NOTTAWASEPPI HURON
BAND OF THE POTAWATOMI
A FEDERALLY RECOGNIZED TRIBAL GOVERNMENT

NHBP

Supreme Court Opinions

2013 – 2021

Indexed By:
Gregory D. Smith
Chief Justice

11/1/2021

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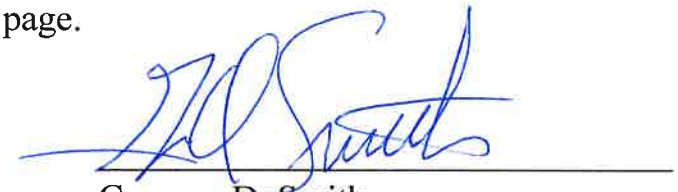
This Index is designed for basic "jump-off research" and merely points to a location in a case where a relevant word or concept appears. This reference location may be a mere passing reference or may be part of several pages discussing the word or concept. This Index does not approve or disapprove any case or concept referenced. It does not acknowledge every legal issue set out in the Nottawaseppi Huron Band of the Potawatomi appellate decisions. It merely points to Nottawaseppi Huron Band of the Potawatomi Supreme Court decisions which touch on the word or concept. The page references herein point to Bates Stamp page numbers at the bottom middle of each page.



Gregory D. Smith
Chief Justice
NHBP Supreme Court
11/26/2021

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Huron Potawatomi Tribal Court
The Nottawaseppi Huron Band of the Potawatomi
2221 1-1/2 Mile Road • Fulton, Michigan 49052
Phone: (269) 729-5151 • Fax: (269) 729-4826

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**

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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.

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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.

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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

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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

Hon. Matthew L.M. Fletcher, Associate Justice

5/7/13
Date

Hon. Holly K. Thompson, Associate Justice

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

Court address; 2221 1/2 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.

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3/6/2013
Dated

John Wabaunsee
Hon. John Wabaunsee, Chief Justice

Huron Potawatomi Tribal Court

The Nottawaseppi Huron Band of the Potawatomi

2221 1-1/2 Mile Road • Fulton, Michigan 49052
Phone: (269) 729-5151 • Fax: (269) 729-4826

Case No. 12-005APP	ORDER AFTER SUPREME COURT HEARING	
PLAINTIFF: Nathaniel Spurr, et al	v.	DEFENDENT: NHBP Tribal Council, Plante Moran LLP and the Tribal Election Board

IT IS ORDERED:

This Court, having heard the arguments of the parties and having reviewed the Trial Court Record and Briefs, hereby affirms the Order of the Trial Court denying the request for temporary restraining order and permanent injunction dated December 29, 2011. Opinion to follow.

18 January 2012
Dated

Hon. John Wabaunsee, Chief Justice

Jan. 18, 2012
Dated

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

January 18, 2012
Dated

Hon. Holly K. Thompson, Assoc. Justice

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CERTIFICATE OF MAILING

I certify that on this date I mailed a copy of this *Order* to the Plaintiff's and Defendant's attorneys by ordinary first-class mail.

1/18/2012
Dated

R. Scott Ryder,
Tribal Court Administrator

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Huron Potawatomi Tribal Court
The Nottawaseppi Huron Band of the Potawatomi
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Nathanial W. Spurr	**v.**	**Tribal Council; Plante Moran LLP; and Tribal Election Board**

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

File Number: 12-005APP

Hon. John Wabaunsee, Chief Justice, Presiding

Hon. Matthew L.M. Fletcher, Associate Justice

Hon. Holly K. Thompson, Associate Justice

Appearances:

Plaintiff-Appellant, Nathanial W. Spurr, in pro per

Defendants-Appellees, William J. Brooks

Opinion by Fletcher, J.

Introduction

Article IX of the Constitution of the Nottawaseppi Huron Band of Potawatomi provides:

> 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 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 members in favor may call for a membership vote on proposed amendments.

In this matter, we are called to interpret the boundaries of acceptable governmental conduct under this provision. This will be the first decision and opinion issued by the Supreme Court, and we do so with the greatest of humility and respect (Mno Bmadzewen) toward the People of the Nottawseppi Huron Band of Potawatomi and the parties.

Procedural History

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This case reaches us on appeal from the trial court's Order Regarding Plaintiff Request for Temporary Restraining Order and Permanent Injunction against the Tribal Council, Plante Moran LLP, and the Tribal Election Board, issued on December 29, 2011. The plaintiff and appellant in this matter is Nathanial W. Spurr, a tribal member, who is seeking to stop an election being held under the auspices of Article IX of the Constitution. We agreed to Mr. Spurr's request for an expedited briefing and argument schedule. *See* 9 NHBPCR § 5(D). We have jurisdiction over this appeal of the trial court's decision. *See* NHBP CONST. art. X, § 3(f); 9 NHBPCR § 3(A). After submission of the parties' briefs, we heard the arguments of the parties on January 12, 2012. Following the conclusion of oral argument, the Supreme Court Justices decided to affirm the order of the trial court.

We now provide the reasons for that decision.

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Factual Background

After a two public meetings conducted by a consultant named James Mills under the apparent authority of the Constitutional Reform Committee in the summer of 2011, the Tribal Council approved Resolution Number 11-17-11-05 calling for an election on whether to approve amendments to the Constitution. At that time, Mr. Spurr was a sitting member of the Tribal Council (he voted against the resolution). The Tribal Council instructed the Election Board to administer the election. On November 23, 2011, the Election Board mailed to each tribal member eligible to vote a packet containing an absentee ballot, instructions for return of the ballot, a self-addressed envelope, a letter from James Mills on tribal letterhead, and contact information for the members of the Tribal Council and Mr. Mills. Mr. Spurr represented to the trial court that he received the ballot packet on November 25, 2011.

On December 15, 2011, nearly three weeks after he received the ballot package in the mail, Mr. Spurr sued to enjoin the election.

On December 20, 2011, the trial court, presided over by Chief Judge Melissa L. Pope, held an emergency hearing on Mr. Spurr's request. On December, 29, 2011, Chief Judge Pope issued an order denying Mr. Spurr's request.

Mr. Spurr appeals.

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Discussion

I. The Tribal Government Must Ensure that Article IX Elections Comply with Potawatomi Standards of Fundamental Fairness.

We begin, as we must, with the Constitution. Article IX is the sole constitutional provision at issue here, and governs the process for amending the Constitution. Article IX provides little guidance on what, if any, minimum standards there are for conducting elections to amend the Constitution. It merely sets a minimum percentage of eligible voters (30 percent) that must vote in the election in order to make the election valid, and the requirements for when the Tribal Council must call an election. The Tribal Council must call an election after

being presented by a petition generated by tribal members or, "[i]n the absence of a petition, the Tribal Council upon a majority vote of its members in favor may call for a membership vote on proposed amendments."

How the election is conducted, and by whom, is not addressed by Article IX. Other provisions in the Constitution relating to elections appear to apply (for the most part) to elections for the office of the Tribal Council, either regular or special elections. *See* NHBP CONST. art. V, § 2 (regular elections for Tribal Council); Constitution art. IV, § 2 ("special election[s]" to fill vacancies in the Tribal Council). It is obvious that, despite Mr. Spurr's claims to the contrary, that the Election Code only applies to regular and special elections for tribal council. The repeated references to "candidates" throughout the Election Code, *e.g.*, §§ 2.2, 2.3, 4.1(A)(2)-(5), 4.2(A)(2)-(3), 5.1(A), 5.2, 6.1(A), 6.2(A)-(B)(1), 7.1, 8.1, 9.5, assure us of that finding. Section 10 of the Election Code is the only exception, and that section governs referendums; that is, an election to review an enacted ordinance or resolution of the Tribal Council. There is little in the way of standards for governing those elections either and, regardless, it is unlikely that any of those standards would apply to an Article IX election.

The question remains then – what standards, if any, govern Article IX elections? The People of the Nottawaseppi Huron Band of Potawatomi established and adopted the Constitution "to provide a means for ... the free expression of the community will...." NHBP CONST. preamble. The mechanism of elections – be they regular, special, referendum, or Article IX elections – appears to be a critical component of providing the "means for ... the free expression of the community will...." As such, Article IX elections should be conducive to allowing the community to communicate. Governmental conduct in calling and administering an Article IX election must be limited in a meaningful way to preserve the clear intent of the People in adopting the Constitution. What standards apply, then, is a matter of tribal common law, and we turn to principles of Potawatomi customary law for guidance.

At the beginning of this opinion we briefly invoked Mno Bmadzewen, and we return to this uniquely Anishinaabe (Ojibwe, Odawa, and Bodewadmi) concept. Eva Petoskey, a member of the Grand Traverse Band of Ottawa and Chippewa

Indians, and a former Vice-Chair of the Grand Traverse Band Tribal Council, recently stated:

> There is a concept that expresses the egalitarian views of our culture. In our language we have a concept, *mino-bimaadziwin*, which essentially means to live a good life and to live in balance. But what you're really saying is much different, much larger than that; it's an articulation of a worldview. Simply said, if you were to be standing in your own center, then out from that, of course, are the circles of your immediate family. And then out from that your extended family, and out from that your clan. And then out from that other people within your tribe. And out from that people, other human beings within the world, other races of people, all of us here in the room. And out from that, the other living beings . . . the animals, the plants, the water, the stars, the moon and the sun, and out from that, the spirits, or the *manitous*, the various spiritual forces within the world. So when you say that, *mino-bimaadziwin*, you're saying that a person lives a life that has really dependently arisen within the web of life. If you're saying that a person is a good person, that means that they are holding that connection, that connectedness within their family, and within their extended family, within their community.

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Eva Petoskey, *40 Years of the Indian Civil Rights Act: Indigenous Women's Reflections*, *in* THE INDIAN CIVIL RIGHTS ACT AT FORTY at 39, 47-48 (Angela R. Riley, Matthew L.M. Fletcher, and Kristen A. Carpenter, eds. 2012) (quoting Eva Petoskey, Address, Michigan State University College of Law, Indigenous Law and Policy Center 5th Annual Indigenous Law Conference (October 10-11, 2008)). The historical record of the Nottawaseppi Huron Band offers examples:

> [E]very time somebody was sick [in the 1930's], the women would all gather together and they'd send the word around and they'd go there [to the home of the ill member] and they'd clean that place out. They'd wash blankets, wash dishes, cook and just do everything. Take care of the baby and everything.

Anthropological Technical Report – Huron Potawatomi, Inc., at 6, *reprinted in* United States Dept. of Interior, Bureau of Indian Affairs, Branch of Acknowledgment and Research, Proposed Finding – Huron Potawatomi, Inc., at 226 (May 10, 1995).

Mno Bmadzewen informs individual Anishinaabe life choices, but also informs the direction of tribal governance. Fred Kelly, an Anishinaabe and member of the Onigaming First Nation in Canada, draws the connection between Mno Bmadzewen and Anishinaabe legal principles:

> The four concentric circles in the sky – *Pagonekiishig* – show the four directions, the four stages of life, the four seasons, the four sacred lodges (sweat, shaking tent, roundhouse, and the Midewe'in lodge), the four sacred drums (the rattle, hand, water, and big ceremonial drum), and the four orders of Sacred Law. Indeed, the four concentric circles of stars is the origin of the sacred four in *Pimaatiziwin* that is the heart of the supreme law of the Anishinaabe. And simply put that is the meaning of a constitution.

Fred Kelly, *Anishinaabe Leadership*, at 3 (Dec. 14, 2005), *quoted in* Vanessa A. Watts, *Towards Anishinaabe Governance and Accountability: Reawakening our Relationships and Sacred Bimaadziwin*, at 77, unpublished master's thesis, University of Victoria (2006).

Mno Bmadzewen is not a legal doctrine, but forms the implicit basis for much of tribal custom and tradition, and serves as a form of fundamental law. We are careful, however, not to equate customary and traditional law as a common law basis for the decision in all cases before this Court. We again emphasize our holding that the Constitution and tribal code offers little or no guidance on how Article IX elections should be governed, nor is there an enumerated statement of fundamental constitutional rights principles. Today, Mno Bmadzewen guides our common law analysis of clarifying the outer boundaries of acceptable governmental conduct in administering Article IX elections.

Many, if not the vast majority, of American Indian tribal courts have recognized as a matter of common law that the notion of "fundamental fairness" applies to tribal elections. For example, the three Michigan Odawa tribal courts

have all referred to fundamental fairness in various ways, but most especially in the context of tribal elections. *E.g.*, *Crampton v. Election Board*, 8 Am. Tribal Law 295, 296 (Little River Band of Ottawa Indians Tribal Court, May 8, 2009); *Bailey v. Grand Traverse Band Election Board*, No. 2008-1031-CV-CV, 2008 WL 6196206, at * 9, 11 (Grand Traverse Band of Ottawa and Chippewa Indians Tribal Judiciary, Aug. 8, 2008) (en banc); *Deckrow v. Little Traverse Bay Bands of Odawa Indians*, No. C-006-0398, 1999 WL 35000425, at * 2 (Little Traverse Bay Bands of Odawa Indians Tribal Court, Sept. 30, 1999). We find the reasoning of these decisions persuasive in our review of the outer boundaries of acceptable governmental conduct in administering Article IX elections.

The oldest of the three decisions, *Deckrow*, issued by the Little Traverse Bay Bands tribal court, involved an individual tribal member's challenge to an election approving the Bands' "Judgment Fund Distribution Plan." *See Deckrow v. Little Traverse Bay Bands of Odawa Indians*, No. 98-A-0010998, 1998 WL 35301007, at * 1 (Little Traverse Bay Bands of Odawa Indians Tribal Appellate Court, Oct. 22, 1998). The Bands argued that no person could sue the tribal government due to the doctrine of tribal sovereign immunity. The *Deckrow* court held that the interim tribal constitution's guarantee of "the right to petition for action or the redress of grievances" effectively created a cause of action for tribal members to challenge election outcomes. 1999 WL 35000425, at * 3. Invoking to some extent tribal customary law, the court added: "After all, government is a human institution and the maxim 'to err is human' is undisputed. Fundamental fairness requires that there be an opportunity for redress, surely, in everyone's book." *Id.* at * 2. We find the *Deckrow* court's invocation of fundamental fairness in the context of tribal customary and traditional law persuasive and compelling.

The next decision, *Bailey*, issued by the Grand Traverse Band's tribal court, involved the alleged tainting of an election for the Tribal Chairman's position due to a possible violation of the tribal election board's own rules. *See Bailey*, 2008 WL 6196206, at * 1-2. The election board there had publicly censored one of the candidates a single day before the election without ever providing notice to the candidate that a grievant had filed a complaint with the election board about the candidate's activities. *See id.* at * 1. The tribal court held that "the unique facts and circumstances of this case present Constitutional issues of due process of law and a lack of fundamental fairness that we cannot ignore or excuse." *Id.* at * 9. The tribal

court ordered a new election based on those "unique facts and circumstances." *See id.* at * 14-15. The *Bailey* court's decision to order a new election only where fundamental fairness lacks in extraordinary circumstances is persuasive to us for purposes of considering a standard of review for acceptable governmental conduct in administering Article IX elections. In fact, the third Odawa tribal court case, *Crampton*, borrowed the exact language the *Bailey* court used in analyzing election challenges. *See Crampton*, 8 Am. Tribal Law at 296. There, the court addressed allegations that candidates for the tribal election board members, who were prohibited from campaigning for office, improperly campaigned. *See* Complaint at 2, *Crampton v. Election Board*, 8 Am. Tribal Law 295 (Little River Band of Ottawa Indians Tribal Court 2009) (No. 09-084 EB).

We hold that Article IX elections, while not governed by any specific standards provided for in the Constitution or in the Tribal Code, must comport with a standard of fundamental fairness as a matter of Potawatomi custom and tradition. We are guided in determining whether the election is fundamentally fair by acknowledging the principles of Mno Bmadzewen and the intent of the Constitution "to provide a means for ... the free expression of the community will...." CONST. preamble.

