

ROSEBUD SIOUX TRIBAL COURT

ROSEBUD SIOUX SUPREME COURT 2007 MAR 30 AM 8:22 (SS) APPEALS COURT

ROSEBUD, SOUTH DAKOTA ( ) FILED

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BY:  CA2006-12

ROSEBUD SIOUX TRIBE, Plaintiff/Appellee

VS. NOTICE OF ENTRY OF ORDER

KEITH HORSE LOOKING SR., Defendant/Appellant(s)

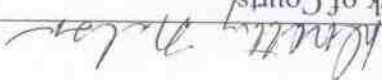
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TO: THE ABOVE-NAMED PARTIES

Please take notice that on the 27<sup>th</sup> day of March, 2007, the Honorable Chief Justice FRANK POMMERSHIEM presiding. The Court entered an **ORDER**. A certified copy of said Judgment of **ORDER** is enclosed and by this reference is incorporated herein and is herewith served upon you.

Dated this 30<sup>th</sup> day of March, 2007.

Clerk of Courts



CERTIFICATE OF SERVICE

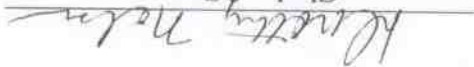
I, Dorothy Nelson, Chief Clerk of Courts of Rosebud Sioux Tribal Supreme Court, hereby certify that I served a true and correct copy of the Notice of Entry of Order and copy of said Order upon the Appellant(s) and Appellee(s) as follows by placing in the U.S. Mail, postage prepaid, addressed as follows:

Anthony Little, DPLS, PO Box 727, Mission, SD 57555

Dana Hanna, Attorney General, Rosebud Sioux Tribe, PO Box 500, Rosebud, SD 57570

Dated this 30<sup>th</sup> day of March, 2007.

Clerk of Courts



ROSEBUD SIOUX TRIBE

SUPREME COURT  
OF THE  
ROSEBUD SIOUX TRIBE  
2007 MAY 10 PM 12:30  
FILED

ROSEBUD SIOUX TRIBE, Plaintiff/Appellee,	VS.	KEITH HORSE LOOKING, Defendant/Appellant.
<hr/> GA 2006-12 <i>[Signature]</i>		

For the failure of Petitioner to sufficiently indicate any mistake of law or fact as

required by Rule 19 of the Appellate Rules of the Rosebud Sioux Supreme Court, the petition for rehearing in this matter is hereby denied.

IT IS SO ORDERED.

For the Court:

*[Signature]*

Frank Pommersheim  
Chief Justice

Dated May 8, 2007.

ATTEST:

*[Signature]*  
Chief Clerk of Courts

ROSEBUD SIOUX

ROSEBUD SIOUX SUPREME COURT  
ROSEBUD SIOUX RESERVATION  
ROSEBUD, SOUTH DAKOTA  
MAY 10 2007 4:23 PM  
APPEALS COURT

\*\*\*\*\* FILED \*\*\*\*\*

ROSEBUD SIOUX TRIBE, BY: [Signature] Plaintiff/Appellant(s)  
DOCKET # CA2006-12

VS.  
NOTICE OF ENTRY  
OF ORDER

KEITH HORSE LOOKING SR.,  
Defendant/Appellee(s)

\*\*\*\*\*

TO: THE ABOVE-NAMED PARTIES

Please take notice that on the 8<sup>th</sup> day of May, 2007, the Honorable Chief Justice FRANK POMMERSHIEM presiding, The Court entered an **ORDER**. A certified copy of said Judgment of **ORDER** is enclosed and by this reference is incorporated herein and is herewith served upon you.

Dated this 10<sup>th</sup> day of May, 2007.

[Signature]  
Clerk of Courts

CERTIFICATE OF SERVICE

I, Dorothy Nelson, Chief Clerk of Courts of Rosebud Sioux Tribal Supreme Court, hereby certify that I served a true and correct copy of the Notice of Entry of Order and copy of said Order upon the Appellant(s) and Appellee(s) as follows by placing in the U.S. Mail, postage prepaid, addressed as follows:

Mato Standing High, Attorney General, Rosebud Sioux Tribe, PO Box 500, Rosebud, SD 57570  
Dakota Plains Legal Services, PO Box 727, Mission, SD 57555

Dated this 10<sup>th</sup> day of May, 2007.

[Signature]  
Clerk of Courts

ROSEBUD SIOUX TRIBE  
TRIAL COURT  
SUPREME COURT  
2007 MAR 30 AM 8:22  
OF THE  
ROSEBUD SIOUX TRIBE

ROSEBUD SIOUX TRIBE,  
Plaintiff/Appellee,  
vs.  
KEITH HORSE LOOKING,  
Defendant/Appellant.  
MEMORANDUM OPINION  
AND ORDER  
CA 2006-12

Per Curiam (Chief Justice Frank Pommersheim and Associate Justices Leroy Greaves and Patrick Lee)

I. Introduction

In the Spring of 2002, Mr. Keith Horse Looking, Defendant/Appellant, was arrested and charged with aggravated assault<sup>1</sup> upon a fellow Tribal member, Mr. Terry Arcoren. Mr. Horse Looking, pursuant to a plea agreement, subsequently pled no contest to a reduced charge of simple assault.<sup>2</sup> The Court then imposed a sentence of sixty days to be served in the Rosebud Sioux Tribal jail.

