



1 *Administrative Record*, followed by a March 1, 2010 filing of *Official Exhibits*. See *HCN R. Civ.*  
2 *P.* 63(D). The Court convened a *Status Hearing* on Thursday, March 4, 2010 at 2:30 p.m. CDT,  
3 in order to address the scheduling.<sup>2</sup> On March 4, 2010, the Court entered the *Scheduling Order*,  
4 setting forth the timelines and procedures to which the parties should adhere during the pendency  
5 of the appeal.

7 On March 19, 2010, the respondent filed a *Motion to Dispense with Briefing Schedule*,  
8 constituting a stipulation to forego submission of briefs in regards to the underlying petition.  
9 *Mot. to Dispense with Briefing Schedule* (Mar. 19, 2010) at 1. The Court convened a *Motion*  
10 *Hearing* on Wednesday, April 7, 2010 at 10:00 a.m. CDT, in order to address the briefing. The  
11 Court entered its *Amended Scheduling Order* on April 28, 2010. The petitioner filed a timely  
12 *Initial Brief* on April 30, 2010. *HCN R. Civ. P.* 63(E). The respondent filed a *Response Brief* on  
13 May 27, 2010. *Id.* The petitioner did not timely file a *Reply Brief*. *Id.* Neither party requested  
14 *Oral Argument*; specifically, the petitioner did not believe that *Oral Arguments* were necessary.  
15 *Initial Br.*, at 1.

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20 *R. Civ. P.* do not reflect such amendment.

21 <sup>2</sup> At the hearing, the Court noted that a discrepancy exists between the TRIBAL ENROLLMENT AND MEMBERSHIP  
22 CODE and the *HCN R. Civ. P.* regarding deadlines. See *supra* n.1. However, the Ho-Chunk Nation General Council  
23 delegated exclusive constitutional authority to the Ho-Chunk Nation Supreme Court “to establish written rules for  
24 the Judiciary.” CONST., ART. VII, § 7(b); see also HCN JUDICIARY ESTABLISHMENT & ORG. ACT, 1 HCC § 1.5c;  
25 *Bonnie Smith v. HCN Gaming Comm'n*, SU 01-02 (HCN S. Ct., May 11, 2001) at 2. Pursuant to this delegation, the  
26 Supreme Court adopted the *Ho-Chunk Nation Rules of Civil Procedure* on May 11, 1996, which “govern the  
27 procedure of the Trial Court in all actions and proceedings.” *HCN R. Civ. P.* 1. Of particular relevance here, *HCN R.*  
28 *Civ. P.* 63 deals with judicial review of administrative adjudication, and establishes court imposed deadlines and  
procedures for the Judiciary. Furthermore, the Supreme Court issued an administrative rule, which indicates that the  
judges must enter written decisions within three (3) months after the parties present a matter for either interim or  
final opinion. *In the Matter of Timely Issuance of Decisions*, ADMIN. RULE 04-09-05(1) (HCN S. Ct., Apr. 9, 2005).  
The TRIBAL ENROLLMENT AND MEMBERSHIP CODE attempts to require the Court to issue a judgment within sixty  
(60) days of the filing. Based upon *HCN R. Civ. P.* 63, *Judicial Review of Administrative Adjudication*, the briefing  
schedule oftentimes extends beyond sixty (60) days of the filing. The Court attempted to expedite the matter. See  
*Scheduling Order*, CV 10-15 (HCN Tr. Ct., Mar. 4, 2010). However, due to an extension requested by the parties,  
the Court issued an *Amended Scheduling Order*, which resulted in the briefing schedule concluding on June 3, 2010.  
Therefore, the Court, relying upon the Supreme Court’s administrative rule, must enter a judgment on or prior to  
September 3, 2010. ADMIN. RULE 04-09-05(1).

1 **APPLICABLE LAW**

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

4 **Art. II – Membership**

5 **Sec. 1. Requirements**

6 The following persons shall be eligible for membership in the Ho-Chunk Nation, provided, that  
7 such persons are not enrolled members of any other Indian nation:

8 (a) All persons of Ho-Chunk blood whose names appear or are entitled to appear on the  
9 official census roll prepared pursuant to the Act of January 18, 1881 (21 Stat. 315), or the  
10 Wisconsin Winnebago Annuity Payroll for the year one thousand nine hundred and one (1901),  
or the Act of January 20, 1910 (36 Stat. 873), or the Act of July 1, 1912 (37 Stat. 187); or

11 (b) All descendants of persons listed in Section 1(a), provided, that such persons are at  
12 least one-fourth (1/4) Ho-Chunk blood.

13 (c) DNA must prove parentage. “DNA” means deoxyribonucleic acid [Amendment II  
14 adopted on May 6, 2009 which became effective June 20, 2009 by operation of law.]

15 (d) Beginning the date this amendment is approved, the Ho-Chunk Nation shall no longer  
16 consider or accept for enrollment any person who has previously been enrolled as a member of  
17 another Tribe (including the Winnebago Tribe of Nebraska). [New section adopted by  
Amendment I on January 26, 2000 and approved by the Secretary on March 3, 2000.]