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II. The Election at Issue Complies with Potawatomi Standards of Fundamental Fairness.

Tribal election cases present legal issues of a particular complexity. Elections such as the Article IX election at issue here involve ultimate questions of tribal governance; namely, whether to amend the language of the Constitution. Elections are complicated endeavors, and involve many competing interests and questions of fairness and process sometimes implicating the responsibilities of the judicial branch of government. *See generally* NHBP CONST. art. X, § 3(b). As the Constitution's preamble states, elections also are inherently political affairs, and are a critical "means for [expressing] the community will...."

We as the Tribal Supreme Court tread carefully into the thicket of tribal elections. The remedy requested by Mr. Spurr – halting an election that is already underway – is extraordinary for at least two reasons. The first reason is that the

technical remedy, an injunction, is all but universally understood in tribal, state, and federal courts as "extraordinary." *E.g.*, *Bauer v. Mohegan Council of Elders*, 8 Am. Tribal Law 99, 102 (Mohegan Tribal Court 2009) ("However, a 'preliminary injunction is an extraordinary and drastic remedy, one that should not be granted unless the movant, by a clear showing, carries the burden of persuasion.'"); *Hopinkah v. Ho-Chunk Nation Election Board*, 1 Am. Tribal Law 256, 261 (Ho-Chunk Nation Trial Court 1998) ("Temporary restraining orders are extraordinary remedies."). The issuance of an injunction that orders governmental officials to cease their activity (in this case, the administration of an election) is the epitome of "judge-made law." JOHN F. DOBBYN, INJUNCTIONS IN A NUTSHELL 1 (1974). The second reason is that, as the government repeatedly argued before both the trial court and the Supreme Court, tribal elections are political affairs not usually implicating the judicial function. While challenges to election parameters and results are within the capacity of the judiciary to resolve, the policy preferences at the heart of the matter are not within our authority to review. We must defer to the Tribal Council on constitutional matters delegated to the Tribal Council, such as Article IX elections. *Cf. Delgado v. Oneida Business Committee*, No. 00-TC-0004, 2000 WL 35782584, at * 5 (Oneida Trial Court, Jun 7, 2000) (holding that issues "delegated to the political or legislative branch of the [tribal] government" are "not within the authority of the judicial branch to determine"); *Wabsis v. Little River Band of Ottawa Indians Enrollment Commission*, No. 04-185-EA, 2005 WL 6344603, at * 1 (Little River Band of Ottawa Indians Tribal Court, April 14, 2005) ("The court must also show the highest deference to a separation of powers for the Executive Branch of the tribe in their interpretation of Constitutional language and in enactment of ordinances....").

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We first address the standard that the trial court must use in determining whether to issue an injunction, and the standard the appellate court must use in reviewing the trial court's decision. The trial court applied the four-part test required in federal and state courts: "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." *Spurr v. Nottawaseppi Huron Band of Potawatomi Tribal Council*, No. 11-251 TRO, at 8 (NHBP Tribal Court, Dec. 29, 2011) (quoting *Winter v. Natural Resources Defense*

Council, 555 U.S. 7, 20 (2008)). This four-part test is standard in other Anishinaabe tribal courts as well. *E.g.*, *Crampton v. Election Board*, 8 Am. Tribal Law 295, 296 (Little River Band of Ottawa Indians Tribal Court 2009); *DeVerney v. Election Board*, 9 Am. Tribal Law 290, 291 (Little River Band of Ottawa Indians Tribal Court 2009). We agree with the trial court on the proper test to apply in analyzing requests for injunctive relief.

As we noted earlier, the issuance of an injunction is an extraordinary matter. The issuance of an injunction against government officials doing the work of the tribal government, which enjoys tribal sovereign immunity, is even more extraordinary. And the issuance of an injunction to stop an election to determine the "will of the community" is still more extraordinary. We will not stop an election that, on its face, meets the relatively simple requirements of Article IX unless the plaintiff makes a clear showing that "the unique facts and circumstances of this case present Constitutional issues of due process of law and a lack of fundamental fairness that we cannot ignore or excuse." *Bailey v. Grand Traverse Band Election Board*, No. 2008-1031-CV-CV, 2008 WL 6196206, at * 9, 11 (Grand Traverse Band of Ottawa and Chippewa Indians Tribal Judiciary, Aug. 8, 2008) (en banc). A high burden of proof is essential because "undoing an election is an extraordinary act and must be avoided as much as possible. It is therefore only appropriate that the challenger in an election dispute prove a violation by a higher standard than by preponderance of the evidence." *Visintin v. Ho-Chunk Nation Election Board*, 7 Am. Tribal Law 280, 289 (Ho-Chunk Nation Trial Court 2008). Other tribal courts have required election challengers to prove by clear and convincing evidence that the election violated the law. *See, e.g.*, *Barrientoz v. GTB Election Board*, No. 2006–316–CV–CV, 2006 WL 6285478, at * 4 (Grand Traverse Band of Ottawa and Chippewa Indians Tribal Judiciary, May 12, 2006) (en banc); *Shomin v. Grand Traverse Band of Ottawa and Chippewa Indians*, No. 2010-001738-CV-CV, slip op. at 18 (Grand Traverse Band of Ottawa and Chippewa Indians Tribal Judiciary, Feb. 28, 2011); *Woods v. Grand Traverse Band Election Board*, No. 2010-001630-CV-CV, slip op. at 11 (Grand Traverse Band of Ottawa and Chippewa Indians Tribal Judiciary, April 23, 2010) (en banc). Following the persuasive guidance of other tribal courts, we apply the clear and convincing evidence standard to Mr. Spurr's allegations here.

We start our analysis with Mr. Spurr's allegations. They involve the method by which the electorate will vote – via a mailing – and the import of a letter included in the election mailing packet drafted by a consultant hired by the Tribal Council to advise on the election. As a preliminary matter, Mr. Spurr alleges that "[t]he election procedure used for this proposed constitution ... was entirely novel." Appellants' Brief at 11. He alleges "there was no voting at the polls on the reservation [and] the requirement to request an absentee ballot was eliminated...." *Id.* at 12.

We assess these preliminary allegations by looking at the requirements of Article IX. Article IX expressly delegates the authority to call an election to amend the Constitution. Twice the provision grants the authority to the Tribal Council: "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*...." (emphasis added). Later, the provision states, "In the absence of a petition, the *Tribal Council upon a majority vote of its members in favor may call for a membership vote* on proposed amendments." (emphasis added) It appears that the Tribal Council has complied with its minimal requirements to call for an Article IX election. The Tribal Council called for the election in Resolution 11-17-11-05 by a majority vote of three to two. That is all that Article IX requires. Nothing in Article IX prohibits the actions taken by the government as alleged by Mr. Spurr.

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Mr. Spurr makes additional allegations about the voting method, arguing that the "mail-in-vote was actually a change made at the eleventh hour ...[,] six days before the ballots were mailed...." Appellants' Brief at 12. According to Mr. Spurr, the Tribal Council "decided to make this last-minute change in the election procedure because they believed it was quite unlikely the proposed Constitution would be approved in a normal, conventional election of the kind that has been used by the Tribe for the last 32 years." *Id.* The government did not dispute these claims, possibly because, standing alone, these allegations have no legal import. The government at oral argument suggests that the intent to increase voter participation is justified by the increase in tribal membership made possible by a recent change to blood quantum, and a resulting increase in the geographic disposition of tribal member domiciles around the State and elsewhere. The change, given these assertions, seems eminently reasonable as a means of increasing voter participation. Mr. Spurr insists that there is some malevolent intent

behind the change to a mail-only ballot system for this election, but offers no evidence whatsoever that such an intent exists. More importantly, there appears to be no substantive impact on whether the increased voter participation will somehow create illegitimate outcomes, despite Mr. Spurr's repeated allegations at oral argument that few Nottawaseppi Huron Band tribal members are competent to vote on these proposed amendments.[1] Efforts by the tribal government to increase voter participation are not disfavored by the Constitution, and Mr. Spurr has not alleged (nor did he prove) any kind of reason why increased voter participation is an unconstitutional outcome. Mr. Spurr's first allegation fails the first prong of the four-part test for the issuance of an injunction – likelihood of success on the merits.

Mr. Spurr's second major allegation gives us pause, however, though not enough to reverse the trial court. Mr. Spurr focuses heavily on a letter on tribal letterhead from James Mills, a consultant retained by the Tribal Council to advise on the amendment process. Appellants' Brief at 9-11. The letter was in the election packet mailed to the tribal membership, and included his contact information for tribal members seeking additional information about the election. *Id.* The so-called "Mills Letter," according to Mr. Spurr, "purported to summarize the important changes made by the proposed constitution to the current Constitution and those made in response to input from Tribal members, is highly selective in terms of the changes from the current constitution that it describes." *Id.* at 10. Mr. Spurr especially objected to the phrase, repeated twice, that one crucial amendment was the product of "fair compromise," suggesting that the drafter of the letter used that phrase as "a thinly veiled endorsement of the constitution." *Id.* Mr. Spurr also argued that the portion of the Mills Letter that offered a contact number to reach Mr. Mills and Tribal Council members further tainted the process. *See id.* at 11.

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[1] *See also* Hearing on Motion for Temporary Restraining Order, *Spurr v. Nottawaseppi Huron Band of the Potawatomi Tribal Council*, No. 11-251 TRO (Dec. 20, 2011), Transcript at 7:

> Specifically, I'm bringing this to your Honor's attention because at the time I believe we had 785 registered voters; so that would mean that we would have upwards of 60 percent of our tribal members—our eligible voting members who are of age—would be receiving ballots in this election who, otherwise, wouldn't have, you know, gone to the polls on election day nor would they have requested absentee ballots. Now all of them have received ballots.
>
> And then the—The problematic thing about that, in the opinion of all the plaintiffs who signed on to this case, is these are people who know very little about the constitution or possibly the tribe. In many cases, they're new members. In many cases, they might not read the newsletter or might not, you know, go through this—this document, which is, you know, almost—almost 19 full pages long single-spaced.

Mr. Spurr offered no evidence that the Mills Letter influenced any tribal member one way or the other.

The trial court dismissed the import of these allegations as "pure speculation." *Spurr v. Nottawaseppi Huron Band of Potawatomi Tribal Council*, No. 11-251 TRO, at 8 (NHBP Tribal Court, Dec. 29, 2011). It is the institutional obligation of the trial court to hear testimony and make findings of fact, and so we defer to the trial court's findings rather than rehear all of the same testimony. In other words, the trial court's findings of fact will not be overturned if they are supported by the evidence or if the appellate court finds that the great weight of the evidence leads to a contrary finding. *See Rasmussen v. Oneida Police Dept.*, No. 99-EP-0030, 2000 WL 35780308, at * 3 (Oneida Tribal Appellate Court, Jan. 24, 2000).

"Pure speculation" – that is, a complete lack of evidence that the government's actions in conducting this election were unacceptable – is an insufficient factual basis *in this matter* to reverse the trial court and order the government to end the election. We do take note of Mr. Spurr's argument that it is difficult to prove that the government's actions are unacceptable. Mr. Spurr would have us hold that any election "disturbance" is justification to shut down the election, even without evidentiary support. Appellants' Brief at 23 (quoting *Citizens for Police Accountability Political Committee v. Browning*, 572 F.3d 1213, 1221 (11th Cir. 2009)). The government counters with reasoning from the Ninth Circuit that "[i]nterference with impending elections is extraordinary ..., and interference with an election after voting has begun is unprecedented." Appellees' Brief at 13 (quoting *Southwest Voter Registration Educ. Project v. Shelley*, 344 F.3d 914, 919 (9th Cir. 2003)); *see also id.* at 13-14 (quoting *Reynolds v. Sims*, 377 U.S. 533, 585 (1964)). We find the government has the better of the argument. The Tribal Council's authority to call and conduct Article IX elections forces the judiciary to extend great deference to that branch of government. Mr. Spurr has not met his burden of proof.

We pause, however, to note that we share, to some extent, Mr. Spurr's concern about the Mills Letter. *See Spurr v. Nottawaseppi Huron Band of Potawatomi Tribal Council*, No. 11-251 TRO, slip op. at 8 (NHBP Tribal Court, Dec. 29, 2011) ("[T]he Court agrees with Plaintiff that the letter from Mr. Mills

should not have been included in the mailing with the ballot...."). We have located one other tribal court decision that threw out an election to amend a tribal court due to concerns about ballot materials. *See In re Anoatubby*, 4 Okla. Trib. 137 (Chickasaw Nation Tribal Court 1994). We now turn to that opinion for persuasive guidance.

In *Anoatubby*, the tribal council called an election to decide whether to amend the Chickasaw constitution to include a provision mirroring the Fifth Amendment to the United States Constitution. *See id.* at 141. The ballot at issue did not contain the actual amendment language, but instead included a summary of the proposed amendment that differed from the actual language. *See id.* The Chicksaw constitution, much like the NHBP Constitution, delegated authority to conduct constitutional amendment elections without much guidance on the procedures to be used. *See id.* at 142 (quoting CHICKASAW CONST. art. XVIII, § 2). The court decided that, even though the actual amendment had been printed in the *Chickasaw Times* just prior to the election, there was no guarantee that tribal members would have the opportunity to read the language before the election. *See id.* at 144. The court enjoined the election.

Anoatubby is distinguishable from this case. Here, the amendment language is included in the ballot, along with the other materials to which Mr. Spurr objects. All voting members will have an opportunity to read the specific amendment language.

Anoatubby also does not offer guidance on the content of a ballot summary. However, in this case, the government's representations about the purposes of including the Mills Letter, the content of the letter, and the inclusion of the contact information firmly rebut the implications Mr. Spurr asks us to make. First, according to the government, the Mills Letter "does nothing more than point out (and highlight for the voters) the portions of the Ballot Draft being presented to voters for possible ratification, which were changed in response to Membership input/comment from the draft Amended and Restated Constitution members were send in July 2011." Appellees' Brief at 18. The government further argues that the Mills letter "encourages a more informed electorate by focusing voter attention on the language that was the subject of the most dispute during the public comment period." *Id.* at 19. While concerned with the possible electioneering in the Mills

Letter, the trial court nonetheless agreed with the government's position that any government error in conducting the election was harmless:

> 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.
>
> ***
>
> [Tribal Members] 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. ... [A]ll Tribal Members, regardless of whether they support or opposed the proposed Amended and Restated Constitution are fully explored before the vote takes place.

Spurr v. Nottawaseppi Huron Band of Potawatomi Tribal Council, No. 11-251 TRO, slip op. at 8 (NHBP Tribal Court, Dec. 29, 2011). The trial court's analysis is very persuasive, taken with the government's position that the Mills Letter is intended to encourage, rather than stifle, political participation. In fact, as the government points out, the ballot materials include this sentence: "Make sure you have taken the time to read and understand the proposed Amended and Restated Constitution before you cast your vote." Appellees' Brief at 20. Much, if not all, of the harm from the alleged electioneering in the Mills Letter is obviated by the clear governmental intent to increase political participation.

Nonetheless, while it is apparent that the government did not violate Article IX or any other provision of the Constitution or the Election Code as it currently reads, we can imagine circumstances where a document included in an election packet mailing constitutes a form of electioneering that we could consider a violation of the Tribal Council's mandate to call and conduct Article IX elections. We hearken back to our consideration of Mno Bmadzewen, and we find that the government's boundaries of acceptable conduct in administering an Article IX election are broad, but not unlimited. Like the *Bailey* court, there may come a day

that the government engages in conduct that is inconsistent with the Constitution and laws. However, so long as the government's conduct respects, as we believe it does here, elections as expressions of the community's will, we will not intervene.

Signed:

2/21/2012 — John Wabaunsee

Dated — Hon. John Wabaunsee, Chief Justice

2/21/2012 — Matthew Fletcher

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

2/21/2012 — [signature]

Dated — Hon. Holly K. Thompson, Associate Justice

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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: 13-043CV		**13-219APP**
Plaintiff/Appellant: **Terry Chivis**	**v.**	**Defendant/Appellee:** **Nottawaseppi Huron Band of the Potawatomi Tribal Council and Homer Mandoka**
Attorney for Plaintiff: None		**Attorney for Defendant: William Brooks**

ORDER OF DISMISSAL

Appellant Terry Chivis has submitted a written request that his appeal be withdrawn. Based on this request, this appeal is dismissed.

