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

Dennis M. Funmaker, Sr.,
Plaintiff,

v.

Case No.: **CV 05-40**

**Ho-Chunk Nation Election Board: Mary
Ellen Dumas et al. and Jo Deen B. Lowe,**
Defendants.

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**ORDER
(Final Judgment)**

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INTRODUCTION

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The Court must determine whether to grant the plaintiff's request for relief. After careful examination of the issues, the Court deems that it must act in conformance with both constitutional and statutory requirements while attempting to abide by case precedent. Such an examination yields only a single rational result as discussed below.

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PROCEDURAL HISTORY

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The Court recounts the procedural history in significant detail in an earlier decision. *Order (Preliminary Determinations)*, CV 05-40 (HCN Tr. Ct., May 13, 2005) at 1-2. For purposes of this decision, the Court notes that recently joined defendant, Associate Justice Jo Deen B. Lowe, filed several documents on May 19, 2005, including: *Answer and Counterclaim*, *Motion for Discovery*, *Witness List*, and *Motion to Dismiss* and *Motion for Summary Judgment on Counterclaim and Cross Claim* accompanied by the requisite affidavit and brief, respectively.

1 See *Ho-Chunk Nation Rules of Civil Procedure* (hereinafter *HCN R. Civ. P.*), Rule 18. In
2 response, the Court entered its May 20, 2005 *Order (Granting Motion for Discovery)*.

3 The institutional defendants responded to the discovery request on May 20, 2005, and
4 also filed the *Defendants' Memorandum of Law*. The Court convened *Trial* on May 23, 2005 at
5 10:00 a.m. CDT. The following parties appeared at *Trial*: Dennis M. Funmaker, Sr., plaintiff;
6 Mary Ellen Dumas, defendants' representative; Ho-Chunk Nation Department of Justice
7 Attorney Michael P. Murphy, defendants' counsel; and Associate Justice Jo Deen B. Lowe,
8 defendant.
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11 **APPLICABLE LAW**

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

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

14 **Sec. 4. Supremacy Clause.** This Constitution shall be the supreme law over the territory
15 and within the jurisdiction of the Ho-Chunk Nation.

16 **Art. V - Legislature**

17 **Sec. 3. Codes.** The Legislature shall adopt Codes governing Membership, Open
18 Meetings, Elections, Ethics including conflicts of interest, nepotism, and the conduct of all
19 elected and appointed officials and employees, and other Codes as deemed necessary.

20 **Sec. 6. Terms of Office.** Members of the Legislature shall serve four (4) year terms
21 which shall be staggered. Legislators shall represent their respective Districts until their
22 successors have been sworn into office except if the Legislator has been successfully removed or
23 recalled in accordance with this Constitution. Members of the Legislature shall be elected by a
24 majority of the eligible voters from their respective Districts.

25 **Art. VI - Executive**

26 **Sec. 5. Term of Office.** The President shall serve four (4) year terms. The President
27 shall serve until a successor has been sworn into office. The President shall be elected by a
28 majority of the eligible voters of the Ho-Chunk Nation.

1 Art. VII - Judiciary

2 Sec. 5. Jurisdiction of the Judiciary.

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

8 Sec. 6. Powers of the Tribal Court.

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

12 Sec. 8. Qualifications.

13 (b) Associate Justices of the Supreme Court shall have been admitted to practice
14 before the Ho-Chunk Courts, and shall possess all qualifications required by enactment of the
15 Legislature. No person convicted of a felony shall serve as an Associate Justice of the Supreme
16 Courts unless pardoned.

16 Sec. 9. Terms of Office. The Chief Justice of the Supreme Court shall be elected to serve
17 for six (6) years and until such time as an election is held and a successor has been sworn into
18 office. At the first election for positions on the Supreme Court, the candidate receiving the
19 highest number of votes for the position of Associate Justice shall serve a four year term; the
20 candidate receiving the second highest number of votes shall serve a two year term. Thereafter,
21 Associate Justices shall serve for four (4) year staggered terms. A Supreme Court Justice shall
22 serve until a successor has been sworn into office. The Chief Judge and any Associate Judges of
23 the Trial Court shall be appointed by the Legislature to serve for three (3) year staggered terms
24 and until their successors have been sworn into office.

22 Sec. 10. Election of Supreme Court Justices. Supreme Court Justices shall be elected by a
23 majority of the eligible voters of the Ho-Chunk Nation, in accordance with the General Election
24 provisions of Article VIII, Section 1, unless otherwise provided.

25 Art. VIII - Elections

26 Sec. 1. General Elections. General Elections shall be held on the first Tuesday in June of
27 odd numbered years. Offices of the Legislature, Executive, and Judiciary shall be filled at
28 General Elections.

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

4 Sec. 7. Challenges of Election Results. Any member of the Ho-Chunk Nation may
5 challenge the results of any election by filing suit in Tribal Court within ten (10) days after the
6 Election Board certifies the election results. The Tribal Court shall hear and decide a challenge
7 to any election within twenty (20) days after the challenge is filed in Tribal Court.

