



Huron Potawatomi Tribal Court

The Nottawaseppi Huron Band of the Potawatomi

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CASE NO: 11-TRO		
Nathaniel Spurr, et al.	v.	Nottawaseppi Huron Band of the Potawatomi Tribal Council, Plante Moran and Tribal Election Board
Nathaniel Spurr Plaintiff In Pro Per 1114 Beaconsfield Avenue Grosse Pointe Park, Michigan 48230-1345		

**ORDER REGARDING PLAINTIFF REQUEST FOR
TEMPORARY RESTRAINING ORDER AND PERMANENT INJUNCTION AGAINST THE
TRIBAL COUNCIL, PLANTE MORAN LLP AND THE TRIBAL ELECTION BOARD**

INTRODUCTION

This matter comes before the Court on Plaintiff’s Request for Temporary Restraining Order and Permanent Injunction against the Tribal Council, Plante Moran, LLP, and the Tribal Election Board regarding the scheduled vote on the proposed amendments to the Nottawaseppi Huron Band of the Potawatomi (NHBP) Constitution.

JURISDICTION

The Nottawaseppi Huron Band of the Potawatomi Tribal Court has jurisdiction over this matter pursuant to Article X. Section 3(b) of the NHBP Constitution:

Civil Jurisdiction. The Tribal Court shall have jurisdiction over any action where one party to the action shall be an Indian, or a corporation or entity owned in whole or in substantial part by an Indian or the NHBP; and (1) the cause of the action arises under the Constitution or laws of the NHBP; or (2) an Indian party to the action resides on lands owned by the NHBP or located within the reservation of the NHBP, or the proceeding involves the Indian Child Welfare Act, 25, U.S.C. 1901 – et seq.

The present case involves the request by the Plaintiff, a member of the NHBP, with the cause of the action arising under the NHBP Constitution.

FACTS

The NHBP have engaged in efforts since late in 2008 to amend the NHBP Constitution. A vote on a proposed Amended and Restated Constitution occurred in April 2009. The total number of votes cast did not reach the Constitutionally-mandated quorum of thirty percent (30%) of the eligible voters required to ratify proposed amendments to the Constitution.

In 2010, the Tribal Council created a Constitution Reform Committee to review the current Constitution, review the Amended and Restated Constitution proposed in April of 2009, and to then make recommendations for revisions for a new Amended and Restated Constitution to propose to Tribal Members. Tribal Council retained James Mills, founder and principal of Creating Stronger Nations, Inc., to facilitate public meetings with the Tribal Membership.

The Constitution Reform Committee presented a draft that was sent to Tribal Members in July of 2011.

James Mills facilitated public forums on the draft of the Amended and Restated Constitution sent to Tribal Members in July of 2011. The first was held on August 20, 2011 in Spring Lake, Michigan. The second was held on August 27, 2011 at the Pine Creek Reservation.

Nathaniel Spurr was present at both of these public forums.

On September 28, 2011, the Tribal Council and the Constitution Reform Committee met to finalize a “Ballot Draft” of an Amended and Restated Constitution.

On November 17, 2011, the Tribal Council approved by majority vote Resolution Number 11-17-11-05 calling for the election by the Tribal Membership of the "Ballot Draft" of the Amended and Restated Constitution. The Resolution stated that the NHBP Election Board would administer the election.

On or about November 23, 2011, Respondents sent an absentee ballot, instructions for the return of the ballot, a self-addressed envelope, a letter from consultant James Mills and contact information for the Tribal Council to all Tribal Members eligible to vote.

On December 15, 2011, Nathaniel Spurr, Plaintiff In Pro Per, filed this Request for a Temporary Restraining Order and Permanent Injunction against the Tribal Council, Plante Moran, LLP, and the Tribal Election Board.

The Court ordered an emergency hearing on the Request for 10:00 a.m. on Tuesday, December 20, 2011. Both parties appeared.