Dated: March 7, 2014

BY THE COURT

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John Wabaunsee

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John Wabaunsee
Chief Judge, NHBP Supreme Court

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. 13-078-CV/TRO 13-079-CV/TRO	ORDER AND DECISION AFTER SUPREME COURT HEARING	
PLAINTIFFS: DEAN TENBRICK TERRY TENBRICK	v.	DEFENDANTS: NOTTAWASEPPI HURON BAND OF THE POTAWATOMI AND NOTAWASEPPI HURON BAND OF THE POTAWATOMI ELECTION BOARD

13-078

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

Opinion by Wabaunsee, CJ

I.

PROCEDURAL HISTORY

These cases reach us on appeal from the Trial Court's Opinion and Order of April 23, 2013. Dean TenBrink and Terry TenBrink (the "TenBrinks"), members of the Nottawaseppi Huron Band of Potawatomi (NHBP), filed an action to appeal the decision of the NHBP Election Board to disqualify them and two other candidates who were seeking election to the NHBP Tribal Council scheduled for April 27, 2013. The complaint was filed on March 8, 2013 and asked for a temporary restraining order

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reinstating them as candidates. The TenBrinks also claimed that portions of the NHBP Election Code were contrary to the NHBP constitution and the Indian Civil Rights Act.[1]

The Trial Court scheduled a hearing on the petition for temporary restraining order for March 15, 2013. At the hearing neither party presented evidence, instead choosing to make oral arguments. Both parties relied on documents attached to various pleadings and filings, but none were introduced into evidence. However there appears to be little dispute as to the basic facts of this case. On March 19, 2013, the Honorable Melissa Pope, trial court judge, denied the request for injunctive relief on the grounds the plaintiffs failed to meet their burden of proof. On April 8, 2013, plaintiffs filed a motion for a new trial, and to alter or amend the judgment. The NHBP Election Board opposed the motion and requested dismissal of the action. After further briefing on April 23, 2013, Judge Pope affirmed her March 19, 2013 decision, denied the motion for new trial, denied the plaintiffs' request for a permanent injunction and advisory opinion and dismissed the TenBrink's case with prejudice.[2] The TenBrinks filed a timely notice of appeal on April 26, 2013. After briefing, the Supreme Court heard oral arguments of the parties on June 5, 2013.

II. STATEMENT OF FACTS

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The Nottawaseppi Huron Band of the Potawatomi (NHBP) Tribal Council amended its Election Code in September 2012.[3] Title III, Election Code, Section 2.5-Candidates and Campaigning, provides:

Section 2.5 - Candidates and Campaigning:

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[1] Rob Larson also filed a complaint. As discussed below, his case was dismissed. The fourth disqualified candidate, RoAnn Bebee-Mohr did not participate in the litigation.

[2] Rob Larson's case had been dismissed for failure to appear at the March 19, 2013 hearing. He is not a party to this appeal.

[3] The NHBP publishes its codes and Constitution on the Nation's website.

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1. The Election Board and the NHBPI Newsletter will only be responsible for publishing a list of candidates and contact information (i.e. address; telephone numbers; e-mail address; webpage), biographical information candidates wish to make available to voters. All other campaigning will be the sole responsibility of the candidates.

2. Candidates, supporters of candidates, or other person(s) acting on another's behalf, shall not, directly or indirectly, knowingly make, publish, circulate or place in the public, either orally or in writing, an assertion, representation, or statement of fact concerning a candidate for elected office, that is false, deceptive, or malicious.

3. Eligible candidates and/or supporters of candidates who wish to distribute campaign materials to the eligible voters must submit their materials to the Election Board no later than fourteen (14) working days prior to the Election.

4. The Election Board prior to distribution must approve all campaign materials.

5. Campaign materials are considered to be: mailers of all sorts, yard signs, clothing, stickers, buttons, websites, social media sites, emails. The Board reserves the right to expand the list with proper notification.

6. Candidates and/or their supporters are barred from mailing campaign materials to eligible voters independent of the Election Board and are in violation of this Code and may be subject to civil and/or criminal penalties.

7. Candidates are required to pay all costs associated with the mailing of campaign materials, which shall include, but not be limited to, copies, envelopes, labels and postage.

8. The Tribal Enrollment office shall supply address labels with the current mailing address of all eligible voting Tribal Members to the Election Board when requested to do so by the Election Board.

9. Restrictions on Campaign Activities at Tribal Government Buildings and Enterprises.

10. Campaign materials (i.e. posters; flyers) may not be posted in any Tribal Government Buildings, Tribal Enterprise Buildings, or in the parking lots (i.e. signs on/in parked vehicles) or other common areas (i.e. entrance; sidewalks, yard) of such Buildings.

After the adoption of the new Election Code the Election Board scheduled an election for three persons to the five-person NHBP Tribal Council. This election notice was issued 150 days before the election scheduled for April 27, 2013. Seven persons

declared their candidacy for election to one of the three contested seats.[4] Tony Day, one of the seven candidates, filed a complaint with the Election Board claiming that four candidates engaged in an unauthorized primary election which was in violation of Section 2.5 of the Election Code. The parties agree that informal meetings were held outside the NHBP Reservation boundaries to narrow the field of candidates and "engaged in regular electioneering communication, get out the vote efforts and eventually formal vote gathering." Respondents Brief (May 9, 2013) at p.5. After a hearing on January 31, 2013 the Election Board disqualified four candidates including the two appellants in this court without specifying the exact nature of the campaign violations except to restate various sections of the Election Code.

According to Section 4.4 of the Election Code, the absentee ballots are to be mailed sixty days before the election. In this case the absentee ballots were to have been mailed by February 25, 2013, since the election was scheduled for April 27, 2013 (the last Saturday in April). This case was not filed until March 8, 2013 after the absentee ballots were mailed.

In their complaint the plaintiffs ask the Trial Court to reinstate them as candidates and to declare that the Election Code violates the NHBP Constitution and the Indian Civil Rights Act. At the hearing on the temporary restraining order held on March 15, 2013, the Trial Court expressed concerns that the absentee ballots had been mailed. On March 19, 2013, The Honorable Melissa Pope denied the plaintiffs request for a restraining order. She held that that the plaintiffs failed to meet their burden of proof for an injunction as set forth by this Court in *Spurr v Nottawaseppi Huron Band of Potawatomi* No.12-005 App., slip op. at 9 (NHBP S.Ct.Feb. 21, 2012). In *Spurr* this court held that a plaintiff seeking a preliminary injunction must establish:

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[4] The record is not clear on the all of the facts in this matter. The decision of the Election Board of February 1, 2013 does not make any findings of fact upon which the Board based its decision. The Election Board found that the four disqualified candidates violated Sections 2.3, 2.4, 2.5 and portions of 2.6 of the Election Code. This recitation of facts is based on what appears to be facts the parties did not contest in filings and oral argument. In the future when the Election Board conducts a hearing on a contested matter, the Board should make specific findings of fact as well as a transcript of the hearing so that a reviewing court will have an understanding of the reasons for a decision.

1) a likelihood of prevailing on the merits of the action;

2) Irreparable harm in the absence of preliminary relief;

3) the balance of equities is in the favor of the moving party; and

4) the injunction is in the public interest.

Utilizing the test set forth in *Spurr* Judge Pope held that the plaintiffs could not demonstrate that they would prevail on the merits of the case.

On April 23, 2013, after further briefing and without oral argument, Judge Pope refused to reconsider her decision of March 19, 2013. Judge Pope did allow the joinder of the cases involving Dean and Terry TenBrink and dismissed the case involving Rob Larson for his failure to appear. She denied the plaintiffs' requests for a new trial, amendment of judgment, permanent injunction and advisory opinion. Judge Pope dismissed the TenBrink's case with prejudice. The TenBrinks filed a timely appeal from the Trial Court's decision.

III.

JURISDICTION

13-078

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

> 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.

The trial court issued a final order on Appellants Terry and Dean's Tenbrick's Request for Advisory Opinion and Petition for Temporary and Permanent Injunction. In accordance with Article XI § 3(c), NHBP Constitution the plaintiffs have filed a timely Notice of Appeal. Therefore, this court has jurisdiction over this appeal of the trial court's decision.

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IV.

CONSTITUTIONALITY OF SECTION 2.5 OF THE ELECTION CODE

Any reading of Section 2.5 subsection 2, 3, 4, 6 of the NHBP Election Code leads one to the conclusion these subsections interfere with NHBP member's rights guaranteed by NHBP Constitution. Article VII, Section 1 a), Individual Rights, subsection 1 of the NHBP Constitution provides:

> The Band, in exercising the powers of self-government, shall not make or enforce any law prohibiting the free exercise of religion, or abridging the freedom of speech or of the press, or the right of the people to peacefully assemble and to petition for redress of grievances.

This section of the NHBP Constitution is patterned after Article I of the United States Constitution. Both the NHBP and U.S. Constitutions declare that the government cannot enact laws that "abridge the freedom of speech". The common definition of abridge as set forth in the Ninth Edition of Black's Law Dictionary is "to reduce or diminish."

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Section 2.5, Subsections 3, 4 and 5 of the Election Codes require that eligible candidates and/or their supporters must submit campaign materials to the Election Board. Before distribution the Election Board must approve all campaign materials. Campaign materials include mailers, yard signs stickers, buttons, websites and emails. Candidates cannot mail campaign materials independent of the Election Board. Candidates are warned that violation of the Election Code could result in civil or criminal penalties. In fact, four candidates were disqualified for violating provisions of this election code for having meetings, using emails and other electronic media and informally agreeing on who would run for election."[5] Requiring a candidate to obtain approval of campaign materials abridges or limits a tribal members' freedom of

[5] Attached to the Decision of the Election Board dated February 1, 2013 were copies of Facebook postings and emails purportedly sent by the four disqualified candidates or their supporters.

expression. Even if the Election Board does not censor campaign materials, the requirement of submission has a chilling effect.

This court has not issued any opinions of the meaning of the Freedom of Expression section of the NHBP Constitution. This Court has previously held that elections held under Article IX of the NHBP Constitution must provide for the free expression of community will and fundamental fairness. *Spurr v NHBP Tribal Council, Feb 21, 2012 at 4-5 and 8.* While not binding on this Court, the NHBP courts may look to decisions of the United States Supreme Court or other tribal courts for guidance in interpreting similar constitutional language. In the light of requirement that NHBP elections must provide for the free expression of community will, fundamental fairness and the interpretation of similar language by other tribal courts, this court determines that Section 2.5 of the NHBP Election Code acts as an abridgment of NHBP members right to free expression of speech and peacefully assemble, and is, therefore, void. On its face Section 2.5 limits tribal members' right to free speech in the context of an election. Candidates must obtain preclearance for any campaign material. They cannot contact other tribal members except by mail supervised by the Election Board. Based on the petition of Tony Day, the Election Board held that candidate meetings held in November 2012 disqualified the plaintiffs. While the reasoning of the Election Board is not clear, Day complained that the November meeting constituted an unapproved "primary election" and the meeting or the election materials were not preapproved by the Election Board.

Other tribal courts apply strict scrutiny to government action burdening individual speech rights. As the Cherokee Nation's highest court wrote: "The right to run for political office ... is granted and guaranteed by the Constitution, and any action by the Government that infringes on this right must be subjected to the strict scrutiny of this Court, both as to procedural and substantive issues." *Lay v. Cherokee Nation Election Commission*, 6 Okla. Trib. 62, 67, 2 Am. Tribal Law 16 (Cherokee Nation Judicial Appeals Tribunal 1999). *Cf. Jacobson v. Eastern Band of Cherokee Indians*, 4 Cher. Rep. 38, 2005 WL 6437829, at * 4 (Cherokee Court of the Eastern Band of Cherokee Indians, Nov. 18, 2005) ("[A]lleged violations of the fundamental right to vote are reviewed by the Court on a 'strict scrutiny' basis.") (citation omitted).

Once the court determines an action by the tribal government is inconsistent with the NHBP constitution, the tribal government must establish it has a compelling interest in restricting speech and that the limitation is narrowly tailored to meet the tribal government's interest. The Election Board expanded the scope of the limitations in the Election Code to disqualify candidates for holding a meeting of tribal members in December 2013 to discuss candidates for election. There is nothing wrong with groups of people meeting to discuss who may run for office. Nothing that occurred in the meeting limited possible candidates. Tribal members were always free to forward their own candidacy and the "informal primary" did not limit them. The Election Board appended lengthy e-mails to its decision, which apparently the Board believed were improper election materials. While it is not clear how the December meeting violates the Election Code, it appears to the Election Board that the December meeting was also contrary to the Election Code.[6]

The Election Board in filings with this court says that the restrictive nature of the Code is necessary to regulate campaigning to insure a fair and orderly process. In their brief to this Court the Election Board also says that they have never denied a candidate the ability to distribute material. Nothing in the briefs or in oral argument by counsel provides a basis to justify the significant restrictions on NHBP members' right to free speech and peaceable assembly.

V.

REMEDY

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The unconstitutionality of the Election Code does not mean the disqualified candidates are to be reinstated, nor does it invalidate the results of the April 27, 2013

[6] Based on representations at oral arguments before this Court and filings in the trial court, a videotape was made of the Election Board hearing. Upon the completion of hearing during the pendency of the ligation the Election Board should have made a copy of the hearing available to the parties, and made a part of the record in this court. The Election Board has not provided any copy or transcript nor can it offer an adequate explanation for its failure to do so. This Court can only speculate as to what happened at the hearing. At a hearing of such importance to the NHBP people the Election Board must have a way of making a record including a transcript so that all members know what took place, and to provide due process.

election. The TenBrinks, in their March 3, 2013 complaint, ask for the reinstatement of the four disqualified candidates and a declaration the Election Code violates the NHBP Constitution and the Indian Civil Rights Act. This Court agrees with the plaintiffs on the constitutionality of the Election Code, but affirms the Trial Court's decision not to reinstate the disqualified candidates.

The TenBrinks did not file their action until after the absentee ballots were mailed. The TenBrinks could have filed their action before the ballots were mailed. Once the ballots were mailed their only possible remedy was to ask to stop the entire election process and start over, which they did not. The TenBrinks did not ask to stop the election until they filed their reply brief on April 17, 2013, ten days before the election and six days before Judge Pope made her final ruling.[7] To invalidate the election at this late date would throw the NHBP into chaos. The previous tribal council members terms have expired. Section 2, Article IV-Governing Council provides that council members serve until their successors are sworn into office. If the three winning candidates were disqualified, the Tribal Council would not be able to transact any business since the Council requires a quorum of three. Section 4, Article IV NHBP Constitution. If the election were voided there would be a question as to whether only the TenBrinks would be reinstated candidates. One candidate did not participate in the litigation. Another candidate's case was dismissed and he did not appeal.

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The disqualified candidates or any tribal member could have challenged the election results in accordance with Section 10 of the Election Code. Under this section challenges to the election must be filed within 5 business days of the election. Based on lack of any reference to a challenge in the appellate proceeding, it appears no challenge was filed. This Court is aware that the TenBrinks started this action without counsel. Judge Pope granted the TenBrinks considerable latitude when they were acting without counsel.[8] The Plaintiffs' late filing and limited request for relief does not

[7] Judge Pope granted the Election Board's request to strike the Reply Brief as untimely.

[8] After their injunction was denied on March 15, 2013 the TenBrinks had counsel.

allow this Court to fashion a remedy of its own devising. The NHBP Courts can only do what the parties request. The judiciary cannot create solutions or remedies on its own initiative.

