

IN THE  
HO-CHUNK NATION SUPREME COURT

**ROBERT A. MUDD,**

Appellee,

vs

**DECISION**

Case No. SU03-02

**HO-CHUNK NATION LEGISLATURE:**

Elliott Garvin, Clarence Pettibone,  
Tracy Thundercloud, Wade Blackdeer,  
Dallas Whitewing, Gerald Cleveland, Sr.,  
Christine Romano, Myrna Thompson,  
George Lewis, Kathyleen Whiterabbit  
And Sharyn Whiterabbit,

Appellants.

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Heard before the Court on Thursday, March 27, 2003 for oral argument before Justice Pro Tempore John Wabaunsee, Associate Justice Mark Butterfield and Chief Justice Mary Jo B. Hunter, presiding.

**PROCEDUAL BACKGROUND**

On January 2, 2003, an enrolled member of the Ho-Chunk Nation, Robert Mudd filed a *Complaint* challenging the Legislature's decisions on how to conduct District meetings that are required by the HCN CONSTITUTION, Art. V, Sec. 8. Mr. Mudd claimed that implementation of the January 2002 reapportionment plan by the HCN Legislature violated the HCN CONSTITUTION ART. V, SEC. 4 because the redistricting plan was not completed by December 3, 2002 as required by the language in that section which states that "Any redistricting or reapportionment shall be completed at least six (6) months prior to the next election, and notice shall be provided to the voters." *Id.* The redistricting plan must be completed within six months of the 2003 General Election that

would be held on the first Tuesday of June of odd numbered years or June 3, 2003. He also claimed the HCN Legislature violated HCN CONSTITUTION ART. V, SECTIONS 4 AND 8 by allowing District V legislators hold area meetings outside of their districts. Before the defendants answered, Mr. Mudd amended his *Complaint* on January 16, 2003 to allege a third claim that the redistricting plan was an amendment to the HCN CONSTITUTION and had not been submitted to the Secretary of Interior as required by HCN CONSTITUTION ART. 13. The plaintiff sought a preliminary injunction, which the Trial Court denied. The parties agreed to decide the case based solely upon briefs and oral argument rather than an evidentiary hearing or trial. On February 13, 2003, the Trial Court issued its *Order (Final Judgment)*.

On March 6, 2003, Mr. Mudd filed a *Motion to Withdraw from Suit*. On March 10, 2003, Mr. Mudd filed a *Reply to Notice of Appeal*. The appellants filed a *Notice of Appeal, Motion to Immediately Vacate Trial Court Judgment and to Dismiss Case* and a *Brief of Appellants*. On March 21, 2003, this Court issued an *Order* denying the motions of both parties. Mr. Mudd was allowed additional time to file his *Response Brief*. The brief of Mr. Mudd was filed on Monday, March 24, 2003.

#### **STATEMENT OF FACTS**

On January 12, 2002, the voters of the Ho-Chunk Nation in a special election conducted in accordance with HCN CONSTITUTION ART. V, SEC. 4 approved a new redistricting plan that has been referred to as Scenario E. Redistricting changed the boundaries of the Districts, and some legislators no longer resided within the boundaries of their districts. The *Legislative Organization Act of 2001*, 2 HCC Sec. 9 (c)(1) requires that Legislators to hold and attend regularly scheduled meeting in their Districts as

required by HCN CONSTITUTION ART. V, SEC. 8. On October 8, 2002 HCN Legislative Counsel William Boulware drafted a memorandum which attempted to address the problem of Legislators who no longer resided in the District that elected them. His plan on district meetings was adopted by the HCN Legislature on November 9, 2002. At the same time the Ho-Chunk Nation Legislature developed a plan for implementing the new redistricting to apply to the election process for the General Election in June 2003. On November 19, 2002 by HCN Legislative Resolution 11-19-02-A the HCN Legislature adopted a new Election Code and stated in Section 5.a (1)(a):

The Legislature shall be composed of the eleven (11) Representatives elected from the following Districts that were established by the January 12, 2002 Special election for Redistricting and Reapportionment.

