Huron Potawatomi Tribal Court
The Nottawaseppi Huron Band of the Potawatomi
2221 1-1/2 Mile Road • Fulton, Michigan 49052
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CASE NO: 12-192-CR		
Russell Chivis, Jon Douglas, Eric Foerster, Melissa Foerster, Tom Foerster, Jim Mackety, Mike Mandoka, Mike Mandoka, Jr., Dawn Reve' Rawlings Neymeiyer, & Chad Stuck, Tribal Members	**v.**	**Nottawaseppi Huron Band of the Potawatomi Tribal Council: Homer A. Mandoka, Tribal Chair, Jamie P. Stuck, Vice Chair, RoAnn Beebe, Tribal Secretary, & Dorie Rios, Treasurer**
PAULA M. FISHER (P60959) Paula M. Fisher, Attorney At Law, PC Attorney for Appellant/Petitioners The Ronan Building 201 So. University Avenue Mt. Pleasant, MI 48858 (989) 773-5978 phone		**WILLIAM J. BROOKS (P43041) Nottawaseppi Huron Band of Potawatomi Attorney for Appellee/Respondents 2221 1 ½ Mile Road Fulton, MI 49052 (269) 729-5151**

OPINION OF THE SUPREME COURT FOR THE NOTTAWASEPPI HURON BAND OF POTAWATOMI

Hon. John Wabaunsee, Chief Justice, Presiding
Hon. Matthew L.M. Fletcher, Associate Justice
Hon. Holly K. Thompson, Associate Justice

Appearances:

Appellant/Petitioners, Paula M. Fisher
Appellee/Respondents, William J. Brooks

Opinion by Thompson, J.

Introduction

Appellants, a group of tribal members of the Nottawaseppi Huron Band of Potawatomi (*hereinafter* "NHBP"), filed a petition with this court seeking a writ of mandamus against Appellees, NHBP Tribal Council. Through the petition, Appellants are asking the court to compel Appellees to perform certain tasks related to the NHBP Constitution provisions regarding tribal membership enrollment. In addition, the parties filed cross-motions to strike with regard to claims made or evidence sought to be admitted since the trial record was closed. With the greatest respect for the people of NHBP whom we serve, we tender our service and opinion in this matter.

Procedural History

This matter came to us on appeal from the trial court's Opinion and Order issued on September 26, 2012. The trial court's order followed a hearing on Appellant's Petition for Writ of Mandamus that alleged that Appellees, NHBP Tribal Council, failed to perform their duties pursuant to Article III, Sec. 6 of the NHBP Constitution and were seeking to have specific duties enforced. Appellees filed a Motion to Dismiss their petition. After a hearing, held on August 28, 2012, the trial court found that Appellant failed to meet the burden of proof necessary to grant mandamus relief, and denied/dismissed their petition. Appellants filed their appeal on October 25, 2012. A briefing schedule was issued and after submission of the parties' briefs, arguments were heard by the Supreme Court on March 7, 2013. In addition, on February 15, 2013, and March 1, 2013, respectively, the parties filed cross-motions to strike evidence/submissions made in addition to or after the closing of the trial court record. Having reviewed the record of the trial court, the submissions of the parties, and following oral argument, we affirm the decision of the trial court in this matter. In addition, we grant the cross-motions to strike. Our reasons for our decision are below.

Factual Background

Eight NHBP tribal members, Appellants, allege a long-standing disagreement with the tribe over a specified group of individuals they feel are erroneously enrolled as tribal members. Appellants contend that they have attempted on many occasions throughout an eleven-year period to have their concerns addressed by approaching various members of the NHBP Enrollment Committee and Tribal Council, to no avail. Appellants filed a petition seeking a writ of mandamus with the tribal court, asking that the Tribal Council be required to do the following:

"1. That this Tribal Court acknowledge that [it] has Mandamus Authority over the Tribal Council and the Enrollment Committee.
2. Court Order Tribal Council to release the detailed findings of Dr. James McClurken, including the genealogy report to the Tribal Membership, including the Petitioners;
3. That this Court Order that an independent audit be performed by someone who has been certified as a genealogist, upon which the parties agree.
4. That results of the independent audit be turned over by this Court and the parties and the general membership.