8 HO-CHUNK NATION ELECTION ORDINANCE, 2 HCC § 6 (amended Nov. 19, 2002)

9 Subsec. 1. Authority.

10 c. Article V, Section 6 of the Constitution requires that members of the Legislature
11 shall be elected by a majority vote of the eligible voters from their respective Districts.

12 d. Article VI, Section 5 of the Constitution requires that the President shall be
13 elected by a majority vote of eligible voters of the Ho-Chunk Nation.

14 e. Article VII, Section 10 of the Constitution requires that Supreme Court Justices
15 shall be elected by a majority vote of the eligible voters of the Ho-Chunk Nation, in accordance
16 with General Election provisions in Article VIII, Section 1, unless otherwise provided.

17 Subsec. 3. Elections. The Constitution prescribes two (2) types of elections: General
18 Elections and Special Elections. When three (3) or more candidates run for a seat in a General or
19 Special Election, there shall be a Primary Election and, if required, a Runoff Election as
20 described in paragraph c, below.

21 a. General Elections. General Elections shall be held in accordance with Article
22 VIII, Section 1 of the Constitution which states:

23 *Sec. 1. General Elections. General Elections shall be held on the first
24 Tuesday in June of odd numbered years. Offices of the Legislature, Executive, and
25 Judiciary shall be filled at General Elections.*

26 b. Special Elections. Special Elections shall refer to all elections other than the
27 General Election including, but not limited to Redistricting/Reapportionment Elections, Recall
28 Elections, and elections to fill vacancies in the Legislature, Judiciary, and the Office of President.
Special Elections shall be held in accordance with Article VIII, Section 2 of the Constitution,
which states:

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

c. Primary Elections and Runoff Elections.

1 (1) Primary Elections shall be held prior to an Election with three (3) or more
2 candidates in order to ensure compliance with the majority vote requirement as provided
3 for in paragraphs 1c through 1e, above.

4 (2) If no candidate in any Primary Election receives more than 50% of the
5 votes cast in such Election, the two candidates with the highest vote totals from the
6 Primary Election (and any candidate(s) tied with the lower of such totals) shall appear on
7 the ballot in the Runoff Election. When there are two (2) seats vacant in a district, the
8 top two (2) vote getters for any vacant seats, if no candidate has received 50%+ 1 vote,
9 shall be on the ballot for the General Election or Runoff Election.

10 Subsec. 7. Notice of Election.

11 a. The Election Board shall post an Official Notice of Election in the ten (10)
12 Polling Places and any other appropriate locations at least ninety (90) calendar days before the
13 election, except that a Notice of Special Election shall be published in the Hocak Worak
14 Newsletter as early as practicable before a Special Election but not less than fifteen (15) calendar
15 days before such Special Election.

16 Subsec. 10. Official Ballots.

17 c. Voters shall be permitted to write-in candidates on Primary Election Ballots only,
18 including Absentee Ballots for a Primary Election. Write-in candidates shall not be allowed on
19 any Runoff Election Ballot.

20 Subsec. 15. Challenges to the Election Results.

21 a. The results of an election may be challenged in accordance with Article VIII,
22 Section 7 of the Constitution, which states:

23 *Sec. 7. Challenges of Election Results. Any member of the Ho-Chunk
24 Nation may challenge the results of any election by filing suit in Trial [sic] Court within
25 ten (10) days after the Election Board certifies the election results. The Trial [sic] Court
26 shall hear and decide a challenge to any election within twenty (20) days after the
27 challenge is filed in Trial [sic] Court.*

28 b. The person challenging the election results shall prove by clear and convincing
evidence that the Election Board violated this Election Ordinance or otherwise conducted an
unfair election, and that the outcome of the election would have been different but for the
violation. If the Court finds the challenge is frivolous and/or wholly without merit, the party
challenging shall be assessed costs of the action in an amount to equal five hundred dollars
(\$500.00).

Subsec. 22. Interpretation and Application of Ordinance by Election Board. The Election
Board shall not possess any substantive rule making authority, but shall retain the ability to

1 interpret and apply the Ordinance unless such interpretation or application is found by the Trial
2 Court to be contrary to the Constitution and laws of the Nation.

3 HO-CHUNK NATION RULES OF CIVIL PROCEDURE

4 Ch. III - General Rules for Pleading

5 Rule 18. Types of Motions.

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

11 Ch. IX - Special Rules for Election Challenges

12 Rule 80. Appeals.

13 (A) Appeals. The final judgment of the Trial Court is appealable to the Ho-Chunk Nation
14 Supreme Court. The Appellant and/or Appellee may obtain a copy of the trial transcript at their
15 own expense.

16 (1) The Notice of Appeal shall be filed and served within three (3) calendar days of entry
17 of the judgment.

18 (2) The Notice of Appeal must state a basis for appeal based upon the laws and/or
19 Constitution of the Ho-Chunk Nation.

20 (3) A *Certificate of Service* and fifty dollar (\$50.00) filing fee must accompany the
21 Notice of Appeal.

21 FEDERAL RULES OF EVIDENCE

22 Rule 1002. Requirement of Original.

23 To prove the content of a writing, recording, or photograph, the original writing,
24 recording, or photograph is required, except as otherwise provided in these rules or by Act of
25 Congress.