IT IS **ORDERED:**

This Court, having heard the arguments of the parties and having reviewed the Trial Court Record and Briefs, hereby reverses that portion of the Order of the Trial Court of April 23, 2013 upholding the constitutionality of Section 2.5 of the NHBP Election Code and declares that it is contrary to the NHBP constitution and has no force and effect. This Court affirms the portions of the order denying the Plaintiffs request to be instated candidates for the April 27, 2013 election. All other portions of Judge Pope's order of April 23, 2013 are affirmed and this matter is remanded to the trial court for actions consistent with this decision.

John Wabaunsee

Dated: July 15, 2013

Hon. John Wabaunsee, Chief Judge

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Dated:

M h.

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

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Dated: July 15, 2013

Hon. Holly K. Thompson, Assoc. Justice

CERTIFICATE OF MAILING

I certify that on this date I mailed a copy of this *Order* to the Plaintiffs' and Defendant's attorneys by ordinary first-class mail.

Dated: 7/23/13

R. Scott Ryder,

Tribal Court Administrator

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

NATHANIEL WESLEY SPURR,	)	**Appeal No.: 17-287-AAP**
Petitioner/Appellee	)	**Trial No.: 17-046-PPO-ND**
	)	**ORDER DENYING**
vs.	)	**APPELLANT'S MOTION TO**
	)	**REVERSE TRIAL COURT'S**
JOY SPURR, (a/k/a JOY JUDGE)	)	**OCTOBER 6, 2017 ORDER**
Respondent/Appellant	)	

Before: **Smith, Chief Justice; Bird and Fletcher, Justices**

Tribal Court Judge:	Honorable Melissa L. Pope
Attorney for Appellant:	Stephen J. Spurr, *esq.*, 1114 Beaconsfield Ave, Grosse Pointe Park, MI 48230-1345
Attorney for Appellee:	Angela Sherigan, *esq.*, 56804 Mound Road, Shelby Township, MI 48316

Appellant JOY SPURR appeals as of right from the Trial Court's October 6, 2017 Notice on Hearing for Motion and Order to Show Cause on Violating a Valid Personal Protection Order. In her appeal, the Appellant contends that the Trial Court should not hear Appellee NATHAN SPURR's motion for show cause for violation of the *Personal Protection Order* (Non-Domestic)(Stalking), also referred to as the *Permanent Harassment Protection Order*, granted on February 17, 2017, because there is a pending appeal with this Court as to the issuance of that order. Appellant further contends that absent this Court's decision on the appeal, the Trial Court can take no action on the hearing or enforcement of the *Personal Protection Order*.

We disagree. Appellant has, in its past filings with this Court, requested a stay of the *Personal Protection Order* granted on February 17, 2017. On July 28, 2017, this Court declined to stay the *Personal Protection Order* pending the outcome of this appeal. Therefore, the *Personal Protection Order* dated February 17, 2017 in this matter remains in full force and effect pending a hearing and decision on the appeal. The Trial Court

may, at its own discretion, do what is necessary to enforce said *Personal Protection Order*, including but not limited to: scheduling and presiding over show cause hearings for alleged violations of same, provided that the due process provisions contained within the Constitution and laws of the Nottawaseppi Huron Band of Potawatomi are followed.

WHEREFORE, ALL PREMISES CONSIDERED;

IT IS ORDERED that the Appellant's Motion to Request Reversal of Trial Court's October 6, 2017 Order is ***DENIED***.

Entered this 6th day of December, 2017.

FOR THE COURT:

Gregory D. Smith

Gregory D. Smith, Chief Justice with permission HLC

I Concur:

Matthew L.M. Fletcher

Matthew L.M. Fletcher, Justice with permission HLC

H T Bird

Holly T. Bird, Justice

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Cc: Attorneys for all parties

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

NATHANIEL WESLEY SPURR, **Petitioner/Appellee**	)	**Appeal No.: 17-287-AAP** **Trial No.: 17-046-PPO-ND** **ORDER APPROVING RESPONDENT'S MOTION FOR CHANGE OF DATE OF ORAL ARGUMENT**
vs.	)	
JOY SPURR, (a/k/a JOY JUDGE) **Respondent/Appellant**	)	

Before: **Smith, Chief Justice; Bird and Fletcher, Justices**

Tribal Court Judge:	Honorable Melissa L. Pope
Attorney for Appellant:	Stephen J. Spurr, *esq.*, 1114 Beaconsfield Ave., Grosse Pointe Park, MI 48230-1345
Attorney for Appellee:	Angela Sherigan, *esq.*, 56804 Mound Road, Shelby Township, MI 48316

Pending before the Court is Respondent's motion to change the date of oral arguments scheduled for Friday, November 10, 2017 at 10:00 a.m. Per Respondent's motion, the Respondent-Appellant and her attorney will be out of the country on a prior commitment and travel arrangements are non-refundable from November 2 – 21, 2017. The Supreme Court having reviewed and discussed the matter, finds that there is a sufficient reason to adjourn the scheduled oral arguments for another date and time.

WHEREFORE, PREMISES CONSIDERED;

IT IS ORDERED that the Respondent's motion for change of date of oral argument is ***GRANTED***.

IT IS FURTHER ORDERED that the Clerk of this Court shall set this matter for a new date for oral arguments by filing a Notice of Hearing to all parties.

Entered this 8th day of November, 2017.

FOR THE COURT:

Gregory D. Smith

Gregory D. Smith, with permission HLC
Chief Justice

I Concur:

Matthew L.M. Fletcher

Matthew L.M. Fletcher, Justice with permission HLC

Holly T. Bird

Holly T. Bird, Justice

Cc: Attorneys for all parties

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IN THE SUPREME COURT
FOR THE NOTTAWASEPPI HURON BAND OF THE POTAWATOMI
AT FULTON, MICHIGAN

NATHANIEL WESLEY SPURR,	)	**Appeal No.: 17-287-AAP**
Petitioner/Appellee	)	**Trial No.: 17-046-PPO-ND**
	)	**ORDER**
vs.	)	
	)	
JOY SPURR, (a/k/a JOY JUDGE)	)	
Respondent/Appellant	)	

FILED
SEP 13 2017
NHBP TRIBAL COURT

Before: **Smith, Chief Justice; Bird and Fletcher, Justices**

Tribal Court Judge:	Honorable Melissa L. Pope
Attorney for Appellant:	Stephen J. Spurr, *esq.*, 1114 Beaconsfield Ave., Grosse Pointe Park, MI 48230-1345
Attorney for Appellee:	Angela Sherigan, *esq.*, 56804 Mound Road, Shelby Township, MI 48316

ORDER

Appellant filed a motion requesting this Honorable Court to waive the page limitation of thirty (30) pages for briefs in this case. Upon consideration of the motion, the Court respectfully denies the motion. ***Wherefore,***

IT IS ORDERED that Appellant's motion to expand the thirty (30) page limit on appellate briefs in this matter is **DENIED**.

Entered this 13th day of September, 2017.

For The Court

Gregory D. Smith
Chief Justice

cc. All parties

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IN THE SUPREME COURT
FOR THE NOTTAWASEPPI HURON BAND OF THE POTAWATOMI
AT FULTON, MICHIGAN

NATHANIEL WESLEY SPURR, **Petitioner/Appellee**	)	**Appeal No.: 17-287-APP** **Trial No.: 17-046-PPO-ND** **ORDER DENYING STAY**
vs.	)	
JOY SPURR, (a/k/a JOY JUDGE) **Respondent/Appellant**	)	

FILED
JUL 28 2017
NHBP TRIBAL COURT

Before: **Smith, Chief Justice; Bird and Fletcher, Justices**

Tribal Court Judge:	Honorable Melissa L. Pope
Attorney for Appellant:	Stephen J. Spurr, *esq.*, 1114 Beaconsfield Ave., Grosse Pointe Park, MI 48230-1345
Attorney for Appellee:	Angela Sherigan, *esq.*, 56804 Mound Road, Shelby Township, MI 48316

Pending before the Court is a *de facto* emergency motion to stay a permanent protection order ("PPO") handed down by the Honorable Melissa L. Pope, Chief Judge of the Nottawaseppi Huron Band of the Potawatomi Tribal Court, on July 21, 2017. The Supreme Court met by conference call on July 27, 2017 and determined, pursuant to Chapter 9, § 13 of the NHBPI Rules of Court, that oral arguments are not necessary to resolve this *de facto* motion. For the following reasons, the *de facto* motion for an emergency stay of the Tribal Court's ruling is denied.

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PROCEDURAL HISTORY

On February 3, 2017, the Tribal Court issued a temporary *ex parte* PPO against Appellant. On February 17, 2017, after conducting a hearing where both Appellant and Appellee[1] testified, the PPO was extended by the Tribal Court for one (1) year. On March 6, 2017, Appellant's husband, Mr. Stephen Spurr, *esq.*, filed a notice of

[1] Appellant, Joy Spurr is the step-mother of Appellee, Nathaniel Wesley Spurr. Since both parties share the same last name, they shall be referred to as "Appellant" and "Appellee" in this order.

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appearance to represent his wife, Appellant, against his son, Appellee. The Tribal Court noted in a footnote of its July 21, 2017 opinion that after retaining counsel, Appellant still regularly appeared to be acting as if she was *pro se* in this litigation.

The gist of the *de facto* motion for an emergency stay is that a Spurr family reunion is set to occur from July 28-30, 2017 in Dover, New Hampshire. Appellant, a non-member and non-resident of the NHBPI tribe, sought to have the February, 2017 PPO rescinded so that Appellant could attend the family reunion of her husband's (and Appellee's) family. On Friday, July 21, 2017, the Tribal Court denied this request. Much aggrieved, on Saturday, July 22, 2017, Appellant, through her attorney, fax-filed a brief on why the PPO should be immediately rescinded, modified, or stayed, by this Honorable Court. No motion, pursuant to Chapter 9, § 14 of the NHBPI Rules of Court, was filed, but this Court, in its discretion, deems the fax-filed brief to be a motion, even though the fee to pursue said motion has not yet been paid.[2] Due to the timing of the family reunion, which Appellee anticipates attending, the *de facto* motion is being addressed in an expedited fashion.

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ISSUE

Does Appellant show good cause for this Court to immediately stay or overturn the July 21, 2017 PPO ruling of the Tribal Court so that Appellant may attend a family reunion of the victim's family when Appellant is not a blood relative of said family?

[2] Appellant is hereby charged the $30.00 required for filing motions with this Honorable Court. Said fee shall be paid on or before August 15, 2017 or this appeal may be subject to dismissal for failure to prosecute and comply with the rules of court.

DISCUSSION

Missing a family reunion which is not one's own blood family is not such a grave or extenuating circumstance that Appellant should be allowed to bypass or circumvent the traditional appellate review process. The Tribal Court made detailed and extensive findings of fact and conclusions of law. The Appellant and Appellee will be allowed to address the Tribal Court's decision in an orderly and structured manner that offers Due Process of Law to all litigants as promised in 25 U.S.C. § 1302(a)(8). Both Appellant and Appellee, through their respective attorneys,[3] will be allowed to present their positions and arguments to this Court in due course, but not in an impromptu fashion. The motion to stay is denied.

WHEREFORE, PREMISES CONSIDERED;

IT IS ORDERED that the *de facto* motion for stay is ***DENIED***. The costs of bringing this motion are hereby assessed against Appellant, Joy Spurr and shall be paid to the Clerk of this Court on or before August 15, 2017 or this appeal will be dismissed with prejudice.

IT IS FURTHER ORDERED that the Clerk of this Court shall not file any further pleadings in this matter that are not personally signed by an attorney of record if the party attempting to file a pleading has legal counsel of record.

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[3] A litigant that is represented by counsel is not at liberty to file *pro se* pleadings, nor make personal arguments to the court, apart from their attorney. U.S. v. Whitesel, 543 F.2d 1176, 1180 (6th Cir. 1976); Burke v. Burke, 425 N.W.2d 550, 552 (Mich. App. 1998); and In Re: LCM, 2005 WL 6234618 (Pawnee 1/24/2005), at page 11. While these cases are not binding on this Court due to the Tribe's federally recognized sovereignty, the Court finds the logic discussed in these opinions persuasive. *See*, Santa Clara Pueblo v. Martinez, 436 U.S. 49, 55-56 (1978). An attorney or record shall personally sign all pleadings pursuant to NHBPI Rules of Court Chapter 5, § 10(C)(1). *Accord*, Mich. R. Ct. 2.114(B).

IT IS FURTHER ORDERED that the Appellant's brief in this case shall be filed by September 21, 2017 and the Appellee's brief filed by October 21, 2017. Any reply brief shall be filed by November 3, 2017. *See*, Chapter 9, § 12 of the NHBPI Rules of Court. Upon all briefs being filed, the Court shall set the place and time for oral arguments. Briefing rules shall be strictly followed. *See*, Chapter 9, § 12 of the NHBPI Rules of Court.

Entered this 28th day of July, 2017.

FOR THE COURT:

Gregory D. Smith,
Chief Justice

Concur:

Matthew L.M. Fletcher
Matthew L.M. Fletcher, Justice with permission HLC

See Attached for Signature
Holly T. Bird, Justice HLC

Cc: Attorneys for all parties

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IT IS FURTHER ORDERED that the Appellant's brief in this case shall be filed by September 21, 2017 and the Appellee's brief filed by October 21, 2017. Any reply brief shall be filed by November 3, 2017. *See*, Chapter 9, § 12 of the NHBPI Rules of Court. Upon all briefs being filed, the Court shall set the place and time for oral arguments. Briefing rules shall be strictly followed. *See*, Chapter 9, § 12 of the NHBPI Rules of Court.

Entered this 28th day of July, 2017.

FOR THE COURT:

Gregory D. Smith,
Chief Justice

Concur:

Matthew L.M. Fletcher, Justice

Holly T. Bird, Justice

Cc: Attorneys for all parties

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Supreme Court Case No.: 18-144-APP		Tribal Court Case No.: 16-0496-PPO-ND
PETITIONER/APPELLEE		RESPONDENT/APPELLANT
NATHANIEL WESLEY SPURR	v.	JOY LYNN SPURR
Angela Sherigan Attorney for Appellee 56804 Mound Road Shelby Township, MI 48316		Joy Lynn Spurr, *pro se* 1114 Beaconsfield Avenue Grosse Pointe Park, MI 48230

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

Before:

Hon. Gregory D. Smith, Chief Justice
Hon. Matthew L.M. Fletcher, Associate Justice
Hon. Holly T. Bird, Associate Justice

Opinion by Smith, C.J.

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RELEVANT FACTS

On January 25, 2018, this Court handed down a decision involving these same parties in *Spurr v. Spurr, Appeal No. 17-287-APP* that found the Nottawaseppi Huron Band of the Potawatomi Tribal Court had subject matter jurisdiction to order a Permanent Protection Order, (PPO), against Appellant, Joy Lynn Spurr to stay away from Appellee, her stepson, Nathaniel Wesley Spurr. *Spurr v. Spurr, Appeal No. 17-287-APP (NHBP Sup. Ct. 1/25/2018), at pages 8-22.* Ironically, if left alone, the PPO involving Appellant would have expired February 17, 2018. *See, Spurr order of Tribal Court*[1] *dated 10/6/2017, at page1, Trial Record page 754.*

On January 31, 2018, a hearing for contempt was held before the Tribal Court and Appellant failed to appear to contest the claimed contempt. *See, Spurr order of Tribal Court dated 2/13/2018, at page 1, Trial Record page 797.* Appellant was held in civil

[1] The Tribal Court hearing in this matter was before Chief Judge Melissa L. Pope, hereinafter "Tribal Court."

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contempt for violating the PPO. *See, Spurr order of Tribal Court dated 2/13/2008, at page 4, point 27, Tribal Record page 800.*

On February 13, 2018, a hearing on the merits of whether the PPO should be extended for another year was held in front of the Tribal Court and testimony was taken from Appellant, Appellee and one witness. *See, Supplemental Appellate Record at 1-2.* The transcript of this hearing is 141 pages. Following proof being presented, the Tribal Court extended the pending PPO to February 14, 2019. *See, Supplemental Appellate Record at pages 134-136 and Spurr order of Tribal Court dated 2/13/2018, Trial Record page 802.* Appellant appealed this order to this Honorable Court.