5. **That in the event that the audit results in in a finding that one or more members are wrongfully enrolled, that said members be ordered to issue a notice of eligibility review by Tribal Council and that in the event that any member cannot provide proof of their membership eligibility, that disenrollment proceedings be commenced against said member.**
6. **That in the event that the independent audit shows that members of the Enrollment Committee and/or Council are not qualified for membership, that they be recused from taking any action on a membership file. ..."**

Petition for Writ of Mandamus, *Chivis v Nottawaseppi Huron Band of Potawatomi*, 12-068-CV (2012).

Appellants infer that the contents of McClurken's genealogical report are invalid because it was produced via the enrollment standards required under the 2006 NHBP Constitutional amendment. It should be noted that the NHBP Constitution was further amended in 2012 by a vote of the membership, creating a more stringent enrollment standard.

Appellees, current members of the NHBP Tribal Council, deny that they have ignored or refused to address Appellant's concerns regarding enrollment. They state that they have directed Appellants toward the procedures then in place to deal with questions concerning enrollment. They argue that they cannot release the full results of the genealogical audits to the membership as they contain information that is confidential and protected by code. In addition, they claim that when a new version of the NHBP Enrollment Code was submitted to the general membership for comment, after several years of work by Tribal Council and the Enrollment Committee, none of the Appellants participated in the process or returned comments regarding same during the comment period. Further, in January 2013, the Tribal Council signed into law the NHBP Enrollment Code, containing procedures which allow for tribal members to request an investigation and review of the enrollment of any member they feel is wrongfully enrolled. *See* Nottawaseppi Huron Band of Potawatomi Enrollment Code, Title II, Article IV.

As stated above, a hearing was held in the trial court on August 28, 2012 on Appellant's Petition for Writ of Mandamus and Appellee's Motion to Dismiss Petition for Writ of Mandamus. Following that, Chief Judge Melissa L. Pope issued an order denying the Petition and granting the Motion to Dismiss.

This appeal followed.

Discussion

I. Jurisdiction of the Supreme Court

Aricle XI § 3(c) of the Constitution of the Nottawaseppi Huron Band of Potawatomi provides:

> **"c. Appellate Jurisdiction. The Tribal Supreme Court shall have jurisdiction to review a final judgment, order or decree of the Tribal Court as provided in**

appellate rules adopted by the Tribal Judiciary or as prescribed by applicable Tribal law."

Huron Potawatomi Tribal Constitution, Article XI § 3(c). *See also* 9 NHBPCR § 3(a).

The trial court having given a final order on Appellant's Petition for Writ of Mandamus and Appellee's Motion to Dismiss Petition for Writ of Mandamus, and per NHBP Constitution, Article XI § 3(c), we have jurisdiction over this appeal of the trial court's decision.

II. Motions to Strike

As a matter of efficiency, we will first address the parties' cross-motions to strike. In their motions, both parties allege that the other has submitted statements and/or allegations in their appellate briefs not submitted in the trial record below. Both have asked that the other parties' briefs be stricken as nonconforming, or, that the Appellee's initial motion to strike be denied.

Currently, NHBP Appellate Court Rules do not contain a provision regarding prohibitions on the content of briefs filed with the Supreme Court. 9 NHBPCR § 12 (A) and (B). Rather, the court rules contain generalized provisions regarding the form and content of appellate briefs. *Id.* In addition, NHBP Appellate Court Rules contains a provision describing the content of the record on appeal. 9 NHBPCR § 7.210. However, in the absence of law, it is the practice of the Court to look to other jurisdictions to see how they treat specific questions of law to determine how best to interpret a legal matter before us.