26 Rule 1003. Admissibility of Duplicates.

27 A duplicate is admissible to the same extent as an original unless (1) a genuine question
28 is raised as to the authenticity of the original or (2) in the circumstances it would be unfair to
admit the duplicate in lieu of the original.

1 Rule 1005. Public Records.

2 The contents of an official record, or of a document authorized to be recorded or filed and
3 actually recorded or filed, including data compilations in any form, if otherwise admissible, may
4 be proved by copy, certified as correct in accordance with rule 902 or testified to be correct by a
5 witness who has compared it with the original. If a copy which complies with the foregoing
6 cannot be obtained by the exercise of reasonable diligence, then other evidence of the contents
7 may be given.

8 **RELEVANT LAW**

9 **CONSTITUTION AND BYLAWS OF THE WISCONSIN WINNEBAGO NATION**

10 Art. V - Nominations and Elections

11 Sec. 3. For the purposes of the first election of the Black River Falls Area, consisting of
12 Clark, Eau Claire and Jackson counties, shall elect three members to the business committee; the
13 Wisconsin Dells Area, consisting of Wood, Juneau, Adams, Columbia, and Sauk counties, shall
14 elect three members to the business committee; the La Crosse-Tomah Area, consisting of La
15 Crosse, Monroe, Vernon and Crawford counties, shall elect one member to the business
16 committee; the Wittenberg area, consisting of Marathon and Shawano counties, shall elect one
17 member to the business committee; and three members will be elected at large from outside of
18 the above areas to the business committee; thereafter, 2/3 of the membership shall be elected
19 from these areas and 1/3 shall be elected at large. The area elected members shall represent their
20 respective areas until their successors have been installed.

21 Sec. 5. For the purpose of the first election the two members elected to the business
22 committee receiving the least number of votes from the Black River Falls Area, the two members
23 election receiving the least number of votes from the Wisconsin Dells Area, the two at large
24 representatives receiving the least number of votes shall be elected for a two year term. All other
25 members elected to the business committee shall be elected for a four-year term. Thereafter, the
26 term of office for all members shall be four (4) years, or until their successors have been
27 installed.

28 Sec. 6. The chairman of the business committee shall be elected at large and shall serve
for a four (4) year term, or until his successor has been installed.

HO-CHUNK NATION ELECTION ORDINANCE, 12 HCO §§ 1.01-9.01 (amended Jan. 19,
1999)

26 Sec. 2.01. Elections.

27 (a) Types of Elections. There shall be two (2) types of elections: General Elections
28 and Special Elections.

1 (b) General Elections. General Elections shall be held in accordance with Article
2 VIII, Section 1 of the Constitution which states:

3 *Sec. 1. General Elections. General Elections shall be held on the first*
4 *Tuesday in June of odd numbered years. Offices of the Legislature, Executive, and*
5 *Judiciary shall be filled at General Elections.*

6 (c) Special Elections. Special Elections shall refer to all elections other than the
7 General Election including, but not limited to, Primary Elections, Redistricting/Reapportionment
8 Elections, Runoff Elections, Recall Elections, and Elections to fill vacancies in the Legislature,
9 Judiciary and Office of the President. Special Elections shall be held in accordance with Article
10 VIII, Section 2 of the Constitution which states:

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

14 (1) Primary Elections shall be held prior to the General Election in order to
15 ensure compliance with the majority vote requirement in Article V, Section 6, Article VI,
16 Section 5, and Article VII, Section 10 of the Constitution.

17 (2) The two candidates with the highest vote totals from the Primary Election
18 shall appear on the ballot in the General Election. When there are two seats vacant in a
19 district, the four candidates with the highest number of votes shall appear on the ballot in
20 the General Election with the first and third candidate with the highest votes appearing on
21 the ballot for one seat and the second and fourth candidate with the highest votes
22 appearing on the ballot for the other seat.

23 FINDINGS OF FACT

24 1. The parties received proper notice of the May 23, 2005 *Trial*.

25 2. The plaintiff, Dennis M. Funmaker, Sr., is an enrolled member of the Ho-Chunk Nation,
26 Tribal ID# 439A000849, and maintains a mailing address of P.O. Box 322, Wisconsin Dells, WI
27 53965.

28 3. The defendant, Ho-Chunk Nation Election Board (hereinafter Election Board), is a
constitutionally established entity, and maintains an address of 4 East Main Street, Black River
Falls, WI 54615. CONSTITUTION OF THE HO-CHUNK NATION (hereinafter CONSTITUTION), ART.

1 VIII, § 4. The defendant, Mary Ellen Dumas, is the Election Board Chairperson, and an enrolled
2 member of the Ho-Chunk Nation, Tribal ID# 439A002156.

