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

3 **Mr. Chloris Lowe, Jr.,**
4 **Enrollment #439A001593;**
5 **Mr. Stewart J. Miller,**
6 **Enrollment #439A002566,**
Plaintiffs,

7 v.

Case No.: **CV 00-104**

8 **Ho-Chunk Nation Legislature Members**
9 **Elliot Garvin, Gerald Cleveland, Myrna**
10 **Thompson, Dallas White Wing, and**
11 **Clarence Pettibone, in their official capacity**
12 **and individually; and Ho-Chunk Nation**
Election Board,
Defendants.

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**ORDER
(Denying Attorney Fees)**

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INTRODUCTION

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19 The Court must determine whether the plaintiffs can receive attorney fees and costs
20 against the Ho-Chunk Nation (hereinafter Nation) for prevailing on their cause of action. The
21 Judiciary has developed an ambiguous jurisprudence in relation to this issue. In light of this
22 ambiguity and other below-identified reasons, the Court denies the plaintiffs' request for relief.
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PROCEDURAL HISTORY

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27 On April 18, 2001, the plaintiffs filed the *Motion for Attorney Fees and Costs* (hereinafter
28 *Plaintiffs' Motion*). Consequently, the Court required the parties to submit legal memoranda on

1 the issue due to its status of one of first impression. *Hr'g* (LPER at 9, Apr. 23, 2001, 10:42:30
2 CDT). The parties submitted timely memoranda on May 4, 2001. The plaintiffs filed the
3 *Memorandum in Support of Attorney Fees and Costs* (hereinafter *Plaintiffs' Memorandum*), and
4 the defendants filed the *Response to Plaintiffs' Motion for Attorney's Fees* (hereinafter
5 *Defendants' Response*).

7 At the time of the filings, the plaintiffs occupied a diminished role in the litigation.
8 Following the entry of the November 13, 2000 *Order (Granting Plaintiffs' Motion for Summary*
9 *Judgment)* (hereinafter *Summary Judgment Order*), the plaintiffs appeared at only four (4) of
10 seven (7) hearings despite receipt of proper notice. See CONSTITUTION OF THE HO-CHUNK
11 NATION (hereinafter CONSTITUTION), ART. V, § 4 (authority to redistrict/reapportion delegated to
12 the Legislature). Yet, even after the conclusion of the present case, the Nation's current
13 redistricting/reapportionment scheme did not become finalized until July 22, 2002. See *Robert*
14 *A. Mudd v. HCN Legislature et al.*, CV 03-01 (HCN Tr. Ct., Feb. 13, 2003) at 11. The Judiciary
15 entered its last decision concerning the legal impact of the 2002 redistricting/reapportionment
16 nearly a year later. *Greg Littlejohn v. HCN Election Bd. et al.*, SU 03-07 (HCN S. Ct., July 11,
17 2003).

21 **APPLICABLE LAW**

22 CONSTITUTION OF THE HO-CHUNK NATION

23 Article V - Legislature

24 Sec. 4. Redistricting or Reapportionment. The Legislature shall have the power to
25 redistrict or reapportion including changing, establishing, or discontinuing Districts. The
26 Legislature shall maintain an accurate census for the purposes of redistricting or
27 reapportionment. The Legislature shall redistrict and reapportion at least once every five (5)
28 years beginning in 1995, in pursuit of one-person/one-vote representation. The Legislature shall

1 exercise this power only by submitting a final proposal to the vote of the people by Special
2 Election which shall be binding and which shall not be reversible by the General Council. Any
3 redistricting or reapportionment shall be completed at least six (6) months prior to the next
election, and notice shall be provided to the voters.

4 Art. VII - Judiciary

5 Sec. 5. Jurisdiction of the Judiciary.

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

11 Sec. 6. Powers of the Tribal Court.

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

15 Sec. 7. Powers of the Supreme Court.

16 (b) The Supreme Court shall have the power to establish written rules for the Judiciary,
17 including qualifications to practice before the Ho-Chunk courts, provided such rules are
18 consistent with the laws of the Ho-Chunk Nation.

19 Art. VII - Elections

20 Sec. 4. Election Board. The Legislature shall enact a law creating an Election Board.
21 The Election Board shall conduct all General and Special Elections. At least sixty (60) days
22 before the election, the Election Board may adopt rules and regulations governing elections.
Election Board members shall serve for two (2) years. Election Board members may serve more
than one term. The Legislature may remove Election Board members for good cause.

23 Art. X - Bill of Rights

24 Sec. 1. Bill of Rights.

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

26 (8) deny to any person within its jurisdiction the equal protection of its laws or
27 deprive any person of liberty or property without due process of law;
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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
immune from suit.

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

9 HO-CHUNK NATION JUDICIARY ACT OF 1995

10 Sec. 3. Rules and Procedure.

11 All matters shall be tried in accordance with the Ho-Chunk Rules of Procedure and the Ho-
12 Chunk Rules of Evidence which shall be written by the Supreme Court, published, and available
13 to the Public.

14 HO-CHUNK NATION LEGISLATIVE RESOLUTION 03-26-96A

15 Limited Waiver of Sovereign Immunity

16 The Ho-Chunk Nation hereby expressly provides a limited waiver of sovereign immunity to the
17 extent that the Court may award a maximum of \$2,000.00 to any one employee. Other remedies
18 shall include an order of the Court to the Personnel Department to reassign the employee. Any
19 monetary awards granted under this Chapter shall be paid out of the department budget from
20 which the employee grieved. Nothing in this Policies and Procedures shall be construed to grant
a party any remedies other than those included in this section.

21 HO-CHUNK NATION PERSONNEL POLICIES AND PROCEDURES MANUAL (updated
Feb. 11, 2002)

22 Ch. 12 - Employment Conduct, Discipline, and Administrative Review

23 Limited Waiver of Sovereign Immunity.

[p. 62]

24
25 The HoChunk [*sic*] Nation hereby expressly provides a limited waiver of sovereign immunity to
26 the extent that the Court may award monetary damages for actual lost wages and benefits
27 established by the employee in an amount not to exceed \$10,000, subject to applicable taxation.
Any monetary award granted under this Chapter shall be paid out of the departmental budget
28 from which the employee grieved. In no event shall the Trial Court grant any monetary award
compensating an employee for actual damages other than with respect to lost wages and benefits.
The Trial Court specifically shall not grant any monetary award against the Nation or its

1 officials, officers, and employees acting within the scope of their authority on the basis of injury
2 to reputation, defamation, or other similar invasion of privacy claim; nor shall the Trial Court
grant any punitive or exemplary damages.

3 The Trial Court may grant equitable relief mandating that the HoChunk [*sic*] Nation
4 prospectively follow its own laws, and as necessary to remedy any past violations of tribal law.
5 Other equitable remedies shall include, but not be limited to: an order of the Court to the
6 Personnel Department to reassign or reinstate the employee, a removal of negative references
7 from the personnel file, an award of bridged service credit, and a restoration of seniority.
8 Notwithstanding the remedial powers noted in the Resolution, the Court shall not grant any
9 remedies that are inconsistent with the laws of the HoChunk [*sic*] Nation. Nothing in this
Limited Waiver or within the Personnel Policies and Procedures Manual shall be construed to
grant a party any legal remedies other than those included in this section. (RESOLUTION
06/09/98A)

10 HO-CHUNK NATION RULES OF CIVIL PROCEDURE (adopted Feb. 22, 1997)

11 Rule 4. Filing Fees.

12 (A) Fee. The filing fee for a *Complaint* in the Trial Court of the Ho-Chunk Nation Judiciary
13 shall be thirty-five dollars (\$35 U.S.). The fee shall be waived for petitions filed by the Ho-
14 Chunk Nation. The fee may be waived at the Court's discretion, for parties who are unable to
pay the fee.

