinances of the Ho-Chunk Nation shall be codified in a master code
26 called the "Ho-Chunk Code" (HCC).

27
28 ¹ The BILL PROCESS rules provided the legal backdrop against which the Ho-Chunk Nation Legislature adopted
HCN LEG. RES. 08-18-98B, and have since been substantially incorporated within the LEGISLATIVE ORGANIZATION
ACT OF 2001, 2 HCC § 11.

1 Resolutions shall be matters of temporary interest and shall be statements of policy. Resolutions
2 need not have a bill number. Resolutions need not be introduced as a bill and need not be
3 included in the master code.

4 **FINDINGS OF FACT**

5
6 Pertaining to the questions involved in this decision, the Court finds that “no genuine
7 issue as to material fact” exists, thereby rendering those matters capable of resolution through
8 summary judgment. *HCN R. Civ. P. 55*. The following undisputed facts reflect common
9 assertions of the parties and references to "documents subject to public inspection." *HCN R. Civ.*
10 *P. 31(A)(5)*.

11
12 1. The parties received proper notice of the November 12, 2004 *Pre-Trial Conference/*
13 *Motion Hearing*.

14
15 2. The Court incorporates by reference the *Findings of Fact* enumerated in the final order of
16 the preceding action. *Ronald K. Kirkwood v. HCN Hous. Dep't et al.*, CV 03-62 (HCN Tr. Ct.,
17 Jan. 26, 2004) at 7-10.

18
19 3. The defendant, Francis Decorah and his predecessors, is/were the Executive Director of
20 the Ho-Chunk Nation Department of Housing (hereinafter Housing Department). The
21 individually named defendants, six (6) housing directors and predecessors, are/were duly
22 nominated and confirmed members of the Housing Department Board of Directors. *See DEP'T OF*
23 *HOUS. ESTABLISHMENT & ORG. ACT OF 2001, 1 HCC § 7.6b*. The individually named
24 defendants, eleven (11) legislators and predecessors, are/were duly elected legislative members,
25 representing the five (5) districts of the Ho-Chunk Nation. *See CONSTITUTION OF THE HO-*
26 *CHUNK NATION (hereinafter CONSTITUTION), ART. V, § 1(b)*.

1 4. On or after August 18, 1998, the plaintiff would have received approval of his housing
2 application but for the passage of HCN LEG. RES. 08-18-98B. *See* HCN LEG. MOT. 08-18-98 at
3 4 (allocating \$9,850,978.00 to fund 127 approved and pending elder housing applications,
4 including the plaintiff's application); *see also* *HCN Elder Hous. Strategic Plan*, Ch. IV at 4
5 (envisioning completion of identified elder homes on or before July 1, 2000).
6

7 5. Assuming the legality of HCN LEG. RES. 08-18-98B, the plaintiff's elder housing
8 application would have become eligible for approval on or after July 1, 2002. *See* Defs.' Ex. D
9 (indicating plaintiff's enrollment date of July 22, 1996); *see also* HCN LEG. RES. 08-18-98B
10 (requiring enrollment of five (5) years prior to the beginning of the fiscal year in which plaintiff
11 could obtain application approval).
12

13 6. Assuming the legality of HCN LEG. RES. 08-18-98B, the plaintiff would have received
14 approval of his housing application on or after July 1, 2002. *See* Defs.' *Disc. Resp.* at 3.
15

16 7. The Ho-Chunk Nation Legislature (hereinafter Legislature) articulated the following
17 justification for the passage of HCN LEG. RES. 08-18-98B: "it is the sense of the Legislature that
18 the restriction on participation in the Home Ownership Program to Members who have been
19 enrolled for at least five years is consistent with the will of the majority of Tribal Members"
20 HCN LEG. RES. 08-18-98B at 2.
21

22 8. The Legislature articulated no justification for the passage of HCN LEG. RES. 08-06-03A.

23 9. On August 14, 2003, the plaintiff filed his initial cause of action challenging the above-
24 identified legislative resolutions. *Kirkwood*, CV 03-62 (HCN Tr. Ct., Jan. 26, 2004) at 1.

25 10. At the *Pre-Trial Conference/Motion Hearing*, the defendants contended that *hocak*
26 tradition and custom imparted a fundamental right to elders to receive services, including
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1 housing, prior to their non-elder counterparts. *Pre-Trial Conference/Mot. Hr'g* (LPER at 12,
2 Nov. 12, 2004, 10:32:33 CST).