We look now to Michigan Court Rules which contain similar provisions to those of NHBP relating to the content of the record on appeal as well as the briefs submitted. *See* MCR 7.210 (A)(1), MCR 7.302(H)(3) and MCR 7.212. Michigan Court Rules also allows for the striking of briefs which do not conform to the court rules. MCR 7.211 (E)(2)(c) and MCR 7.212 (I). When looking at evidence or statements not already submitted in the trial record in the matter subject to appeal, the Michigan Appellate Court has clearly established that parties cannot add to the record on appeal anything not already considered by the trial below. Lorland Civic Ass'n v DiMatteo, 10 Mich.App. 129, 137-138, 157 N.W.2d 1 (1968). *Also see* Isagholian v Transamerica Ins. Corp. 208 Mich.App. 9, 18, 527 N.W.2d 1 (1994). This includes affidavits, depositions, exhibits, allegations, etc. that would enlarge the record on appeal. Lorland and Isagholian at *Id. Also see* Dora v Lesinski, 351 Mich. 579, 581, 88 N.W.2d 592 (1958). Further, the Michigan Appellate Court has allowed for actual and punitive damages where appellate briefs were filed in repeated nonconformance with Michigan Court Rules, causing hindrance or delay or without any reasonable basis for belief that there was a meritorious issue to be determine on appeal. Coburn v Coburn, 230 Mich.App.118, 120, 583 N.W.2d 490 (1998).

Like the Michigan Court Rules, NHBP contains a provision outlining the content of the trial record and limiting it to the submissions in the trial court below. We adopt the interpretation of the Michigan Appellate Court in finding that our review of any appeal shall consist only of the statements, allegations, and evidence submitted in the trial court below. Therefore, any statements, allegations, evidence, exhibits, affidavits, depositions, etc. not

submitted in the trial court record and subsequently, in the record on appeal pursuant to 9 NHBP § 7.210 or in briefs conforming to same, will not be considered by us in our review. Thus, we grant the motions to strike, generally and without specificity, by disregarding any parts of the briefs filed in this matter or any arguments pertaining thereto, that are in addition to or would enlarge upon the trial court record.

III. Petition for Writ of Mandamus

This case presents a matter of first impression for this Court as to whether a writ of mandamus can be obtained under the Court's jurisdiction, by tribal members seeking to compel their governing body, the Tribal Council, to perform a specific duty or task. We will first start by examining the definitions of a writ of mandamus; determine the authority of this Court to issue same; discuss the appropriate test for obtaining a writ of mandamus; and finally, apply the test to the facts of this case.

a. Definition of a Writ of Mandamus

A writ of mandamus is generally defined as a command issuing from a court of law requiring an inferior court, board, corporation, governmental body, or person to perform a specific duty, that duty arising by the parties' office or by operation of law. Brian W. Blaesser & Alan C. Weinstein, Federal Land Use Law & Litigation § 11:31 (2012). Further, the remedy of mandamus is allowable as a peremptory writ or an alternative writ. A peremptory writ is appropriate where "the right to require performance of the act is clear, and it is apparent that no valid excuse for nonperformance can be given.." Kaibel v Mun. Bldg. Commn., 829 F. Supp.2d 779, 783 (D. Minn. 2011). An alternative writ requires a party to do a particular act or show cause as to why the performance of the act is not required. *Id.* In most cases, a writ of mandamus shall not be imposed where there is a "plain, speedy, and adequate remedy in the ordinary course of law." *Id.* at 784.

Several tribes have codified the remedy of writ of mandamus in their codes and constitutions. The Snoqualmie Indian Tribe, Grand Traverse Band of Ottawa and Chippewa Indians, Ponca Tribe of Nebraska, Shawnee Tribe of Indians of Oklahoma, and the Confederated Salish and Kootenai Tribes all provide for the specific remedy of mandamus by law. In addition, many tribal courts have utilized mandamus powers following the lead of American state courts. (*See* Eriacho v Ramah Dist. Ct., 6 Am. Tribal Law 624 (Navajo 2005); Decker v Thorne, 3 Am. Tribal Law 24 (Salish-Kootenai C.A. 2001); and Chapman v Little River Band of Ottawa Indians, No. 07-164-CC, No. 08-034-AP, 2008 WL 6928160 (Little River C.A.) (Little River Band of Ottawa Indians Tribal Court, August 5, 2008)). In all cases, mandamus is recognized as an extraordinary remedy to be used only in circumstances where there is no other means for equitable relief. *Quayle v. Cantu*, No. 08-CA-1028, *1 (Saginaw Chippewa Indian Tribe of Michigan Court of Appeals Sept. 12, 2008).