15 (C) Other costs waived. A person authorized to file their petition without paying a filing fee
16 shall also be entitled to have other costs and expenses deferred until the time of settlement or
17 judgement of the action.

18 Rule 16. Signature of Parties and Counsel; Special Appearances.

19 (B) Counsel not admitted to practice before the Ho-Chunk Nation Courts may be permitted to
20 appear on behalf of a client by *Special Appearance* in an action. In order to be permitted to
21 make a special appearance, counsel must file a motion to allow the special appearance; a
22 proposed *Order*; and an affidavit containing the oath or affirmation for admission to practice,
stating that they are admitted to practice in another state, federal or tribal jurisdiction, and stating
23 they have been in actual practice for two or more years. They must also submit a processing fee
for the special appearance of \$35.00.

24 Rule 20. Hearings on Motions.

25 A hearing on a *Motion* may be held in the discretion of the Court. A party requesting a hearing
26 must (a) schedule the hearing with the Court and (b) deliver or mail notice of the hearing to other
27 parties at least five (5) calendar days prior to the hearing. If the trial is scheduled to begin within
the time allowed for a hearing, all responses shall be made by the time scheduled for
28 commencement of the trial. *Motions* made within fourteen (14) calendar days of trial may be
dismissed and costs and fees assessed against the moving party if the Court finds no good cause
exists for failing to file the *Motion* more than fourteen (14) calendar days in advance of the trial.

1 Rule 27. The Nation as a Party.

2 (B) Civil Actions. When the Nation is filing a civil suit, a writ of mandamus, or the Nation is
3 named as a party, the *Complaint*, in the case of an official or employee being sued, should
4 indicate whether the official or employee is being sued in his or her individual capacity. Service
5 can be made on the Ho-Chunk Nation Department of Justice and will be considered proper
6 unless otherwise indicated by these rules, successive rules of the Ho-Chunk Nation Court, or Ho-
7 Chunk Nation Law.

8 Rule 38. Non-Compliance.

9 If a party fails to appear or respond under these rules, a party may request or the Court may issue
10 an *Order* requiring a response and imposing costs, attorney's fees, and sanctions as justice
11 requires in order to secure compliance.

12 Rule 44. Presence of Parties and Witnesses.

13 (A) Subpoenas. *Subpoenas* may be used to cause a witness to appear and give testimony. If a
14 party wishes to have a subpoena issued by the Court, he/she shall furnish a properly prepared
15 subpoena including information necessary for service of process at least ten (10) calendar days
16 before trial. Service will be completed at least three (3) calendar days prior to hearing or trial.
17 When service has been completed, the Court shall mail proof of service to all parties. When
18 service of the subpoena will not be through the Court, the requesting party shall present the
19 properly prepared subpoena to the Court for signature in time to ensure proper service before the
20 hearing or trial and shall return proof of service to the Court prior to the trial. If a party does not
21 timely request a subpoena, he/she shall not be entitled to a postponement because of the absence
22 of the witness. If the subpoena has been timely issued, the Court may, in its discretion, postpone
23 the hearing or trial. A person who fails to appear after being subpoenaed may be held in
24 contempt of court.

25 Rule 53. Relief Available.

26 Except in a *Default Judgement*, the Court is not limited to the relief requested in the pleading and
27 may give any relief the evidence makes appropriate. The Court may only order such relief to the
28 extent allowed by Ho-Chunk Nation enactments. The Court may order any party to pay costs,
including filing fees, costs of service and discovery, jury and witness costs. Findings of fact and
conclusions of law shall be made by the Court in support of all final judgements.

HO-CHUNK NATION RULES OF CIVIL PROCEDURE (amended Apr. 13, 2002)

Rule 53. Relief Available.

Except in a *Default Judgment*, the Court is not limited to the relief requested in the pleading and
may give any relief it deems appropriate. The Court may only order such relief to the extent
allowed by Ho-Chunk Nation enactments. The Court may order any party to pay costs,
including attorney's fees, filing fees, costs of service and discovery, jury and witness costs.

1 Findings of fact and conclusions of law shall be made by the Court in support of all final
2 judgments.

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

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

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

15 (C) Motion to Modify. After the time period in which to file a *Motion to Amend* or a *Motion for*
Reconsideration has elapsed, a party may file a *Motion to Modify* with the Court. The *Motion*
16 must be based upon new information that has come to the party's attention that, if true, could
17 have the effect of altering or modifying the judgment. Upon such motion, the Court may modify
the judgment accordingly. If the Court modifies the judgment, the time for initiating an appeal
18 commences when the Court denies the motion on the record or when an order denying the
19 motion is entered, whichever occurs first. If within thirty (30) calendar days after the filing of
such motion, and the Court does not decide the motion or the judge does not sign an order
20 denying the motion, the motion is considered denied. The time for initiating an appeal from
judgment commences in accordance with the Rules of Appellate Procedure.

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

23 (E) Grounds for Relief. The Court may grant relief from judgments or orders on motion of a
24 party made within a reasonable time for the following reasons: (1) newly discovered evidence
25 which could not reasonably have been discovered in time to request a new trial; or (2) fraud,
misrepresentation or serious misconduct of another party to the action; or (3) good cause if the
26 requesting party was not personally served in accordance with Rule 5(c)(1)(a)(i) or (ii); did not
have proper service and did not appear in the action; or (4) the judgment has been satisfied,
27 released, discharged or is without effect due to a judgment earlier in time.
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1 Rule 61. Appeals.

2 Any final *Judgment* or *Order* of the Trial Court may be appealed to the Ho-Chunk Nation
3 Supreme Court. The *Appeal* must comply with the Ho-Chunk Nation *Rules of Appellate*
4 *Procedure*, specifically *Rules of Appellate Procedure*, Rule 7, Right of Appeal. All subsequent
5 actions of a final *Judgment* or Trial Court *Order* must follow the HCN *Rules of Appellate*
6 *Procedure*.

6 HO-CHUNK NATION CONTEMPT ORDINANCE

7 Sec. 1.01. Statement of Policy.

8 The Ho-Chunk Nation, mindful that the Judiciary represents a fundamental aspect of tribal
9 sovereignty, recognizes that the Nation's Courts retain the inherent authority to exercise the
10 power of contempt. In order to preserve the dignity and decorum of the Judicial Branch, secure
11 the compliance with orders and procedures, and protect the due process rights of those appearing
12 before the Courts, this Ordinance establishes the substantive and procedural requirements of the
13 contempt power.

13 Sec. 3.01. Subject Matter Jurisdiction.

14 The authority of the Ho-Chunk Nation's Courts to pursue contempt remains available in civil
15 matters which otherwise fall within the jurisdiction of the Nation pursuant to the Constitution,
16 laws, statutes, ordinances, and resolutions.

16 Sec. 5.01. Kinds of Sanctions.

17 Upon a finding of contempt, the Ho-Chunk Nation Courts are authorized to impose any or all of
18 the following:

19 (a) Payment of a sum of money sufficient to compensate a party for a loss or injury
20 suffered as a result of the contempt of Court;

21 (b) Payment of a sum of money to the Court not to exceed \$100 for each day the
22 contempt of Court continues;

23 (c) An order designed to redress past disobedience with a prior order of the Court;

24 (d) An order designed to ensure compliance with an ongoing order of the Court;

25 (e) Any order appropriate sanction or order if the Court expressly finds that Section
26 5.01(a-d) would be ineffective to address, terminate, or otherwise ensure compliance in a past or
27 continuing contempt of Court.