3 11. For the purposes of constitutional scrutiny, the defendants advocate utilizing an
4 intermediate level of review for examination of the legislative resolutions. *Id.* at 11, 10:24:06
5 CST; *see also Craig v. Boren*, 429 U.S. 190, 197 (1976) ("[t]o withstand constitutional
6 challenge, . . . [the] classification[] . . . must serve important governmental objectives and must
7 be substantially related to achievement of those objectives.")

8 12. On November 12, 2004, the defendants presented the Court with an April 27, 2004
9 Executive Order, which imposed a "moratorium on new home construction and existing home
10 purchases for a minimum [period] of six months." Defs.' Ex. E. The Court remains unaware of
11 whether the moratorium exceeded its deadline of October 27, 2004.
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15 DECISION

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17 The defendants enumerated several defenses to the plaintiff's cause of action, and the
18 Court shall address each defense in turn. In doing so, the Court shall examine the nature of its
19 broad jurisdictional grant, distinguishing between its legal and equitable powers. The Court
20 enters this preliminary ruling in the plaintiff's favor due to the defendants' failure to abide by
21 mandated statutory processes. However, the Court must direct the parties to re-enter discovery
22 because it cannot resolve the ultimate issue based upon the exposed facts.
23

24 The Court easily dispenses with a couple of defenses since contingent upon the naming of
25 parties. On September 2, 2004, the plaintiff filed an *Amended Complaint* in which he added the
26 Housing Department Board of Directors and Legislators as party defendants. The defendants
27 earlier based the defenses of standing and failure to join an indispensable party on the absence of
28

1 the subsequently named defendants. *Defs.' Br. in Supp. of Mot. for Summ. J.* at 2-3; *Defs.*
2 *Answer* at 1-2. The plaintiff's amendment to the pleading removes these defenses from further
3 judicial consideration.

4
5 The defendants continue to actively assert the following defenses: laches, immunity from
6 suit, and failure to state a claim. *Defs.' Br. in Supp. of Mot. for Summ. J.* at 3-5. The Court shall
7 decline to address the latter defense due to its constitutional dimension. The Court does not base
8 its decision on constitutional interpretation in recognition of the cardinal principle that courts
9 should avoid constitutional questions if a judgment may rest on statutory or other grounds.
10 *Crowell v. Benson*, 285 U.S. 22, 62 (1932).

11
12 Regarding the immunity issue, the Ho-Chunk Nation Supreme Court recently emphasized
13 that "the principle of sovereign immunity exists primarily to protect the public treasury from
14 lawsuits seeking damages. It does not prevent people from suing the HCN government to
15 enforce their rights under the HCN Constitution." *Hope B. Smith v. Ho-Chunk Nation*, SU 03-08
16 (HCN S. Ct., Dec. 8, 2003) at 10; *see also* CONST., ART. XII, § 1-2. A plaintiff must institute
17 such a suit against an official or employee, claiming that the individual "act[ed] beyond the
18 scope of their duties or authority." CONST., ART. XII, § 2. Essentially, the plaintiff seeks to
19 affect the future actions of the official or employee in an effort to avoid a continuing violation of
20 the law. A plaintiff will typically request injunctive relief against the official or employee
21 entrusted with implementing an allegedly illegal statutory provision.

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24 The fact that the . . . officer, by virtue of his [or her] office, has some
25 connection with the enforcement of the act, is the important and material
26 fact, and whether it arises out of the general law, or is specially created by
the act itself, is not material so long as it exists.

27 *Ex Parte Young*, 209 U.S. 123, 157 (1908).

1 In the instant case, the plaintiff seeks to enjoin the actions of the individual Housing
2 Department Board of Directors and Housing Department Executive Director. The plaintiff
3 attacks the legality of two (2) legislative resolutions, and requests an injunction against further
4 imposition of this legislation. The Court holds that the plaintiff's suit survives the immunity
5 defense, and that it may consider granting prospective injunctive relief, which can possess an
6 ancillary monetary impact. *Smith*, SU 03-08 at 11; *see also Chloris Lowe, Jr. et al. v. HCN*
7 *Legislative Members Elliot Garvin et al.*, CV 00-104 (HCN Tr. Ct., Mar. 22, 2004).