The Trial Court held that the HCN Legislature had allowed holdover legislators to hold District meetings in their former districts. The Trial Court stated that the legislature's decision on District meetings diminished tribal member's right to vote. The Trial Court declared the November 8, 2002 resolution as null and void and enjoined its implementation. Based on this finding the trial court invalidated portions of the Election Ordinance and ordered the Election Board to conduct an election for two additional legislators from District V and have no election for legislators from Districts I and IV. Under the original election ordinance there would have been elections in each of the five Ho-Chunk Nation legislative districts. The Court ordered that two holdover legislators assume the vacant seats in Districts I and IV. The HCN Legislature then appealed.

### **STANDARD OF REVIEW**

The facts in this case are not disputed. The issues are solely those of statutory and Constitutional interpretation. The Supreme Court has the final say on Constitutional

interpretation. HCN CONSTITUTION, ART.VII, § 7(b) and (c). On questions of law and Constitutional interpretation the Supreme Court applies the *de novo* standard of review. *Louella Kelty v. Jonette Pettibone et al.*, SU 99-02 (HCN Sup. Ct. Sept. 24, 1999). This means that the Court looks at the case afresh to see if the interpretation by the Trial Court is the proper interpretation of the law or Constitutional provision at issue in the particular case.

The General Council may not reverse decisions of the Judiciary interpreting the Ho-Chunk Nation Constitution , HCN Constitution Art. IV §, 3(b)., though the General Council may recommend that the HCN CONSTITUTION be changed in a Secretarial Election to reflect dissatisfaction with that interpretation. *See* HCN CONSTITUTION, ART. IV, § 3(c).

## DISCUSSION

### I. **Did the Trial Court abuse its discretion or commit legal error when it found that Mr. Mudd had standing to maintain the lawsuit?**

The Trial Court enunciated two reasons for allowing Mr. Mudd to maintain his lawsuit. The standing based on custom and tradition was allowed due to the status at the time of the lawsuit. Following the issuance of the trial court order, the Traditional Court issued another ruling, which is in direct conflict with their earlier interpretation of custom and tradition. Based upon the later ruling, Mr. Mudd attempted to withdraw from the case. Without deciding on the merits of the basis for standing founded on custom and tradition, this Court allowed the case before us to proceed since the Trial Court indicated a second basis for Mr. Mudd's standing.

The other basis for Mr. Mudd's standing was that he had shown sufficient personal harm based upon a claim of violation of his rights to equal protection analysis. . In reviewing the Trial Court record, both the *Complaint* and the *Amended Complaint* allege that the new plan, Scenario E, diminishes the Ho-Chunk Nation's sovereignty and right to govern. As a member of the Ho-Chunk Nation, Mr. Mudd has a right to participate in General Council. HCN CONSTITUTION., ART. IV, SEC. 1. As a participant member of General Council, Mr. Mudd does have a personal harm to protect where he complains of a diminishment of the sovereign powers from the enactment of Scenario E. (See xi paragraph 21, *Complaint* and paragraph 24, *Amended Complaint*)

Although the Trial Court states that paragraph 7 of the *Amended Complaint* is the paragraph that states personal harm, the underlying rationale that Mr. Mudd has standing based upon equal protection claims is supported by the record. Therefore, this Court affirms the Trial Court's holding that Mr. Mudd had standing to maintain the lawsuit.<sup>1</sup>

**II. Whether the Trial Court's decision on the merits of the redistricting implementation was in error for failing to hold that the individual Legislators had acted beyond the scope of their authority under of the HCN CONSTITUTION, ART. XII?**

The HCN Legislature argues that the Trial Court should have made a ruling that the individual Legislators had acted beyond the scope of their authority prior to making a ruling against the Legislators. The basis for this argument appears to be a claim of sovereign immunity under HCN CONSTITUTION, Art. XII. This Court does not accept the