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FINDINGS OF FACT

1. The plaintiff, Chloris A. Lowe, Jr., is a member of the Ho-Chunk Nation, Tribal ID #439A001593, and resides at 2821 West Sixth Street, Wilmington, DE. The plaintiff, Stewart J. Miller, is a member of the Ho-Chunk Nation, Tribal ID #439A002566, and resides at 225 Larkin Street, Madison, WI. *Compl. for Declaratory & Injunctive Relief* (hereinafter *Complaint*), CV 00-104 (Oct. 25, 2000) at 1-2.

2. The defendants, Elliot Garvin, Gerald Cleveland, Myrna Thompson, Dallas White Wing, and Clarence Pettibone, are duly elected representatives to the Ho-Chunk Nation Legislature, a governmental branch of the Nation, a federally recognized Indian tribe with principal offices located on trust lands at the Ho-Chunk Nation Headquarters, W9814 Airport Road, P.O. Box 667, Black River Falls, WI. The defendant, Ho-Chunk Nation Election Board, is a constitutionally designated agency of the Nation with offices located at 4 East Main Street, Black River Falls, WI. CONST., ART. VII, § 4.

3. Plaintiffs' counsel, Attorney Gary J. Montana, resides at N12933 North Prairie Road, Osseo, WI. *Compl.* at 18. The physical address of the Ho-Chunk Nation Trial Court is W9598 Highway 54 East, Black River Falls, WI. The distance between the two (2) locations is approximately thirty-five (35) miles one way, and can be traveled in approximately thirty-nine (39) minutes. <http://www.mapquest.com/directions/main.adp?bCTsettings=1> (last visited Mar. 9, 2004).

4. On October 25, 2000, plaintiffs' counsel paid the filing fee of \$35.00 for the initial pleading. *See Ho-Chunk Nation Rules of Civil Procedure* (hereinafter *HCN R. Civ. P.*), Rule 4(A).

1 5. On October 25, 2000, plaintiffs' counsel paid the fee of \$35.00 for his special appearance.
2 *Id.*, Rule 16(B).

3 6. On November 1, 2000, a purported agent of plaintiffs' counsel, Libby R. Fairchild, Tribal
4 ID #439A002179, paid the fee of \$30.00 associated with the Court's service of subpoenas. *Id.*,
5 Rule 44(C); *see also Aff. of Serv.*, CV 00-104 (Nov. 8, 2000).

7 7. Prior to the issuance of the *Summary Judgment Order*, plaintiffs' counsel attended three
8 (3) judicial proceedings. The November 1, 2000 *Pre-Trial Hearing* began at 8:00 a.m. and
9 adjourned at 8:30 a.m. CST. *Pre-Trial Hr'g Tr.*, CV 00-104 (Nov. 8, 2000) at 1, 25. The
10 November 6, 2000 *Hearing on Defenses* began at 9:10 a.m. and adjourned at 11:00 a.m. CST.
11 *Hr'g on Defenses Tr.*, CV 00-104 (Nov. 13, 2000) at 1, 64. The November 9, 2000 *Summary*
12 *Judgment Hearing* began at 1:34 p.m. and adjourned at 2:44 p.m. CST. *Summ. J. Hr'g Tr.*, CV
13 00-104 (Nov. 20, 2000) at 2, 48. Therefore, plaintiffs' counsel participated in hearings for a
14 combined total of three (3) hours and thirty (30) minutes.
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16 8. Prior to the issuance of the *Summary Judgment Order*, plaintiffs' counsel filed fifty-eight
17 (58) pages of individually prepared written work product. The October 25, 2000 *Complaint*
18 consisted of eighteen (18) prepared pages and thirteen (13) pages of attachments. The October
19 25, 2000 *Motion to Appear Specially* consisted of five (5) prepared pages, including the
20 *Certificate of Delivery*. The November 3, 2000 *Notice of Disclosure* consisted of four (4)
21 prepared pages, including the *Certificate of Hand Delivery*. The November 6, 2000 *Defendant's*
22 [*sic*] *Reply to Defendant's Motion to Dismiss* consisted of fourteen (14) prepared pages,
23 including the *Certificate of Mail and Via Fax*. The November 7, 2000 *Plaintiffs* [*sic*] *Notice of*
24 *Witnesses* consisted of four (4) prepared pages, including the *Certificate of Mail and Via Fax*.
25 The November 8, 2000 *Cross Motion for Summary Judgment* consisted of three (3) prepared
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1 pages, including the *Certificate of Mail and Via Fax*. The November 9, 2000 *Plaintiff(s)* [*sic*]
2 *Memorandum in Support of Cross Motion for Summary Judgment* consisted of ten (10) prepared
3 pages, including the *Certificate of Mail and Via Fax*, and also two (2) pages of attachments.
4

5 9. On November 1, 2000, the Court informed the parties that they would need to deliver all
6 future filings to one another and the Court by facsimile transmission due to the condensed
7 election challenge timeframe. *Pre-Trial Hr'g Tr.* at 21, ll. 16-17.

8 10. Prior to the issuance of the *Summary Judgment Order*, plaintiffs' counsel prepared
9 twenty-two (22) subpoenas, which he presented to the Court.
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11 11. On December 28, 2000, the defendants/appellants filed the *Notice of Appeal*. The
12 appellants made the following contention regarding the entry of summary judgment.

13 Placing a "no action" or "no change" scenario on the ballot is not per se
14 unconstitutional under the HCN Constitution. The [Court] also committed
15 reversible error by holding that a "no action" or "no change" scenario is
16 *per se* unconstitutional. *See Order* at p. 14 of 15. The Constitutional
17 requirement of Article V, section 4 requiring that the Legislature exercise
18 their power by submitting to a binding vote of the People directly implies
19 the People's right to reject the proposal and maintain the status quo.

20 *Notice of Appeal*, SU 00-17 (Dec. 28, 2000) at 4. The appellants elaborated upon this argument
21 in the *Appellants' Brief*.

22 The Legislature discharged its Constitutional duty by formulating a final
23 redistricting/reapportionment proposal and submitting it to the People.
24 The People exercised their prerogative by rejecting redistricting/
25 reapportionment and choosing no change. The People's choice does not
26 negate the fact that the Legislature did what the clear terms of the
27 Constitution require it to do.

28 *Appellants' Br.*, SU 00-17 (Jan. 8, 2001) at 9; *but see* CONST., ART. V, § 4 ("The Legislature shall
redistrict and reapportion at least once every five (5) years . . ."). Despite the presence of a
clear constitutional mandate, the appellants continued to argue that "the People decide whether
any redistricting/reapportionment occurs." *Appellants' Br.* at 9.

1 12. On February 17, 2001, the appellants presented their position to the Ho-Chunk Nation
2 Supreme Court (hereinafter HCN Supreme Court) at oral argument, prompting an initial question
3 from Justice *Pro Tempore* Kimberly Vele. Justice Vele inquired: "what I don't understand in
4 your argument, Counsel, is how does an option to do nothing further the 'in pursuit' language,
5 which is in the Constitution?" *Oral Argument* Tr., SU 00-17 (Feb. 17, 2001) at 13, ll. 12-14.
6 Not persuaded by the response of appellants' counsel, Justice Vele continued: "I want to know,
7 how does the 'no action' plan meet the requirement, 'in pursuit of one-person/one-vote,' if it's no
8 action?" *Id.* at 14-15, ll. 24-1. Appellants' counsel answered: "my argument is not that it meets
9 the requirement, and not [that] the 'no action' is *per se* constitutional." *Id.* at 15, ll. 2-4.
10 Nonetheless, the appellants contended that the Judiciary remained powerless to grant a remedy
11 due to the alleged presence of a non-justiciable political question. *Id.*, ll. 9-18.