9 The Court must now examine the timeliness defense presented by reference to the
10 doctrine of laches. The defendants' assertion of laches, and not a statute of limitation, signifies
11 that the defendants consider the instant suit as one rooted in equity and not law. The
12 CONSTITUTION provides that "[t]he Trial Court shall have original jurisdiction over all cases and
13 controversies, both criminal and civil, in law or in equity" CONST., ART. VII, § 5(a).
14 However, while the Court distinguishes between criminal and civil causes of action, it has not
15 distinguished between legal and equitable causes of action. Instead, the Judiciary has focused
16 upon the character of the relief, identifying certain forms of relief as equitable as opposed to
17 legal. *See e.g., Robert A. Mudd v. HCN Legislature et al.*, SU 03-02 (HCN S. Ct., Apr. 8, 2003)
18 at 6, n.2; *Smith*, SU 03-08 at 11; *Millie Decorah, as Fin. Dir. of the HCN, et al. v. Joan*
19 *Whitewater*, SU 98-02 (HCN S. Ct., Oct. 26, 1998) at 4; *HCN Election Bd. v. Robert A. Mudd*,
20 SU 97-05 (HCN S. Ct., Oct. 28, 1997) at 5.

21 The legal/equitable dichotomy derives from the historical position of the church in Anglo
22 government. The Court of Chancery, or court of equity, developed in fifteenth century England
23 to provide remedies not obtainable in the courts of law. The Lord High Chancellor presided over
24 the court, and received his ecclesiastical appointment from the king. Litigants would petition the
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1 king for permission to present their controversy before the court since one could not proceed to
2 the Court of Chancery as a matter of right. Oftentimes, if a potential money damage award
3 available from the courts of law would prove insufficient to rectify a harm, then a litigant would
4 attempt to secure alternative relief from the court of equity.
5

6 The courts of law developed a body of case precedent by resort to long-standing tradition
7 and custom. Through this process, the courts of law generated a known canon of common law.
8 The quintessential remedy associated with the courts of law was money damages. Secular
9 judges could affect justice by rearranging the established positions of the parties, whereas the
10 ministerial Chancellor could achieve justice by impacting future events. The distinction between
11 retroactive and prospective application continues to mark the difference between legal and
12 equitable relief.
13

14 The Court of Chancery eschewed the principle of *stare decisis* due to its commitment to
15 case-by-case adjudication. The Chancellor relied instead on notions of natural justice, and
16 awarded equitable remedies, principally injunctive relief. The Chancellor maintained immense
17 discretionary authority as opposed to the common law judges who needed to rigidly adhere to
18 established legal dictates. As a corollary, while parties could demand legal relief, litigants could
19 only request equitable relief due to its extraordinary character.
20

21 The courts of equity and law coexisted for centuries before a monumental change in the
22 eighteenth century. A series of Chancellors began to formalize equitable procedure and base
23 decision-making upon resort to case precedent. This transformation occurred amidst increasing
24 charges of arbitrary and inconsistent adjudication. As a result, the Court of Chancery departed
25 from its theological foundation and strict reliance upon ecclesiastical discretion.
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1 Regardless, the emerging American judicial system integrated traditional models of the
2 Court of Chancery despite many state and federal courts sitting simultaneously as both equitable
3 and legal tribunals, including the United States Supreme Court (hereinafter U.S. Supreme Court).
4 The U.S. Supreme Court entertained seventeen (17) equitable disputes during its first twelve (12)
5 years in existence, but only cited to two (2) cases in the resulting decisions. This aversion to
6 precedential authority in equitable cases ended with the appointment of Chief Justice John
7 Marshall on February 4, 1801, by President John Adams. Chief Justice Marshall gradually
8 elevated the importance of adherence to *stare decisis* and standardized procedure in all cases and
9 controversies.
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12 Thereafter, formal distinctions between legal and equitable causes of action began to
13 erode, but courts continued to differentiate between the filings. The convergence of legal and
14 equitable case practice culminated in the adoption of the FEDERAL RULES OF CIVIL PROCEDURE
15 in 1938. *See* 28 U.S.C. § 2072 (2005). Legal and equitable causes of action now share the
16 common designation as civil causes of action.² Yet, courts and practitioners still observe the
17 historical categorization of civil suits. In 1949, the U.S. Supreme Court remarked:
18 "[n]otwithstanding the fusion of law and equity by the Rules of Civil Procedure, the substantive
19 principles of Courts of Chancery remain unaffected." *Stainback v. Mo Hock Ke Lok Po*, 336
20 U.S. 368, 382 n.26 (1949). The focus, however, largely shifted to the manner of relief afforded
21 and away from the nature of the claim asserted, although not entirely. *Id.*
22
23