A point that is extremely relevant to the case at hand is that the only issue currently on appeal is whether the Tribal Court has subject matter jurisdiction to order a PPO against Appellant, a non-Indian. *Appellant's brief at pages 15-18.* Said question was the centerpiece issue in the earlier appeal of these same parties in *Spurr v Spurr, Appeal No. 17-287-APP (NHBP Sup. Ct. 1/25/2018).* Appellant acknowledged this issue had already been ruled on in the February 13, 2018 hearing on extending the PPO. *See Supplemental Appellate Record at pages 17-20.* This Court believes the doctrines of *res judicata* and "law of the case" control the decision in the pending appeal.

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ANALYSIS

The U.S. Supreme Court once defined the concept of *res judicata* as follows:

> *Res judicata* ensures the finality of decisions. Under *res judicata*, "a final judgment on the merits bars further claims by parties or their privies based on the same cause of action...*Res judicata* thus encourages reliance on judicial decisions, bars vexatious litigation, and frees the courts to resolve other disputes.

Brown v. Felson, 442 U.S. 127, 131 (1979), internal citations omitted. The theory of *res judicata* exists in federal, state and tribal courts.[2] *Res judicata* applies in the Nottawaseppi Huron Band of the Potawatomi tribal court system.

A legal concept closely related to *res judicata* is the "law of the case doctrine." The U.S. Supreme Court, speaking through legendary Justice Oliver Wendell Holmes, Jr., explained the law of the case doctrine as follows:

> In absence of statute the phrase, "law of the case,"...merely expresses the practice of courts generally to refuse to reopen what has been decided, not limit their power.

Messenger v. Anderson, 225 U.S. 436, 444 (1912). The law of the case doctrine also enjoys a strong following in federal, state and tribal courts.[3]

Appellant admitted in her appellate brief that she knew the issue of subject matter jurisdiction was decided in her prior appeal. *See Appellant's brief at page 17.* Appellant further acknowledged at the February 13, 2018 hearing that the issue of subject matter jurisdiction was previously addressed and ruled on by this Honorable Court. *See Supplemental Appellate Record at pages 19-20.* This Court acknowledges that lack of subject matter jurisdiction can be raised at any point in a proceeding. *See, Mansfield C. & L.M. Ry. Co. v. Swan, 111 U.S. 379, 382 (1884) and Crow v. Parker, Case No. CV-07-246 (E. Band Cherokee Tribal Ct. 10/17/2007), at Discussion.* The problem here is that the question of subject matter jurisdiction for the NHBP Tribal Court to issue a PPO against Appellant, who is a non-Indian, was already asked and answered. A much-

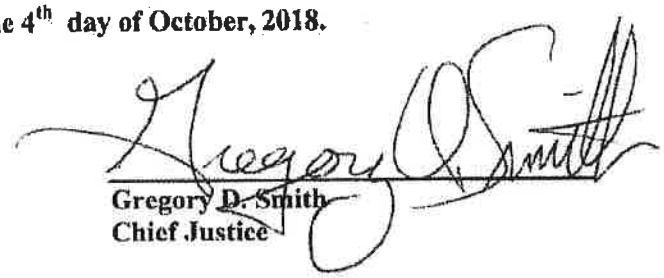
[2] *See e.g.*, Buck v. Thomas M. Cooley Law School, 597 F.3d 812, 816-817 (6th Cir. 2010); Gregory Marina, Inc. v. City of Detroit, 144 N.W.2d 503, 506 (Mich. 1966); and Austin v. Austin, Appeal No. A-CV-47-91 (Navajo Sup. Ct. 3/31/1993), at part III.

[3] *See e.g.*, Bowling v. Pfizer, Inc., 132 F.3d 1147, 1150 (6th Cir. 1998); Freeman v. DEC Intern., Inc., 536 N.W.2d 815, 817 (Mich. App. 1995); and Piotra v. Gustafon, Appeal No. 00-10128 (Turtle Mtn. Ct. App. 3/1/2005), at page 2.

aggrieved litigant simply repeating the question does not change our answer. ***WHEREFORE,***

IT IS ORDERED that the decision of the Tribal Court is ***affirmed*** for the reasons set forth in *Spurr v. Spurr, Appeal No. 17-287-APP (NHBP Sup. Ct. 1/25/2018)*. Costs are assessed against Appellant.

This is the 4th day of October, 2018.



Gregory D. Smith
Chief Justice

Bird and Fletcher, Justices, concur

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NHBP TRIBAL COURT
NOTTAWASEPPI HURON BAND OF THE POTAWATOMI
22211 ½ MILE RD. • FULTON, MI 49052
P: 269.704.8404 • F: 269.729.4826 - ORI NO. MI010077J

SUPREME COURT CASE NO. 17-287-APP		TRIBAL COURT CASE NO. 17-046-PPO/ND
PETITIONER/APPELLEE		RESPONDENT/APPELLANT
NATHANIEL WESLEY SPURR Angela Sherigan Attorney for the Petitioner/Appellee 56804 Mound Road Shelby Township, MI 48316	v.	JOY LYNN SPURR A/K/A JOY JUDGE Stephen Spurr Attorney for the Respondent/Appellant 1114 Beaconsfield Avenue Grosse Pointe Park, MI 48230

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

Before:
Hon. Gregory D. Smith, Chief Justice, Presiding
Hon. Matthew L.M. Fletcher, Associate Justice
Hon. Holly T. Bird, Associate Justice

Opinion by Fletcher, J.

Introduction

We are called here today to determine whether the law of the Nottawaseppi Huron Band of the Potawatomi provides authority for the tribal court to issue personal protection orders involving the defendant and appellant in this matter, Joy Spurr, a non-Indian who resides outside of the boundaries of Nottawaseppi Huron Band Indian country.

We hold that the law of the Nottawaseppi Huron Band of the Potawatomi does provide that authorization.[1]

We are further asked to determine whether the trial judge abused her discretion in both finding a factual basis for a personal protection order against Joy Spurr and in crafting the scope of the order itself. We hold that the trial judge did not abuse her discretion.

The orders are AFFIRMED.

Facts and Procedural History

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The appellant and defendant Joy Spurr is a nonmember of the Band who resides in the Detroit area, outside of the boundaries of the Band's Indian country.

The appellee and plaintiff Nathaniel Spurr is a tribal member. Joy Spurr is Nathaniel's step-mother. During the period at issue, Nathaniel resided at least part of the time within the boundaries of the Pine Creek Reservation, part of the Indian country of the Band.

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[1] We thank Clarissa Grimes for her work in preparing a helpful bench brief under the supervision of the Indian Law Clinic of the Michigan State University College of Law.

In February 2017, Nathaniel Spurr sought a personal protection order from the Nottawaseppi Huron Band tribal court. He alleged that Joy Spurr had appeared at his grandmother's house, located on trust land within the reservation, and hand-delivered a harassing letter to Nathaniel. He further alleged that Joy Spurr had initiated "roughly 200-300" contacts with Nathaniel (and others involved with Nathaniel) since approximately November and December of 2012. Joy Spurr allegedly initiated many of these contacts electronically, and on a few occasions, interfered with Nathaniel's financial arrangements with third parties. The tribal court found that delivery of the letter and the other allegations constituted stalking and harassment as defined by the tribal code.

In a series of orders, the tribal court barred Joy Spurr from initiating unwanted communications with Nathaniel Spurr on and off the reservation, and with third parties involved with Nathaniel. The court initially issued a temporary Personal Protection Order on February 3, 2017, set to expire on February 17, 2017 ("February 3, 2017 Order"). The trial court scheduled a hearing for February 16, 2017 in accordance with NHBP Code § 7.4-15, which required the court to hold

a "full hearing" within 14 days of the issuance of a temporary protection order. The defendant Joy Spurr asked for a stay, which the court denied on February 14, 2017, citing § 7.4-15. Joy Spurr appeared by phone at the hearing on February 16, 2017, though she left before the conclusion of the hearing. The trial court issued a permanent (one year) civil protection order favoring Nathaniel Spurr against Joy Spurr on February 17, 2017 ("February 17, 2017 Order").

In March and April 2017, Joy Spurr faxed several documents and addenda that constituted a motion for reconsideration of the permanent order. During much of this period, Joy Spurr did not provide a working email address or fax machine number to the court for purposes of providing expedited service of court documents. Meanwhile, she inundated the court with dozens, even hundreds, of pages of documents. The incredible amount of time and effort the staff of the tribal court took to communicate with Joy Spurr and her counsel, to provide service of court documents to Joy Spurr and her counsel, and to receive, manage, and file the voluminous material Joy Spurr filed — much of which did not comply with the court's rules for filing and service — is worth noting. The appellate court applauds this effort to ensure Joy

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Spurr received the process due her in this matter from the inception of the case until now, and perhaps going forward as the case continues. The trial court's procedural order of March 27, 2017 and the order of July 21, 2017 details these efforts. Both orders informed Joy Spurr that since she was represented by counsel, only her counsel could submit documents to the court. She nevertheless continued to submit documents not signed by her attorney. The court staff is to be commended for its professionalism and for performing above and beyond their job duties.

On July 21, 2017, after wading through this incredible morass of paper, Chief Judge Melissa L. Pope denied the motion for reconsideration. Opinion and Order After Hearing on Respondent's Motion for Reconsideration or Modification of Court Order ("July 21, 2017 Order"). In a carefully constructed 36-page opinion, the trial court waded through dozens of exhibits, most of which was introduced into the record by Joy Spurr, to conclude, "The evidence shows that Respondent Joy Spurr has gone far outside the realm of what could be considered a communication in the spirit of family responsibilities to cross the line into harassment for a significant period of time." July 21,

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2017 Order at 30. The Order detailed several incidents and communications as examples of harassment, including without limitation communications from Joy Spurr to Nathaniel Spurr accusing him without grounding of criminal perjury, unemployment fraud, and other attacks on the character of Nathaniel Spurr. Id. at 29-30.

This appeal followed. Appellant Joy Spurr immediately asked the appellate court to order a stay on the permanent order issued by the trial court in February 2017. We denied that motion on July 28, 2017.

The parties submitted merits briefs, and we held oral argument on January 15, 2018.[2]

Discussion

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We begin our discussion with reference to the principles that guide the Nottawaseppi Huron Band of the Potawatomi in addressing difficult matters such as those before us. The Band has directed all parties and entities involved in these matters to follow Noeg

[2] To the extent that this opinion does not directly address legal arguments made by the Appellant, those arguments are rejected as either not preserved for appeal below or not developed adequately to require analysis by this court.

Meshomsenanek Kenomagewenen, the Seven Grandfather Teachings.

NHBP Code § 7.4-6:

> In carrying out the powers of self-government in a manner that promotes and preserves our Bode'wadmi values and traditions, the Tribe strives to be guided by the Seven Grandfather Teachings in its deliberations and decisions. The rights and limitations contained in this code are intended to reflect the values in the Seven Grandfather Teachings to ensure that persons within the jurisdiction of the Tribe will be guided by the Seven Grandfather Teachings:
>
> Bwakawen — Wisdom
>
> Debanawen — Love
>
> Kejitwawenindowen — Respect
>
> Wedasewen — Bravery
>
> Gwekwadzewen — Honesty
>
> Edbesendowen — Humility
>
> Debwewin — Truth

Id. *See also Spurr v. Tribal Council*, No. 12-005APP, at 4-6 (2012).

This court deeply respects these teachings and endeavors to act in accordance with them. Nothing good can come of bitterness and retribution. We are guided by the principles laid out before us by the Nottawaseppi Huron Band and its People. We are saddened that interpersonal conflict can rise to the level requiring judicial intervention at the request of one of the parties. We must perform this duty, but do so with the greatest respect for all the persons involved.

I. The Tribal Court Possesses Jurisdiction to Issue Personal Protection Orders Involving Joy Spurr under These Facts.

Joy Spurr argues that the Nottawaseppi Huron Band tribal court lacks jurisdiction over her activities on several grounds: that she is not a tribal member, that she is not an Indian, and that the activities complained about largely different not occur in the tribe's Indian country. We reject each of these contentions.

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A. Federal Law Background

In Section 905 of the Violence Against Women Reauthorization Act of 2013, Congress authorized Indian tribes to issue and enforce

personal protection orders "involving any person . . . within the authority of [an] Indian tribe." 18 U.S.C. § 2265(e), Pub. L. 113-4, Title IX, § 905, Mar. 7, 2013, 127 Stat. 124. Congress further provided "A protection order issued by a . . . tribal . . . court is consistent with this subsection if . . . (1) such court has jurisdiction over the parties and matter under the law of such . . . Indian tribe . . . ." 18 U.S.C. § 2265(a). Section 2265, also known to the parties as Section 905 of the Public Law from which it derives, makes two critical matters clear. First, the use of the phrase "any person" renders tribal membership or Indian status irrelevant to the authority of Indian tribes to issue personal protection orders, so long as that person is "within the authority" of an Indian tribe. Second, whether a person is within the authority of an Indian tribe depends on "the laws of such . . . Indian tribe."

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The goal of section 2265 is the make the protection of victims of violence, stalking, and other illegal acts uniform across all American jurisdictions, federal, state, and tribal. *Cf., e.g., Tulalip Tribes v. Morris*, 11 Am. Tribal Law 462, 465 (Tulalip Tribal Court of Appeals 2014) (interpreting new section 2265 and noting that "Section 2265 [was intended to] ensur[e] that 'victims of domestic violence are able to move

across State and Tribal boundaries without losing [sic] ability to enforce protection orders they have previously obtained to increase their safety.'"). Until the most recent modification of section 2265, offenders and perpetrators who were non-Indian or non-tribal members could reach from beyond Indian country to harm reservation Indian victims without fear of retribution. The old section 2265 did not directly authorize Indian tribes to issue personal protection orders involving offenders and perpetrators who were non-Indians or non-tribal members. *E.g.*, *Honanie v. Acothley*, 11 Am. Tribal Law 4, 8 (Hopi Court of Appeals 2011) (interpreting old section 2265: "While other jurisdictions may be required to honor Hopi protection orders under the express requirements of the full faith and credit provisions of the Violence Against Women Act, 18 U.S.C. Section 2265, the Hopi Tribal Court has no power to enter a protection order that directly purports to reach conduct outside of the territorial jurisdiction of the Hopi Tribe."). Where the offender or perpetrator resided within Indian country, or the illegal act took place in Indian country, federal Indian law required tribes to show that the tribal court had authority to issue personal protection order through the so-called *Montana* test. *See Montana v.*

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United States, 450 U.S. 544, 565-66 (1981). Under that test, the United States Supreme Court holds that tribal governments generally do not possess jurisdiction over nonmembers unless the nonmembers consent or unless the nonmember conduct affects the political integrity, economic security, and health and welfare of the tribe and its members. While one would think that nonmember stalking and harassment, which has wreaked terrible harms on the health and welfare of Indian people and ability of tribal governments to respond to those harms, would easily meet the second part of this test, the Supreme Court has never held, in its limited universe of cases, that nonmember conduct was egregious enough to meet the second part of the test. *E.g. Strate v. A-1 Contractors*, 520 U.S. 438 (1997) (rejecting tribal court jurisdiction over tort claims arising from automobile accident allegedly perpetrated by nonmember driver in Indian country); *Plains Commerce Bank v. Long Family Land and Cattle Co.*, 554 U.S. 316 (2008) (rejecting tribal court jurisdiction over bank that tribal jury found to have discriminated on the basis of race against tribal member owned ranch); *Atkinson Trading Co. v. Shirley*, 532 U.S. 645 (2001) (rejecting tribal authority to impose tax on nonmember business that received public safety services

from the tribe). *Contra Dollar General Corp. v. Mississippi Band of Choctaw Indians*, 136 S.Ct. 2159 (2016) (dividing 4-4 over whether tribal member minor's civil claim of sexual molestation against store located on tribal trust lands could proceed in tribal court). To be sure, the Supreme Court has never agreed to review a case involving nonmember stalking and harassment against Indian people living within Indian country. In short, the authority of Indian tribes to issue personal protection orders involving nonmembers was uncertain at best.