14 13. On March 13, 2001, the HCN Supreme Court entered its final judgment and, while not
15 even choosing to directly discuss the constitutionality of the "No Action or No Change" scenario,
16 flatly rejected the political question defense. *Decision*, SU 00-17 (HCN S. Ct., Mar. 13, 2001) at
17 4-5.

19 14. On April 18, 2001, plaintiffs' counsel filed the *Plaintiffs' Motion*, which consisted of four
20 (4) prepared pages, including the *Certificate of Service*. The motion noted that "[t]he plaintiff(s)
21 within their Complaint have clearly set out their request for attorney fees, costs and expenses
22 associated with filing of this lawsuit." *Pls.' Mot.* at 2 (citing *Compl.* at 17). Acknowledging
23 November 13, 2000, as a terminal date, the plaintiffs argued that the defendants' patently
24 unconstitutional actions forced the plaintiffs to litigate. *Pls.' Mot.*

26 15. On May 4, 2000, plaintiffs' counsel filed the *Plaintiffs' Memorandum*, which consisted of
27 five (5) prepared pages, including the *Certificate of Service*. The plaintiffs inquired: "[w]hy
28

1 should the Defendants be able to act in any manner they choose and then have the attorney's [*sic*]
 2 that are retained by the whole Nation, represent then [*sic*] against the membership and defend
 3 their unconstitutional actions free of charge?" *Pls.' Mem.* at 3. The plaintiffs concluded by
 4 stating that the Court "has the statutory authority to grant attorney fees and costs, as costs may be
 5 interpreted to include fees. The Plaintiffs respectfully request attorney fees in the amount of
 6 \$3,700.00 and costs in the amount of \$1022.00" *Id.* at 4 (citing *HCN R. Civ. P.* 53). The
 7 plaintiffs provided no itemization in conjunction with this request.

9 16. Neither party requested a hearing on the issue of attorney fees and costs. *See HCN R.*
 10 *Civ. P.* 20.

12 17. The following figures represent a statistical analysis of civil cases filed in the Trial Court
 13 during the 2000 calendar year.

14	Number of Civil Cases:	116 ¹
15	Number of Civil Cases w/ Possibility of Trial:	75 ²
16	Number of Civil Cases w/ Nation as Plaintiff:	28 ³
17	Number of Civil Cases w/ Nation as Defendant:	42 ⁴
18	Number of Cases not involving the Nation:	6 ⁵
19	Number of Cases in which the Nation Prevailed:	53/66 ⁶

21 ¹ The Court almost exclusively entertains civil cases, but the "CV" designation is not used for juvenile, domestic
 22 violence or child support enforcement matters.

23 ² The remainder of civil cases dealt with CTF/ITF requests in which the Court routinely holds one (1) non-
 24 adversarial fact-finding hearing.

25 ³ This figure includes one (1) intragovernmental dispute in which the Nation constituted the sole party: *HCN Dep't*
 26 *of Justice v. HCN Gaming Comm'n*, CV 00-58.

27 ⁴ This figure includes one (1) intragovernmental dispute in which the Nation constituted the sole party: *HCN Dep't*
 28 *of Justice v. HCN Gaming Comm'n*, CV 00-58. This figure also includes cases brought against employees or
 officials of the Nation with the Department of Justice providing legal representation. *See HCN R. Civ. P.* 27(B).

⁵ Four (4) of these cases involved individual contractual disputes proceeding under *Hocak* tradition and custom, and
 the remaining two (2) were initiated by the Hocak Federal Credit Union for the purpose of debt collection. *See*
 CLAIMS AGAINST PER CAPITA ORDINANCE, § 103(d).

⁶ This figure excludes the following cases: *Cindy Gilbertson v. HCN Ins. Review Comm'n et al.*, CV 00-112
 (unaware of outcome on remand to HIRC); *Lisa S. Wathen v. HCN Gaming Comm'n*, CV 00-65 (pending final
 determination at trial level); and *HCN Dep't of Justice v. HCN Gaming Comm'n*, CV 00-58. The interlocutory
 decision rendered in a temporarily consolidated action enabled the Court, Chief Judge William H. Bossman
 presiding, to enter a final determination in *Wathen. Maureen Arnett et al. v. HCN Dep't of Admin. et al.*, CV 00-60,

1 Percentage of Cases in which the Nation Prevailed: 80.3%

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3 18. On April 13, 2002, the Ho-Chunk Nation Supreme Court amended Rule 53 to expressly
4 include "attorney's fees" as an enumerated "cost" that the Trial Court could award a prevailing
5 party. *HCN R. Civ. P. 53*. Prior to the amendment, the Court granted attorney fees in two (2)
6 cases pursuant to Rule 53. *Steve B. Funmaker v. JoAnn Jones et al.*, CV 97-72 (HCN Tr. Ct.,
7 Mar. 26, 1998); *Jeremy Rockman v. JoAnn Jones*, CV 96-47 (HCN Tr. Ct., Nov. 8, 1996), *aff'd*,
8 SU 96-10 (HCN S. Ct., Mar. 24, 1997).
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11 **DECISION**
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14 This decision concerns whether a plaintiff may receive attorney fees and costs as a result
15 of suing to enjoin an unreasonable and unconstitutional action of agents of the Nation. The Court
16 shall begin by reviewing prior case law within this jurisdiction. The Court shall then extend its
17 focus outward to discover the current status of federal law on this issue. The examination shall
18 conclude with an assessment of the Court's equitable powers.
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20 In *Simplot*, the Court awarded the amount of \$200.00 "for reasonable expenses and fees"
21 against the Nation as a consequence of its unjustified failure to respond to interrogatories.
22 *Lonnie Simplot et al. v. HCN Dep't of Health*, CV 95-26-27, 96-05 (HCN Tr. Ct., Aug. 14, 1996)
23 at 1. Furthermore, the Court found that the absence of a response "prejudiced [the plaintiffs] in
24 their ability to file proper Motions for Summary Judgment in their case." *Id.* (HCN Tr. Ct., June
25 26, 1996) at 2. The Court premised its award on the fact that the defendant's inaction forced the
26 plaintiffs to file a motion to compel. *Id.*
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28
-65 (HCN Tr. Ct., Jan. 8, 2001).

1 Similarly in *Rockman*, the plaintiff's action forced the defendant to unnecessarily expend
2 resources. The plaintiff initiated the suit by filing an initial pleading, but subsequently requested
3 a voluntary dismissal at the scheduling conference. *Rockman*, CV 96-47 (HCN Tr. Ct., Nov. 8,
4 1996) at 1. The Court awarded \$570.60 for "reasonable" attorney fees and mileage
5 reimbursement since the defendant "incurred unnecessary costs[] in defending against an action
6 that the plaintiff . . . brought[,] wasting the resources of the Court and its staff and that of the
7 defendant." *Id.* at 4. The Court based the mileage award on the distance that the attorney needed
8 to travel to attend the scheduling conference, using the statutory allowance of \$.30 per mile to
9 calculate a roundtrip from Madison to Black River Falls. *Id.* at 2.

12 The HCN Supreme Court affirmed the Trial Court decision after reviewing the judgment
13 for an abuse of discretion in granting attorney fees and costs pursuant to *HCN R. Civ. P. 53. Id.*
14 SU 96-10 (HCN S. Ct., Mar. 24, 1997) at 1. The HCN Supreme Court stated:

16 [t]he trial court properly exercised that discretion in awarding the costs
17 and fees she incurred in connection with the October 30, 1996 hearing. As
18 a result of the Appellant's failure to notify the Appellee of his intention to
19 dismiss his claim, the Appellee incurred substantial cost to attend a
20 hearing that was previously scheduled by the trial court. This Court agrees
that if the Appellee had received proper notice for considering the Motion
to Dismiss without prejudice, the trial court may have canceled the
scheduling hearing.

