

**IN THE NOOKSACK TRIBAL COURT OF APPEALS
NOOKSACK INDIAN TRIBE
DEMING, WASHINGTON**

ELEANOR J. BELMONT et al.,

Plaintiff/Counterclaim Defendant-
Respondents,

v.

**ROBERT KELLY, Chairman of the
Nooksack Tribal Council, et al.,**

Defendant/Counterclaimant-Petitioners.

2014-CI-CL-007

**Order Regarding the
Petition for Writ of Mandamus**

This matter comes before us pursuant to the Petition for Writ of Mandamus filed by Petitioner Michelle Joan Roberts, on April 15, 2016. This lawsuit is one of many involving the parties regarding Petitioner's enrollment in the Tribe. The general background and history of these lawsuits is familiar to the parties and will not be repeated here.

The present petition arises from the recent removal of the tribal trial judge presiding over these lawsuits. In March of this year, following a ruling by the then-presiding judge in the present lawsuit against the members of the Tribal Council, the Tribal Council removed the presiding trial judge and has thus far failed to appoint a new judge. For lack of a judge, this lawsuit, with several motions pending before the Court, has come to a standstill. Petitioner alleges that members of the Tribal Council, being defendants in this lawsuit, are deliberately refusing to hire a new trial judge in order to prevent this lawsuit from moving forward. Arguing that the failure to hire a judge is "yet another tactic to deny Petitioner due process of law in order to gain a litigation advantage in the present case," Petitioner now asks this Court to issue a writ of mandamus ordering the members of the Tribal Council to appoint a new judge or reinstate the former presiding judge.

As of the date of this Order, the members of the Tribal Council have still failed to appoint a trial judge to preside over this action.

While the Tribe has not filed a response to this Petition, in a letter to this Court in a related matter, the Tribe argues that this Court lacks jurisdiction to entertain a petition for writ of mandamus against members of the Tribal Council. Accordingly, first this Court will take up the question of whether the Court has jurisdiction over the present Petition.

The Tribe argues that this Court lacks jurisdiction to entertain a petition for writ of mandamus against the Chairman and other members of the Tribal Council because a recent amendment of Section 10.00.100(b) of the Nooksack Tribal Code states that "The Nooksack Tribe has not waived its sovereign immunity, nor consented to suit, for claims seeking writs of mandamus against the Chairman of the Nooksack Tribe, nor the members of the Tribal Council." This provision of the Nooksack Tribal Code was adopted by the Tribal Council two days after the

Petitioner filed the present Petition for Writ of Mandamus. *See* Resolution #16-47 (April 18, 2016). The preamble to the Resolution states that the Resolution is intended to “correct” our decision in *Lomeli v. Kelly*, 12 NICS App. 1 (Nooksack Tribal Court of Appeals, 2014) in which this Court held that under the Constitution of the Nooksack Tribe, the Tribal Court had jurisdiction to issue a writ of mandamus to compel Tribal Council officers to perform constitutionally required non-discretionary duties. It is a fundamental principle of constitutional government that when a statute, ordinance or resolution conflicts with the Constitution, it is the Constitution that prevails, not the statute, ordinance or resolution. Accordingly, the recent amendment of section 10.00.100(b) is unconstitutional and, *a fortiori*, without legal effect. For the reasons set forth in *Lomeli*, this Court has jurisdiction to entertain a petition for writ of mandamus.

Petitioner argues that she is entitled to a writ of mandamus directed to the members of the Tribal Council because the Tribal Council’s failure to appoint a judge to preside over her lawsuit deprives her of due process of law. There is no question that as a citizen of the Nooksack Indian Tribe, Petitioner enjoys a constitutional right to due process of law and equal protection under the law. Article IX of the Constitution of the Nooksack Indian Tribe states that

All members of the Nooksack Indian Tribe shall be accorded equal rights pursuant to tribal law. The protection guaranteed to persons by Title II of the [Indian] Civil Rights Act of 1968 (82 Stat. 77) against actions of the Nooksack Indian Tribe in the exercise of its powers of self-government shall apply to the members of the Nooksack Indian Tribe.