b. The Authority of the Court to Issue a Writ of Mandamus

The NHBP Constitution, Article XI §3 provides the following judicial authority:

"a) The judicial power of the Nottawaseppi Huron Band of the Potawatomi shall be in the Tribal Court system. The judicial power shall extend to all civil and criminal cases arising under this Constitution, all legislative enactments of the Band, including codes, statutes, ordinances, regulations, all resolutions, agreements, and contracts to which the Band or any of its entities is a party, and the judicial decisions of the Tribal Court system.

b) The judicial power of the Tribal Court system may be exercised to the fullest extent consistent with self-determination and the sovereign powers of the Band, and, as exercised, shall govern all persons and entities subject to the jurisdiction of the Band under Article II of this Constitution."

Constitution of the Nottawaseppi Huron Band of the Potawatomi, Article XI §3.

There is no specific language in the Constitution or laws of NHBP that address whether the Court has the authority to issue writs of mandamus. However, there is nothing precluding the Court from providing mandamus relief where appropriate. Thus, given the broad authority of the Court over matters subject to their jurisdiction, it is clear that the Court may issue a writ of mandamus where it is determined that such relief is warranted. The parties in this case both agree that the Court has such authority, but disagree as to its application. We will explore this topic further below.

c. The Burden of Proof for Obtaining a Writ of Mandamus

For the first time, this Court sets forth the standards that determine whether a party may be granted mandamus relief. To obtain a writ of mandamus, the petitioner must establish the following: 1) the petitioner must have a clear legal right established by the Constitution and laws of the NHBP to the performance of a specific duty; 2) the respondent must have a clear legal duty established by the Constitution and laws of the NHBP; 3) the specific duty sought to be performed can only be in the form of injunctive relief, rather than retroactive or monetary relief; and 4) the petitioner must have no other adequate legal or equitable remedy.

d. Analysis: Does Appellant Meet the Burden of Proof for Obtaining a Writ of Mandamus?

Under the four-part test given above, we now examine whether or not the Appellant meets the burden of proof for the remedy of mandamus. First, it must be determined whether the Appellants have standing through a clear legal right established by the Constitution and laws of NHBP to the performance of a specific duty. Appellants argue that Article III, Section 6(a)(1) of the NHBP Constitution mandates a clear legal duty on behalf of the Tribal Council to disenroll tribal members who do not possess the blood quantum required under that 2012 Constitutional amendment. Their argument extends to requiring the Tribal Council to release Dr. McClurken's genealogy report, perform an independent audit by a genealogist that they themselves agree upon with the results of same being released to the membership, and then begin disenrollment proceedings against any "wrongfully enrolled" members identified as a result of said audit.

Appellants rely on Snowden & Hinmon v. Saginaw Chippewa Indian Tribe of Michigan, No. 04-CA-1017 (Saginaw Chippewa Indian Tribe of Michigan Court of Appeals Jan. 5, 2005) as means of supporting their standing argument. However, in *Snowden*, the Enrollment Department at Saginaw Chippewa Indian Tribe attempted to disenroll two deceased tribal members and their descendants for reasons other than those listed in their Constitution. There, the Court looked at the "implied power of disenrollment" where disenrollment occurred outside of the given procedural and Constitutional mandates, which were very limited. NHBP, on the other hand, has an enrollment code which provides a more detailed set of definitions and procedures when it comes to enrollment. It would be improper for this Court to create an "implied power" of disenrollment, thus creating an affirmative, mandatory duty, where the laws of the NHBP are clear in this regard. Therefore, Appellants reliance on *Snowden* is not persuasive in the context of this case.