21 *Id.* In addition, the HCN Supreme Court awarded the defendant/appellee the identical amount of
22 \$570.60 "incurred in connection of [*sic*] this appeal."⁷ *Id.* at 2.

25 ⁷ The Court cannot understand the automatic granting of costs and fees at the appellate level due to the absence of
26 any binding case law on the issue of taxation of costs. See *Jacob Lonetree et al. v. Robert Funmaker, Jr. et al.*, SU
27 00-16 (HCN S. Ct., Mar. 16, 2001) at 3-4 (only appellate decisions serve as binding precedent). The HCN Supreme
28 Court later denied a request for appellate lay advocate fees and costs in a separate case. *Carol J. Smith v. Rainbow
Bingo*, SU 97-04 (HCN S. Ct., Jan. 8, 1998). The appellee claimed that the appellants filed a frivolous appeal,
which the HCN Supreme Court defined as an appeal "presenting no legal argument or question." *Id.* at 2. Despite
the denial, the HCN Supreme Court nonetheless insinuated that Ms. Smith could have received lay advocate fees
against the Nation if it had filed an appeal in bad faith. *Id.* at 3.

1 The *Funmaker* case differs from the above actions in that the plaintiff neither failed to
2 prosecute his claims nor neglected to adhere to procedural requirements. The defendants filed
3 dispositive motions, which the plaintiff, by and through legal counsel, argued against at a
4 scheduled motion hearing. *Funmaker*, CV 97-72 (HCN Tr. Ct., Nov. 26, 1997) at 2. The Court
5 awarded \$3,311.75, twenty-five percent (25%) of the requested amount, since one (1) of the four
6 (4) causes of action proved "frivolous and should never have been brought in the first place." *Id.*
7 at 16, n.6. The Court denied attorney fees in relation to the other causes of action since each
8 possessed "arguable merit." *Id.* Furthermore, the Court awarded attorney costs and services in
9 the amount of \$249.95, including copying charges that the Court reduced to reflect its standing
10 charge of \$.05 per page. *Id.* (HCN Tr. Ct., Mar. 26, 1998) at 2.

13 The Court did not address the issue of attorney fees again until two (2) years later. *Jolene*
14 *Smith v. Scott Beard, as Dir. of HCN Dep't of Educ., et al.*, CV96-94 (HCN Tr. Ct., Aug. 10,
15 2000), *aff'd on other grounds*, SU 00-14 (HCN S. Ct., Feb. 6, 2001). Ms. Smith's lay advocate
16 requested fees following a settlement, three (3) subsequent appeals and prevailing, in part, at
17 trial. *Id.* at 1-5. Like *Simplot*, the *Smith* case proceeded to Court after the plaintiff exhausted the
18 Administrative Grievance Process of the HO-CHUNK NATION PERSONNEL POLICIES &
19 PROCEDURE MANUAL (hereinafter PERSONNEL MANUAL). Unlike *Simplot*, the Court denied
20 attorney fees by reference to the limited waiver of sovereign immunity.⁸ *Id.* at 25-26.

23 The Court decided the issue as follows:

24 the limited waiver of sovereign immunity at issue in this case (HCN
25 LEGISLATIVE RES. 3-26-96A) allows the wronged employee to recover a
26 maximum of \$2,000 and reinstatement. It is silent as to attorney, or Lay

27 ⁸ In *dicta*, the Court stated that "if the Court were to award lay advocate fees[,] it would scrutinize the billings to
28 determine whether they were reasonable and necessary and broken into standard billing units of no less than ¼ hours
for lay advocates and paralegals or the lowest tenths of hours for attorneys." *Smith*, CV 96-94 (HCN Tr. Ct., Sept. 6,
2000) at 4. This practice equates with the manner of reimbursement utilized in juvenile case *Guardian ad litem*
appointments.

1 Advocate[,] fees. The Court must give appropriate deference to the
2 Legislature. Had the Legislature intended that a wronged employee be
3 able to recover attorney or Lay Advocate fees, they would have
4 specifically so stated. Furthermore, HCN LEGISLATIVE RES. 3-26-96A
5 bars any remedies not explicitly listed within the resolution. The Court
therefore holds that the plaintiff's claim for Lay Advocate fees is barred by
HCN LEGISLATIVE RES. 3-26-96A.

6 *Id.* (footnote omitted). The Court declined to explain the justification for providing the *Simplot*
7 plaintiffs attorney fees, which when combined with an award of back pay exceeded the \$2,000.00
8 statutory limitation. *See Simplot*, CV 96-05 (HCN Tr. Ct., Aug. 29, 1996) at 24.

9 The Court may have considered the attorney fees award as a sanction for failure to adhere
10 to a discovery request. *See HCN R. Civ. P. 38*. In fact, the *Simplot* plaintiffs received no
11 attorney fees for prevailing on their cause of action. The Court, however, never referenced Rule
12 38, but did note that the single occurrence could "be seen as a clear exception to the normal rule
13 of no attorney's fees where the Court was attempting to uphold the integrity of the judicial
14 process." *Smith*, CV 96-94 (HCN Tr. Ct., Sept. 6, 2000) at 3. Yet, the Court offered no rationale
15 explaining how a monetary sanction could pierce the Nation's sovereign immunity.
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18 Despite not granting attorney fees, the Court awarded costs in *Smith* in the form of filing
19 fees. *Id.* (HCN Tr. Ct., July 10, 2001) at 2. The Court appeared willing to award lay advocate
20 costs, telephone, postal and copying, but denied such requests due to the plaintiff's failure to
21 submit an itemization supported by corroborating documentation. *Id.* at 2-3. Again, the Court
22 did not explain how such awards could pierce the Nation's sovereign immunity.
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24 The Court also chose to deny reimbursement for travel costs, but upon a different
25 rationale. The Court expressed that "[t]ravel costs are not costs in the traditional sense."⁹ *Id.* at
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28 ⁹ The Court distinguished the award of travel costs in *Rockman* by describing the award as an effort "to prevent
injustice when a defendant was forced to hire an attorney who filed an *Answer* and appeared in Court before the
plaintiff voluntarily dismissed his case." *Smith*, CV 96-94 (HCN Tr. Ct., Sept. 6, 2000) at 3. This judge, however,

1 3. Instead, when the plaintiff "obtained employment with the Ho-Chunk Nation, she accepted
2 these travel costs as incidental to her employment with the Nation as she may only sue the Nation
3 through its courts."¹⁰ *Id.*

4
5 Most recently, the Court followed the guidance of *Smith* and granted costs, but denied
6 attorney fees. *Joan M. Whitewater et al. v. HCN Office of Tribal Enrollment et al.*, CV 99-62
7 (HCN Tr. Ct., Apr. 3, 2001), *rev'd on other grounds*, SU 01-06 (HCN S. Ct., Oct. 31, 2001). The
8 Court found "no statutory or other authority to grant attorney's fees."¹¹ *Whitewater*, CV 99-62 at
9 31. The Court requested an itemization of costs, but the appellate reversal negated this issue.