18 **Sec. 2. Relinquishment of Membership and Re-enrollment.**

19 Enrollment in any other Indian Nation shall constitute voluntary relinquishment of membership.  
20 Adult members may relinquish their membership or the membership of their minor children.  
21 Relinquishment of membership shall be done in writing. Any adult member who has voluntarily  
22 requested to be removed from the Membership Roll shall not be eligible for re-enrollment. Any  
23 minor whose membership has been relinquished by a parent shall be eligible for re-enrollment  
upon reaching the age of eighteen (18).

24 **Sec. 3. Re-enrollment by General Council.**

25 Any person of at least one-fourth (1/4) Ho-Chunk blood who has relinquished membership under  
26 Section 2 of this Article may be re-enrolled into membership by a two-thirds (2/3) vote of the  
27 General Council, provided, that such individual is not an enrolled member of any other Indian  
28 Nation.

**Sec. 4. Membership Roll**

1 The Legislature shall maintain one official roll of all tribal members.

2 Sec. 5. Membership Code.

3 The Legislature shall have the power to enact laws not inconsistent with this Article to govern  
4 membership. Removal of any person who is not eligible for membership from the Membership  
5 Roll shall be done in accordance with the Membership Code, provided, that such removal is  
6 approved by at least two-thirds (2/3) vote of the General Council.

7 Sec. 6. Appeals

8 Any person who has been rejected for enrollment or who has been removed from the  
9 Membership Roll shall have the right to appeal to the Judiciary for a remedy in equity consistent  
10 with this Constitution.

11 Art. IV – General Council

12 Sec. 2. Delegation of Authority. The General Council hereby authorizes the legislative  
13 branch to make laws and appropriate funds in accordance with Article V. The General Council  
14 hereby authorizes the executive branch to enforce the laws and administer funds in accordance  
15 with Article VI. The General Council hereby authorizes the judicial branch to interpret and  
16 apply the laws and Constitution of the Nation in accordance with Article VII.

17 Art. V - Legislature

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

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

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

23 Art. VII- Judiciary

24 Sec. 5. Jurisdiction of the Judiciary

25 (a) The Trial Court shall have original jurisdiction over all cases and controversies,  
26 both criminal and civil, in law or in equity, arising under the Constitution, laws, customs, and  
27 traditions of the Ho-Chunk Nation, including cases in which the Ho-Chunk Nation, or its  
28 officials and employees, shall be a party.

29 Sec. 6. Powers of the Trial Court.

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

1 TRIBAL ENROLLMENT AND MEMBERSHIP CODE, 6 HCC § 7

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3 3. Definitions. For purposes of this Code, these words have the following definitions and  
4 will be identified throughout this document by capitalization:

5 i. "Clear and Convincing Evidence" means evidence that tends to show, on its face,  
6 more likely than not, that fact which is trying to be proven.

7 r. "DNA" is the acronym for deoxyribonucleic acid, which is that nucleic acid that  
8 carries the genetic information in the cell and is capable of self-replication and synthesis  
9 of ribonucleic acid "RNA."

10 u. "Ho-Chunk Blood" means the quantum of Ho-Chunk Blood in a person's lineage  
11 as it appears in Article II, Section 1 of the Constitution and includes Members of the Winnebago  
12 Tribe of Nebraska. If the Base Rolls provide no percentage of Ho-Chunk Blood, the Tribal  
13 Enrollment Officer will determine that the percentage of Ho-Chunk Blood is four-fourths (4/4),  
14 unless the Tribal Enrollment Officer determines by Clear and Convincing Evidence that the  
15 actual percentage is less than four-fourths (4/4).

16 5. Committee on Tribal Enrollment.

17 a. Committee Membership.

18 (1) Within the Department of Heritage Preservation, there will be a  
19 Committee on Tribal Enrollment that will serve the Office of Tribal Enrollment in an  
20 advisory capacity and hear appeals in accordance with this Code.

21 8. Appeals to Committee on Tribal Enrollment and Trial Court.

22 a. Except for as provided in paragraph 10. b. (2) (b) (v) (cc) 1, any Member,  
23 Applicant, or Sponsor may appeal a determination made by the Office of Tribal Enrollment to  
24 the Committee on Tribal Enrollment. Matters which may be appealed include determinations  
25 regarding Eligibility for Membership, a fine imposed by the Committee, or a Blood Quantum  
26 change that adversely affects the Member. Such appeal must be filed within sixty (60) Days after  
27 the date on which the Office of Tribal Enrollment publishes Notice of Eligibility for Membership  
28 or notifies the Member, Applicant, or Sponsor of the decision by certified mail. The Committee  
will hold a hearing and issue a decision on such appeal in accordance with this Code.

b. The Committee on Tribal Enrollment's decision will be appealable to the Trial  
Court pursuant to Article II, Section 6 of the Constitution.

10. Ineligible Tribal Member Removal Procedures.

a. Grounds for Removal.