Congress eventually became aware of these problems and initiated a fix. As amended in 2013, section 2265 now works to guarantee that offenders and perpetrators can no longer play games with jurisdictional boundaries in order to avoid repercussions for stalking or harassing Indian people in Indian country. Congress has finally seen fit to acknowledge tribal power over nonmember offenders and perpetrators, likely rendering federal Indian law doctrines such as the *Montana* line of cases irrelevant in this context. *See* Violence Against Women Reauthorization Act of 2012, H. Rep. 112-480 pt. 1, at 245 (May 15, 2012) (dissenting views) ("Another important tool in reducing violence on tribal land is the use of protection orders. Section 905 of the Senate-

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passed bill and the Moore bill clarifies Congress' intent to recognize that tribal courts have full civil jurisdiction to issue and enforce protection orders involving any person, Indian or non-Indian.").

In light of the new jurisdictional regime available to Indian tribes, the Nottawaseppi Huron Band of the Potawatomi has adopted positive tribal law to implement the authority now recognized by Congress under section 2265. As required by section 2265, we now review relevant tribal law governing jurisdictional questions in this matter.

B. Personal Jurisdiction

We now turn to whether the relevant tribal code authorizes the tribal court issue a personal protection order in this matter involving a non-Indian person who does not reside in the Band's Indian country. We hold that the tribal court possesses jurisdiction over Joy Spurr sufficient to impose a civil protection order on her conduct.

As we must, we begin with the Constitution of the Nottawaseppi Huron Band of the Potawatomi. Article II, Section 2(a) provides that the jurisdiction of the tribe extends to all persons within the territorial

boundaries of the tribe's lands, which include at a minimum reservation and trust lands. In relevant part:

> The jurisdiction and sovereign powers of the Band shall, consistent with applicable federal law, extend and be exercised to the fullest extent consistent with tribal self-determination, including without limitation, to all of the Band's territory as set forth in Section 1 of this Article, to all natural resources located within the Band's territory, to any and all persons within the Band's territory and to all activities and matters within the Band's territory.

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The Constitution also provides that the jurisdiction of the tribe may extend beyond the tribe's lands where authorized by the exercise of tribal treaty rights, federal statute or regulation, or intergovernmental agreement. In this context, Article II, Section 2(a) provides in relevant part:

> The Band's jurisdiction shall also extend beyond its territory whenever the Band is acting pursuant to jurisdiction that is created or affirmed by rights reserved or created by treaty, statutes adopted by the Tribal Council in the exercise of the

Band's inherent sovereignty, Federal statute, regulation or other federal authorization, or a compact or other agreement entered into with a state or local government under applicable law.

The conclusion we reach from these two key provisions of the tribe's constitution is that inherent tribal powers extend generally to the tribe's lands and to tribal members, wherever they may be. The tribal constitution also appears to provide that the tribe can exercise other powers authorized under federal law or other agreement, presumably including federal statutes such as section 2265.

The tribal domestic violence code defines "Indian country" for the purposes of the code. The first three sub parts of that definition track 18 U.S.C. § 1151. The fourth sub part provides:

> The territory of the Band shall encompass the Band's historical land base known as the Pine Creek Reservation in Athens Township, Michigan, and all lands now held or hereafter acquired by or for the Band, or held in trust for the Band by the United States, including lands in which rights have been reserved or never ceded by the Nottawaseppi

Huron Band of the Potawatomi in previous treaties, or as may otherwise be provided under federal law. This includes lands upon which FireKeepers Casino and Hotel is located.

It is undisputed that the Pine Creek Reservation is within the Indian country of the Nottawaseppi Huron Band of the Potawatomi.

The record shows that at the time of the issuance of the civil protection order, the complaining victim, Nathaniel Spurr, resided on the Band's lands within the Pine Creek Reservation with his grandmother. He acted at that time as her guardian. She has since walked on. Nathaniel Spurr complained to the trial court, and Joy Spurr did not deny, that Ms. Spurr came onto tribal lands to engage Nathaniel Spurr directly. The trial court made specific findings confirming those allegations, again not directly challenged by Joy Spurr.

The record also shows that Joy Spurr initiated unwanted contacts with Nathaniel Spurr before he resided on the reservation as well. The record further shows that Joy Spurr initiated contacts with tribal governmental officials and employees both on and off the reservation. Testimony from a tribal employee at the February 15, 2017 hearing

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confirms these contacts. The trial court found that Joy Spurr had engaged in numerous unwanted and improper contacts with Nathaniel Spurr and interfered with Nathaniel's personal business both within and without the Band's Indian country. We agree with the trial court that these contacts constitute a pattern and practice of harassing and stalking Nathaniel Spurr wherever he may be.

Joy Spurr argues on appeal that as a nonmember who resides off the reservation the tribal court has no jurisdiction over her. Joy Spurr also argues implicitly that many of the contacts involved off-reservation incidents, and therefore cannot be enjoined by the tribal court. We disagree. The purpose of the Section 2265 is to avoid piecemeal personal protection orders that could allow offenders and perpetrators to exploit jurisdictional gaps. Appellant here is asking the appellate court for license to continue the harassment and stalking of Nathaniel Spurr from afar. This we will not do.

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C. Subject Matter Jurisdiction

We now turn with the subject matter jurisdiction of the tribal court. Tribal law allows the tribal court to match personal protection

orders to the facts presented, including the type and severity of the offender or perpetrator's conduct, and the types of remedies sought and required. Not all victims and offenders are the same, nor is all conduct the same. The code effectively allows for unique facts and remedies, and provides great discretion to the trial court to craft orders that fulfill the requirements of a given case. We hold that the tribal code authorized the trial judge to issue the protection orders in this case.

The Code provides for three types of protection orders: 1) a Civil Protection Order, designed for victims of "domestic violence, family violence, dating violence, or stalking" (NHBP Code §§ 7.4-49-57); 2) a Harassment Protection Order (NHBP Code §§ 7.4-71-78); and 3) a Sexual Assault Protection Order (NHBP Code §§ 7.4-79-87). The Civil Protection Order falls under the "Civil Protection Order" section of the Code, while the Harassment Protection Order and the Sexual Assault Protection Order are found in the "Criminal Protection Orders" section of the Code. In a given case, it appears that "Civil Protection Orders" are civil in character, and "Sexual Assault Prevention Orders" are likely criminal in character. "Harassment Protection Orders," we shall see, can be either civil or criminal.

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The trial court has discretion to choose from this menu of potential orders depending on the improper or illegal actions complained about. For our purposes today, the trial court has identified stalking and harassment as the core factual bases for the protection orders it issued. The tribal code authorizes the tribal court to issue civil personal protection orders for anyone claiming to be the victim of stalking, whether or not that stalking was a crime or was reported as a crime: "A petition to obtain a protection order under this section may be filed by . . . [a]ny person claiming to be the victim of domestic violence, family violence, dating violence or *stalking* . . . ." NHBP Code § 7.4-50(A) (emphasis added). The tribal code also authorizes the tribal court to issue personal protection orders for anyone claiming to be the victim of harassment: "The NHBP finds that the prevention of harassment is important to the health, safety and general welfare of the tribal community. This article is intended to provide victims with a speedy and inexpensive method of obtaining *civil harassment protection orders* preventing all further unwanted contact between the victim and the perpetrator." NHBP Code § 7.4-71 (emphasis added). In general, the act of "stalking" is treated as a crime in the tribal code, and harassment is

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treated as a civil offense. However, the definition of the crime of "stalking" includes acts of harassment:

> A person commits the crime of stalking if, without lawful authority:
>
> (1) He or she intentionally and repeatedly *harasses* or repeatedly follows another person; and
>
> (2) The person being *harassed* or followed is placed in fear that the stalker intends to injure the person, another person, or property of the person or of another person. The fear must be one that a reasonable person would experience under the same circumstances; and
>
> (3) The stalker either:
>
> (a) Intends to frighten, intimidate, or *harass* the person; or
>
> (b) Knows or reasonably should know that the person is afraid, intimidated, or *harassed* even if the stalker did not intend to place the person in fear or intimidate or *harass* the person.

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NHBP Code § 7.4-42(A) (emphasis added). Under the tribal code provision, harassment is an act or series of acts that can constitute criminal stalking. One also can conceive of acts of stalking that do not rise to the level of criminal conduct in the discretion of the trial judge, which could therefore justify the issuance of a civil protection order.

While the tribal code perhaps could be made clearer (though we suspect the drafting of the Domestic Violence Code has already been a heroic and difficult task), we hold that the tribal code authorizes the court to issue civil personal protection orders for "stalking" or "harassment." Article X of the tribal code, labeled Civil Protection Orders, specifically mentions "stalking" as a basis for the issuance of a civil protection order. NHBP Code § 7.4-50(A). Article XII of the tribal code, labeled Criminal Protection Orders, specifically mentions "harassment" as a basis for the issuance of a civil protection order. NHBP Code § 7.4-71. The code also provides definitions of "stalking" and "harassment" in various places in the code, most notably in NHBP Code § 7.4-42(A), which defines "stalking" in part as "harassment."

Appellant argues formalistically that because the term "stalking" is referenced in one or more of the trial court's personal protection

orders, and because "stalking" is defined as a crime in the code, the personal protection orders must be criminal orders barred by *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978). We disagree. Even a strict textualist would have to agree, perhaps grudgingly, that the tribal code allows the tribal court to issue a civil protection order for either stalking or harassment, or both. We take the trial court at its word that these are civil personal protection orders, not criminal. As such, the trial court had subject matter jurisdiction over the Appellant's actions.

II. We Find No Clear Error by the Trial Court in Its Fact-finding Duties, Nor Did the Trial Court Abuse Its Discretion in the Issuance of Civil Protection Orders Involving Joy Spurr.

Appellant Joy Spurr argues that her contacts with Nathaniel Spurr and others did not rise to the level of harassment or stalking, and otherwise do not justify the issuance of the protective orders. We disagree.

Trial judges are afforded great deference by appellate judges reviewing certain aspects of their work. In matters where the trial

judge is the finder of fact, or performs any fact finding function, trial judges are present in the courtroom when witnesses testify. As such, trial judges can assess way witnesses speak, the tenor of their voice, their body language, and perhaps even their credibility. Appellate judges reviewing a cold transcript of trial level hearings may misinterpret speakers' intent when discerning the meaning of the words spoken, just as anyone who has misinterpreted a text message or email or had one of their texts or emails misinterpreted.

Structurally, it is the function of the trial court to perform this fact finding duty (absent the empaneling of a jury). The tribal judiciary is structured similar to the structure of federal and state courts, with separate trial and appellate courts. The People of the Nottawaseppi Huron Band chose to largely replicate this structure rather than a structure where there is no appellate court, or where the appellate court exercises broad review of the trial judge, essentially recreating the work of the trial judge.

The trial and appellate functions are separate here. In these court systems, the standard practice is for the appellate court to extend considerable deference to the separate work of trial level judges, most

notably the findings of fact. Anishinaabe tribal courts uniformly have adopted a clear error standard of review of a trial court's findings of fact. *E.g.*, *Harrington v. Little Traverse Bay Bands of Odawa Indians Election Board*, 13 Am. Tribal Law 123, 126 (Little Traverse Bay Bands of Odawa Indians Appellate Court 2012); *De Young v. Southbird*, No. 99-11-568-CV-SC, 2001 WL 36194388, at *2 (Grand Traverse Band Court of Appeals, March 6, 2001). *Cf. Morgan v. Blakely*, 2008 WL 8565282, at *1 (Leech Lake Band of Ojibwe Appellate Court 2008) ("abuse of discretion"). Much like the work of the trial court in serving as fact finder, trial courts are also entitled to deference in review by appellate courts in crafting remedies for injunctive relief, including personal protection orders. "The standard of review of a [trial court]'s exercise of equity is abuse of discretion; an abuse of discretion is shown if the Court disregarded the facts or applicable principles of equity." *United States ex rel. Auginaush v. Medure*, 8 Am. Tribal Law 304, 325 (White Earth Band of Chippewa Tribal Court 2009).

Even a cursory review of the record shows that the findings of fact made in the two February 2017 and the July 2017 orders filed by the trial court are amply supported by evidence in the record. Nathaniel

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Spurr's original submission detailed in writing how Joy Spurr appeared uninvited and unwanted at his grandmother's home on the Pine Creek Reservation, leaving a harassing letter in the mailbox after she was asked to leave. Nathaniel had been serving as guardian for his grandmother by virtue of a tribal court order and was residing at her home on the reservation at the time. Nathaniel also alleged Joy Spurr had contacted numerous third parties at the hospital, with hospice, state social services, tribal police, and even the tribal chairman to object to Nathaniel's service as guardian. In that original submission, Nathaniel detailed other disturbing actions by Joy Spurr over the previous four and a half years. In one incident, Joy allegedly misrepresented herself as Nathaniel to his automobile insurance carrier. In another incident, Joy allegedly obtained a police report Nathaniel filed when his car was stolen in Grosse Pointe Park, Michigan, and mailed harassing letters to Nathaniel about the report. In another incident, Joy allegedly opened Nathaniel's mail and disclosed Nathaniel's private financial information to tribal citizens. In yet another incident, Nathaniel alleged Joy misrepresented herself as Nathaniel by stealing confidential financial and personal information

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about him in an ultimately failed attempt to acquire Nathaniel's credit score. Finally, in the original petition for a protective order, Nathaniel alleged that over the past several years, Joy had made hundreds of unwanted contacts with him.

At the initial hearing on February 15, 2017, Nathaniel confirmed these allegations under oath. Three witnesses confirmed various aspects of these allegations, again under oath. On February 17, 2017, the trial court issued an order finding that Joy Spurr had "committed the following acts of willful, unconsented contact: Appearing at residence uninvited; Delivering documents to residence; Interference with hospital visitation; Interference with Petitioner's financial matters; Other unwanted contact."

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As noted in the preliminary facts section of this opinion, Joy Spurr asked for reconsideration of the trial court's decision to enter a permanent order. The court held a hearing that included more testimony from the parties. During the entire period of the litigation, Joy Spurr also had inundated the court with numerous documents and written submissions. In large part, Joy Spurr's own writings and document submissions confirm Nathaniel Spurr's allegations of

unwanted contacts. For example, Joy conceded she appeared at Nathaniel's grandmother's home and left a harassing letter, which she admitted was titled "Nathaniel Spurr: A Dose of the Truth," and which she herself characterized as a document alleging "lies, abuse, thefts, and assaults Nathaniel had been perpetrating." 3 Record on Appeal 076. The letter itself is reprinted at 3 Record on Appeal 142-145. Additionally, Joy Spurr submitted as evidence exhibits dozens of copies of Nathaniel's personal financial and other records, supporting Nathaniel's allegations that Joy has improperly obtained his financial records. There is much, much more in the record. The relationship of Nathaniel Spurr and Joy Spurr is deeply fractured and troubled, but a reasonable observer could conclude that Joy Spurr was the primary perpetrator of the worst parts of the relationship. Joy's admissions that she engaged in the acts that Nathaniel alleged and the trial court concluded constituted stalking and harassment more than adequately support the trial court's findings of fact.

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Conclusion

At bottom, at least from the point of view of Joy Spurr, the contacts and communications she initiates with Nathaniel Spurr and

others involved with Nathaniel are intended to serve as guidance by a parental figure to a child, no different than any other familial relationship.