24 In relation to the instant case, the constitutional drafters formed Article VII against the
25 foregoing backdrop, recognizing that the phrase "in law or in equity" carried an intrinsic and
26

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28 ² The Court composed the preceding historical account by reference to two (2) secondary resources. John R. Kroger, *Supreme Court Equity, 1789-1835, and the History of American Judging*, 34 HOUS. L. REV. 1425 (1998); Kevin C. Kennedy, *Equitable Remedies and Principled Discretion: The Michigan Experience*, 74 U. DET. MERCY

1 well-understood meaning. CONST., ART. VII, § 5(a). The Court has made similar unremarkable
2 and indisputable observations in the past. *See e.g., Chloris Lowe, Jr. v. HCN Legislative*
3 *Members Elliot Garvin et al.*, CV 00-104 (HCN Tr. Ct., Mar. 30, 2001) at 4 (identifying the
4 origin of the tribal one-person/one-vote principle); *Parmenton Decorah v. HCN Legislature et*
5 *al.*, CV 99-08 (HCN Tr. Ct., July 1, 1999) at 8 (identifying the origin of the tribal Bill of Rights).
6
7 The plaintiff clearly presents an equitable cause of action, and the defendants' choice of defenses
8 corroborates this fact.

9
10 The plaintiff requests injunctive relief against the defendants, asking the Court to coerce
11 future official actions, and the defendants respond to the plaintiff's request by raising the doctrine
12 of laches.

13 From the beginning, equity, in the absence of any statute of limitations
14 made applicable to equity suits, has provided its own rule of limitations
15 through the doctrine of laches, the principle that equity will not aid a
16 plaintiff whose unexcused delay, if the suit were allowed, would be
prejudicial to the defendant.

17 *Russell v. Todd*, 309 U.S. 280, 287 (1940). A statute of limitation would apply to an equitable
18 cause of action only when a court could exercise concurrent jurisdiction at law or when a
19 plaintiff sought equitable relief for violation of a legal right. *Id.* at 287-89. "But where the
20 equity jurisdiction is exclusive and is not exercised in aid or support of a legal right, . . . statutes
21 of limitations barring actions at law are inapplicable . . ." *Id.* at 289.

22
23 Statutes of limitation did not historically bar equitable claims due to the ongoing status of
24 the harm. *See generally Kenneth L. Twin v. Douglas Greengrass, Exec. Dir. of Admin.*, CV 03-
25 88 (HCN Tr. Ct., Oct. 7, 2004) (discussing the operation of statutes of limitation). Furthermore,
26 "laches is not like limitation, a mere matter of time; but principally a question of the inequity of
27

28
L. REV. 609 (1997).

1 permitting the claim to be enforced -- an inequity founded upon some change in the condition or
2 relations of . . . the parties." *Gallier v. Cadwell*, 145 U.S. 368, 373 (1892). A court's attention
3 must focus upon the resulting inequity or prejudice, if any, and not solely the issue of timeliness
4 because "[w]hile laches is often spoken of as the equitable equivalent of the legal statute of
5 limitations, . . . there is no fixed time which makes it an absolute bar."³ *Wagg v. Herbert*, 215
6 U.S. 546, 553 (1910) (referring to an equitable suit in which the U.S. Supreme Court reached the
7 merits nineteen (19) years after the cause of action arose).

8
9 The Court earlier adopted a three-part test for determining the proper application of the
10 doctrine of laches. A defendant must demonstrate: "1) unreasonable delay, 2) lack of
11 knowledge on the part of the party asserting the defense that the other party would assert the
12 right on which he[/she] bases his[/her] suit, and 3) prejudice to the party asserting the defense in
13 the event the action is maintained."⁴ *Steve B. Funmaker v. JoAnn Jones et al.*, CV 97-72 (HCN
14 Tr. Ct., Nov. 26, 1997) at 14 (citing *Andersen v. Kojo*, 110 Wis. 2d 22, 27 (Wis. Ct. App. 1982)).
15 The Court must determine whether the defendants have satisfied each prong of the test in the
16 case at bar.⁵ The Court does not need to proceed past the final prong because the defendants
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19

20 ³ Equity does recognize the presence of gross laches where "the passage of a great length of time creates a nearly
21 insurmountable burden on the plaintiffs to disprove the obvious defense of laches." *County of Oneida v. Oneida*
22 *Indian Nation*, 470 U.S. 226, 266 (1985) (Brennan, J., dissenting). In raising such a defense, the timeframe must be
23 "so prolonged that in the normal course of events evidence is lost or obscured." *Russell*, 309 U.S. at 287.