CONST., art. IX. Moreover, Title II of the Indian Civil Rights Act, codified as 25 U.S.C. §1302, states, in relevant part, that “No Indian tribe in exercising powers of self-government shall— . . . deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law.” 25 U.S.C. §1302(a)(8).

The next question that must be addressed is whether the Tribal Council’s failure to appoint in a timely fashion a judge to preside over her lawsuit has violated her constitutional rights to equal protection and due process of law. As noted above, Petitioner’s lawsuit concerns her enrollment in the Tribe. As is familiar to the parties of this lawsuit, the Tribal Council is threatening to disenroll the Petitioner from the Tribe. The Petitioner brought the present lawsuit to challenge the legality of this threatened action. Tribal law protects all Tribal members from being arbitrarily deprived of their Tribal membership. If the Tribal Council disenrolls the Petitioner before the Tribal Court adjudicates the legality of her disenrollment, then she will have lost her membership in the Tribe without the equal protection and due process afforded by the laws of the Tribe. Thus, if the Tribal Council’s failure to appoint a judge to preside over her lawsuit leads to her disenrollment before the Tribal Court has adjudicated and entered a final judgment on the legality of the threatened disenrollment, then the Tribal Court’s failure to appoint a judge to preside over her lawsuit would constitute a violation of Petitioner’s rights to equal protection and due process under the Constitution of the Nooksack Indian Tribe.

Having concluded that the failure of the Tribal Council to appoint in a timely fashion a judge to preside over her lawsuit would be a violation of equal protection and due process, this Court must now consider whether a writ of mandamus would be an appropriate remedy to prevent this failure. As noted above, in *Lomeli* this Court held that under the Constitution of the Nooksack

Tribe, the Tribal Court had jurisdiction to issue a writ of mandamus to compel Tribal Council officers to perform constitutionally required non-discretionary duties. Thus, to determine whether a writ of mandamus would be an appropriate remedy to address the Tribal Council's failure to appoint a judge to preside over Petitioner's pending lawsuit, we must determine whether appointing a person as a tribal judge to the Nooksack Tribal Court is a nondiscretionary, constitutional duty imposed by law. Clearly, the process of appointing a judge requires a great deal of judgment and discretion on the part of the Tribal Council. For each potential appointee, the Tribal Council must determine whether that person has the character, knowledge, judgment and experience to be appointed to the Nooksack bench. No particular individual has a right to be appointed as a tribal judge. It follows, therefore, that the Tribal Council can have no duty to appoint a particular person to the Tribal Court. Insofar as the Petitioner has asked us to order the Tribal Council to reinstate the formerly presiding judge, this would be inappropriate.

Nonetheless, the lack of a duty to appoint a particular person as a tribal judge is consistent with the Tribal Council having a general duty to appoint some person as a tribal judge. The Constitution of the Nooksack Indian Tribe states that "It shall be the duty of the tribal council to provide, through ordinance, for the establishment of a tribal court." CONST., art. VI, sec. 2. Clearly, one cannot have a tribal court without appointing one or more judges to preside over cases that come before that court. It follows, therefore, that the Tribal Council has a nondiscretionary general duty imposed by the Constitution of the Nooksack Indian Tribe to appoint one or more people as judges to the Tribal Court.

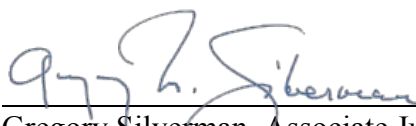
In light of the foregoing, we find that the Petitioner is threatened with an injury to her constitutional rights of equal protection and due process as a result of the Tribal Council's failure to appoint a judge to preside over her lawsuit and that a writ of mandamus directed to the Tribal Council would be an appropriate remedy to prevent Petitioner from being deprived of her constitutional rights of equal protection and due process.

Accordingly, we hereby order that the Tribal Council either appoint in a timely fashion a judge to adjudicate Petitioner's challenge to her threatened disenrollment or in the alternative to refrain from taking any further action to disenroll her.

It is so ordered, this 28th day of June, for the panel,

Douglas Nash, Associate Judge

Eric Nielsen, Chief Judge



Gregory Silverman, Associate Judge