3 4. The defendant, Associate Justice Jo Deen B. Lowe, is an enrolled member of the Ho-
4 Chunk Nation, Tribal ID# 439A001601, and maintains an address of N5710 Highway 12-16,
5 New Lisbon, WI 53950.
6

7 5. On April 23, 2005, the Election Board conducted the General Primary Election, which
8 included an open seat for Associate Justice of the Ho-Chunk Nation Supreme Court (hereinafter
9 Supreme Court). The plaintiff received 421 votes out of a total of 813 votes cast, amounting to
10 51.7835% of the tabulated votes. Incumbent Associate Justice Lowe received 383 votes,
11 amounting to 47.1095% of the tabulated votes. Nine (9) votes were cast for write-in candidates,
12 amounting to 1.1070% of the tabulated votes. *Compl.*, Attach. 2.
13

14 6. On April 24, 2005, the Election Board certified the plaintiff and Associate Justice Lowe
15 as candidates in the scheduled June 7, 2005 General Run-off Election by unanimous vote. *Def.'s*
16 *Answer*, Attach. A at 2.
17

18 7. On January 10, 2002, the Administration Committee of the Ho-Chunk Nation Legislature
19 (hereinafter Legislature) purportedly revised the Associate Justice job description. The
20 committee minutes reveal the following:
21

22 **Associate Justice of the Supreme Court Job Description:**

23 **MOTION by Rep. S. Whiterabbit** to approve the Associate Justice of the
24 Supreme Court Job Description as presented. Second by Rep. Romano.
25 3-0-0. **MOTION CARRIED.**

26 *HCN Leg. Admin. Comm. Mins. 01-10-02* at 2 (emphasis in original). The full legislative body
27 subsequently ratified the committee action. *HCN Leg. Mins. 01-24-02* at 2. The Ho-Chunk
28 Nation Department of Personnel maintains three (3) different job descriptions for Associate
Justice, two (2) of which indicate legislative approval of January 24, 2002. *Def.'s Ex. 1-3.*

1 These two (2) job descriptions differ in that one includes the minimum qualification of a law
2 degree, and the other only notes that a "[l]aw degree [is] desired, but not required" Def.'s
3 Ex. 2. Neither the recorded minutes of the January 10, 2002 Administration Committee meeting
4 nor proffered testimony could shed additional light on the discrepancy. *See* FED. R. EVID. 1002-
5 03, 1005.¹

7 8. The plaintiff does not possess a *juris doctor* degree from an accredited academic
8 institution.

11 DECISION

12 This case signifies the continuation, but perhaps not culmination, of a legal examination
13 that began with the first cases filed in the fledgling Ho-Chunk Nation Judiciary nearly ten (10)
14 years ago. In 1995, the Court determined that the Election Board could not administer the oath
15 of office to presumed winners of the June 6, 1995 General Election since several presidential and
16 legislative candidates did not achieve a majority vote (fifty percent plus one (50% + 1)) in the
17 single election format.² *See, e.g., Jo Ann Jones v. HCN Election Bd. et al.*, CV 95-05 (HCN Tr.
18 Ct., July 6, 1995) at 5-6, *aff'd*, SU 95-05 (HCN S. Ct., Aug. 15, 1995) at 3-4; *see also* CONST.,
19 ARTS. V, § 6, VI, § 5.³ The predecessor constitutional provisions required a mere plurality of
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22 ¹ The Supreme Court adopted the FEDERAL RULES OF EVIDENCE for usage in all tribal judicial proceedings. *In re*
23 *Adoption of Fed. R. Evid.* (HCN S. Ct., June 5, 1999).

24 ² The Court declined to enjoin the swearing-in ceremony of Chief Justice-elect Mary Jo Brooks Hunter and District
25 III Legislator-elect Dallas R. Whitewing due to the absence of any such request, likely because each individual had
obtained a majority vote in the General Election. *Joyce Warner et al. v. HCN Election Bd.*, CV 03-06, -09-10 (HCN
Tr. Ct., July 3, 199%) at 14.

26 ³ The Court did not apply the majority vote provision to the Associate Justice races since the CONSTITUTION directly
27 addresses the manner by which Associate Justices should be elected in the first General Election under the recently
28 adopted CONSTITUTION. *Dennis Funmaker et al. v. HCN Election Bd.*, CV 95-09 (HCN Tr. Ct., July 7, 1995) at 2-3;
see also CONST., ART. VII, § 9. The Court deemed that Section 10 permitted a one-time exception to the majority
vote provision, and that said provision accommodated the Section 9 framework by internal reference, *i.e.*, addition
of the phrase "unless otherwise provided," which does not appear in the presidential or legislative Term of Office
sections. CONST., ART. VII § 10. The Court explained:

[t]his Court holds that the phrase "unless otherwise provided" in Art. VII, Section 10 of the

1 votes to elect a business committee member. CONST. & BYLAWS OF WIS. WINNEBAGO NATION,
2 ART. V, §§ 3-6.

3
4 Consequently, the Court ordered the affected individuals to participate in a run-off
5 election held on August 15, 1995. *See, e.g., Jones*, CV 95-05 at 6. The Supreme Court
6 sanctioned the Court's fashioning of relief, which it found specifically contemplated by the
7 CONSTITUTION. The *Jones* Court explained:

8 [b]ased upon the lower court's ruling that a run-off election is the remedy
9 to the contested election, this Court holds that such a remedy is within the
10 power of the judiciary. Article VII, Section 6 of the Constitution states
11 that "[T]he [*sic*] Trial Court shall have the power to issue all remedies in
12 law . . ." [*sic*] In so doing, the Trial Court ruled that the first election be
considered as the primary election and ordered the run-off election to
achieve the majority vote.