Appellants also rely on Quayle v. Cantu, No. 08-CA-1028 (Saginaw Chippewa Indian Tribe of Michigan Court of Appeals, Sept. 12, 2008) to support their argument that mandamus relief is necessary to enforce the Tribe's enrollment ordinance. In *Quayle*, the Court determined that enrollment certifiers had a legal duty to provide membership applicants with answers regarding their applications after having waited for several years. However, the Court declined to provide mandamus relief as to when the certifiers must respond to applicants where the enrollment code did not specify a time limit, even though the applicants had been waiting for five to ten years. The Appellant's reliance on *Quayle* is misplaced. In this case, the appellants claim to have waited for several years for the Tribal Council to satisfy their concerns regarding persons they felt were wrongfully enrolled. However, like the Tribe's Constitution in *Quayle*, the NHBP Constitution does not mandate a time period for the Tribal Council's response to member requests regarding enrollment issues. Like the Court in *Quayle*, this Court declines to impose a time period over the Tribal Council in this case where the Constitution has not clearly mandated one. To do so would be an impermissible and overbroad reach of the Court's power to interpret the laws of NHBP.

As tribal members, Appellants have a right to be concerned about the state of membership in NHBP. They have a right to be involved in the legislative, judicial, and procedural process of NHBP, per the privileges defined in the Constitution, codes and ordinances of NHBP. Appellants also have a right to have their Tribal Council, as their governing body, to perform according to laws of NHBP. However, Appellants have failed to show that the Tribal Council owes them a clear legal duty to perform the actions they are requesting. There is nothing in the Constitution, codes, or ordinances that requires the Tribal Council to release Dr. McClurken's genealogy report, perform an independent audit by a genealogist that they themselves agree upon, release the results of same to the membership, and then begin disenrollment proceedings against any members identified by that audit as "wrongfully enrolled."

Appellant fails to meet the burden of proof for the first part of the test to obtain mandamus relief, where there is no evidence of a breach of a clear legal duty by the Tribal Council. Therefore, we decline to further address the remaining requirements of the test where standing is not found.

The Court would like to note, however, that since this case was filed, Tribal Council signed into law a new ordinance that would allow parties to challenge the membership of tribal members. The action by the Tribal Council in enacting these new procedures is persuasive to show that the Council has provided an alternate remedy to mandamus relief.

Conclusion

We grant the motions to strike, without specificity, and rule that no evidence not submitted in the trial record will be considered by the Court on appeal. In addition, we affirm the Trial Court's denial of the Petition for Writ of Mandamus.

IT IS SO ORDERED.

Signed:

9 May 2013
Date

John Wabaunsee
Hon. John Wabaunsee, Chief Justice

May 10, 2013
Date

Matthew Fletcher
Hon. Matthew L.M. Fletcher, Associate Justice

5/7/13
Date

Holly Thompson
Hon. Holly K. Thompson, Associate Justice

NOTTAWASEPPI HURON BAND OF THE POTAWATOMI SUPREME COURT	ORDER FOR MOTION ARGUMENT AND ORAL ARGUMENT	CASE NO. 12-239APP

Court address; 2221 11/2 Mile Road, Fulton, MI 49052 Phone: (269) 729-5151

In the Matter of:

Russell Chivis et al v. NHBP Tribal Council

THE COURT FINDS:

1. This matter was set for Oral Arguments, on Appellant's Appeal of the Tribal Court's Order denying a Writ of Mandamus, for **1:30pm on March 7, 2013**.

2. The parties filed briefs in this matter according to NHBPCR 9, Section 12.

3. In addition to the filed briefs, the Appellants filed *Appellant/Petitioner's Rebuttal Brief on Appeal* and in response to that, the Appellee filed a *Motion for Leave to File Motion to Strike Appellant's Rebuttal Brief on Appeal.*

4. Finally, the Appellants filed *Appellant/Petitioner's Opposition to Appellee/Tribe's Motion for Leave to File Motion to Strike.*

IT IS ORDERED:

1. The Motions will be heard by the Supreme Court before the Oral Arguments take place. Each party will have five (5) minutes to address the Motion.

2. The Supreme Court will then recess to consider the arguments and make a decision on the Motion.

3. Upon reconvening, the Supreme Court will hear Oral Arguments.

3/6/2013
Dated

John Wabaunsee
Hon. John Wabaunsee, Chief Justice