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<sup>1</sup> This Court declined to address the issue of custom and tradition as the alternative basis for standing. The Appellee Mudd fundamentally agreed with Appellant's counsel that the basis of standing under custom and tradition was no longer viable. The trial court record did not include the Traditional Court's February 24, 2003 basis for lack of standing. Since the Trial Court did not have that information before it, this Court is not inclined to address that portion of the Trial Court Order.

arguments made in this vein.<sup>2</sup> Both the Trial Court and the Supreme Court are not barred from issuing declaratory relief pursuant to HCN CONSTITUTION, ART. VII, SEC. 6 & 7.

The bulk of the appellants' claim is based upon supposed errors of law. The Supreme Court will address those issues.

**III. Whether the Trial Court erred as a matter of law in deciding that the HCN Legislature should be enjoined from implementing Scenario E because the implementation scheme was deemed "antithetical to the constitutional structure"?**

The HCN CONSTITUTION ART. VII, SECTIONS 6 (A) AND (B) provide the backdrop for the powers of the Trial Court. The Trial Court has the power to make findings of fact and conclusions of law. The Trial Court shall have the power to issue all remedies in law and equity including injunctive and declaratory relief. Further, the Trial Court has the power to declare the laws of the Ho-Chunk Nation void if such laws are not in agreement with the HCN CONSTITUTION. The Trial Court is limited to acting within those designated powers as the judicial authority of the Ho-Chunk Nation. HCN CONSTITUTION., ART. VII, SEC. 4. The HCN Supreme Court examines the Trial Court's Judgment's to determine whether it made a proper interpretation of the Constitution and the laws of the Nation, recognizing that the Trial Court has both the right and authority to make such determinations in the first instance.

As was stated above, the plaintiff claimed that the implementation of the redistricting plan was unconstitutional for three reasons. First, the implementation of the January 12, 2003 redistricting plan violated the HCN CONSTITUTION because it was not

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<sup>2</sup> The appellant continues to misapprehend the nature of sovereign immunity. This doctrine prevents actions against the Nation without its permission, particularly where the suit is for money. Here the claim is not for money damages against the Nation but rather for declaratory and injunctive relief. These are remedies in equity and prospective in nature and are not generally barred by the doctrine of sovereign immunity.

implemented within six months of the June, 2003 election. Second he complained that one of District V legislators (whose District used to include Brown County, Wisconsin) held an area meetings in his former district in the State of Wisconsin. With the implementation of the redistricting none of the new District V was in the State of Wisconsin. Third, he complained that the redistricting plan was not approved by the Secretary of Interior. This third question was removed by the trial court at the preliminary injunction hearing and was not appealed.

The principal concern of the plaintiff and the Trial Court was reconciling the one person-one vote requirement of HCN CONSTITUTION ART. V SEC. 4 with the necessity of Legislators holding and attending regularly scheduled meetings in their respective districts. HCN CONSTITUTION ART. V SEC. 6 provides that “legislators shall represent their respective Districts until their successors have been sworn in to office...”. The Trial Court held not only is there the one person one vote requirement for election of legislators, but also there is a requirement for one person one vote for the District meetings. The Trial Court also construed HCN CONSTITUTION. ART. V, SEC. 6 to require that legislators, once they are elected, reside in the district they represent.

When the voters of the Ho-Chunk Nation approved the redistricting plan on January 12, 2002, the old districts *ceased to exist* pursuant to HCN CONST. Art. V, § 4. When the HCN Legislature adopted the revised ELECTION ORDINANCE on November 19, 2002, the redistricting plan was fully implemented. Eleven days earlier the HCN Legislature attempted to deal with the problems of District meetings and legislators resided outside of their new districts. There appears to be nothing unconstitutional about the adoption on November 8, 2002 plan. Like the Trial Court the Legislature assumes the

