



## 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: 12-068-CV**

**RUSSELL CHIVIS, JON DOUGLAS, ERIC  
FOERSTER, DAWN NEYMEIJER, JIM  
MACKETY and CHAD STUCK**

v.

**THE NOTTAWASEPPI HURON BAND OF  
THE POTAWATOMI, HOMER  
MANDOKA, TRIBAL CHAIR, JAMIE P.  
STUCK, VICE CHAIR, ROANN BEEBE,  
TRIBAL SECRETARY, and DORIE RIOS,  
TREASURER**

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### OPINION AND ORDER

At a session of said Court held in the Courthouse of the Nottawaseppi Huron Band of the Potawatomi Tribal Court on the Pine Creek Reservation on the 28<sup>th</sup> day of August 2012

Honorable Melissa L. Pope Presiding

#### **INTRODUCTION**

This matter comes before the Court on a Petition for Writ of Mandamus and a Motion to Dismiss Petition for Writ of Mandamus. The Plaintiffs allege that the Defendants, the Nottawaseppi Huron Band of the Potawatomi (NHBP) and the members of NHBP Tribal Council, have failed to perform duties pursuant to Article III, Section 6 of the NHBP Constitution.

## **JURISDICTION**

The NHBP Tribal Court has jurisdiction over this matter pursuant to Article XI, Section 3(b) of the NHBP Constitution:

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.

Suits against Tribal officials are authorized under Article X of the NHBP Constitution:

Section 2. Authorization of Suits against Officials and Employees of the Band.

- a) Officials and employees of the Band shall be subject to suit if
  1. The suit is brought in the Band's Tribal Court.
  2. The suit is against such officials or employees in their official capacity;
  3. The suit seeks only prospective injunctive relief, and does not seek monetary damages or any other form of retroactive relief;
  4. The suit seeks to enforce legal rights and duties established by this Constitution and by the laws of the Band.

In the present case, the Plaintiffs, NHBP Tribal Members, are petitioning for a writ of mandamus with the Plaintiffs' cause of action arising under their assertion that the Defendants have failed to perform duties pursuant to Article III, Section 6 of the NHBP Constitution.

## **STATEMENT OF FACTS**

The Plaintiffs, by and through their attorney, submitted their Petition for Writ of Mandamus on or about April 27, 2012.

Defendants, by and through their attorney, submitted Defendants' Answer to Petitioners' Petition for Writ of Mandamus with Special/Affirmative Defenses on or about May 17, 2012.

Defendants submitted Defendants' Motion to Dismiss Petition for Writ of Mandamus on or about June 28, 2012.

Plaintiffs submitted Member/Petitioners' Response Brief in Opposition to the Tribe's Motion to Dismiss on or about July 17, 2012.

On or about July 17, 2012, Plaintiffs filed Petitioner's Notice of Submission of Evidence in Support of their Mandamus Request for a New Audit. Plaintiffs requested that this document be kept in the non-public portion of the Court's file due to it containing "detailed genealogical information."

A hearing on Defendants' Motion to Dismiss was held on August 28, 2012. Both parties personally appeared and presented arguments to the Court.

#### **ANALYSIS**

This is a case of first impression, meaning that the NHBP Tribal Court has not had any previous cases involving a petition for a writ of mandamus. As such, there is no binding precedent, or specific rules from case law, to follow when deciding this case.

With cases of first impression, the NHBP Tribal Court looks to other courts for guidance to determine what the law shall be at NHBP. All other court opinions whether from a tribal court, state court or federal court are persuasive authority, meaning that the NHBP Tribal Court does not have to follow them, unless required by federal law.

The 1968 Edition of the Black's Law Dictionary provides an excellent definition of mandamus, in particular in relation to the issues of this case:

We command. This is the name of a writ (formerly a high prerogative writ) which issues from a court of superior jurisdiction, and is directed to a private or municipal corporation, or any of its offices, or to an executive, administrative or judicial officer, or to an inferior court, commanding the performance of a particular act therein specified, and belonging to his or their public, official, or ministerial duty, or directing the restoration of the complainant to rights or privileges of which he has been illegally deprived.

While there are no specific references in the NHBP Constitution to the NHBP Tribal Court having the authority to issue writs of mandamus, both parties agree that the NHBP Tribal Court has this judicial authority, as does this Court, pursuant to Article XI, Section 3(b) of the NHBP Constitution. However, the parties disagree as to whether a writ of mandamus is appropriate in the present case.