13 Article VIII, Section 2 also states "Special Elections shall be held when
14 called for . . ." by this Constitution. [*sic*] This provision states that the
15 judiciary has the authority to call a special run-off election as remedy to
the current election dispute.

16 *Jones*, SU 95-05 at 5-6. As a result, the Legislature amended the election code prior to the 1997
17 General Election to reflect the judicially created bifurcated format. HCN ELECTION ORDINANCE,
18 § 2.01(c).

19
20 The Judiciary later reasserted its constitutional authority to order a special run-off
21 election. In 1997, the Court extended the majority vote requirement to include special elections
22 *Robert A. Mudd v. HCN Election Bd.*, CV 97-129 (HCN Tr. Ct., Oct. 3, 1997), *aff'd*, SU 97-05
23

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25
26 Constitution of the Ho-Chunk Nation refers specifically to Section 9 for this first election, and
27 means that the majority vote requirement does not apply to the election held June 6, 1995[,] for
28 the position of Associate Justices of the Ho-Chunk Nation Supreme Court. For this election only,
the Constitution provides that the two highest vote getters will be seated in the four and two year
terms, respectively, without a requirement that they receive a majority of the votes cast. In future
elections for the Associate Justice positions, a majority vote will be required pursuant to the
language of Art. VII, Section 10.

Funmaker, CV 95-09 at 2-3.

1 (HCN S. Ct., Oct. 28, 1997).⁴ In doing so, the Court “order[ed] that a run-off election be held
2 pursuant to the ‘majority vote’ requirement of the HCN Constitution, Art. V, § 6 between the top
3 two vote getters of the September 13, 1997 Special Election.” *Mudd*, CV 97-129 at 10. Again,
4 the Supreme Court upheld the decision below, indicating that

6 [a]ctions of the Trial Court which are prescribed by the Constitution are
7 addressed in Article VII, Section 6(a), which states: “... [sic] The Trial
8 Court shall have the power to issue all remedies in law and in equity...”
9 [sic] (emphasis added). . . . [T]he Trial Court has fashioned an equitable
10 remedy to allow for all classes of constituents to select their elected
11 representatives by the same mode of procedure. Here, the remedy
fashioned in equity by the Trial Court to uphold the notion of fairness was
to order a run-off election based upon the Constitutional powers of the
Trial Court.

12 *Mudd*, SU 97-05 at 5.⁵

13 Subsequent judicial decisions and legislative modifications have derived from these
14 seminal opinions, each addressing unresolved peripheral questions to the ongoing central debate.
15 The Court shall examine the evolution of the law as concerns the majority vote principle, and
16 determine the applicable law to the current set of facts. The Court shall conclude by offering a
17 candid assessment of its final judgment.
18

19 **I. HO-CHUNK NATION ELECTION ORDINANCE, 12 HCO § 2.01(c)**

20 As stated above, the Legislature amended the Special Election subsection in an effort to
21 codify the judicial decisions rendered in the 1995 consolidated election challenge cases. The
22 Legislature distinguished between general and special elections by designating only the
23

24
25 ⁴ No candidate had received a majority vote in the Special Primary Election, thereby necessitating the Special Run-
26 off Election. *Mudd*, CV 97-129 at 3. The Court later entertained a special election case where an Associate Justice
27 candidate received the requisite majority vote in the primary election. The Court enjoined the holding of a run-off
election since the CONSTITUTION did not mandate the occurrence of the run-off on a date certain as distinguished
from general elections. *Todd R. Matha v. HCN Election Bd. Chairperson, Vaughn Pettibone, et al.*, CV 02-34
(HCN Tr. Ct., Apr. 12, 2002); *see also* CONST., ART. VIII, § 1.

28 ⁵ The Court emphasizes the equitable nature of this injunctive form of relief despite the earlier reference to its legal
character. *See generally Ronald K. Kirkwood v. Francis Decorah, in his official capacity as Dir. of HCN Hous.*
Dep't, et al., CV 04-33 (HCN Tr. Ct., Feb. 11, 2005) at 14-17; *see also* CONST., ART. VII, § 6(a).

1 constitutionally mandated election that occurs in odd years on the first Tuesday in June as a
2 general election, or rather "the General Election." HCN ELECTION ORDINANCE, § 2.01(c); *see*
3 *also* CONST., ART. VIII, § 1. The Legislature did not elevate the judicially constructed general
4 primary election to General Election status, presumably due to its implicit, as opposed to
5 explicit, constitutional foundation. Specifically, the Legislature declared that "Special Elections
6 shall refer to all elections other than the General Election including, but no limited to, Primary
7 Elections" HCN ELECTION ORDINANCE, § 2.01(c).

9 The Legislature required the holding of primary elections "prior to the General Election
10 in order to ensure compliance with the majority vote requirement." *Id.*, § 2.01(c)(1). The
11 Legislature did not emphatically state the consequence of a candidate receiving a majority vote
12 in a special primary election convened in conjunction with the General Election. Instead, the
13 HCN ELECTION ORDINANCE noted the following:
14

15 [t]he two candidates with the highest vote totals from the Primary Election
16 shall appear on the ballot in the General Election. When there are two
17 seats vacant in a district, the four candidates with the highest number of
18 votes shall appear on the ballot in the General Election with the first and
19 third candidate with the highest votes appearing on the ballot for one seat
20 and the second and fourth candidate with the highest votes appearing on
21 the ballot for the other seat.