old Districts continue to exist in some form. Therefore, the November 8, 2002 plan incorrectly tries to maintain the old district boundaries and incorrectly states that each legislator must continue to reside in the district from which he or she serve. There appears to be nothing in the Ho-Chunk Nation Constitution, Ordinances, Resolutions or other law that prohibits a legislator from moving out of his or her district, if the legislator met the one year residency requirement at the time of the filing of the Declaration of Candidacy. *See*, 2 HCC, Section 6.6.e (Residency Requirement for Legislators). Once a person has been elected to the HCN Legislature that person has no limits on residency other than prudential ones of preserving his or her ties to their constituents. It is not however constitutionally mandated. The HCN CONSTITUTION mandates only that the legislator will have meetings in his or her district.

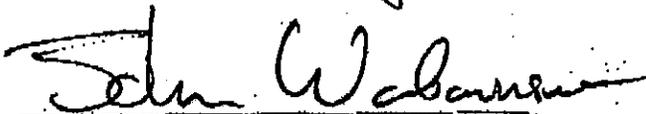
The Trial Court incorrectly stated that the Nation will operate under two redistricting/reapportionment schemes from 2003-2005. The Trial Court tried to remedy a problem *that did not exist*. The Trial Court stated that right to vote at a district meeting was the same as the right to vote in a Special or General Election. While politically it may be important for a Legislator to heed the wishes of voters at a District meeting, the actions of a District meeting are not binding on a Legislator unless a the Ho-Chunk Nation Code requires it. The methods and means of holding District meetings are within the powers of the Legislature, and this Court will not interfere unless there is a showing that the Legislature is acting without authority, or that the action is contrary to this Constitution.

For the foregoing reasons, the trial court decision is reversed. The HCN elections for 2003 should be held as planned.<sup>3</sup>

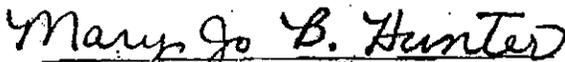
**IT IS SO ORDERED** this 8<sup>th</sup> day of April 2003.



Hon. Mark D. Butterfield, Associate Justice



Hon. John Wabaunsee, Justice Pro Tempore



Hon. Mary Jo B. Hunter, Chief Justice  
Ho-Chunk Nation Supreme Court

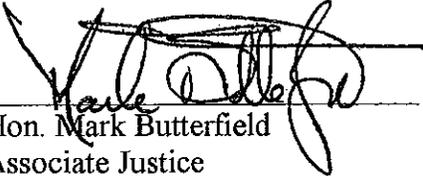
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<sup>3</sup> The Court realizes that reversing the lower court decision under the looming deadlines of the April 29, 2003 Primary will necessarily require swift and sure action by the Election Board. Counsel for the appellant assured the Supreme Court that an election could be conducted within this timeframe without offending either the Constitution or the HCN Election Ordinance.

## Concurrence

While I join the majority in the bulk of this opinion, I differ in two respects. Further, I write separately to note my dissatisfaction with the fact the resolution of this case was brought so late in the process. Counsel for appellant assured the Court that there was sufficient time to craft a remedy, but I am very skeptical that all the ramifications of today's decision can be dealt with in the short timeframes permitted. This Court was asked to decide an extremely complex issue in a very short time frame and the Court has done so on an expedited basis. The Legislature had a long time to consider the implementation of Scenario E and should have done so well before the six month period prior to the General Election was about to expire. HCN CONSTITUTION, ART. V, § 4.

Lastly, I write to emphasize that my decision to join the majority's opinion is based on the fact that I believe that redistricting has been done. Although it may seem awkward to some that two Legislators elected from District V, shall still represent it without residing within the new boundaries, this is not constitutionally impermissible. As Area V has been reduced in size so that each Legislator represents the proper number of voters unlike the Trial Court I feel the one-man/one-vote requirement is met. If the voters are dissatisfied with their representatives resulting from this implementation there are sufficient ways built into the structure of the Constitution for them to voice that dissatisfaction, should it exist.



Hon. Mark Butterfield  
Associate Justice