1 (1) The Member is less than one-fourth (1/4) Ho-Chunk Blood (Article II,  
2 Section 1(b) of the Constitution);

3 (2) insufficient proof of Ho-Chunk ancestry (Article II, Section 1(a) of the  
4 Constitution);

5 b. Persons Authorized to Initiate Possible Removal.

6 (1) Initiation of Removal by Tribal Enrollment Officer. The Tribal Enrollment  
7 Officer will initiate a removal of a Member from the Membership Roll upon determining  
8 that, by Clear and Convincing Evidence, the Member fails to meet the eligibility  
9 requirements.

10 e. Commencement of Removal.

11 (3) Notice of Hearing. The Office of Tribal Enrollment will provide the notice  
12 of hearing to the Affected Member at least thirty (30) Days prior to the date set for the  
13 hearing. The notice will include the date, time and location of the hearing and state that  
14 the Affected Member has the right to be represented by counsel. The notice will be sent  
15 by certified mail return receipt requested.

16 f. Hearing.

17 (2) Discovery. Not less than fifteen (15) Days prior to a hearing, each party  
18 will share with the other(s) all documentary evidence which the party intends to present  
19 at the hearing.

20 (3) Postponement of Hearings. Once scheduled, hearings will not be  
21 postponed for more than thirty (30) Days.

22 (4) Chairperson to Preside. The Chairperson of the Committee will preside  
23 over the hearing and will be responsible for controlling the presentation and admissibility  
24 of evidence, appearance of witnesses, and the overall order of the hearing.

25 (6) Closed Hearing. Due to confidential and private matters hearings will be  
26 closed to the public. Only Members of the Committee, the Tribal Enrollment Officer and  
27 his or her designated administrative/technical staff, the Affiants, the Affected Member,  
28 and the counsel of each party, the court reporter, and video photographer may be present  
at all times. Witnesses will be present only when giving testimony and shall be instructed  
to not discuss their testimony with any other individual during the hearing.

(7) Record. The record will include the Affidavits, all documentary evidence  
presented at the hearing and any stipulation or admission entered into at the hearing and  
all testimony taken during the hearing. The hearing will be recorded by transcript and  
video-taped. The transcript and tape will be kept on file by the Office of Tribal  
Enrollment for not less than one (1) year after the hearing. Transcripts and tapes will not

1 be released to any person, including the Affected Member, other than as required by the  
2 discovery rules applicable to any appeal to the Nation's Trial Court.

3 (10) Evidence.

4 (a) Formal rules of evidence do not apply at the hearing but evidence  
5 which is irrelevant, cumulative or which would be unfair or prejudicial may be  
6 excluded by the Chair or admitted by the Chair under special conditions or  
7 stipulations. Basic rules of relevancy, materiality and probative force will be used  
8 by the Chair as a guide to admissibility. The Chair will rule on the admissibility of  
9 evidence.

10 (b) Documentary evidence may be received in the form of copies or  
11 excerpts if the original is not readily available. Upon request, opportunity will be  
12 granted to compare the copy to the original. At the discretion of the Committee, a  
13 reasonable amount of time will be provided to review the evidence.

14 (c) Greater weight will be given to the following documents: verification  
15 of enrollment in another Indian Tribe, certified birth certificate, social security  
16 card, Court Orders, and DNA analysis.

17 g. Findings and Recommendations.

18 (3) Timeline for Findings and Recommendations. The Committee will issue  
19 written findings and recommendations to the parties within ten (10) Days of the hearing.

20 (4) Committee Findings and Recommendations. The Committee on Tribal  
21 Enrollment may render any of the following findings and recommendations:

22 (a) Find that the removal by the Affiants is Frivolous and/or  
23 Malicious, and dismiss the removal.

24 (b) Find that the Affiants or Tribal Enrollment Officer failed to meet  
25 the evidentiary standard necessary to remove a Member and dismiss the removal.

26 (c) Find that an Affected Member, through admission, does not meet  
27 the Membership requirements and proceed with the removal.

28 (d) Find that the Affected Member is ineligible for Membership if  
documentary and/or testimonial evidence shows by Clear and Convincing  
Evidence that the Affected Member does not meet the qualifications for  
Membership outlined in Article II, Section 1 of the Ho-Chunk Constitution.

(e) If the Committee finds the Affected Member is ineligible for  
Tribal Membership, it may further recommend the forfeiture of any or all property  
or the repayment of money received from the Nation, pursuant to the laws of the

1 Nation. This may only happen upon a determination by the Committee that the  
2 evidence establishes beyond a reasonable doubt that the Affected Member became  
3 a Member through fraud.

4 (f) Order that the Affected Member, and their relatives needed to  
5 establish Ho-Chunk lineage, submit to a DNA analysis to be conducted by an  
6 independent testing laboratory contracted by and paid by the Ho-Chunk Nation.  
The Affected Member must contact the Office of Tribal Enrollment in order to set  
testing times and locations for him or her and the selected relative(s).

7 12. Appeals to Trial Court.