22 *Id.*, § 2.01(c)(2). This perceived omission led to the Election Board's errant declaration of a
23 winner in a primary election as detailed below. Also, limiting the association of primary
24 elections with the General Election gave rise to the dispute at issue in *Mudd*.

25 **II. *Debra C. Greengrass v. HCN Election Bd.*, SU 99-03 (HCN S.
26 Ct., June 30, 1999)**

27 The Election Board declared Joan Greendeer-Lee winner of the Associate Justice race as
28 a result of her receipt of a majority vote in the April 3, 1999 Primary Election held in
anticipation of the June 1, 1999 General Election. Incumbent Associate Justice Greengrass, the

1 second place finisher, challenged this action, arguing that the CONSTITUTION required the top two
2 (2) vote recipients to proceed to the General Election. In resolving the dispute, the Supreme
3 Court began by ruling that "[t]he Constitution is clear that the election of Supreme Court Justices
4 shall take place on the first Tuesday of June in odd-numbered years." *Greengrass*, SU 99-03 at 2
5 (citing CONST., ART. VIII, § 1).

6
7 Consequently, the Supreme Court explained that "[n]either this Court nor the Legislature
8 has the constitutional authority to modify that requirement." *Id.* The Supreme Court determined
9 that the HCN ELECTION ORDINANCE definitively resolved the issue by requiring that "[t]he two
10 candidates with the highest vote totals from the Primary Election *shall appear* on the ballot in the
11 General Election." *Id.* (quoting HCN ELECTION ORDINANCE, § 2.01(c)(2)) (emphasis added).
12 The above provision absolutely requires the top two (2) vote recipients to appear in the General
13 Election, regardless of whether one receives a majority vote.
14

15
16 The appellant persuaded the *Greengrass* Court to accept its proposition that the
17 constitutional reference to a General Election implicitly acknowledges a process including
18 primary and run-off components, but the Supreme Court responded by stating that "the
19 Legislature has made it clear that the General Election process does not include the Primary
20 Election." *Id.* at 2-3 (citing HCN ELECTION ORDINANCE, § 2.01(c)). At this point, the Supreme
21 Court returned to its supremacy argument, noting that "any act undertaken by any governmental
22 branch or governmental agent contrary to the Constitution is thereby void." *Id.* at 3 (citing
23 CONST., ART. III, § 4). The Supreme Court continued: "[f]or the Appellant to equate the
24 Primary Election with the General Election and declare a winner upon a majority vote *is*
25 *contrary to the Constitution* and a mistaken application of the Code." *Id.* (emphasis added).
26
27
28

1 Nowhere in its opinion did the Supreme Court state that a mere amendment to the
2 election code could serve to validate a similar future action by the Election Board. The
3 *Greengrass* Court referred to the HCN ELECTION ORDINANCE in order to demonstrate the
4 conformity of the statute. The Supreme Court based its decision on the application of the
5 CONSTITUTION to the given facts, and the election code violation was a secondary concern. Quite
6 simply, the election of the Associate Justice needed to occur on the date set forth for the General
7 Election in the CONSTITUTION. However, the general discussion regarding the HCN ELECTION
8 ORDINANCE could generate misunderstanding even upon a thorough reading of the judgment.

9 Also, the Supreme Court provided an interpretation of the phrase, "unless otherwise
10 provided," in non-binding, although quite strong, *dicta*.⁶ *Id.* at 4.

11 As Appellant has pointed out, Article VII, § 10, of the Constitution states
12 that "Supreme Court Justices shall be elected by a majority vote of the
13 eligible voters of the Ho-Chunk Nation, in Accordance with the General
14 Election provisions of Article VIII, § 1, unless otherwise provided."
15 While this section clearly delegates authority to the Legislature to establish
16 procedures for the election of Supreme Court justices that might be
17 distinct from the elections for the Legislative and Executive branches, the
18 Legislature has clearly not done so. We do not find anywhere in the
19 Constitution or the Election Code that "provides otherwise"

20 *Id.* at 4 (quoting CONST., ART. VII, § 10).

21 **III. ELECTION ORDINANCE, 2 HCC § 6.3**

22 Presumably in response to the *Greengrass* decision, the Legislature amended the
23 aforementioned election code provisions. First, the Legislature declared that "[w]hen three (3) or
24 more candidates run for a seat in a General or Special Election, there shall be a Primary Election
25 and, if required, a Runoff Election" ⁷ ELECTION ORDINANCE, § 6.3. Within this provision,
26

27 _____
28 ⁶ The Supreme Court later chose to discourage the use of *dicta* to offer seeming resolution to substantive legal issues. *James Smith et al. v. Ron Wilbur*, SU 99-12 (HCN S. Ct., Feb. 9, 2000).