24 ⁴ In its examination of the operable facts, the Court commented that "[s]tatute[s] of limitation[] were created to
25 address such concerns of timeliness, and, in their absence, the common law doctrine of laches serve[d] as an
26 equitable tool to protect parties from defending against claims which they reasonably [could] not expect to be
27 resurrected." *Funmaker*, CV 97-72 at 14-15. However, as noted above, the doctrine of laches neither arises from
28 the common law tradition nor acts to defeat purely legal claims.

⁵ The Ho-Chunk Nation Supreme Court (hereinafter HCN Supreme Court) later noted its acceptance of this Court's
adoption of the doctrine of laches. *HCN Gaming Comm'n v. Wallace Johnson*, SU 98-05 (HCN S. Ct., Oct. 21,
1998). Unfortunately, despite the obvious application of a statute of limitation, the *Wallace* Court needlessly
included a discussion of laches, stating that "[t]he interlocutory appeal . . . is **REVERSED** according to the doctrine
of laches enacted by the HCN Legislature Resolution 2/20/96B, HCN law." *Id.* at 3 (citing HCN GAMING
ORDINANCE, § 1101(c)(i) (imposing a forty-five (45) day deadline to file an initial pleading)) (emphasis in original).
In fact, legislative bodies do not *enact* such doctrines, but may possibly choose to *codify* the defense. The Court,
however, cannot envision a circumstance where laches would bar a suit after the passage of a month and a half. The
HCN Supreme Court cited Trial Court decisions that appeared to lend credence to this manner of analysis, noting

1 presented absolutely no allegations of prejudice. Moreover, the defendants' request for summary
2 judgment belies any claim of prejudice capable of substantiating the assertion of a doctrine of
3 laches defense. The factual information upon which this case rests is easily ascertainable despite
4 the defendants' penchant for supplying ambiguous discovery responses.
5

6 Having dispensed with the proffered defenses, the Court will now consider the plaintiff's
7 substantive claims. As stated above, the Court renders this decision on the basis of statutory
8 analysis, preserving the opportunity to address the constitutional issues in the future. The Court
9 limits its opinion to an examination of a single legislative resolution, and will offer direction
10 concerning the procedure for resolving the remaining issues.
11

12 On August 18, 1998, the Legislature passed a resolution for the purpose of erecting "a
13 condition for eligibility to receive home ownership assistance."⁶ HCN LEG. RES. 08-18-98B at
14 2. Specifically, "any applicant whose Home Ownership application was not approved prior to
15 July 1, 1998, must have been enrolled for five years prior to the commencement of the fiscal year
16 in which the approval of such applicant's file is considered" *Id.* The Legislature
17 emphasized " that participation in the Home Ownership Program and in other Programs of the
18 Housing Department are [*sic*] not an entitlement, and that the establishment of eligibility criteria
19 for such programs is within the authority of the Legislature." *Id.*; *see also* CONST., ART. V, §
20 2(a). Finally, the Legislature stressed "that nothing contained elsewhere in the statutes and
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24 that "[t]he Trial Court's own precedent case[s] followed the doctrine of laches" *Wallace*, SU 98-05 at 2 (citing
25 *Lance Meronek v. Ho-Chunk Nation et al.*, CV 98-15 (HCN Tr. Ct., July 17, 1998) and *Jaqueline R. Nichols v.*
26 *Randy Snowball*, CV 97-167 (HCN Tr. Ct., Apr. 15, 1998) (employing laches to dismiss suits where the plaintiffs
27 failed to timely file initial administrative grievances within five (5) days of the cause of action)). Each trial level
28 opinion should have more appropriately centered upon the defenses of sovereign immunity and failure to exhaust
administrative remedies, and not laches or even a statute of limitation. *See Kenneth L. Twin v. Toni McDonald et*
al., CV 04-27 (HCN Tr. Ct., Nov. 12, 2004); *Twin*, CV 03-88. Additionally, the HCN Supreme Court subsequently
confirmed that Trial Court case law does not possess any precedential authority. *Jacob LoneTree et al. v. Robert*
Funmaker, Jr. et al., SU 00-16 (HCN Tr. Ct., Mar. 16, 2001) at 4.