8 a. An appeal of the findings and recommendations of the Committee on Tribal  
9 Enrollment must be filed in the Trial Court within thirty (30) Days of the date of the findings and  
10 recommendations.

11 b. Scope of Judicial Review. Decisions of the Trial Court will be based upon a  
12 review of the record of the Committee on Tribal Enrollment's proceedings, oral arguments, if  
13 any, and any written statements submitted. The Trial Court will not exercise de novo review of  
14 the Committee's findings and recommendations and will give proper deference to the expertise  
of the Committee and to its determinations of credibility. The Trial Court will not substitute its  
discretion for discretion legally vested in the Committee. The Trial Court will strictly construe  
the provisions of this Code.

15 c. The Trial Court will determine whether the findings and recommendations of the  
16 Committee:

- 17 (1) contains irregularities of procedure;  
18 (2) is arbitrary, capricious or unreasonable;  
19 (3) is unsupported by Clear and Convincing Evidence upon the whole record; or  
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21 HO-CHUNK NATION RULES OF CIVIL PROCEDURE

22 Rule 5. Notice of Service of Process.

23 (A) Definitions.

24 2. Summons - The official notice to the party informing him/her that he/she is identified  
25 as a party to an action or is being sued, that an *Answer* is due in twenty (20) calendar days (*See*  
26 *HCN R. Civ. P. 6*) and that a *Default Judgment* may be entered against them if they do not file an  
27 *Answer* in the prescribed time. It shall also include the name and location of the Court, the case  
number, and the names of the parties. The *Summons* shall be issued by the Clerk of Court and  
shall be served with a copy of the filed *Complaint* attached.

28 (C) Methods of Service of Process

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2 1. Personal Service. The required papers are delivered to the party in person by the  
3 bailiff, or when authorized by the Court, a law enforcement officer from any jurisdiction, or any  
4 other person not a party to the action who is eighteen (18) years of age or older and of suitable  
5 discretion.

6 Rule 61. Appeals.

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

11 Rule 63. Judicial Review of Administrative Adjudication.

12 (A) Any person aggrieved by a final agency decision may request that the Ho-Chunk Nation  
13 Trial Court review such decision by filing a *Petition for Administrative Review* with the Court  
14 within thirty (30) calendar days of such decision, unless otherwise provided.

15 (E) Within thirty (30) calendar days of filing the *Petition for Administrative Review*, the  
16 petitioner shall file a written brief, an *Initial Brief*, unless the petitioner has sought an evidentiary  
17 modification pursuant to *HCN R. Civ. P. 63(D)(1)(a-b)*. The respondent shall have thirty (30)  
18 calendar days after filing of the brief within which to file a *Response Brief*. After filing of  
19 respondent's *Response Brief*, the petitioner may file the *Reply Brief* within ten (10) calendar  
20 days.

21 Rule 70. Judgments in Traditional Court Resolution Proceeding.

22 Selection of the Traditional Court by a litigant forecloses the use of the Trial Court. All decisions  
23 of the Traditional Court will be summarized in writing by the Trial Judge. The decisions of the  
24 Traditional Court will not be appealable. The party selecting resolution by the Traditional Court  
25 must do so in writing and sign an acknowledgment that they understand that they will not be able  
26 to appeal the judgment to the Trial Court or Supreme Court. All parties appearing before the  
27 Traditional Court must appear voluntarily and consent in writing to the jurisdiction of the  
28 Traditional Court. The decisions of the Traditional Court apply only to the parties involved in  
that dispute, and will not be given any legal authority beyond that provided by the CONSTITUTION  
OF THE HO-CHUNK NATION.

FEDERAL RULES OF EVIDENCE

Rule 801. Definitions.

The following definitions apply under this article:

(a) Statement.

1 A "statement" is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is  
2 intended by the person as an assertion.

3 (b) Declarant.

4 A "declarant" is a person who makes a statement.

5 (c) Hearsay.

6 "Hearsay" is a statement, other than one made by the declarant while testifying at the trial or  
7 hearing, offered in evidence to prove the truth of the matter asserted.

8 Rule 802. Hearsay Rule.

9 Hearsay is not admissible except as provided by these rules or by other rules prescribed by the  
10 Supreme Court pursuant to statutory authority or by Act of Congress.

11 Rule 803. Hearsay Exceptions; Availability of Declarant Immaterial.

12 The following are not excluded by the hearsay rule, even though the declarant is available as a  
13 witness:

14 (6) Records of regularly conducted activity. A memorandum, report, record, or data  
15 compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the  
16 time by, or from information transmitted by, a person with knowledge, if kept in the course of a  
17 regularly conducted business activity, and if it was the regular practice of that business activity to  
18 make the memorandum, report, record or data compilation, all as shown by the testimony of the  
19 custodian or other qualified witness, or by certification that complies with Rule 902(11), Rule  
20 902(12), or a statute permitting certification, unless the source of information or the method or  
circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this  
paragraph includes business, institution, association, profession, occupation, and calling of every  
kind, whether or not conducted for profit.

