



# Ho-Chunk Nation Department of Justice

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October 4, 2016

To: President Wilfrid Cleveland  
Vice President Darren Brinegar  
Ho-Chunk Nation Legislature

Cc: Legislative Counsel

From: Ho-Chunk Nation Attorney General Amanda L. WhiteEagle *AWW*

RE: 2016 General Council Actions

On September 17, 2016, the Ho-Chunk Nation General Council held its annual meeting at the Alliant Energy Center in Madison, Wisconsin. The Department of Justice, through the Attorney General, traditionally prepares an opinion for the President and Legislature about each General Council Resolution. The purpose of the opinion is to assist the Legislature in determining what type of action, if any, can be taken on the resolutions. The official General Council minutes were provided by the General Council Secretary Iris Cleveland, and I received a copy on September 29, 2016.

Traditionally, opinions are not rendered on resolutions that failed to be adopted. Nonetheless, the defeat of a resolution does not mean that the General Council adopted the inverse of the resolution. Here is a detailed explanation of the power of the General Council, which was previously promulgated by the Department of Justice:

### **Power to Set Policy:**

The General Council articulates policy through the voting process. A policy is not a law, and can only be carried out by enactment of law by the Legislature.

### **Power to Set General Council Procedures:**

Procedures do not require an enactment of law, and it takes effect upon vote of the General Council.

**Power Reserved Only to the General Council:** The General Council retains distinct powers that cannot be accomplished by any other branch of government; those are General Council Removal of Elected Officials and enrollment issues regarding certain types of re-enrollment. The General Council might consider placing such business close to the front of the agenda to insure that those duties specifically assigned to General Council get addressed at every Annual General Council Meeting. Clearly, it is up to the General Council itself to set their own agenda and this was previously suggested for future meetings.

The table below summarizes the constitutional powers of the General Council, which was also previously promulgated by the Department of Justice.

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<b><u>Attorney General:</u></b> Amanda L. WhiteEagle	<b><u>Senior Tribal Counsel:</u></b> Wendi A. Huling Michael D. Oeser	<b><u>Tribal Counsel:</u></b> Michelle M. Greendeer-Rave Nicole M. Homer	<b><u>Tribal Prosecutor:</u></b> Rebecca Maki-Wallander
<b><u>Tribal Attorneys:</u></b>	Erik S. Shircel, Bruce Elliott Reynolds, Angelia Naquayouma		
<b><u>Paralegals:</u></b>	Sue Thompson, Alana T. DeCora-Ayesh, Amanda Glasspoole, Jessica Millis		
<b><u>Victim/Witness Coordinator:</u></b>	Vacant		

<b>Powers of the General Council</b>	<b>General Council does NOT have the following powers</b>
Set Policy	To Enact Law (power of the Legislature)
Review and Reverse Legislative Action and Return to Legislature for Reconsideration	To Appropriate Funds (power of the Legislature)
Establish Procedures for the General Council	To Enforce Laws and Administer Funds (power of the President)
Call Special Elections	To Review Actions for Hiring/Firing Personnel (Power of the President)
Remove Legislators	To Set Salaries, Terms and Conditions of Employment for Government Personnel (power of the Legislature)
Remove the President	To Set Legislative Procedures, Officers, or Codes of Conduct (power of the Legislature)
Propose Amendments to the CONSTITUTION OF THE HO-CHUNK NATION by calling for a Secretarial Election	To Select and Hire Personnel (power of the President)
Remove Ineligible Tribal Members from the Membership Roll	

## 2016 GENERAL COUNCIL ANALYSIS

### 09-17-2016-01 Dissolution of the General Council Agency (GCA)

According to the CONSTITUTION OF THE HO-CHUNK NATION (hereinafter CONSTITUTION), the “General Council Branch delegate[d] authority to General Council Agency to select, hire manage and supervise General Council Branch personnel to accomplish the tasks mandated by General Council.” CONST., Art. IV, § 3(g)(effective September 28, 2012). The General Council created and approved the constitutionally-created General Council Agency (hereinafter GCA) through its associated bylaws and budgets.<sup>1</sup> Nonetheless, the General Council retains the power to set binding policy. CONST., Art. IV, § 3(a), (f). If the General Council wishes to dissolve the General Council Agency in its entirety, then it will require a constitutional amendment to do so. *See id.*, Art. XIII (effective February 11, 2016).<sup>2</sup>

In order to comply with both the CONSTITUTION as well as the General Council, the Legislature should structure a law, similar to the HO-CHUNK NATION PLANNING COMMITTEE ESTABLISHMENT ACT, *i.e.*, the HO-CHUNK NATION GENERAL COUNCIL AGENCY OFFICE ESTABLISHMENT ACT. The Legislature may incorporate the General Council’s policy into law. The resolution specifically indicated how the General Council wishes its office to function. *General Council Resolution 09/17/2016-01*. First,

<sup>1</sup> See *infra* n. 3.