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11 Each of the foregoing judgments shares some common traits apart from seeming logical
12 inconsistencies. The rulings represent discretionary decisions of the Court, yet conditioned upon
13 the fact that "[t]he Court may only order such relief to the extent allowed by Ho-Chunk Nation
14 enactments." *HCN R. Civ. P. 53*. One such enactment, the CONSTITUTION, provides that the
15 Court may "issue all remedies in law and in equity." CONST., ART. VII, § 6(a). However, this
16 broad grant of authority does not evidence a waiver of tribal sovereign immunity, and the
17 existence of sovereign immunity serves to confuse an already complicated inquiry when a party
18 seeks attorney fees against the Nation. *See id.*, § 5(a). Regrettably, the Court has not developed
19 easily defined standards, but an ambiguous case-by-case approach. Furthermore, the Court has
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25 does not believe Ms. Jones was compelled any more than Ms. Smith to acquire legal counsel, so the difference may
26 rest with the opposing party's unwillingness to prosecute the action, thereby causing unjustifiable harm and
27 inconvenience.

28 ¹⁰ The Court cannot readily discern why the same reasoning would not serve as a prohibition against the other
"traditional costs," especially the filing fees. Even when a plaintiff obtains a judicial waiver of the filing fee, he or
she is responsible for reimbursement to the Court upon settlement of or prevailing on the cause of action. *HCN R.*
Civ. P. 4(C). The payment of a filing fee is certainly incidental to bringing suit in the Judiciary.

¹¹ The presiding judge must have based the decision on a sovereign immunity consideration since both the Trial
Court and HCN Supreme Court recognized the ability of a party to receive attorney fees by authority of *HCN R. Civ.*
P. 53 in *Rockman*.

1 not consulted, or at least cited, external law to elucidate "traditional" or contemporary approaches
2 to the issue. The Court shall attempt to do so at this point.

3 Both parties addressed the issue of attorney fees by first examining the seminal case on
4 the issue. *Pl.'s Mem.* at 2; *Defs.' Resp.* at 2. The United States Supreme Court (hereinafter U.S.
5 Supreme Court) provided an historical overview of the law relating to taxation of costs in a case
6 in which it overturned an attorney fees award. *Alyeska Pipeline Co. v. Wilderness Soc'y*, 421
7 U.S. 240 (1975). The appellate division granted attorney fees as an exercise of its equitable
8 powers and since the plaintiffs had fulfilled the role of "private attorney general" in prosecuting
9 violations of federal law. *Id.* at 241.

10 The U.S. Supreme Court reiterated the "American rule" that "the prevailing litigant is
11 ordinarily not entitled to collect a reasonable attorneys' fee from the loser." *Id.* at 247. The
12 *Alyeska* Court emphasized that this rule "is deeply rooted in our history and in congressional
13 policy." *Id.* at 271. Nonetheless, the U.S. Supreme Court recognized the continuing vitality of
14 three (3) common law exceptions to the general rule. *Id.* at 257-59.

15 First, the *Alyeska* Court acknowledged the historic "common fund exception." *Id.* at 257-
16 58; *see also Chambers v. NASCO, Inc.*, 501 U.S. 32, 45 (1991). In equity, a court could "permit
17 the trustee of a fund or property, or a party preserving or recovering a fund for the benefit of
18 others in addition to himself, to recover his costs, including his attorneys' fees, from the fund or
19 property itself or directly from the other parties enjoying the benefit." *Alyeska*, 421 U.S. at 257.
20 By doing so, the Court would "distribut[e] the costs of the burden of the litigation." *Sprague v.*
21 *Ticonic Nat'l Bank*, 307 U.S. 161, 167 (1939).

22 Second, a court could grant attorney fees in the event a party exhibited "'willful
23 disobedience of a court order.'" *Alyeska*, 421 U.S. at 258 (quoting *Fleischmann Distilling Corp.*

1 v. *Maier Brewing Co.*, 386 U.S. 714, 718 (1967)). This exception represents the inherent judicial
2 power to hold either a party or counsel in contempt of court. *See e.g., In re: Diane Lonetree*, SU
3 96-16 (HCN S. Ct., Apr. 14, 1997) at 2. As a consequence of a court's inherent discretion, a
4 court could "impose as part of the [contempt] fine attorney's fees representing the entire cost of
5 the litigation." *Chambers*, 501 U.S. at 45 (citing *Toledo Scale Co. v. Computing Scale Co.*, 261
6 U.S. 399, 428 (1923)).

8 Third, a court could award attorney fees if a party "acted in bad faith, vexatiously,
9 wantonly, or for oppressive reasons." *Alyeska*, 421 U.S. at 258-59 (quoting *F.D. Rich Co. v.*
10 *United States ex rel. Indus. Lumber Co.*, 417 U.S. 116, 129 (1974)). The authority to impose
11 attorney fees in this instance derives "from the court's traditional equitable powers," *Winters v.*
12 *City of Oklahoma City*, 740 P.2d 724, 726 (Okla. 1987), but also implicates the "inherent power
13 to police itself." *Chambers*, 501 U.S. at 46. Consequently, a court would not need any basis in
14 substantive law in order to act because "when fees are based upon misconduct by an attorney or
15 party in the litigation itself, . . . the matter is procedural." *In re Larry's Apartment*, 249 F. 3d
16 832, 838 (9th Cir. 2001).

19 To a certain extent, the third exception resembles the inherent power of contempt. *See*
20 *Hutto v. Finney*, 437 U.S. 678, 691 (1978). The purposes for awarding attorney fees, vindication
21 of judicial authority and restitution to the injured party, prove the same. *Chambers*, 501 U.S. at
22 46 (citing *id.* at 689 n.14). However, the bad faith exception is not necessarily triggered by
23 disrespectful courtroom conduct or a failure to adhere to lawful judicial directives. For example,
24 a court may award attorney fees based solely upon an objective assessment of the pleading. *See*
25 *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 766 (1980). Yet, "bad faith may be found, not
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1 only in the actions that led to the lawsuit, but also in the conduct of the litigation." *Id.* (quoting
2 *Hall v. Cole*, 412 U.S. 1, 15(1973)).

3 All of the above common law exceptions are rooted in the inherent powers of the
4 judiciary. "The inherent powers of . . . courts are those which 'are necessary to the exercise of all
5 others.'" *Roadway Express*, 447 U.S. at 764 (quoting *United States v. Hudson*, 11 U.S. 32, 34
6 (1812)). Due to their pedigree, a court must exercise such powers "with restraint and discretion."
7 *Roadway Express*, 447 U.S. at 764. "A primary aspect of that discretion is the ability to fashion
8 an appropriate sanction for conduct which abuses the judicial process." *Chambers*, 501 U.S. at
9 44-45. In addition, the dictates of due process mandate fair notice and the opportunity for a
10 hearing prior to assessing attorney fees.¹² *Id.* at 50; *see also* CONST., ART. X, § 1(a)(8); *In re*
11 *Rick McArthur*, SU 97-07 (HCN S. Ct., Feb. 27, 1998) at 5-7.

14 The preceding discussion sets forth the justification for a court granting attorney fees
15 pursuant to its inherent authority, but does not explain how such a grant could pierce the
16 sovereign immunity of a governmental unit. The U.S. Supreme Court confronted this issue a few
17 years after deciding *Alyeska*. *Hutto v. Finney*, 437 U.S. 678 (1978). The *Hutto* Court examined
18 the issue against a backdrop of federal cases, which established the legal premise that a litigant
19 could receive declaratory and injunctive relief against a state official acting outside of his or her
20 official capacity. *See e.g., Edelman v. Jordan*, 415 U.S. 651 (1974); *Ex Parte Young*, 209 U.S.
21 123 (1908).

24 The theory of *Young* was that an unconstitutional statute is void, and
25 therefore does not "impart to [the official] any immunity from
26 responsibility to the supreme authority of the United States." *Young* also
27 held that the Eleventh Amendment¹³ does not prevent federal courts from

28 ¹² The attorney fees award in *Alyeska* did not suffer from constitutional infirmities. The U.S. Supreme Court
overturned the appellate division since the award did not fit within any of the exceptions. *Alyeska*, 421 U.S. at 259.