21 Rule 901. Requirement of Authentication or Identification.

22 (a) General provision.

23 The requirement of authentication or identification as a condition precedent to  
24 admissibility is satisfied by evidence sufficient to support a finding that the matter in  
25 question is what its proponent claims.

26 (b) Illustrations.

27 By way of illustration only, and not by way of limitation, the following are examples  
28 of authentication or identification conforming with the requirements of this rule:



1 II, § 5. The CONSTITUTION indicates that “[a]ny person who has been rejected for enrollment or  
2 who has been removed from the Membership Roll shall have the right to appeal to the Judiciary  
3 for a remedy *in equity consistent with this Constitution.*” *Id.*, ART. II, § 6 (emphasis added).<sup>3</sup>  
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5 The CONSTITUTION delineates the Trial Court as having “the power to issue all remedies  
6 in law and in equity including injunctive and declaratory relief and all writs including attachment  
7 and mandamus.” *Id.*, ART.VII, § 6(a). An equitable remedy is one administered according to  
8 fairness as opposed to strictly formulated rules. *Ronald Kent Kirkwood v. Francis Decorah et*  
9 *al.*, CV 04-33 (HCN Tr. Ct., Feb. 11, 2005) at 15. Equitable remedies are typically prospective  
10 in nature and involve the court coercing a party to perform or refrain from performing an action.  
11 *Id.*; *Hope B. Smith v. Ho-Chunk Nation*, SU 03-80 (HCN S. Ct., Dec. 8, 2003) at 11. The  
12 TRIBAL ENROLLMENT AND MEMBERSHIP CODE allows the Court only two (2) options for review,  
13 to either sustain or remand. *See supra* note 3. The TRIBAL ENROLLMENT AND MEMBERSHIP  
14 CODE encroaches upon the Court’s ability to perform an appeal and grant appropriate or  
15 expansive relief.<sup>4</sup> *Id.*  
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19 <sup>3</sup> The TRIBAL ENROLLMENT AND MEMBERSHIP CODE attempts to restrict the Court’s constitutionally granted  
20 authority to hear such appeals and grant remedies in equity. Specifically, the legislation states,

21 [i]n reviewing a finding and recommendation of the Committee, the Trial Court will have two (2)  
22 options. These two (2) options are to either sustain or remand the Committee’s findings and  
23 recommendations. The Court may not reverse a Committee’s findings and recommendations. The  
24 Trial Court will only remand the Committee’s findings and recommendations if the Court  
25 determines that the Committee’s findings and recommendations contain irregularities of  
procedures or are arbitrary, capricious, or unreasonable, or unsupported by Clear and Convincing  
Evidence upon the whole record or involve an abuse of discretion. Upon remand, the Committee  
will reconsider its findings and determinations in light of the Trial Court’s opinion and judgment.

26 TRIBAL ENROLLMENT AND MEMBERSHIP CODE, 2 HCC § 7.12. A court of equity has traditionally had the power to  
27 fashion any remedy deemed necessary and appropriate to do justice in the particular case. The legislation inhibits the  
28 Court’s ability to review an appeal and grant appropriate or expansive relief. *See, e.g.,* *Bride v. Baker*, 37 App. D.C.  
231, 236 (D.C. Cir. 1911) (“Courts of equity are established to do justice in cases where an adequate remedy at law  
may not be had, and they should seek to do ultimate justice in all cases.”). The Court cannot practically employ its  
equitable powers if improperly constrained to afford the utmost deferential treatment to the Committee’s decision.

<sup>4</sup> The predecessor legislation did not contain any similar provisions. TRIBAL ENROLLMENT AND MEMBERSHIP ACT  
OF 1995, HCNL 015-85, §12.

1           The TRIBAL ENROLLMENT AND MEMBERSHIP CODE creates a committee to conduct  
2 administrative adjudication by way of appeals.<sup>5</sup> TRIBAL ENROLLMENT AND MEMBERSHIP CODE,  
3 2 HCC § 7.8. However, by virtue of the legislation, the Committee appears to perform  
4 administrative adjudication. Whether it is through adjudicatory rulemaking, informal rulemaking  
5 or legislative rulemaking, this presupposes that the Legislature has the constitutional authority to  
6 make enrollment decisions. The Legislature does not have that authority and cannot delegate  
7 any power that it does not retain; therefore, any informal, formal or legislative rulemaking made  
8 by a division or a subdivision of an Executive Department would not require any judicial  
9 deference. The powers of the Legislature are enumerated within the CONSTITUTION, and the  
10 ability to determine membership is not one of the enumerated powers of the Legislature.  
11 CONST., ART. V, § 2. Nonetheless, the Court recognizes the legislative authority to enact a law  
12 governing membership to provide a mechanism to effectuate the constitutional membership  
13 provision. Even so, the statutory limitation cannot supersede the constitutional grant of power to  
14 the Trial Court. The Trial Court has the authority to “issue all remedies in law and equity.”  
15 CONST., ART. VII, §6(a); see also *id*, ART. II, § 6 (establishing a “right to appeal to the Judiciary  
16 for a remedy in equity”). Because of this constitutional mandate, it cannot be an error for the  
17 Trial Court to exercise its remedial power.