OPINION

This matter comes before the Court on Plaintiff's Request for Temporary Restraining Order and Permanent Injunction against the Tribal Council, Plante Moran, LLP, and the Tribal Election Board regarding the scheduled vote on the proposed amendments to the Nottawaseppi Huron Band of the Potawatomi (NHBP) Constitution. The Request is signed by Plaintiff, Nathaniel Spurr, In Pro Per, meaning that he is not an attorney and is representing himself. In addition, the Request contains the following six (6) individuals: Robert Potter, signed by Stephen J. Spurr, identified as Robert Potter's legal guardian; Mary Wesley; Josiah H. Spurr; Sarah Hendricks; Irene Wesley; and Bradley Potter. Plaintiff also attached a list of thirty-eight (38) individuals that Plaintiff states want to join the action, but for whom he has not yet obtained signatures. While the Court acknowledges the signatures of the six (6) aforementioned individuals, as well as inclusion of thirty-eight (38) other individuals who may have an interest in this case, the Court can only recognize Nathaniel Spurr as a Plaintiff. The requirements to

represent others in the Nottawaseppi Huron Band of the Potawatomi Tribal Court can be found in Court

Rule 4: Court Rules of Professional Conduct as follows:

Section 3. Admission to Practice. In order to practice before the Tribal courts, an individual must:

- A. be admitted to practice before the courts of any state, and to be presently in good standing with the bar association or licensing agency of said state.
- B. have completed the Nottawaseppi Huron Band Tribal Court Application for Admission to Practice and the Oath of Admission; and
- C. have been duly admitted by the Nottawaseppi Huron Band Tribal Court.

The Court Rules do not permit lay advocates. As Nathaniel Spurr is not an attorney admitted to practice before the NHBP Tribal Court, he can only represent himself in this case.

Plaintiff alleges that Defendants violated the NHBP Constitution with regard to procedures used in preparation for the January 27, 2012 vote on the proposed amended Constitution in violation of the Election Code.

The NHBP Constitution addresses amendments to the Constitution in Article IX:

This Constitution may be amended by a majority of the qualified voters of the Band at an election called for that purpose by the Tribal Council provided that at least thirty (30%) percent of those entitled to vote in said election unless a higher majority is required by the terms of this Constitution, votes in said election. The Tribal Council shall call an election for the amendment of the Constitution upon presentation of a petition setting forth the proposed amendment and signed by two-thirds of the eligible voters of the Band. In the absence of a petition, the Tribal Council upon a majority vote of its member in favor may call for a membership vote on proposed amendments.

Article IX reflects the only specific reference in the NHBP Constitution to amending the Constitution. At this point in the process, the Respondents have fulfilled the Constitutional requirements

of Article IX. Specifically, the Tribal Council passed a Resolution by majority vote calling for an election of the Amended and Restated Constitution.

Plaintiff also alleges that Respondents violated the Constitution by scheduling the vote on the proposed Amended and Restated Constitution for January instead of in April, the month elections are historically held. Article V – Nominations and Elections, referenced by Plaintiff, states:

Sec.1. Elections shall be held yearly at the annual membership meeting for those Tribal Council seats whose holders terms have expired. The term of office for each elected member shall be three (3) years.

Sec. 2. An election board appointed by the Tribal Council shall recommend rules and regulations governing elections to be approved by the Tribal Council.

Sec. 3. Only those members having attained the age of eighteen (18) may vote.

Sec. 4. Nominees and members of the Tribal Council shall be twenty-one (21) years of age or older.

While Article V. Sec. 1. does require that elections be held on a yearly basis at the annual membership meeting, it does not apply to the election of constitutional amendments. The full sentence denotes that “[e]lections shall be held yearly at the annual membership meeting for those Tribal Council seats whose holders terms have expired”. *Emphasis added.* A plain reading of Article V makes it clear that Article V applies only to the election of seats on Tribal Council. Thus, Respondents have not violated Article V of the NHBP Constitution.

In determining that the NHBP Constitution was not violated, we turn to allegations that Respondents violated provisions of the Election Code. Plaintiff alleges that the Election Code, amended February 4, 2010, requires specific procedures that were not followed by Respondents.