<sup>2</sup> Prior to the 2012 amendment, the General Council previously dissolved the General Council Planning Committee (hereinafter GCPC). *See General Council Resolution 9/17/05M*. The General Council “review[ed] and revers[ed] actions of the Legislature,” as the GCPC was created by law. *2005 General Council Actions Memorandum* (Nov. 23, 2005) at 7. However, in this instance, the General Council Agency is not created by law, but by the CONSTITUTION.

the Office would coordinate with tribal membership three months prior to the General Council meeting for all meeting specifications. Second, only one tribal member per district will represent and assist with the coordination of the annual General Council meetings; the General Council requested a prohibition against current members serving for the prospective five (5) years. Third, all of the General Council Agency bylaws are rescinded. Fourth, all board members are to return any and all property assigned to them. And finally, no further GCA meetings shall occur upon approval of this resolution.

The General Council cast 1,761 votes, and the Resolution was **PASSED** with 1,176 Affirming, 576 Opposing, and 117 Abstaining.

### **09-17-2016-02 Untitled**

This resolution approves fiscal year 2018 General Council budget. *General Council Resolution 09/17/2016-02*. According to the CONSTITUTION, the Legislature “shall enact an annual budget. The budget shall include an appropriation of operating funds for each branch of the government. The Legislature shall not appropriate funds which have not been authorized by law. No item shall be included in the budget if it is not authorized by law.” CONST., Art. V, § 13. The Ho-Chunk Nation APPROPRIATIONS & BUDGET PROCESS ACT, specifically indicates that the “General Council Agency shall submit the proposed annual budget for the General Council and General Council Agency to the Finance Committee . . .” APPROPRIATIONS & BUDGET PROCESS ACT, 2 HCC §4.5b(4). Additionally, the General Council rescinded the General Council Agency Bylaws.<sup>3</sup> *See id.*, at 2.

The resolution states that “for the FY 2018 General Council Budget is approved in the amount of no less than \$1,410,934.00 . . .” *Id.* The General Council previously delegated its authority to “the legislative branch to make laws and appropriate funds in accordance with Article V.” CONST., Art. IV, § 2. The Legislature may continue to exercise its constitutionally delegated duty, and is not required to approve the budget as proposed.

The General Council cast 1,734 votes, and the Resolution was **PASSED** with 876 Affirming, 680 Opposing, and 178 Abstaining.

### **09-17-2016-03 To Increase Per Capita Allocation to 80% General Welfare Fund and Increase Per Capita Payments**

Under the Indian Gaming Regulatory Act, an Indian Tribe may make per capita payments to members to provide for their general welfare, if it has a Bureau of Indian Affairs, approved revenue allocation plan. The federal requirements for tribal revenue

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<sup>3</sup> The draftsman made reference to the General Council Agency Bylaws mandate that a budget must be submitted to the General Council. However, the General Council passed General Council Agency Bylaws in September 2009. *See Resolution 09/12/2009-A*. The Bylaws were only amended one time since their enactment; however, such amendment did not affect the budget process. *See Resolution 09/27/2014-1*. The General Council Agency Bylaws do not indicate that the General Council or the General Council Agency budget must be approved by the General Council.

allocation plans adopted under the IGRA are set forth in the Code of Federal Regulations, 25 C.F.R. Part 290, which contains procedures for submitting, reviewing, and approving such plans for distributing net revenues from tribal gaming activities.

The PER CAPITA DISTRIBUTION ORDINANCE specifies the allocation of Tribal Gaming Revenues. The resolution “respectfully requests that the Legislature amend the Per Capita Distribution Ordinance and Tribal Allocation Plan to 80% to provide for General Welfare of the tribal members and to cut the other revenue allocations to accommodate this increase.” *See General Council Resolution 09/17/2016-03* at 1. Based upon the language, the General Council is not mandating, but requesting that the Legislature amend the tribal revenue allocation plan – this is discretionary.

Ideally, the Legislature should complete a feasibility analysis and study, and share the data with the tribal members as to the findings. The General Council has set its policy and requests an increase to the tribal revenue allocation plan with regards to the General Welfare of the Nation or its members; currently, the tribal revenue allocation plan indicates that 78.26% is to provide for the General Welfare of the Nation or its members. PER CAPITA DISTRIBUTION ORDINANCE, 2 HCC §12.6a(2).

The resolution indicates that a tribal member “who desire(s) may opt out of this increase.” *General Council Resolution 09/17/2016-03* at 2. Nevertheless, each member must receive equal treatment, and thus the same amount of per capita distribution. CONST., Art. X, § 1(a)(8). The mechanism for a member to simply “opt out” must be researched with regards to its constitutionality and fairness.