⁷ The allowance of write-in candidates in any primary election effectively eliminates the possibility of a primary election limited to two (2) or fewer candidates. ELECTION ORDINANCE, § 6.10c.

1 the Legislature accepted the notion of the General Election as a process. Furthermore, the
2 Legislature created the possibility of a primary election without a run-off component. As
3 mentioned above, this possibility does not violate the CONSTITUTION in the context of a special
4 election. *See supra* p. 12 n.4. The ELECTION ORDINANCE, however, extends the scope of the
5 exception.
6

7 The ELECTION ORDINANCE directs the Election Board to hold a Primary Election "prior to
8 an Election with three (3) or more candidates in order to ensure compliance with the majority
9 vote requirement." ELECTION ORDINANCE, § 6.3c(1). The ELECTION ORDINANCE then provides:
10

11 [i]f no candidate *in any* Primary Election receives more than 50% of the
12 votes cast in such Election, the two candidates with the highest vote totals
13 from the Primary Election (and any candidate(s) tied with the lower of
14 such totals) shall appear on the ballot in the Runoff Election. When there
15 are two (2) seats vacant in a district, the top two (2) vote getters for any
16 vacant seats, if no candidate has received 50%+ 1 vote, shall be on the
17 ballot for the General Election or Runoff Election.

18 *Id.*, § 6.3c(2) (emphasis added). The Legislature removed any distinction between general and
19 special elections, and clearly approved the declaration of a winner in a general primary election,
20 provided that the candidate satisfy the majority vote requirement. By doing so, the statute
21 appeared to directly contravene the *Greengrass* decision, which relied principally, if not entirely,
22 upon constitutional interpretation.

23 **IV. *Greg Littlejohn v. HCN Election Bd. et al.*, SU 03-07 (HCN S.
24 Ct., June 11, 2003)**

25 The Election Board could not abide by the General Election notice provisions in
26 connection with the District V, Seat 2 legislative race due to the late entrance of a final appellate
27 decision in a redistricting/reapportionment action. *Id.*, § 6.7a; *see also Robert A. Mudd v. HCN*
28 *Legislature*, CV 03-01 (HCN Tr. Ct., Feb. 13, 2003), *rev'd in part*, SU 03-02 (HCN S. Ct., Apr.
8, 2003). The Election Board lacked sufficient time to post an official notice of election for the

1 primary component of the June 3, 2003 General Election. *Id.* Therefore, the Election Board
2 designated the primary component as a special election to permit abbreviated notice, and
3 determined to hold the run-off component in conjunction with the General Election. *Id.* The
4 legislative seat in question was set to expire by routine operation of the CONSTITUTION, *i.e.*,
5 conclusion of the four-year term. CONST., ART. V, § 6.

7 Incumbent Kathyleen V. Lonetree-Whiterabbit received a majority vote in the designated
8 May 20, 2003 Special Primary Election, causing the Election Board to certify Legislator
9 Lonetree-Whiterabbit as the winner of the legislative seat. Second place vote recipient, Gregory
10 A. Littlejohn, filed an election challenge. The plaintiff argued that the Election Board could not
11 declare a winner of a general election legislative race prior to the constitutionally mandated
12 General Election on June 3, 2003.

14 The Supreme Court reviewed the *Greengrass* decision and held the reasoning
15 inapplicable because the Legislature amended relevant election code provisions during the
16 interim. *Littlejohn*, SU 03-07 at 2. After distinguishing *Greengrass*, the Supreme Court offered
17 an explanation justifying the Election Board's actions.

19 [T]he Election Board was responding to the decision of this Court in
20 *Robert Mudd v. HCN Legislature, et. Al.*, [*sic*] SU03-02 (HCN S. Ct.,
21 April 8, 2003). The HCN Election Board considered the election to be a
22 Special Election in an effort to comply with the timelines of the recently
23 revised HCN Election Ordinance. However, the District V, Seat 2 [*sic*] of
24 the HCN Legislature was initially a vacancy that was open for election
under the General Election. It is this creation of a "hybrid" open election
seat that impelled the Trial Court to discern whether the election seat was
a general or special election.

25 *Id.* at 2-3 (footnote omitted). At this juncture, the *Littlejohn* majority declined to declare the
26 primary election either general or special in nature, deeming such an action unnecessary. The
27 Supreme Court clarified that "the current HCN Election Ordinance does not distinguish between
28

1 general and special elections for purpose of holding a primary election." *Id.* at 3 (citing
2 ELECTION ORDINANCE, § 6.3c(2)). Therefore, "[w]hen no one receives the 50% of the votes cast,
3 then, and only then, is a runoff election held for the two candidates with the highest votes." *Id.* at
4 4.
5

6 The Supreme Court seemingly could have designated the "hybrid" election as a special
7 election because of the inevitable consequence of its earlier constitutional ruling. The *Littlejohn*
8 Court could have essentially characterized the election as having been "called for by . . . th[e]
9 Constitution." CONST., ART. VIII, § 2; *see also supra* pp. 11-12. This possible analysis,
10 however, ignores the constitutional underpinnings of *Greengrass*. The District V, Seat 2
11 vacancy was to occur as a result of the expiration of the legislative term. The General Election
12 status of the race appeared to compel the run-off.
13

14 Regardless, the Supreme Court insisted that the relevant analysis had undergone a
15 transformation since the *Greengrass* decision.
16

17 The question of whether an election is general or special is no longer a
18 hurdle that must be met in order to have a primary and runoff election.
19 The question at the onset is if there are three (3) or more candidates. If so,
20 a primary election must be held. Once the primary election is held, the
21 next question is whether or not a candidate has received more than 50% of
the votes cast in the election. If so, that candidate is the winner. If not, the
two highest vote-getters are placed in a runoff election.