¹³ "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced

1 granting prospective injunctive relief to prevent a continuing violation of
2 federal law. . . .

3 Both prospective and retrospective relief implicate Eleventh Amendment
4 concerns, but the availability of prospective relief of the sort awarded in
5 *Ex Parte Young* gives life to the Supremacy Clause.¹⁴ Remedies designed
6 to end a continuing violation of federal law are necessary to vindicate the
7 federal interest in assuring the supremacy of that law.

8 *Green v. Mansour*, 474 U.S. 64, 68 (1985) (quoting *Ex Parte Young*, 209 U.S. at 160) (internal
9 citations omitted).

10 In *Hutto*, the U.S. Supreme Court approved an award of attorney fees as an ancillary cost
11 to an appropriate grant of prospective injunctive relief. *Hutto*, 437 U.S. at 690. Federal courts
12 possess this remedy in order to induce compliance with an injunction, and to compensate the
13 prevailing party for "expenses incurred in litigation seeking only prospective relief." *Id.* at 695.
14 The *Hutto* Court premised the award on the bad faith exception, and remarked that "[c]osts have
15 traditionally been awarded without regard for the States' Eleventh Amendment immunity." *Id.*
16 The Court continued: "[a] federal court's interest in orderly, expeditious proceedings 'justifies
17 [it] in treating the state just as any other litigant and in imposing costs upon it 'when an award is
18 called for.'" *Id.* at 696 (quoting *Fairmont Creamery Co. v. Minnesota*, 275 U.S. 70 (1927)).

19 The U.S. Supreme Court expressed the same sentiment in *Alyeska*. The Court criticized
20 any proposed expansion of the "American rule" that would "operate only against private parties
21 and not against the Government." *Alyeska*, 421 U.S. at 269. Regardless, the real difficulty is
22 discerning the line between retroactive and prospective relief and associated ancillary fees and
23 costs. *See Hutto*, 437 U.S. at 690.
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27 or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign
28 State." U.S. CONST. amend. XI.

¹⁴ This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties
made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land . . ."
U.S. CONST. art. VI, § 2.

1 The HCN Supreme Court has affirmed dismissals on the basis of sovereign immunity
2 from suit in the absence of underlying requests for money damages. *See e.g., Chloris A. Lowe,*
3 *Jr. v. Ho-Chunk Nation et al.*, SU 97-01 (HCN S. Ct., June 13, 1997); *see also* CONST., ART. XII,
4 § 1. The failure to name appropriate parties often proved the dispositive factor.
5

6 It is necessary for the courts to know which individuals are being sued so
7 that the trier of fact may assess whether or not that specific individual has
8 acted outside the scope of their authority or not. Suits based upon the
9 legal argument that someone has acted outside of their authority
10 specifically name the individual(s).

11 *Lowe*, SU 97-01 at 4; *see also* CONST., ART. XII, § 2. If a plaintiff identifies either an official or
12 employee acting outside the scope of their authority, then the Court may consider whether to
13 grant "declaratory and non-monetary injunctive relief." CONST., ART. XII, § 2.

14 The HCN Supreme Court explored the contours of the Judiciary's equitable powers even
15 further in a subsequent employment case. *Millie Decorah, as Fin. Dir. of the HCN, et al. v. Joan*
16 *Whitewater*, SU 98-02 (HCN S. Ct., Oct. 26, 1998). In *Decorah*, the parties entered into a
17 settlement at the trial level, but stipulated that the presiding judge should determine the plaintiff's
18 appropriate rate of pay. The defendants agreed to reinstate the plaintiff and provide her a damage
19 award of \$2,000.00. The Trial Court, however, gave retroactive, rather than just prospective,
20 effect to the comparable wage determination. *Id.* at 3.

21 Ms. Whitewater had named only individual defendants, thereby enabling her to receive
22 only equitable relief from the Court. Consequently, the HCN Supreme Court overturned the
23 Trial Court's award of retroactive relief, explaining as follows:
24

25 [t]he language of the Ho-Chunk Nation Constitution is clear. The Tribal
26 Court may only award equitable relief where officials of the Ho-Chunk
27 Nation act beyond the scope of their duties. Equitable relief is defined as
28 "relief sought in a court with equity powers as, for example, in the case of
one seeking an injunction or specific performance *instead of money*

1 *damages.*" Black's Law Dictionary [539 (6th ed. 1990).] The definition of
2 equitable relief is defined as nonmonetary [*sic*] relief.

3 *Id.* at 4 (emphasis in original); *see also Robert A. Mudd v. HCN Legislature et al.*, SU 03-02
4 (HCN S. Ct., Apr. 8, 2003) at 6, n.2. The HCN Supreme Court emphasized that "[b]y awarding
5 the payment as retroactive, the award bec[ame] a monetary award."¹⁵ *Id.*

6 The HCN Supreme Court first addressed the permissible scope of prospective injunctive
7 relief against the Nation earlier in the year. *C. Smith*, SU 97-04. Ms. Smith properly exhausted
8 her administrative remedies in an employment action and filed suit against a unit of government
9 and an official. Therefore, Ms. Smith availed herself of the limited waiver of sovereign
10 immunity. *Id.* at 1.

11 The HCN Supreme Court emphatically stated that "[w]ithout this expressed waiver of
12 immunity such employee suits w[ould] be dismissed." *Id.* at 2. The HCN Supreme Court
13 focused on the restrictive language within the waiver, which mandated that "[n]othing in this
14 Policies and Procedures shall be construed to grant a party any remedies other than those
15 included in [that] section." *Id.* at 4 (quoting HCN LEG. RES. 03-26-96A) (emphasis in original).
16 Therefore, the HCN Supreme Court held that the Trial Court had no authority to order a removal
17 of a written reprimand from Ms. Smith's personnel file.¹⁶ *C. Smith*, SU 97-04 at 4.

18 More recently, the HCN Supreme Court affirmed the Trial Court's granting of
19 prospective injunctive relief in the form of a raise in pay and a written apology. *H. Smith*, SU
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25 ¹⁵ The Court has independently awarded prospective injunctive relief in the form of reinstatement, which could
26 inevitably result in the future payment of wages despite the presence of sovereign immunity. *See e.g., Roy J. Rhode*
27 *v. Ona M. Garvin, as Gen. Manager of Rainbow Casino*, CV 00-39 (HCN Tr. Ct., Aug. 24, 2001).

28 ¹⁶ The HCN Supreme Court offered no explanation of how the legislative resolution trumped the Judiciary's " power
to issue all remedies in law and in equity including injunctive and declaratory relief." CONST., ART. VII, § 6(a); *see*
also HCN R. Civ. P. 53. The proposed removal of negative references from the file surely represented a form of
prospective injunctive relief, and Ms. Smith designated an individual defendant in order to enable receipt of such
relief. CONST., ART. XII, § 2. Perhaps Ms. Smith failed to name an appropriate individual with control over or the
ability to direct modifications of the personnel file. However, the Judiciary has never imposed such technical

1 03-08. The HCN Supreme Court indicated that "[t]he initial place to see whether sovereign
2 immunity has been violated is the HCN CONSTITUTION." *Id.* at 10. After citing relevant
3 constitutional provisions, the HCN Supreme Court noted the following:

4
5 the principle of sovereign immunity exists primarily to protect the public
6 treasury from lawsuits seeking damages. It does not prevent people from
7 suing the HCN government to enforce their rights under the HCN
8 Constitution. . . . The appellant contends that the Trial Court violated the
9 limited waiver of sovereign [immunity] by awarding prospective relief in
10 the form of a two cent (\$.02) per hour raise. . . .