⁶ The Legislature has since codified the substance of the resolution in statutory form. HOME OWNERSHIP & BENEFIT
HOUS. PROGRAM FOR THE GEN. WELFARE OF ELDERS ACT (hereinafter ELDER HOUSING ACT), 8 HCC § 7.7i, 8c(1).

1 ordinances of the Nation shall be interpreted to limit the effect of the foregoing resolutions."

2 HCN LEG. RES. 08-18-98B at 2.

3
4 The Court agrees with the legislative characterization of home ownership assistance. The
5 Ho-Chunk Nation may only afford such assistance when financially capable of doing so,
6 negating any designation as an entitlement. Yet, this noted agreement does not resolve the
7 dispute since "[a]ll rights, benefits, privileges, and immunities of Membership shall take effect
8 immediately upon timely approval of an application by the Office of Tribal Enrollment[.]" and
9 the plaintiff became enrolled on July 22, 1996. TRIBAL ENROLLMENT & MEMBERSHIP ACT OF
10 1995 (hereinafter MEMBERSHIP ACT), § 6(e). The Court must unsurprisingly designate the
11 possible receipt of a minimum \$100,000.00 housing grant as a benefit. See ELDER HOUSING
12 ACT, § 7.2e (describing housing assistance as a benefit).

13
14 Therefore, the Legislature violated the plaintiff's right to full and equal enjoyment of the
15 benefits associated with tribal enrollment. To be sure, perhaps not every affected adult member
16 would have received the entitlement, but HCN LEG. RES. 08-18-98B erects an absolute bar
17 against consideration and possible approval for a period of five (5) years regardless of one's
18 eligibility. The plaintiff would have received the entitlement but for the five (5) year restriction,
19 which runs afoul of the guarantee conferred by the MEMBERSHIP ACT.

20
21 The Legislature attempted to guard against this possibility by declaring the supremacy of
22 the resolution within the body of the text. However, the Legislature could not modify the
23 protections afforded by the MEMBERSHIP ACT without complying with the dictates of the former
24 BILL PROCESS rules. For example, the rules required that the Legislature present the amendment
25 in bill format and publish for public comment. BILL PROCESS, § 2. The Legislature did not
26
27
28

1 satisfy these or other procedural or substantive requisites.⁷ Furthermore, the Legislature may not
2 constitutionally elevate a resolution above a statute due to the recognized hierarchy of laws.
3
4 CONST., ART. XI, §§ 1-2.

5 Consequently, the Court could have entered appropriate injunctive relief had the plaintiff
6 filed his suit during the period of time from August 18, 1998 to August 5, 2003. The plaintiff,
7 however, initiated his cause of action on August 14, 2003. As of August 6, 2003, the state of the
8 law changed with the introduction of the "Elder Point Criteria." HCN LEG. RES. 08-06-03A.
9 Due to the presence of sovereign immunity, the Court may not award retroactive injunctive relief
10 against an official or employee.
11

12 The granting of such relief would constitute compensation for a past statutory violation,
13 which directly equates with a legal claim for monetary damages. The Court may not consider
14 this option due to the absence of any express waiver of sovereign immunity from suit. CONST.,
15 ART. XII, § 1. The U.S. Supreme Court has "refused to extend the reasoning of [*Ex Parte*]
16 *Young* . . . to claims for retroactive relief," and this Court joins in this refusal. *Green v.*
17 *Mansour*, 474 U.S. 64, 68 (1985). A court cannot enjoin the occurrence of a past action, and
18 simply identifying the manner of relief as equitable is both disingenuous and of no consequence.
19 *Edelman v. Jordan*, 415 U.S. 651, 666 (1974). The distinction between retroactive and
20 prospective relief proves vitally important when adjudging a suit in equity. *Quern v. Jordan*, 440
21 U.S. 332, 337 (1979).
22