The General Council indicates if the Legislature does not take action within 90 days to enact legislation, this the “matter shall be placed on a referendum ballot and a special election shall be held within 180 days.” *General Council Resolution 09/17/2016-03* at 2. The CONSTITUTION already addresses what is to occur if there is inaction by the legislative or executive branch in the 2012 constitutional amendment.

The General Council retains the power to set policy for the Nation . . . . This policy shall be made into laws . . . by the Legislative Branch of the Ho-Chunk Nation within forty-five (45) days after a majority vote of the qualified voters of the Ho-Chunk Nation General Council at Annual Meetings . . . The Executive Branch shall enforce this policy within sixty (60) days of the majority vote . . . In the event that this policy is not enacted by the Legislative Branch or enforced by the Executive Branch within fifteen (15) days of the aforementioned deadlines, the Ho-Chunk Nation General Council shall file suit in the Ho-Chunk Nation Tribal Court [sic] against elected officials of the Ho-Chunk Nation branch of government. . . .

CONST., Art. IV, § 3(a). To date, the Nation has not had a direct vote in which the entire electorate is asked to vote on a particular proposal, which results in the adoption of a new law. “The General Council . . . authorize[d] the legislative branch to make laws and appropriate funds in accordance with Article V.” *Id.*, Art. IV, § 2. Even to

the extent the Legislature amended its laws to allow for referenda, it is not beholden to enact whatever the entire electorate voted for in a particular proposal. The General Council already delegated that authority to the Legislature.

The PER CAPITA DISTRIBUTION ORDINANCE is under the purview of the Legislature, and any changes are discretionary.

The General Council cast 1,818 votes, and the Resolution was **PASSED** with 1,200 Affirming, 561 Opposing, and 57 Abstaining.

#### **09-17-2016-04 Resolutions made into Law within One Year**

The resolution indicates that “if the Legislature does not enact or formally reject by written resolution within one year the approved resolutions are automatically enacted into law by default.”

According to the CONSTITUTION, the General Council delegated to the legislative branch the authority to “make laws and appropriate funds in accordance with Article V.” CONST., Art. IV, § 2. The CONSTITUTION addresses what is to occur if there is inaction by the legislative or executive branch in the 2012 constitutional amendment.

The General Council retains the power to set policy for the Nation . . . This policy shall be made into laws . . . by the Legislative Branch of the Ho-Chunk Nation within forty-five (45) days after a majority vote of the qualified voters of the Ho-Chunk Nation General Council at Annual Meetings . . . The Executive Branch shall enforce this policy within sixty (60) days of the majority vote . . . In the event that this policy is not enacted by the Legislative Branch or enforced by the Executive Branch within fifteen (15) days of the aforementioned deadlines, the Ho-Chunk Nation General Council shall file suit in the Ho-Chunk Nation Tribal Court [sic] against elected officials of the Ho-Chunk Nation branch of government. . . .

*Id.*, Art. IV, § 3(a). The General Council has usurped the constitutionally-delegated authority for the Legislature to make laws. “The General Council . . . authorize[d] the legislative branch to make laws and appropriate funds in accordance with Article V.” *Id.*, Art. IV, § 2. This resolution undermines the plain language of the CONSTITUTION. Ideally, a procedure would be set in place, which appropriately responds to the General Council or the General Council participants, which articulately discusses the proposed action or inaction by the other branches of government; the General Council requests enactment or a formal rejection. Again, there is recourse available to the General Council already. *Id.*, Art. IV, § 3(a).

The General Council cast 1,715 votes, and the Resolution was **PASSED** with 1,226 Affirming, 376 Opposing, and 113 Abstaining.

#### **09-17-2016-05 Special Election to Amend the Ho-Chunk Nation Constitution for the Rights**

## of Nature

The General Council retains the authority to request a “secretarial election.”<sup>4</sup> *See* CONST., Art. XIII, § 2. The CONSTITUTION indicates that “[i]t shall be the duty of the Ho-Chunk Nation Election Board to call and hold an election on any proposed amendment to this Constitution . . . at the request of the General Council . . . .” *Id.*, Art. XIII, § 2.

The General Council retains the power to set policy for the Nation, and the people have laudable trepidations regarding the Nation’s future environment. Based upon this policy, the General Council wished to add constitutional rights to protect the rights of nature and add a provision under the Bill of Rights.

The General Council cast 1,757 votes, and the Resolution was **PASSED** with 1,587 Affirming, 107 Opposing, and 63 Abstaining.

### **09-17-2016-06 Amend Ho-Chunk Housing Program to Provide Housing for Elite Elders**

This policy-setting resolution may violate the equal protection clause contained in the CONSTITUTION. CONST., Art. X, § 1(a)(8). The resolution states that:

the Ho-Chunk Nation Housing Program be amended for individuals that qualify as elite elders to get homes if they have the ability to maintain them within one year from the approval of this resolution. No new homes will be provided until the elite elders on the current waiting list are provided homes.