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21           The Supreme Court has previously ruled that the Court may review agency constitutional  
22 interpretations de novo. *Willard Lonetree v. Larry Garvin*, SU 07-04 (HCN S. Ct., Oct. 8, 2007)  
23 at 4. Supreme Court decisions “are binding on the Trial Court.” *Jacob LoneTree et al. v. Robert*  
24 *Funmaker, Jr. et al.*, SU 00-16 (HCN Tr. Ct., Mar. 16, 2001) at 4 (citing CONST., ART. VII, § 7(c)).

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27 <sup>5</sup> The CONSTITUTION authorizes the Judiciary to hear appeals. CONST., ART. II, § 6. Nonetheless, the Legislature  
28 also created a mechanism under the TRIBAL ENROLLMENT AND MEMBERSHIP CODE for the Tribal Enrollment  
Committee within the Department of Heritage Preservation to hear appeals. TRIBAL ENROLLMENT AND MEMBERSHIP  
CODE, 2 HCC § 7.5a(1) (forming a committee “that will serve the Office of Tribal Enrollment in an advisory  
capacity and hear appeals in accordance with this Code”).

1 The Supreme Court earlier explained that “[s]tare decisis is the policy of courts to stand by prior  
2 established precedent.” See *HCN Election Bd. v. Robert Mudd*, SU 97-05 (HCN S. Ct., Oct. 28,  
3 1997) at 2. The Trial Court must observe binding precedent of the Supreme Court. Likewise,  
4 the Supreme Court has favored a plain language approach and interpretation to the  
5 CONSTITUTION, statutes, and contracts. See, e.g., *Chloris Lowe, Jr. et al. v. HCN Legislature*  
6 *Members et al.*, SU 00-17 (HCN S. Ct., Mar. 13, 2001) at 6; *Marx Advertising Agency, Inc. v.*  
7 *HCN et al.*, SU 04-07 (HCN S. Ct., Apr. 4, 2004) at 11; *Greg Littlejohn v. HCN Election Bd. et*  
8 *al.*, SU 03-07 (HCN S. Ct., July 11, 2003) (Butterfield, J. dissenting) at 5.

11 The plain language of the Constitution indicates “[t]he following persons shall be eligible  
12 for membership in the Ho-Chunk Nation . . . [a]ll descendants of persons listed in Section 1(a),  
13 provided, that such persons are at least one-fourth (1/4) Ho-Chunk blood.” CONST., ART. II, §  
14 1(b). The Committee determined that Ms. Powless, through clear and convincing evidence  
15 provided through a DNA (deoxyribonucleic acid) test,<sup>6</sup> that she was not one-fourth (1/4) Ho-  
16 Chunk blood as constitutionally mandated; as a voluntary DNA analysis of the petitioner, Daria  
17 M. Powless, and the purported source of her blood quantum, Eldon Powless, revealed that there

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20 <sup>6</sup>The Legislature has deliberately selected this well-established burden of proof for accomplishing the purpose of the  
21 legislation. The Seventh Circuit Court of Appeals has offered the following observation in relation to this civil  
22 evidentiary standard:

23 The party with the burden of proof “must have been able to ‘place in the ultimate fact-finder an  
24 abiding conviction that the truth of . . . [his or her] factual contentions are “highly probable.””  
25 *Colorado v. New Mexico*, 467 U.S. 310, 317 (1984). This is the Supreme Court’s definition of  
26 those words so often and so freely bandied about: ‘clear and convincing evidence.’

27 *Von Gonten v. Research Sys. Corp.*, 739 F.2d 1264, 1268 (7th Cir. 1984); see also *Joelene Smith v. Scott Beard et*  
28 *al.*, SU 00-14 (HCN S. Ct., Mar. 12, 2001) at 1 (acknowledging this standard definition). To prove something by  
“clear and convincing evidence,” the party with the burden of proof must convince the trier of fact that it is  
substantially more likely than not that the thing is in fact true. This is a lesser requirement than “proof beyond a  
reasonable doubt,” which requires that the trier of fact be close to certain of the truth of the matter asserted, but a  
stricter requirement than proof by “preponderance of the evidence,” which merely requires that the matter asserted  
seem more likely true than not. The TRIBAL ENROLLMENT AND MEMBERSHIP CODE defines clear and convincing  
evidence as “evidence that tends to show, on its face, more likely than not, that fact which is trying to be proven.”  
TRIBAL ENROLLMENT AND MEMBERSHIP CODE, 2 HCC § 7.3i. The legislatively provided definition appears to  
confusingly incorporate the “preponderance of the evidence” standard.

1 was a 0.000% chance that the alleged source of the petitioner’s blood quantum was related to the  
2 petitioner. *Enrollment Committee Decision* (Jan. 8, 2010) at 1; *Official Ex.* at 8-9.