The Election Code is comprised of the following sections: Title and Purpose; Eligible Voters and Candidates; Election Board; Notice of Regular and Special Elections; Ballots; Polling Places, Times and Regulations; Election to Office; Certifying the Vote; Election Challenges; and Referendums.

The first noticeable issue is that there is no section on amendments to the Constitution. While Section 10 applies to referendums, an amendment to the Constitution is not the same as a referendum. There is support for this conclusion in both the NHBP Constitution and the Election Code. The NHBP Constitution specifically separates these two (2) topics in Article VII: Right of Referendum and Article IX: Amendments. The Articles themselves list different requirements to engage the process. Article VII states that a referendum may be presented for a vote to the Tribal Membership “upon affirmative vote to submit said ordinance or resolution be a majority of the Council or when so requested by a petition presented to the Council bearing the signatures of at least twenty-five (25%) percent of eligible voters of the Band.” Article IX, however, requires majority vote of the Tribal Council or “upon presentation of a petition setting forth the proposed amendment and signed by two-thirds of the eligible voters of the Band.” In looking at the fact that the NHBP Constitution requires 25% - or one-quarter - of eligible voters to bring the issue of a referendum to a vote, but two-thirds – or sixty-six percent (66%) – of eligible voters to bring the issue of a constitutional amendment to a vote, it is clear that these provisions are not synonymous or interchangeable. This conclusion is further supported by the fact that the NHBP Constitution requires “that at least fifty (50%) percent of those entitled to vote shall vote on the referendum” while Article IX states that “[t]his Constitution may be amended by a majority of the qualified voters of the Band at an election called for that purpose by the Tribal Council provided that at least thirty (30%) percent of those entitled to vote in said election...votes in said election”. With the Election Code not specifically addressing amendments to the Constitution and Section 10 – Referendums clearly not applying to votes on constitutional amendments, we turn to the other Sections of the Election Code to determine if those apply to votes on constitutional amendments.

Plaintiffs state that Respondents violated the Election Code by sending out absentee ballots to all of the Tribal Members eligible to vote in this election. Section 4.1(C) of the Election Code states:

An absentee ballot request form will be sent with the initial notice of a regular or special election. All absentee ballot requests must be signed and dated by the Voter.

However, Section 4.1 makes it clear that the provisions under this Section apply to elections of Tribal Council members only. Section 4.1 states in pertinent part:

An Initial Notice of a Regular Election, or any Special Election needed to fill a vacancy on the Tribal Council for the balance of an expired term, will be sent to all eligible voters at least sixty (60) days prior to the Election Date.

While a vote on a proposed amended Constitution may be a special election, Section 4.1 makes it evident that the Election Code refers only to “any Special Election needed to fill a vacancy on the Tribal Council for the balance of an expired term”. There is nothing in this Section that simply refers to a “special election”. As such, there is no requirement that an eligible voter must submit a ballot request form in order to obtain an absentee ballot in a special election not involving the filling of a vacancy on Tribal Council. Thus, Respondents did not violate the Election Code by sending out ballots to all eligible voters.

Plaintiff asserts that Respondents violated Section 1.2 of the Election Code by including other documents and information with the ballot in its November 23, 2011 mailing. Section 1.2 of the Election Code states:

The purpose of this Code is to ensure that procedures used in the Nottawaseppi Huron Band of the Potawatomi Tribal Elections are conducted in a manner that is in accordance with Constitutional requirements and in a consistent, fair and efficient manner.

As this provision of the Election Code refers generally to “Nottawaseppi Huron Band of the Potawatomi Tribal Elections,” this Court finds that it applies to a vote on constitutional amendments.

Plaintiff asserted in his initial Request the following:

The Mills letter begins with the statement that “A constitution is often a statement of balance and compromise between competing factions. We need to look at the whole document and determine whether it meets our

needs, keeping in mind that none of us will ever have the 'perfect' document that satisfies us 100 percent." The letter goes on with much language, the import of which was that the proposed amendments fully reflected input, comments and suggestions from Tribal members, that "The Committee and the Tribal Council made changes to the proposed Constitution based on your voting and your input" and that, in every instance where there was disagreement, the amendment finally proposed was a "fair compromise." The second page of the Mills letter begins with the words "Here are the revised sections based on your input."