*General Council Res.* 09-17-2016-06. The resolution is designed to place elite elders above all other housing program recipients based upon age. This resolution may be deemed unconstitutional as no other tribal members are provided services from the Housing Department until the elite elders are provided services. The resolution erects an absolute bar against all other tribal members, and potentially other elite elders (who are not currently on the waiting list) from receiving homes; “[n]o new homes will be provided until the elite elders on the current waiting list are provided homes.” To the extent that the Legislature wishes to develop such a categorization, then the law must demonstrate that it is “rationally related” to a “legitimate” government interest.

In the past, the Ho-Chunk Nation Trial Court agreed with legislative characterization of home ownership assistance, but that it may only afford such assistance when financially capable of doing so, negating any designation as an entitlement. *See Kirkwood v. Decorah, et al.*, CV 04-33 (HCN Tr. Ct., Feb. 11, 2005). In *Kirkwood*, *dicta* suggested that the Legislature violated the plaintiff’s right to full and equal enjoyment of the benefits associated with tribal enrollment when they imposed a five (5) year enrollment restriction for anyone receiving an elder home. *Kirkwood* would have received a home, but for the five (5) year restriction of enrollment imposed by the

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<sup>4</sup> The CONSTITUTION retained the words “Secretarial Election,” even though the section no longer requires the Secretary of the Interior’s approval to amend the CONSTITUTION.

Legislature, which was considered to run afoul of the tribal member enrollment guarantee conferred by the TRIBAL ENROLLMENT & MEMBERSHIP CODE.

Presently the Housing program has four (4) different categories of general welfare assistance: non-elders, veterans, elders, and combat veterans. The elders and combat veterans assistance programs receive assistance in the form of a grant, which must be satisfied through a contractual agreement with the Nation. It appears as though the goal of the pending resolution is already being met as the Housing program present provides housing assistance to ten (10) elders annually already but that it does not only serve elite elders but all tribal members of all ages.

The General Council cast 1,637 votes, and the Resolution was **PASSED** with 1,183 Affirming, 356 Opposing, and 98 Abstaining.

**09-17-2016-07 Provide Alternative Energy Sources to Ho-Chunk Elders.**

The General Council retains the power to set binding policy. CONST., Art. IV, § 3(a), (f). The General Council wants to see the creation of a program that will provide “interested” elders access to funding and programs that will put alternative energy in elder homes. *General Council Resolution 09/17/2016-07* at 1. The resolution further states that prioritizes elders with special needs. Again, to the extent that the Legislature wishes to develop such a categorization, then the law must demonstrate that it is “rationally related” to a “legitimate” government interest because Ho-Chunk Nation tribal members each have the right to full and equal enjoyment of the benefits associated with tribal enrollment. CONST., Art. X, § 1(a)(8).

However, the resolution oversteps policy and intrudes upon a constitutionally delegated provision when it mandates that the “resolution shall be submitted as part of the annual budget process from this day forward until repealed.” *General Council Resolution 09/17/2016-07* at 2. Nonetheless, an additional, albeit interesting caveat, the General Council would like an explanation by the Vice President to the extent that the resolution is not funded.

The General Council cast 1,683 votes, and the Resolution was **PASSED** with 1,372 Affirming, 231 Opposing, and 80 Abstaining.

**09-17-2016-08 Lower the Elder Eligibility Age from 60-50 and Elite Elder Age from 70-60**

No action necessary; the resolution was defeated.

The General Council cast 1,784 votes, and the Resolution was **DEFEATED** with 630 Affirming, 1,112 Opposing, and 42 Abstaining.

**09-17-2016-09 Rescind Resolution 9/19/15-9 Rights of Nature**

No action necessary; the resolution was defeated.

The General Council cast 1,731 votes, and the Resolution was **DEFEATED** with 624 Affirming, 782 Opposing, and 325 Abstaining.

**09-17-2016-10 Decrease the Eligibility of the Per Capita Distribution from Age 25 to 18.**

No action necessary; the resolution was defeated.

The General Council cast 1,876 votes, and the Resolution was **DEFEATED** with 245 Affirming, 1,586 Opposing, and 45 Abstaining.

**09-17-2016-11 Provide Tribal Health Insurance to All Tribal Members that Need it.**

No action necessary; the resolution was defeated.

The General Council cast 1,784 votes, and the Resolution was **DEFEATED** with 797 Affirming, 930 Opposing, and 57 Abstaining.

**09-17-2016-12 Removal of Wilfrid Cleveland from President of the Ho-Chunk Nation for Felony Convictions While in Office**

No action necessary; the resolution was defeated.

The General Council cast 1,909 votes, and the Resolution was **DEFEATED** with 405 Affirming, 1,386 Opposing, and 118 Abstaining.