It is clear from the briefs from both parties, as well as independent research by the Court, that many courts consider a writ of mandamus to be an extraordinary remedy. The United States Supreme Court refers to the writ of mandamus as one of “the most potent weapons in the judicial arsenal.” *Cheney v U.S. Dist. Court for Dist. of Columbia*, 542 U.S. 367, 380-381 (2004) (citing *Kerr v. United States Dist. Court for Northern Dist. of Cal.*, 426 U.S. 394 (1976)). “[T]he petitioners bear the burden of demonstrating their entitlement to this extraordinary remedy.” *Citizens for Protections of Marriage v. Board of State Canvassers*, 263 Mich. App. 487, 492 (2004). “Mandamus and prohibition are extraordinary remedies.” *Bullcoming v. Wilson*, 9 Okla. Trib. 227, 2006 WL 6122744 (Cheyenne-Arapaho 2006). “The Court possesses mandamus powers. However, those powers must be used in only the most extraordinary circumstances.” *Davis v. SCIT*, 07-07-C10087, 29 (2007). This Court, in reviewing the substantial case law in other courts, holds that a writ of mandamus is an extraordinary remedy in the NHBP Tribal Court.

In holding that a writ of mandamus is an extraordinary remedy, this Court now looks to other courts for guidance as to what factors to consider when presented with a petition for a writ of mandamus. The criteria in federal court includes: that there is “no other adequate means to attain relief;” that petitioner’s “right to issuance of the writ is clear and indisputable;” and that the writ is “appropriate under the circumstances.” *Cheney v. U.S. Dist. Court for Dist. of Columbia*, 380-381. In the state of Michigan, the petitioner must prove: that “the petitioner has a clear legal right – not possessed by citizens generally – to the performance of the specific duty sought to be compelled;” that “the defendant has a clear legal duty to perform it;” that the act to be compelled “is ministerial in nature;” and that the petitioner “has no other adequate legal or equitable remedy.” *White-Bey v. Dep’t of Corrections*, 239 Mich App 221, 223-224 (1994); *Inglis v. Public School Employees Retirement Bd.*, 374 Mich. 10, 13; 131 NW2d 54 (1964).

To have clear criteria specific to the NHBP Tribal Court, the following criteria is established for a writ of mandamus: 1) the petitioner must have a clear legal right established through the NHBP Constitution and by the laws of the Band, not generally possessed by enrolled NHBP Tribal Members, to the performance of the specific duty; 2) the respondent must have a clear legal duty established through the NHBP Constitution and by the laws of the Band; 3) the specific duty to be performed must only be injunctive relief and not seek monetary damages or any other form of retroactive relief; and 4) the petitioner has no other adequate legal or equitable remedy. The Court bases these criteria on a reading of other jurisdictions in conjunction with Article X of the NHBP Constitution:

Section 2. Authorization of Suits against Officials and Employees of the Band.

- a) Officials and employees of the Band shall be subject to suit if
  1. The suit is brought in the Band's Tribal Court.
  2. The suit is against such officials or employees in their official capacity;
  3. The suit seeks only prospective injunctive relief, and does not seek monetary damages or any other form of retroactive relief;
  4. The suit seeks to enforce legal rights and duties established by this Constitution and by the laws of the Band.

The Defendants have argued in their Motion to Dismiss Petition for Writ of Mandamus that the Plaintiffs have failed to state a claim upon which mandamus relief can be granted. The Defendants discussed the substance of what is now the NHBP four-part test for granting a writ of mandamus in their brief, but within the context of other jurisdictions' case law, demonstrating that the Plaintiffs have: failed to address how the Plaintiffs have a clear legal right to the performance of the relief they are requesting; failed to address a provision in the NHBP Constitution or other NHBP law that requires Defendants to perform the actions requested in the Defendants' prayer for relief; failed to demonstrate how the relief

requested is ministerial in nature; and failed to address how there are no other adequate legal or equitable remedies.

In the Plaintiffs' Petition for Writ of Mandamus, the Plaintiffs list two grounds for their Petition. In Count I, Plaintiffs state that the NHBP Tribal Council has failed to address Tribal Member concerns that there are allegedly unqualified members who are enrolled in NHBP. In Count II, Plaintiffs state that Tribal Council has failed to release the detailed report of Dr. James McClurken and the accompanying genealogy report. The Plaintiffs do not provide any grounds in their Petition as to how these counts involve a legal right owed to them as defined in the NHBP Constitution and by the laws of the Band or involve a legal duty owed by Tribal Council as defined in the NHBP Constitution and by the laws of the Band. The Court did not find any such references to these legal rights or duties in the NHBP Constitution or in the laws of the NHBP.