The actual words "fair compromise" were in fact used twice on the first page of the Mills letter.

The Mills letter was a thinly veiled endorsement of the proposed constitution. As such, it was highly irregular, highly inappropriate (sic) and constitutes an electioneering communication in violation of the Tribal Election Code and Article V of the Tribal Constitution...

While the Court agrees with Plaintiff that the letter from Mr. Mills should not have been included in the mailing with the ballot, at this time, the accusation that the actions of Respondents will irreparably damage the integrity of the election or the outcome is pure speculation on the part of Plaintiff. The same is true for Plaintiff's assertion that contact with James Mills or members of Tribal Council about the proposed Amended and Restated Constitution will be electioneering. In *Chris Rogers v. NHBPI and Homer Mandoka*, Case No. 11-049-CV, this Court held that "[a] plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." Speculation on the part of Plaintiffs does not meet the burden of establishing the likelihood of success on the merits. The case cited by Plaintiff, *NLRB v. Carroll Contracting & Ready-Mix*, 636 F. 2d 111 (5th Circuit 1981) does not lend support to his argument. First, it is a case involving a union, not a sovereign nation. Second, it addresses behavior at the polls. While sending an analysis with a ballot may be questionable, it was sent on or about November 23, 2011. With ballots needing to be posted by 5:00 p.m. on January 27, 2012 and counted on January 28, 2012, Tribal Members will have had over sixty (60) days to engage in the political process to determine how they want to vote or if they want to vote.

Plaintiffs state in their Brief in Response to Brief of Defendants in Opposition to

Motion/Complaint for Temporary Restraining Order:

If the members of this Tribal Council (and any future Tribal Council) can ensure the passage of any Constitutional Amendments it wants, and also guarantee its own re-election, by manipulating election procedures unfairly, and in violation of the Tribal Constitution and laws, the Tribal Council could remain in office for life, even if an overwhelming majority of Tribal Members would vote them out in a fair election. If there is a better example of irreparable harm, we cannot think of one!

Once again, the assertions by Plaintiff are speculation. Further, Plaintiff and all other Tribal Members have many options for protecting the interests of the Tribe and Tribal Members. First and foremost, all Tribal Members may engage in the political process. In the present case, they can communicate their concerns about the proposed Amended and Restated Constitution, encourage discussion and encourage Tribal Members to have their voice heard by voting in the election. With the vote being approximately one (1) month away, all Tribal Members, regardless of whether they support or oppose the proposed Amended and Restated Constitution can be actively involved with the political process to the extent that any concerns about all of the different aspects of the proposed Amended and Restated Constitution are fully explored before the vote takes place.

CONCLUSION

Respondents, as fully discussed in this Opinion and Order, have not demonstrated any violations of the NHBP Constitution. Article V applies only to the election of members of Tribal Council. Article IX has been followed to date. Respondents also have not demonstrated any violations of the Election Code. Section 4 of the Election Code only applies to the election of Tribal Council members and “the special election needed to fill a vacancy on the Tribal Council for the balance of the expired term”. Finally, while the Court agrees that the inclusion of additional materials with the ballot is not a best

practice, the potential harm is speculative and does not meet the burden of showing the likelihood of success on the merits. In balancing the speculative harm against the burden of preventing Tribal Members from engaging in the political process and casting their vote in favor of or against the proposed Amended and Restated Constitution, the burden of silencing the Tribal Members outweighs the possible harm articulated by Plaintiff.

ORDER

For the reasons set forth in this Opinion and Order, Plaintiff's Request for Temporary Restraining Order and Permanent Injunction against the Tribal Council, Plante Moran, LLP, and the Tribal Election Board is hereby **DENIED**.

12.29.11

Date

Melissa L. Pope

Melissa L. Pope, Chief Judge

CERTIFICATE OF MAILING

I certify that on this day I mailed a copy of the *Opinion and Order* by first-class mail to the parties, or their attorneys, at the addresses listed below.

1/6/2012

Date

R. Scott Ryder

R. Scott Ryder
Tribal Court Administrator