22 *Littlejohn*, SU 03-07 at 4 (citing ELECTION ORDINANCE, § 6.3c(1-2)). The Supreme Court
23 concluded that "[t]he Legislature has the authority to create laws to enforce the requirements of
24 the HCN Constitution[,]" and impliedly ruled that the Election Board did not violate those
25 requirements. *Id.*
26

27 **V. Interpretation and Application of Law**

28

1 To begin, the Court must emphasize that its ruling only addresses the facts of the instant
2 case, and does not necessarily extend to presidential and legislative election scenarios. The
3 Court may not offer advisory opinions, and must limit its examination to justiciable cases or
4 controversies. *See, e.g., HCN Legislature v. HCN Gen. Council et al.*, CV 01-11 (HCN Tr. Ct.,
5 June 22, 2001); *see also* CONST., ART. VII, § 5(a). Additionally, the Court recognizes the
6 cardinal principle that courts should avoid constitutional questions if a judgment may rest on
7 statutory or other grounds. *Crowell v. Benson*, 285 U.S. 22, 62 (1932).

8
9 Quite clearly, a strict application of the ELECTION ORDINANCE to the facts would result in
10 a victory for the plaintiff. *See* ELECTION ORDINANCE, § 6.3c(2). Yet, the Election Board chose
11 to employ the *Greengrass* analysis to justify the convening of a run-off election. The Election
12 Board determined that the constitutionally based *Greengrass* decision essentially trumped the
13 Supreme Court's straightforward argument presented in *Littlejohn*. Perhaps the Election Board
14 distinguished the *Littlejohn* decision on the basis that the case dealt with a special election.
15 However, nothing in *Littlejohn* leads the Court to believe that the Supreme Court grasped onto
16 this dispositive distinction.
17
18

19 The defendants, therefore, unavoidably urge the Court to hold the seemingly applicable
20 ELECTION ORDINANCE provision unconstitutional. The Court must strive to avoid this
21 consequence, and the Court can easily accomplish this feat. The Supreme Court has identified a
22 difference that separates the constitutional judicial election provisions and its presidential and
23 legislative counterparts, namely the addition of the phrase, "unless otherwise provided." CONST.,
24 ART. VII, § 10. At the time of *Greengrass*, the Legislature had not acted upon this delegation of
25 authority, but that no longer proves the situation.⁸ The Court can permissibly interpret paragraph
26
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28

⁸ While this ruling comports with the *dicta* in *Greengrass*, the Court recognizes that the ruling appears to contradict its earlier holding in *Funmaker*. In fact, neither prior statement binds the Court since the Supreme Court has

1 c as the statutory instrumentality by which the Legislature provided otherwise. The question of
2 whether paragraph c applies in the same manner to presidential and legislative elections is not
3 before the Court.

4
5 The instant holding gives due deference to the CONSTITUTION, the ELECTION ORDINANCE
6 and the cited appellate decisions. Most importantly, the Court avoids declaring the applicable
7 statutory provisions unconstitutional as applied to the case at bar. Consequently, the Court
8 enjoins the holding of a run-off election for Associate Justice, and directs the Election Board to
9 declare the plaintiff the winner of the General Election. Associate Justice Lowe maintains the
10 constitutional right to complete her four-year term of office. CONST., ART. VII, § 9. The parties
11 retain the right to appeal this final judgment pursuant to the *Special Rules for Election*
12 *Challenges.*⁹ *HCN R. Civ. P. 80.*

13
14
15 **IT IS SO ORDERED** this 24th day of May 2005, by the Ho-Chunk Nation Trial Court
16 located in Black River Falls, WI within the sovereign lands of the Ho-Chunk Nation.

17
18
19 _____
20 Honorable Todd R. Matha
Associate Trial Court Judge

21
22
23
24
25 indicated that "[w]hile the [T]rial [C]ourt should try to remain consistent in its decisions, only decisions by this court
26 are limitations on the Trial Court." *Jacob LoneTree et al. v. Robert Funmaker, Jr. et al.*, SU 00-16 (HCN Tr. Ct.,
27 Mar. 16, 2001) at 4. Also, *Funmaker* lacks preclusive effect in accordance with the doctrine of collateral estoppel.
See David Abangan v. HCN Dep't of Bus., CV 01-08 (HCN Tr. Ct., July 16, 2003) at 18-19.

28 ⁹ The Court declined to address the issue related to minimum qualifications of the position due to the absence of any
demonstrative proof. Finally, in an effort to accommodate the parties, the Court provided itself a single day to draft
this opinion. The Court apologizes for any grammatical or other miscellaneous errors due to an inability to
thoroughly proofread the decision.