23
24 The Court must consider the plaintiff's claims under the current status of the law.
25 Unfortunately, the Court cannot continue its analysis without a further disclosure of relevant
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27
28 ⁷ The HCN Supreme Court previously stated that it "supports the 'Bill Process Act' as it reassures the Ho-Chunk
Nation tribal members that the Legislative body cannot pass bills into law without public input, for or against it [*sic*],
prior to any legislative enactment." *HCN Election Bd. et al. v. Aurelia L. Hopinkah*, SU 98-08 (HCN S. Ct., Apr. 7,

1 facts. The Court, therefore, reopens the discovery period as opposed to proceeding to trial. The
2 Court maintains discretion to enter such a ruling. *See Regina K. Baldwin et al. v. Ho-Chunk*
3 *Nation et al.*, SU 02-01 (HCN S. Ct., Feb. 15, 2002) (confirming that the Court possesses
4 authority to extend discovery for the purpose of rendering a final judgment).
5

6 The Court foresees the necessity of performing a two-fold inquiry. First, the Court must
7 determine whether the practical effect of the "Elder Point Criteria" is to absolutely bar the
8 plaintiff from housing assistance, thereby violating the MEMBERSHIP ACT in the same manner as
9 detailed above.⁸ The ELDER HOUSING ACT recognizes that "[t]he mortality rate of Ho-Chunk
10 Elders is such that, using an age of sixty (60) years to qualify as an Elder, many Elders will not
11 live long enough to fully enjoy the benefits of the Nation's Elder housing programs." ELDER
12 HOUSING ACT, § 7.2e. Consequently, does the "Elder Point Criteria" act to deny the plaintiff, an
13 elite elder, any reasonable hope of securing assistance based upon the number of younger
14 applicants, elder and soon-to-be elders, with a greater accumulation of points due to length of
15 enrollment? *Id.*, § 7.6. The Court will presume that the Legislature adopted the "Elder Point
16 Criteria" in response to the existing and reasonably foreseeable fiscal environment.
17
18

19 The plaintiff must deliver discovery requests to the defendants on or before Friday,
20 February 25, 2005. The defendants must provide timely and forthright responses within twenty-
21 five (25) calendar days of receipt. The parties may request an extension of the timeframes upon
22 a showing of good cause.
23

24 Second, if the "Elder Point Criteria" does not constitute an absolute bar, then the Court
25 must determine the constitutionality of the same. The CONSTITUTION reflects the People's
26

27 1999) at 5.

28 ⁸ The Court has attempted to read the MEMBERSHIP ACT and the ELDER HOUSING ACT in *pari materia*, but cannot
reconcile the relevant statutory mandates of the respective laws. *See Theresa Lynn Hendrickson v. HCN Office of*

1 resolute intention of sustaining and promoting tradition and culture, including the respect and
2 reverence due tribal elders. CONST., pmbL., ART. V, § 2(r); *see also* ELDER PROTECTION ACT OF
3 2001, 4 HCC § 1.2. The Legislature adopted the "Elder Point Criteria" without articulating any
4 justification for its existence, and the criteria undeniably discriminates against recent elder
5 enrollees.
6

7 The parties must provide legal memoranda to the Court on or before Friday, April 8,
8 2005, addressing the outstanding constitutional and statutory issues. In arguing whether the
9 noted discrimination constitutes a violation of equal protection, the parties should answer, at a
10 minimum, the following questions: 1) what level of constitutional scrutiny should the Court
11 employ in its examination of the "Elder Point Criteria;" 2) what justification exists for the "Elder
12 Point Criteria;" 3) should the Court accept a *post hoc* justification; 4) how does the "Elder Point
13 Criteria" aid in accomplishing the identified goals of the ELDER HOUSING ACT, specifically the
14 goal of "ensur[ing] th[at] Tribal Elders with the greatest need are served the earliest," ELDER
15 HOUSING ACT, § 7.5a; and 5) how does the "Elder Point Criteria" comport with HCN LEG. RES.
16 11-07-95D? The parties may likewise request an extension of the timeframe upon a showing of
17 good cause.
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19
20

21 **IT IS SO ORDERED** this 11th day of February 2005, by the Ho-Chunk Nation Trial
22 Court located in Black River Falls, WI within the sovereign lands of the Ho-Chunk Nation.
23

24
25 _____
26 Honorable Todd R. Matha
27 Associate Trial Court Judge
28

Tribal Enrollment, SU 02-06 (HCN S. Ct., Mar. 21, 2003) at 2-3, 7-8.