In Member/Petitioners' Response Brief in Opposition to the Tribe's Motion to Dismiss, the Plaintiffs reference the four affidavits they have submitted that include statements that: tribal government officials have been made aware repeatedly that there are individuals who are enrolled NHBP Tribal Members who Plaintiffs allege are not Potawatomi; that some individuals have relinquished membership because of this issue; and that the Plaintiffs were denied presenting on this issue in the way they anticipated. Plaintiffs state the following on page five of their brief:

[T]he circumstances herein are so extraordinary that Tribal members have relinquished their membership in protest over the membership issue not being properly addressed. This supports the conclusion that there is an alarming need for the membership to effect change which has not occurred despite repeated efforts to do so by direct communication with the Tribal government. This has caused the Petitioners and other (sic.) to have lack of confidence in their government.

The Plaintiffs argue that this lack of confidence in the NHBP Tribal government is a sufficient basis for a writ of mandamus. They cite *In re. Navajo Election Administration's Detennition of Insufficiency*, (sic; correct case name: *In re. Navajo Election Administration's Determination of Insufficiency*), No. SC-CV-24-09 (6/22/2009) as persuasive case law that supports their position. However, a key reason for the

decision in this Navajo Nation case was that the Defendant owed a legal duty to the Plaintiff. The Plaintiffs do not provide any evidence in their Response Brief as to a legal right owed to them by Tribal Council or a legal duty of the Tribal Council pursuant to the NHBP Constitution and by the laws of the Band.

When questioned during Oral Arguments as to what legal duty the Defendants had that they had not fulfilled, the Petitioners referenced Article III, Section 6. of the NHBP Constitution which provides:

- a) Persons may only be removed from the Membership Roll for the following reasons:
  1. A Tribal member who is found to have been erroneously or fraudulently enrolled, or is an enrolled member of another Indian tribe, whether federally recognized or not, or any other person who is found not eligible for Tribal Membership pursuant to the tribe's membership requirements contained in the Constitution of the Huron Band shall be subject to disenrollment. A Tribal Member who has been convicted of criminal treason in the Band's tribal court and all opportunities to appeal such conviction have been exhausted, is subject to disenrollment.
- b) No person shall be disenrolled from the Band unless they are first notified in writing of the reason(s) for their disenrollment, and given not less than thirty (30) days written notice before the hearing on their case before the Tribal Court. The hearing shall be open unless the person in question requests that the hearing be held in Closed Session.
- c) Until disenrollment is final under applicable law, the individual shall have all rights he/she is entitled to as a Tribal Member.

The above is the full extent of any reference to disenrollment in the NHBP Constitution. There are no references to any legal duties of the NHBP Tribal Council in this Section on disenrollment.

A motion to dismiss a petition for a writ of mandamus for failure to state a claim upon which mandamus relief can be granted is reviewed in a similar manner as a motion for summary judgment.

Motions for Summary Judgment are governed by Chapter 5, Section 27(C) of the NHBP Court Rules on Civil Procedure which provide in pertinent part:

The judgment sought shall be rendered if the pleadings, deposition, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

Even in viewing all evidence in a light most favorable to the Plaintiffs, the Plaintiffs have failed to provide evidence of a claim upon which mandamus relief can be granted, including evidence as to a legal right owed to them by Tribal Council or a legal duty of the Tribal Council pursuant to the NHBP Constitution and by the laws of the Band.

### **CONCLUSION**

The NHBP Tribal Court has the judicial authority to issue a writ of mandamus when appropriate. The criteria for a writ of mandamus is rooted in Article X, Section 2(a) of the NHBP Constitution and is as follows: 1) the petitioner must have a clear legal right established by the NHBP Constitution and by the laws of the Band, not generally possessed by enrolled NHBP Tribal Members, to the performance of the specific duty; 2) the respondent must have a clear legal duty established by the NHBP Constitution and by the laws of the Band; 3) the specific duty to be performed involves only injunctive relief and does not seek monetary damages or any other form of retroactive relief; and 4) the petitioner has no other adequate legal or equitable remedy. The Plaintiffs have failed to present evidence in their initial Petition for Writ of Mandamus and in their Response Brief in Opposition to the Tribe's Motion to Dismiss that states a claim upon which mandamus relief can be granted, even when the evidence is viewed in a light most favorable to the Plaintiffs.



**ORDER**

For the reasons set forth in this Opinion and Order, the Defendants' Motion to Dismiss Petition for Writ of Mandamus is GRANTED and the case is DISMISSED.

9-26-12  
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.

9/26/2012  
Date

R. Scott Ryder  
R. Scott Ryder  
Tribal Court Administrator