11
12 What the Trial Court ordered is in the nature of prospective forward
13 looking relief, not damages to punish the defendant for its past wrongs.
14 Although such relief has a monetary effect, so do many forms of
15 injunctive relief that the Court has sanctioned in the past such as ordering
16 a new election. However, this Court finds that such forward-looking relief
17 is well within the powers enumerated in the HCN Const., Art. VII, § 6(a).
18 "The Trial Court shall have the power to issue all remedies in law and in
19 equity including injunctive and declaratory relief and all writs including
20 attachment and mandamus."

21 *Id.* at 10-11 (emphasis in original).¹⁷ The HCN Supreme Court applied the same reasoning in its
22 affirmation of the requirement of a written apology. *Id.* at 11.

23
24 The foregoing synopsis of tribal case law demonstrates that the Judiciary has granted
25 attorney fees and costs pursuant to the *HCN R. Civ. P.* in conjunction with its inherent and/or
26 constitutional powers. The case review also demonstrates that the Judiciary has granted
27 prospective injunctive relief possessing an ancillary or incidental monetary impact pursuant to its
28 inherent equitable and/or constitutional powers. Unfortunately, the case law does not reveal any
clear guidance for purposes of resolving the issue at hand.

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30 pleading requirements, and the HCN Supreme Court later upheld a grant of similar relief despite the absence of an
31 individually named defendant. *Hope B. Smith v. Ho-Chunk Nation*, SU 03-08 (HCN S. Ct., Dec. 8, 2003).

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33 ¹⁷ The HCN Supreme Court acknowledged the constitutional limitation of granting "non-monetary [forms of]
34 injunctive relief," CONST., ART. XII, § 2, but concentrated its attention instead on an earlier constitutional provision
35 that does not contain the "non-monetary" limitation. *Id.* at 10-11. Also, the HCN Supreme Court gave no indication
36 that the more liberal limited waiver of sovereign immunity influenced its decision. PERS. MANUAL, Ch. 12 at 62.

1 The plaintiffs arguably present a credible request for receipt of attorney fees and costs,
2 provided that the plaintiffs submit an appropriate itemization. The defendants essentially
3 abandoned its dubious legal argument after confronting only a few questions at the appellate
4 hearing. One could deem the defendants' contentions as crafted in bad faith, but an award of
5 attorney fees and costs could only follow if the Judiciary has adopted the "American rule" with
6 the above-noted exceptions.
7

8 Despite signs of just that, the Court remains reluctant to incorporate jurisprudence
9 "deeply rooted in [American] history" and English common law into *HCN R. Civ. P. 53*.¹⁸
10 *Alyeska*, 421 U.S. at 271. Only the HCN Supreme Court knows the intent of the relevant rule.
11 The Court cannot opine the breadth or scope of the rule on the basis of standing case law.
12

13 Furthermore, the Court cannot readily deduce the HCN Supreme Court's position on
14 prospective injunctive relief given the seemingly conflicting precedential authority. *Compare H.*
15 *Smith*, SU 03-08 at 10-11, *with Decorah*, SU 98-02 at 4, *and C. Smith*, SU 97-04 at 4. Does
16 *HCN R. Civ. P. 53* envision allowing attorney fees and costs to a party that prevails in
17 approximately eighty percent (80%) of its cases and never against it?¹⁹ This question raises
18 significant equal protection concerns. *See* CONST., ART. X, § 1(a)(8).
19

20 In addition, the Court again directs the parties' attention to the fact that the CONSTITUTION
21 mentions equitable injunctive relief in two (2) separate provisions, but places the condition,
22 "non-monetary," only in the latter instance. CONST. ARTS. VII, § 6(a), XII, § 2. Several
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25 ¹⁸ The Court cannot simply adopt the Anglo common law tradition. Rather, the Court develops its common law
26 through the gradual incorporation of traditional and customary precepts as enunciated by the Ho-Chunk Nation
27 Traditional Court. *See e.g., Ho-Chunk Nation v. Harry Steindorf et al.*, CV 99-82 (HCN Tr. Ct., Feb. 11, 2000),
aff'd, SU 00-04 (HCN S. Ct., Sept. 29, 2000); *see also* CONST., ART. VII, § 5(a).

28 ¹⁹ The Ho-Chunk Nation Department of Justice routinely requests attorney fees in the initial pleading or response,
but has not, in the recollection of the Court, subsequently filed either a motion reiterating the same or presented an
itemization of costs.

1 questions result from this observation concerning injunctive remedies of which the Court shall
2 only identify a few. First, if a plaintiff can receive only non-monetary injunctive relief in a suit
3 against an individual, then what accounts for the decision in *C. Smith*, reversing the ordered
4 removal of negative references from a personnel file? Second, can a plaintiff receive only
5 injunctive relief possessing a monetary element in an action in which the Nation has waived its
6 sovereign immunity from suit?²⁰ Third, if so, does the fact that the Court is dealing with a
7 constitutionally permitted election challenge change the dynamic? Finally, is "monetary
8 injunctive relief" even a legally recognized designation in light of the prospective nature of the
9 remedy?
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12 As a consequence of these and other unresolved questions, the Court feels compelled to
13 deny the plaintiffs' request for attorney fees and costs. While the plaintiffs likely present a valid
14 claim for bad faith litigation strategy, the HCN Supreme Court has not definitively adopted the
15 American rule and exceptions for use in this jurisdiction. The Court denies the request for costs
16 for similar reasons identified above. The Court notes that this judgment does not constitute a
17 discretionary decision, *i.e.*, this order does not include any subjective determinations committed
18 to it by the appellate body.²¹
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20 The parties retain the right to file a timely post judgment motion with this Court in
21 accordance with *HCN R. Civ. P. 58, Amendment to or Relief from Judgment or Order*.
22 Otherwise, "[a]ny final *Judgment* or *Order* of the Trial Court may be appealed to the Ho-Chunk
23 Nation Supreme Court. The *Appeal* must comply with the Ho-Chunk Nation *Rules of Appellate*
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26 ²⁰ The HO-CHUNK NATION CONTEMPT ORDINANCE recognizes the Judiciary's "inherent authority to exercise the
27 power of contempt" in all cases over which the court exercises proper subject matter jurisdiction. HO-CHUNK
28 NATION CONTEMPT ORDINANCE, §§ 1.01, 3.01. As a result, the Judiciary has authorization to impose monetary
sanctions. *Id.* § 5.01.

²¹ Otherwise, attorney fees and cost assessments are reviewed for an abuse of discretion. *Rockman*, SU 96-10 at 1;
Chambers, 501 U.S. at 55.

1 *Procedure* [hereinafter *HCN R. App. P.*], specifically [*HCN R. App. P.*], Rule 7, Right of
2 Appeal.” *HCN R. Civ. P.* 61. The appellant “shall within thirty (30) calendar days after the day
3 such judgment or order was rendered, file with the [Supreme Court] Clerk of Court, a Notice of
4 Appeal from such judgment or order, together with a filing fee of thirty-five dollars (\$35 U.S.)”
5 *HCN R. App. P.* 7(b)(1). “All subsequent actions of a final *Judgment* or *Trial Court Order* must
6 follow the [*HCN R. App. P.*]” *HCN R. Civ. P.* 61.

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8 **IT IS SO ORDERED** this 22nd day of March 2004, by the Ho-Chunk Nation Trial Court
9 located in Black River Falls, WI within the sovereign lands of the Ho-Chunk Nation.
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13 Honorable Todd R. Matha
14 Associate Trial Court Judge
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Ho-Chunk Nation Court System
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Black River Falls, WI 54615
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