3 Based upon the Committee’s determination, the petitioner filed a *Petition for*  
4 *Administrative Review* because the petitioner’s “attorney was not granted sufficient time to  
5 prepare for [the] case, time for discovery, [and the] request for rescheduling of [the] case was  
6 denied by [the Committee]. *Pet.* at 1. She further alleged that the “[p]erson initiating the  
7 removal [was] not present at [the] hearing.” *Id.* Furthermore, the “DNA [was] not authenticated  
8 by [an] expert.” *Id.* Also, the Committee failed to consider the Traditional Court ruling.<sup>7</sup>  
9 Finally, the petitioner’s “due process was denied.” *Id.* The petitioner consequently requested  
10 that the “matter be dismissed, [and she] remain enrolled as [T]raditional [C]ourt decided on  
11 October 19, 2009[, and] that she receive her per capita. [Or the Court] remand for [a] new  
12 hearing with discovery and new DNA test certified [and] paid for by [the] Ho-Chunk Nation and  
13 Eldon Powless.” *Id.* at 3. The only relevant inquiry to the Court is whether Ms. Powless has the  
14 requisite (1/4) Ho-Chunk blood. CONST., ART. II, § 1(b).

15 The Court recognizes that the Committee was not required to follow the formal rules of  
16 evidence in the removal hearing. TRIBAL ENROLLMENT AND MEMBERSHIP CODE, 2 HCC §  
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21 <sup>7</sup> In some instances, the CONSTITUTION and tradition and custom do not coincide. For instance, the Traditional Court  
22 has previously indicated that tradition and custom would only be applicable to an undisturbed paternal line. *See*  
23 *Robert A. Mudd v. HCN Legislature*, SU 03-02 (HCN S. Ct., Apr. 8, 2003) at 4. In a juvenile case, the Traditional  
24 Court similarly articulated as follows: “unless a child possesses undisturbed paternal Hochač heritage, the Traditional  
25 Court may only concur with the placement of a child . . . An adult or child with Hochač heritage derived maternally  
26 who voluntarily resides amongst the Hochač is welcome, but is not a member of a clan.” *In the Interest of Minor*  
27 *Child: S.L.S., DOB 01/03/1986*, JV 00-19 (HCN Tr. Ct., Mar. 29, 2001) at 5, n.1. Regardless, the CONSTITUTION  
28 requires that “persons are at least one-fourth (1/4) Ho-Chunk blood.” CONST., ART. II, § 1(b). The *Preamble* of the  
CONSTITUTION bespeaks an incorporation of culture and traditions within the document, which is the supreme law of  
the land. CONST., pmb., ART. III, § 4. Ms. Annette Powless attended a *Traditional Court* meeting in October  
2009; the Traditional Court indicated that Ms. Daria Powless should remain enrolled. *Removal Hr’g of Daria M.*  
*Powless*, Professional Reporting Services (Dec. 22, 2009) at 71; *Official Ex.* at 2. Although, the HCN R. Civ. P. 70  
requires that “[a]ll parties appearing before the Traditional Court must appear voluntarily and consent in writing to  
the jurisdiction of the Traditional Court,” only Ms. Powless appeared, and the parties did not mutually consent.  
*HCN R. Civ. P. 70*. Further, the Traditional Court indicated that the grandmother cared for the petitioner with no  
assistance, and that petitioner was destined to experience the Ho-Chunk way of life. *Official Ex.* at 2. The Court  
neither disputes that the grandmother cared for Ms. Powless, nor the perceived, preordained life of the petitioner.

1 7.10f(10)(a). As previously discussed, the Court cannot be improperly bound by the restrictive  
2 standards of review articulated within the TRIBAL ENROLLMENT AND MEMBERSHIP CODE. The  
3 Court maintains several serious concerns regarding the admission of the DNA evidence in this  
4 case. As the DNA test was the primary piece of evidence presented by the Office of Tribal  
5 Enrollment and the primary evidence that the Committee relied upon for its *Decision*, the issues  
6 surrounding its admission are problematic. *Enrollment Committee Decision* (Jan. 8, 2010) at 1.  
7 The Court presently finds the DNA test inadmissible as offered for several reasons analyzed  
8 below.  
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11 The DNA test allowed into evidence by the Committee is hearsay as defined by the  
12 FEDERAL RULES OF EVIDENCE (hereinafter FED. R. EVID.) 801(c). It is a statement, other than one  
13 made by the declarant while testifying at trial or hearing, offered in evidence to prove the truth of  
14 the matter asserted. *Id.* A written assertion is considered a “statement.” FED. R. EVID. 801(a).  
15 Thus, the DNA test’s assertion that Mr. Powless is not the petitioner’s father is a “statement.” A  
16 “declarant” is a person who makes a statement. FED. R. EVID. 801(b). The “declarant” of the  
17 results of the DNA test is the Oklahoma State University Human Identity Laboratory (hereinafter  
18 OSU Laboratory). At the hearing, no one from the OSU laboratory testified. The DNA test  
19 results were offered to prove the truth of the matter asserted; specifically that Mr. Powless is not  
20 the father of the petitioner. Therefore, the DNA test results meet the definition of hearsay. Such  
21 hearsay is inadmissible. FED. R. EVID. 802. The DNA test does not fall under the business  
22 records hearsay exception. FED. R. EVID. 803(6) allows business records to be admitted "if  
23 witnesses testify that the records are integrated into a company's records and relied upon in its  
24 day to day operations." *Matter of Ollag Constr. Equip. Corp.*, 665 F.2d 43, 46 (2d Cir. 1981).  
25 Although OSU laboratory may engage in DNA analyses on a daily basis, those analyses are not  
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1 akin to the running of the day-to-day operations of the business. The necessary witnesses also  
2 did not testify at the removal hearing.