Some Anishinaabe people are familiar with the story of Blue Garter. *E.g.*, Hannah Askew & Lindsay Borrows, Summary of Anishinabek Legal Principles: Examples of Some Legal Principles Applied to Harms and Conflicts between Individuals within a Group at 25 (2012); 2 Ojibwa Texts 23 (American Ethnological Society 1917). A young Anishinaabe man travels from his home village to an isolated lodge where he meets Blue Garter, a young woman. They fall in love, but Blue Garter's parents oppose the marriage. Blue Garter's father imposes a series of virtually impossible tasks for the young man to complete before he will approve of the marriage, believing the tasks could not be completed and hoping the young man would eventually go away. However, Blue Garter secretly helps the young man complete the tasks, one after the other. One day, Blue Garter's parents grudgingly approve of the marriage. Once married, however, Blue Garter and her young husband flee her parents. Her parents give chase day after day. Ultimately, in order to escape her parents, Blue Garter transforms

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herself and her partner into ducks and escape across the water. For all of Blue Garter's good intentions, their negative actions drive away their daughter and her husband. Instead of gaining a new family member, Blue Garter's parents lose their daughter.

We draw from this story the principle that a parent-child or mentor-mentee relationship can go terribly wrong. Persons with greater experience and wisdom can and should guide and assist younger, more inexperienced persons. But older persons must also be guided by the Noeg Meshomsenanek Kenomagewenen.

With respect due the parties and the trial court judge, we AFFIRM the February 17, 2017 Order.

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Signed:

January 25, 2018
Date

Gregory D. Smith with permission HLC
Hon. Gregory D. Smith, Chief Justice

January 25, 2018
Date

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

January 25, 2018
Date

Holly T. Bird with permission HLC
Hon. Holly T. Bird, Associate Justice

IN THE SUPREME COURT
FOR THE NOTTAWASEPPI HURON BAND OF THE POTAWATOMI
AT FULTON, MICHIGAN

NATHANIEL WESLEY SPURR, Petitioner/Appellee	)	Appeal No.: 17-287-AAP Trial No.: 17-046-PPO-ND Chief Judge Pope
vs.	)	
JOY SPURR, (a/k/a JOY JUDGE) Respondent/Appellant	)	

FILED
JAN 0 8 2018
NHBP TRIBAL COURT

Before: **Smith, Chief Justice; Bird and Fletcher, Justices**

ADMINISRATIVE ORDER

This matter came before the NHBPI Supreme Court upon Appellant's motion to bypass the Tribal Court and to *sua sponte* supplement the pending appeal involving these parties with a Show Cause hearing that has not yet occurred. For the following reasons, this motion is **DENIED**.

RELEVENT FACTS

There is an appeal pending before the NHBPI Supreme Court relating to a one (1) year Personal Protection Order, ("PPO"), entered by the Honorable Melissa L. Pope, Chief Judge of the NHBPI Tribal Court on February 17, 2017. The pending appeal has been delayed several times due to requests for extensions and resets filed or made by Appellant. This appeal is set for oral arguments on Monday, January 15, 2018, at 10:00 a.m., prevailing time in Fulton, Michigan.

On January 2, 2018, Appellant moved this Honorable Court to allow Appellant to append a *de facto* restraining order request to the pending appeal in a fashion closely associated to the contract theory of anticipatory repudiation. Basically the Appellant's argument is as follows:

A) On October 2, 2017, Appellee sought a Show Cause Order from the Tribal Court to determine if Appellant had violated the February 17, 2017 P.P.O. This show cause hearing was set to be heard on December 13, 2017.

B) On December 12, 2017, Appellant informed the Tribal Court, quoting the current motion before this Honorable Court, "The Respondent therefore respectfully declines to attend the Show Cause Hearing scheduled in the court on Wednesday, December 13, 2017 at 1:00." Appellant did not appear for court on December 13, 2017, but Appellant's counsel did appear.

C) In response to Appellant ignoring the show cause order of the Tribal Court, Chief Judge Pope set a second show cause hearing for January 31, 2018. This second order was entered on December 21, 2017.

D) Appellant claims this December 21, 2017 show cause order, which set a January 31, 2018 hearing, arrived at Appellant's home on December 28, 2017. Two (2) days later, Appellant filed the pending motion to append the above-cited scenario to the appeal set for oral argument on January 15, 2018.

The basis for Appellant's motion is that Appellant should be allowed to bypass a trial on the merits of the show cause so long as Appellant ***politely*** tells the Tribal Court "I will not respect your orders." Appellant is wrong.

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DISCUSSION

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There is an old proverb from India which says *"The only way to eat an elephant is one bite at a time."* While there appears to be a multitude of disputes between these parties, this Honorable Court will focus solely on the case actually pending before this Court. Once that "bite" of the litigation is digested, the next bite may be taken.

An appellate court generally acts as an error correction court reviewing records developed and fleshed out at the trial court level. As insightfully noted Judge Jed S. Rakoff, a federal court district judge from New York:

> No principle of federal jurisprudence has proved more efficacious than the "final judgment rule," by which a district court's interim rulings may not normally be appealed until the case is over and final judgment rendered.

> Naturally, any party that loses an important interim ruling wants to appeal immediately, believing that a parade of horribles will follow if the district court's supposed error is not immediately corrected. But, as many state jurisdictions have learned to their detriment, the result of permitting interim appeals is vexatious and duplicative litigation, prolonged uncertainty, and endless delay. Since, moreover, interim appeals are typically taken before a full record is developed, the appellate courts that permit them must rule without the broader perspective that comes from knowing the while story. Whether on the ballfield or in court, "it ain't over till it's over" is both shrewd observation and sound advise.

Picard v. Katz, 466 B.R. 208, 208-209 (S.D.N.Y. 2012), footnotes omitted.

This Court cannot, and will not, allow a deliberate by-pass of the trial court. A trial court must be allowed to try cases because the trial court is in a unique position to see witnesses and note demeanor and credibility. Coin v. Mowa, Hopi Appeal No. AP-005-95 (Hopi Tribal Ct. App. 3/25/1997). This Court will only allow a litigant to by-pass the normal appellate process by direct petition except in extreme circumstances. *Accord*, Ashworth v. Nicholson, Appeal No. 06-1525 (Vet. App. 9/11/2006). The Appellant's motion does not present an extreme circumstance justifying a by-passing of the Tribal Courts' rightful place in the NHBPI judicial system. If Appellant is still much aggrieved ***after*** the Tribal Court rules on Appellant's case, Appellant is welcome to appeal, but Appellant must wait until the Tribal Court actually rules on Appellant's case before the appeal process begins.

The motion to append new issues to the pre-existing appeal set for oral arguments on January 15, 2018, is ***DENIED***.

Entered this 8th day of January, 2018.

Chief Justice Gregory D. Smith With permission HLC
Gregory D. Smith, Chief Justice

Justice Holly T. Bird With permission HLC
Holly T. Bird, Justice

Justice Matthew L.M. Fletcher With permission HLC
Matthew L.M. Fletcher, Justice

Cc: Attorneys for all parties

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IN THE SUPREME COURT
FOR THE NOTTAWASEPPI HURON BAND OF THE POTAWATOMI
AT FULTON, MICHIGAN

IN RE:	**Appeal No.: 2021-111-APP**
NHBP ELECTION BOARD DECISION,	**Trial No.: 21-074-AMA/ELE**
DISPUTE 2021-2,	**Chief Judge Melissa L. Pope**
(Administrative Appeal).	**OPINION**

Before: ***Gregory D. Smith, Chief Justice; Holly T. Bird and Matthew L.M. Fletcher, Justices***

Opinion By: **Smith, C.J.**

This is the first of a series of election campaign dispute appeals related to the April 24, 2021 leadership election for the Nottawaseppi Huron Band of the Potawatomi, (NHBP). This opinion addresses good-faith immunity from lawsuits for tribal officials acting within the scope of their official capacity or office. (good-faith immunity). Although time renders this case moot for the specific election in dispute, guidance is needed for future election disputes. Under the facts of this case, good-faith immunity shields both the NHBP Tribal Council and the Tribal Council Attorney from suit. The Tribal Court is ***AFFIRMED*** in part and ***VACATED*** in part. Guidance will be offered for future elections.

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INTRODUCTION

All parties to this appeal, be it the litigants, the Election Board, or the reviewing courts are branches or representatives of the NHBP Nation. The appellate record and briefs in this case amount to a paper stack that exceeds one and one-half (1.5) feet.[1] This mound of legal filings began as a one (1) paragraph public comment that offended a

[1] To exceed eighteen (18) inches of paper, one must stack nine (9) reams of paper. A ream of paper has 500 sheets. By comparison, the 2012 edition of Cohen's Handbook of Federal Indian Law has approximately 1500 pages and is slightly less than three (3) inches thick.

political candidate. That candidate won his election. The Tribal Council Chairman and Tribal Council Attorney won their court claim that good-faith immunity protects them from liability in this matter. The Election Board decision was upheld by the Tribal Court. Basically, all parties to this appeal won some aspect of their case or position. Victory failed to vindicate and this appeal marched on. This debate now ends.

RELEVANT FACTS

NHBP Tribal Council Business Meetings, ("Council Meetings"), pursuant to NHBP Code § 1.1-8C(2)(i), include a designated time segment reserved for public comment.[2] NHBP Constitution, Art. VII § 1(a)(1) protects NHBP Tribal Citizens' Right to Free Speech, declaring:

> The Band, in exercising the powers of self-government, shall not make or enforce any law prohibiting the free exercise of religion, or abridging the freedom of speech or the press, or the right of the people to peacefully assemble and to petition for redress of grievances.

Tenbrink v. NHBP Tribal Council, Appeal No. 13-078-CV/TRO, at *6 (NHBP Sup. Ct. 7/15/2013). NHBP Tribal Council Meetings Bylaws direct that comments from NHBP tribal members "***will***" be allowed.[3] This public comment segment allows tribal members a forum for exercising their right to free speech and the right to petition the Tribal Council to address governmental grievances.

[2] NHBP Code § 1.1-8C(2)(i) states, as follows: *C. Procedures for Regular and Special Meetings. (2) Proceedings. (i) "**Tribal member comments will be heard.**"* This Court acknowledges that finding and following legislative intent is the "guiding star" of a court's review of a statute or ordinance. People v. Pichitino, 59 N.W.2d 100, 101 (Mich. 1953) and Smith v. Louis Berkman Co., 894 F. Supp. 1084, 1090 (W.D. Ky. 1995).

[3] Terms such as "will" or "shall" are generally viewed as mandatory instructive terms for statutory construction purposes. See e.g., Baden-Winterwood v. Life Time Fitness, 556 F.3d 618, 631 (6th Cir. 2009) and Kalashov v. Kapture, 868 F. Supp. 882, 889 (E.D. Mich. 1994).

NHBP tribal citizen, Paula Stuck,[4] took issue with re-election campaign claims made by incumbent NHBP Tribal Councilman, Dr. Jeff Chivis, during the lead-in to the April 24, 2021 NHBP Tribal Council Election. Paula Stuck submitted the following comment, that was read aloud at the January 21, 2021 Council Meeting's public comment segment:

> In the January 2021 Turtle Press[,] I read and viewed the proud winners of the Big Buck Contest. A couple weeks later I received [a] Special Edition Meet the Candidates[.] Much to my dismay, incumbent candidate Jeff Chivis's bio stated he implemented the Big Buck Contest. What a huge red flag!!!! How can a council person design a contest and not only enter it[,] but win 3rd place[?] Your bio states you adhere to traditional religion and life ways. You need to revisit the Seven Grandfathers teachings. Your [sic] taking credit for many accomplishments that were in place or in the works 5+ years ago. Shame on you. I would love to hear in your humble spirit what the definition of lying to you.[5]

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Both the NHBP Election Board and the NHBP Tribal Court, (the Honorable Chief Judge Melissa L. Pope), found as fact that the record now before this Court lacks any direct proof that anyone encouraged, facilitated, recruited or directed Paula Stuck to submit the above-cited public comment. This Court does not dispute this finding.

Paula Stuck's public comment was received and circulated to the NHBP Tribal Council on January 20, 2021. A legal opinion was requested by the Council from Tribal Council Attorney, John Swimmer, ("Attorney Swimmer"), who advised the Council that

[4] Ms. Stuck is the mother of NHBP Tribal Council Chairman Jamie Stuck, ("Chairman Stuck").
[5] Parenthetical added for clarity. The "Seven Grandfathers Teachings" is a reference to the guiding principles of good citizenship for NHBP tribal citizens that include: "1) Wisdom, 2) Love, 3) Respect, 4) Bravery, 5) Honesty, 6) Humility, and 7) Truth. These principles go hand-in-hand with "MnoBmadzewen," which roughly translates "the good path for living life." For a detailed definition of MnoBmadzewen, *see* Spurr v. Tribal Council, Appeal No. 12-005-APP, at *6 (NHBP Sup. Ct. 2/12/2012).

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Paula Stuck's public comment must be publicly read at the NHBP Council Meeting according to NHBP Code § 1.1-8C(2)(i), even though Paula Stuck's comment discusses an election campaign issue. Attorney Swimmer further advised that the Tribal Council Meeting is not the proper forum to allow Council Member rebuttal for Paula Stuck's unflattering public comment of Dr. Chivis according to NHBP Election Code § 3.1-9O, which bars Council Members from conducting campaign activities while preforming official duties.

The January 21, 2021 Council Meeting was being conducted via Zoom, (with Chairman Jamie Stuck presiding), due to COVID-19 protocols. This meeting included Paula Stuck's public comment. After Paula Stuck's public comment was read aloud at the Tribal Council Meeting, the following exchange took place between Dr. Chivis, Chairman Stuck, and Attorney Swimmer:

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Dr. Chivis: John, and I will - would like to respond to that.

Chairman Stuck: I would be careful responding while you're in your duties as Council Member. {Cross-talk} to closed session and discuss. We don't have another [internet] link set up for an executive session.

Dr. Chivis: So what's the issue with me responding to a question directed at me?

Chairman Stuck: It is – It is as you – directed to you as a candidate, and you're operating right now within your duties of a council member, which goes against the election code.

Mr. Swimmer: And we've [the NHBP Tribal Council] adopted a policy that – on the conflicts of intertest that we are not responding – during the election the candidates are not responding to election matters during the election period. There – There may be another forum for you to respond to this directly, but we

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would ask you not to respond at Council meeting today.

Chairman Stuck: I mean if there's some way, Jeff [Dr. Chivis], you want to respond to Miss Stuck's comments and questions outside your duties of Tribal Council, you know, that's your, you know, choice as a candidate, but just want to make sure we're not in any violation of any codes or policies right now as we're in a duly called public meeting.[6]

Dr. Chivis did not respond to Paula Stuck's public comment at the Council Meeting, but on January 26, 2021, Dr. Chivis filed a campaign grievance with the NHBP Election Board against Paula Stuck for defamation, and against Chairman Stuck and Attorney Swimmer for purportedly campaigning at the January 21, 2021 Council Meeting. Dr. Chivis claimed Chairman Stuck and Attorney Swimmer were facilitating the reading of Paula Stuck's public comment, while hindering Dr. Chivis' ability to respond to Paula Stuck's unflattering comments about Dr. Chivis.

The NHBP Election Board heard evidence on February 19, 2021. Chairman Stuck and Attorney Swimmer both reserved arguments on good-faith, legislative, absolute, and/or attorney-client immunity issues until after testimony was presented because the NHBP Election Board procedures do not offer a formal pretrial motion process. The Election Board found that Chairman Stuck and Attorney Swimmer were acting within the scope of their official capacity duties on January 21, 2021 and were therefore entitled to good-faith qualified immunity. The Election Board, in *dicta* after finding that qualified immunity applied in this matter, scolded Chairman Stuck and

[6] Parentheticals added for clarity.

Attorney Swimmer for violating the spirit of a fair election process,[7] if not the letter of said law. The Election Board also suggested that the very Tribal Council that was bickering over this scenario could (and should) revise the NHBP Code to address this issue. Chairman Stuck and Attorney Swimmer appealed the March 5, 2021 decision of the NHBP Election Board to the NHBP Tribal Court, arguing that any comments made in the Election Board decision after the finding that qualified immunity existed were improper and should be stricken.

The Tribal Court reviewed the record from the Election Board and heard argument of all parties. On April 7, 2021, the Tribal Court affirmed the Election Board decision. Specifically, the Tribal Court found that Chairman Stuck and Attorney Swimmer deserve good-faith qualified immunity for their actions (or inactions) at the January 21, 2021 NHBP Council Meeting. This Court agrees that immunity exists for the actions of Chairman Stuck and Attorney Swimmer, which were made in good-faith as part of their official duties, on January 21, 2021.

On April 24, 2021, Dr. Jeff Chivis was re-elected as a member of the NHBP Tribal Council. On May 3, 2021, Chairman Stuck and Attorney Swimmer appealed the Tribal Court's order to this Honorable Court challenging the scolding received from the Election Board as improper *dicta*. While on appeal to this Court, Dr. Chivis, for the first time, inserts a cross-appeal. Chairman Stuck and Attorney Swimmer filed a motion to dismiss Dr. Chivis' cross-appeal. The Election Board filed their own motion to dismiss the cross-appeal, and a brief. Paula Stuck's one-paragraph public comment, about an

[7] This Court has previously acknowledged the constitutional mandate and duty to ensure the NHBP election process meets fundamental fairness. Spurr v. Tribal Council, Appeal No. 12-005APP, at *3 (NHBP Sup. Ct. 2/12/2012).

election that has already been won by the person offended by Paula Stuck's unflattering public comment, is now a foot and one-half thick stack of papers sitting before this Honorable Court.

This appeal pits two potentially contradictory NHBP ordinances against each other. NHBP Code § 1.1-8C(2)(i) allows public comment from NHBP tribal members at Tribal Council Meetings. NHBP Code § 3.1-9M prohibits election campaigning using "NHBP government or enterprise property," which Appellees claim includes the Zoom link used at the January 21, 2021 Tribal Council Meeting.[8] This Court will now weigh in on this version of "A House Divided."[9] This aspect of NHBP election law is a matter of first impression for this Honorable Court.

JURISDICTION

This Honorable Court has jurisdiction to consider this matter pursuant to NHBP Constitution, Art. XI § 3(c), which says:

> Appellate Jurisdiction. The Tribal Supreme Court shall have jurisdiction to review a final judgment, order or decree as provided in appellate rules adopted by the Tribal Judiciary or applicable Tribal law.

Accord, NHBP R. App. Pro. 9 § 3(a).

STANDARD OF REVIEW

When NHBP law is not clear on a legal matter, this Court may look to other jurisdictions for persuasive, but non-binding, guidance. *See e.g.*, Chivis v. Tribal

[8] Appellees did not explain how Ms. Stuck was to present her public comment at the Tribal Council's Zoom Meeting without using the NHBP Zoom link provided. To focus on this technicality, which was totally beyond Paula Stuck's control, would amount to a *de facto* censorship of tribal member comments.

[9] While most Americans associate the phrase of "A house divided against itself cannot stand" with Abraham Lincoln's unsuccessful 1858 U.S. Senate campaign against Stephen A. Douglas, the quote originates much earlier. *Compare*, Filippi v. Filippi, 818 A. 2d 608, 611 n.1 (R.I. 2003), and Pellgrino v. Ampco Sys. Parking, 789 N.W.2d 777, 815 (Mich. 2010), Corrigan, dissenting.

Council, Appeal No. 12-192-CR, at *4-*5 (NHBP Sup. Ct. 5/10/2013). Tribal courts generally agree that sufficiency of evidence factual findings issues in civil cases, (including administrative appeals), must be sustained unless those factual findings are clearly erroneous, but a lower court's legal conclusions are reviewed *de novo* with no presumption of correctness. *See e.g.*, Neptune Leasing, Inc. v. Mt. States Petroleum Corp., 2013 Navajo Sup. Ct. Lexis 3, at *7 (Navajo Sup. Ct. 5/13/2013); Brosset v. Grand Casinos of La., 1998 Tunica-Biloxi Trib. Lexis 2, at *5-*7 (Tunica-Biloxi Ct. App. 5/27/1998); and Wolf Point Organization v. Investment Centers of America, Inc., 2001 ML 4758, 2001 Mont. Fort Peck Tribe Lexis 3, at *10 (Ft. Peck Ct. App. 2/6/2001). This Court adopts the above-mentioned standards of review.

ANALYSIS

Dr. Jeff Chivis' Claims: Irrespective of abandonment/waiver of issues due to Dr. Chivis not pursuing claims until the appeal came before this Court; Dr. Chivis won his election on April 24, 2021. *See* NHBP Election Bd. Decision – Election Challenge 2021-A, at *2 (NHBP Tribal Ct. 7/6/2021), *Pope, C.J.* Any potential error by the lower tribunals relating to Dr. Chivis' successful 2021 election campaign would be harmless error. *See e.g.*, Raphael v. Grand Traverse Band of Ottawa & Chippewa Indians, Appeal No. 90-01-CV, 1999 Grand Traverse Band App. Lexis 7, at *2-*3 (G.T.B. Ct. App. 10/15/1999); United States v. Hasting, 461 U.S. 499, 509-510 (1983); Tobias-Chaves v. Garland, 999 F.3d 999, 1003 (6th Cir. 2021); and Maier v. Maier, 874 N.W.2d 725, 731 (Mich. App. 2015). Further analysis regarding Dr. Chivis' arguments as appellant is unnecessary.

Good-Faith Immunity for Chairman Stuck and Attorney Swimmer: The NHBP Election Board and the NHBP Tribal Court both made factual findings that Chairman Stuck and Attorney Swimmer were acting in their official capacity at the NHBP Council Meeting dated January 21, 2021. Chairman Stuck was acting as the presiding officer of the properly called Tribal Council Meeting and Chairman Stuck was attempting to follow rules of procedure for said meeting by allowing public comment, as mandated by NHBP Code § 1.1-8C(2)(i), according to factual findings by the Tribal Court and Election Board. According to factual findings by both the Election Board and the Tribal Court, Attorney Swimmer's comments and opinions of January 21, 2021 were legitimate actions in his official role of providing Tribal Council with requested legal advice. This Court agrees with the Election Board and Tribal Court on these factual findings. Both the Election Board and the Tribal Court made factual findings that neither Chairman Stuck, nor Attorney Swimmer, had any part in Paula Stuck's public comment of January 21, 2021, except to read the comments during the designated NHBP Code § 1.1-8C(2)(i) Public Comment time slot. The appellate record supports this factual finding. Chairman Stuck and Attorney Swimmer advised the Tribal Council, (primarily Dr. Chivis), that the Council Meeting was not the proper forum for responding to Paula Stuck's comments – all of which are part of "official duties." While these factual findings may appear inequitable; these factual findings were not actively challenged by any litigant to this appeal and therefore are now, by default, binding on this Court. Spurr v. Spurr, Appeal No. 17-287-APP, at *22-*24 (NHBP Sup. Ct. 1/25/2018). *See also*, Tenbrick v. Tenbrick, Appeal No. 13-078-CV/TRO, at *4 n.4 (NHBP Sup. Ct. 7/15/2013).

Dr. Chivis argues in his brief that since the Election Board complaint was leveled at Chairman Stuck and Attorney Swimmer as ***individuals***; the claim is outside of good-faith immunity consideration. In the alternative, Dr. Chivis argues, (but points to no supporting fact in the appellate record), that by ***acting***, Chairman Stuck and Attorney Swimmer ***must*** be acting beyond the scope of their official duties (*ultra vires*). Both arguments are wrong. Merely declaring that an official is being sued as an individual does not automatically remove the application of good-faith immunity[10] if said public official is acting in good faith within the scope of their official capacity. Mullenix v. Luna, 577 U.S. 7, 11 (2015); Watson v. Pearson, 928 F.3d 507, 510 (6th Cir. 2019); Holeton v. City of Livonia, 935 N.W.2d 601, 609 (Mich. App. 2019); and Strickland v. Decoteau, Appeal No. TMAC-04-003, 2005 Turtle Mt. App. Lexis 10, at *4 (Turtle Mtn. Ct. App. 3/14/2005).

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The United States Court of Appeals for the Second Circuit explains the problem with Dr. Chivis' argument, (that merely declaring a case against a public official "an individual suit," instead of a suit against a sovereign government, removes the possibility of good-faith immunity), stating the following:

> A government official sued in his individual capacity is entitled to qualified immunity (1) if the conduct attributed to him was not prohibited by federal law, [citations]; or (2) where that conduct was so prohibited, if the plaintiff's right not to be subjected to such conduct by the defendant was not clearly established at the time it occurred, [citations]; or (3) if the defendant's action was "objective[ly], legal[ly] reasonable[]...in light of the legal rules that were clearly established at the time it was taken. [citation].

[10] Often called "qualified immunity" by courts.

Manganiello v. City of New York, 612 F.3d 149, 164 (2nd Cir. 2010), (citations omitted. Other parentheticals in original text). *Accord*, Watson v. Pearson, 928 F.3d 507, 510 (6th Cir. 2019). Dr. Chivis failed to show how the actions of Chairman Stuck and Attorney Swimmer were outside of the scope of their official duties. Dr. Chivis did not show how/why said actions of January 21, 2021 had an evil motive, or were a part of a conspiracy with Paula Stuck to circumvent NHBP election ordinances, thus good-faith immunity bars Dr. Chivis' claim. *See*, Kanuszewski v. Michigan H.H.S., 927 F.3d 396, 422-423 (6th Cir. 2019). Dr. Chivis, as the plaintiff at the Election Board, had the duty of overcoming Chairman Stuck and Attorney Swimmer's claim of good-faith immunity. *See*, Lavinge v. Forshee, 861 N.W.2d 635, 643 (Mich. App. 2014), citing Pearson v. Callahan, 555 U.S. 223, 231-232 (2009). Both the Election Board and the Tribal Court found, as fact, that Chairman Stuck and Attorney Swimmer acted within the scope of their official capacity duties; meaning that Dr. Chivis did not negate their good-faith immunity bar to being sued for performing their official duties on January 21, 2021. This Court affirms the factual findings of both the Election Board and Tribal Court.

Now, having addressed the focal point of this case, the Court will reluctantly address the some of collateral issues as guidance for future cases.

Legislative Immunity: The United States Supreme Court, in Tenney v. Brandhove, 341 U.S. 367, 377 (1951), discussed legislative immunity, (a/k/a legislative privilege), and how that immunity should apply to legislators' debate or actions in the good-faith performance of official duties declaring:

> The claim of unworthy purpose [of a legislator's motive/action] does not destroy the privilege.

> Legislators are immune from the deterrents of the uninhabited discharge of their legislative duty, not for their private indulgence but for the public good. One must not expect uncommon courage even in legislators. This privilege would be of little value if they could be subjected to the cost and inconvenience and distractions of a trial upon a conclusion of a pleader, or the hazard of a judgment against them based upon a jury's speculation as to motives. The holding of this Court in Fletcher v. Peck, 6 Cranch 87, 130 [1810], that it was not consonant with our scheme of government for a court to inquire into the motives of legislators, has remained unquestioned.

Parentheticals added. This concept exists in Indian Country. *See e.g.*, Smith v. Confederated Salish & Kootenai Tribes, Appeal No. AP-94-027-CV, 1996 Mont. Salish & Kootenai Tribe Lexis 5, at *6 (Conf. S&K Ct. App. 8/8/1996). To overcome this high hurdle of legislative immunity, a plaintiff must show the following:

> To deny good faith immunity to tribal officers, a plaintiff would have to show specific facts that demonstrate the officers violated a "clearly established" right. It is not sufficient simply to make a conclusory allegation of a general violation of a broad right." The contours of the right must be sufficiently clear that a reasonable officer would understand what he is doing is wrong." [citation].

Id., at *8. While legislative immunity is not *carte blanche* absolute protection for political actors during a Tribal Council meeting; it is an extremely high threshold to meet before immunity is lost by said political actors. Said threshold was not met in this case.[11]

[11] During oral arguments before this Court, Appellees argued that friction exists between a plain reading of the NHBP Tribal Council Meeting's Public Comment ordinance and the NHBP Election ordinance. Apparently contradictory legislative instructions do not amount to a clear legislative mandate. Therefore, Appellees' own argument undermines their position that either ordinance was deliberately breached on January 21, 2021.

After a Finding of Immunity: Good-faith immunity and legislative immunity serve as a ***bar from suit***, not just a defense to a legal claim. Mitchell v. Forsyth, 472 U.S. 511, 525-526 (1985); Johnson v. VanderKooi, 903 N.W.2d 843, 854 (Mich. App. 2017), (partially rev'd on other grounds); and Beillo v. E. Band of Cherokee Indians, 3 Cher. Rep. 47, 50 (E. Band Cher. Tribal Ct. 1/30/2003). Both the NHBP Election Board and the NHBP Tribal Court made factual findings that Chairman Stuck and Attorney Swimmer were entitled to good-faith immunity in this case. This Court affirms that finding.

Good-faith immunity allows public officials "breathing room to make reasonable, but mistaken judgments, and protects all but the plainly incompetent or those who knowingly violate the law." Messerschmidt v. Millender, 565 U.S. 535, 546 (2012). Once a finding is made that good-faith immunity, qualified immunity, or legislative immunity exists, the reviewing tribunal's inquiry into other aspects of the case ceases. Saucier v. Katz, 533 U.S. 194, 201 (2001). This Court has previously noted that any NHBP Election Board decision must include sufficiently specific findings of fact to allow legitimate appellate review. Tenbrink v. Tribal Council, Appeal No. 13-078 CV/TRO, at *4 n.4 (NHBP Sup. Ct. 7/15/2013). Therefore, the Election Board did not err in addressing ***some*** of the facts set forth in their ruling when reaching their decision that good-faith immunity existed in the current case.

In the case at hand, the Election Board's scolding of Chairman Stuck and Attorney Swimmer was *dicta* made after the Election Board had already ruled that immunity existed for Chairman Stuck and Attorney Swimmer. The *impromptu* editorial should not have been included in the Election Board's opinion. Said error was harmless

because the Election Board as a body, or the members of the Election Board as individual NHBP tribal citizens, could have exercised their NHBP Constitution, Art. VII § 1(a)(1) Right of Free Speech and Assembly to call upon the Tribal Council to address their concerns of NHBP election law inequity through the legislative and/or rule-making process. This call for action could even be done as a public comment at a regularly scheduled Tribal Council meeting – just as Paula Stuck utilized the public comment segment of the Tribal Council Meeting of January 21, 2021. Upon a finding that immunity existed, the Election Board's review discussion should have ended. All comments made by the NHBP Election Board beyond that needed to determine that immunity existed shall be stricken from the record.

CONCLUSION

The Election Board and Tribal Court are affirmed in their laudable handling of a delicate situation. The litigants are all trustees of the funds and best interests of the NHBP people. Thin-skins for those in the arena of politics tend to cause continued strife. *Accord*, Commonwealth v. Acquaviva, Case Nos. 129, 130, 131 and 132, 1958 Pa. Dist. & Cnty. Dec. Lexis 401 at *10-*11 (Pa. Common. Pleas. 3/20/1958).[12] Any debate over regulating public comment at NHBP Tribal Council meetings should be reserved for the legislative branch of NHBP government to set, reset, revise, or re-assert the current NHBP election and/or public comment rules. This Court *applies* laws. It does not *write* laws. That role is reserved for the NHBP Tribal Council. Every concern presented in this appeal can more efficiently and economically be addressed in a NHBP Tribal

[12] This is not a new concept. *See e.g.*, Conner v. Mid S. Ins. Agency, 943 F. Supp. 647, 659 n.11 (W. D. La. 1995), (quoting Rudyard Kipling's poem "If"), and Titus 3:9.

Council legislative arena – ironically, where the focal parties to this appeal all already are sitting. The decisions of the NHBP Election Board and NHBP Tribal Court are ***VACATED*** to the extent that either conflict with this ruling. All other aspects of the decisions below are hereby ***AFFIRMED.***

Entered this 21st day of October, 2021.

Gregory D. Smith,
Chief Justice

Bird & Fletcher concur.

cc: Attorneys for all parties