3 The Second Circuit has laid out a basic admissibility test for DNA evidence. It  
4 recognized that the general theories of genetics which support DNA testing are readily accepted  
5 within the scientific community. *United States v. Jakobetz*, 955 F.2d 786, 799 (2nd Cir. 1992).  
6 Thus, a court can take judicial notice of the general acceptability of the general theory of DNA  
7 evidence and the use of common techniques. *Id.* However, in order to be admissible there must  
8 be a showing of reliability of the particular data being offered. *Id.* at 799-800. For example, a  
9 qualified witness should give some indication how the laboratory work was completed and what  
10 analysis was used in making the calculations. *Id.* at 800.

11 The Second Circuit's requirements for DNA testing to be admissible represent a very  
12 basic threshold. Several Circuits have more stringent standards. However, even under the  
13 Second Circuit's moderate standard, Mr. Hall's presentation is not sufficient to authenticate the  
14 DNA evidence accepted by the Committee. FED. R. EVID. 901(a) requires authentication as a  
15 condition precedent to admissibility. Authentication is satisfied by evidence sufficient to support  
16 a finding that the matter in question is what its proponent claims. FED. R. EVID. 901(a).  
17 Evidence can be authenticated by the testimony of a witness with knowledge. FED. R. EVID.  
18 901(b)(1). However, Mr. Hall does not have sufficient knowledge of how the laboratory work  
19 was done, analyzed, and delivered.

20 In order for the DNA test to be admitted into evidence, the Enrollment Office must  
21 provide testimony from a representative of OSU Laboratory to testify as to its authenticity. This  
22 must be someone with personal knowledge of the procedures and processes of OSU Laboratory's  
23 DNA testing facility. As the test was completed over five (5) years ago, those in charge of  
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1 administering the test may no longer be employed by OSU Laboratory. It possible that someone  
2 from OSU Laboratory is still qualified to testify as to how the laboratory work was completed,  
3 how the information was analyzed, and the chain of custody was established in regards to this  
4 particular DNA test.  
5

6 **BASED UPON THE FOREGOING**, the respondent must schedule a hearing with the  
7 Court on or before December 2, 2010 for the purposes of presenting and authenticating the DNA  
8 test, in accordance with the FEDERAL RULES OF EVIDENCE. The respondent may instead require  
9 the petitioner to submit to a new DNA test, conducted by an independent testing laboratory  
10 contracted by and paid by the Ho-Chunk Nation. The Court understands that due to the  
11 availability of the laboratory, the testing may not be able to be completed by this date. However,  
12 the respondent shall notify the Court on or before December 2, 2010, as to when the test will  
13 actually occur. The respondent shall also notify the Court within ten (10) days of receiving the  
14 new test results to schedule an evidentiary hearing.  
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17 The parties retain the right to file a timely post-judgment motion with this Court in  
18 accordance with *HCN R. Civ. P. 58*, Amendment to or Relief from Judgment or Order.  
19 Otherwise, "[t]he time for taking an appeal shall begin from the date the judgment is filed with  
20 the [Trial Court] Clerk [of Court]." *HCN R. Civ. P. 57*. Since this decision represents a non-  
21 final judgment, "[a]n appeal from [this] interlocutory order maybe [*sic*] sought by filing a  
22 petition for permission to appeal with the Supreme Court Clerk within ten (10) calendar days  
23 after the entry of such order with proof of service on all other parties to an action." *Ho-Chunk*  
24 *Nation Rules of Appellate Procedure*, Rule 8.<sup>8</sup>  
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<sup>8</sup> Parties can obtain a copy of the applicable rules by contacting the Ho-Chunk Nation Judiciary at (715) 284-2722 or (800) 434-4070 or visiting the judicial website at [www.ho-chunknation.com/government/judicial/cons\\_law.htm](http://www.ho-chunknation.com/government/judicial/cons_law.htm).



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**IT IS SO ORDERED** this 2nd day of September 2010, by the Ho-Chunk Nation Trial Court located in Black River Falls, WI within the sovereign lands of the Ho-Chunk Nation.

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Honorable Amanda L. Rockman  
Associate Trial Court Judge<sup>9</sup>

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<sup>9</sup> The Court appreciates the assistance of Staff Attorney Zachary Harold Atherton-Ely in the preparation and drafting of this opinion.