Mr. Horse Looking obtained a stay of sentence and then appealed to this Court claiming that his sentence of sixty days was not permitted under the Law and Order Code. This Court ruled against the Appellant noting that Law and Order Code had been amended prior to Mr. Horse Looking's offense and his sixty day sentence was indeed authorized by the Law and Order Code.

After the unsuccessful appeal, the stay suspending the execution of sixty day jail time was dissolved and a warrant issued for Mr. Horse Looking's arrest. Before the arrest was

<sup>1</sup> Aggravated Assault is a Class A offense under the Rosebud Sioux Law and Order Code punishable by up to one year in jail and a fine up to \$1,000 or both.  
<sup>2</sup> Simple Assault is a Class B offense under the Rosebud Sioux Law and Order Code, Sec. 5-5-1, punishable by up to sixty days in jail and a \$500 fine or both.

<sup>3</sup> An action for declaratory relief filed by the Attorney General was also voluntarily dismissed.

effectuated, Mr. Horse Looking obtained a letter from then Tribal President, Mr. Charles Colombe, that purported to "pardon" Mr. Horse Looking. The letter is dated May 31, 2003 and was directed to Chief Judge Sherman Marshall. The letter somewhat ambiguously requested "your concurrence upon our decision."

The Tribal Prosecutor and the Tribal Attorney General did not agree with President's Colombe's assertion of his right to "pardon" contained in his letter and notified Judge Marshall of their concerns. The special judge appointed in this matter subsequently notified Mr. Colombe of the Attorney General's objections and declined to issue any "concurrence" in the purported pardon, unless Mr. Horse Looking served his sixty day sentence and then filed a motion with the court for consideration of his request for concurrence in the pardon.<sup>3</sup> Mr. Horse Looking was not rearrested and he did not serve his sixty day sentence.

After considerable delay, counsel for Mr. Horse Looking filed a motion for commutation or modification of sentence. Another stay of sentence was granted by the trial court. A hearing was held on the motion before Special Judge Paul Jensen. Somewhat oddly, neither side called any witnesses and no significant evidence was presented at the hearing. The court denied the motion and issued a memorandum opinion. This appeal followed and oral argument was heard on March 9, 2007.

II. Issues

This appeal presents two issues, namely:

A. Whether the Tribal Constitution or any relevant Tribal ordinance recognizes the authority of the Tribal President to grant pardons; and

<sup>4</sup> While the Appellant has failed to identify any standard of review, the appropriate standard for reviewing these questions of law is *de novo*.

ordinance that dealt with the issue of pardons in general or executive pardons in particular. In

to grant pardons. It was further conceded that the Tribal Council had not enacted any

at oral argument that the Tribal Constitution does not expressly authorize the Tribal Chairman

This issue was not pursued vigorously on appeal. Counsel for the Appellant conceded

A. Tribal Constitution Authority to Pardon<sup>4</sup>

understood to be minimal to nonexistent.

concept of inherent power – especially in the domestic law and order arena – is generally

appropriate legislation, no such pardon power exists. In a constitutional democracy, the

have acted through the formation of their Constitution or through their lawmakers enacting

pardon may be located any place within the government. In this view, unless the 'people'

democracy, it is the will of the 'people' rather than the Crown that controls and the power to

English notion that the granting of pardons is an inherent prerogative of the Crown. In a

that mandates such power be executive in nature. The executive model is rooted in the

textually recognized as an executive power, there is no principle, constitutional or otherwise,

Dakota Constitution, Art. IV, Sec. 3. And while such power, where it exists, is most often

it is expressly recognized in both the United States Constitution, Art. II, Sec. 2 and the South

Anglo-American jurisprudence. *Ex Parte Wells*, 18 How. (59 U.S.) 307 (1855). For example,

The concept of a pardon as a release or remission of a past wrong is deeply rooted in

III. Discussion

Each issue will be discussed in turn.

authority of the Tribal President to grant pardons.

B. Whether there is any Tribal tradition or custom that recognizes the inherent

The Pawnee Tribe of Oklahoma employs a unique process that is part of its Law and Order Code. In § 606 of the Criminal Procedure Act of the Code, it is provided that the Chief Executive Officer of the Tribe may decide to grant a pardon. If so, then he files the proposed action with the Clerk of Courts for 60 days, during which time each Justice of its Supreme Court and each member of the Tribal Council is also given a copy of the proposed action. If during that 60-day period any Justice or Tribal Council member files a written disapproval of

*E. White Mountain Apache Tribal Rules of Criminal Procedure.*

The White Mountain Apache Tribe has empowered the Tribal Chairman, as part of the post-verdict proceedings recognized in its Rules of Criminal Procedure, to grant pardons, reprieves and commutations. The Chairman must, however, report each such action to the Tribal Council, advising of the facts and the reason(s) the pardon was granted. *Rule 7.1 Part E, White Mountain Apache Tribal Rules of Criminal Procedure.*

The several legislative approaches cited were quite various as to the procedures employed. The Standing Rock Sioux Tribe, for example, has enacted a specific chapter of its Code of Justice, providing that the Tribal Council has the sole and exclusive power to grant pardons after final convictions for all felonies rendered by the Standing Rock Sioux Tribal Court. § 4-401. The code provides for a process of application for a pardon, a hearing on the application, and the final determination of the issue. §§ 4-402 *et seq.* It is noteworthy that by this enactment the Standing Rock Sioux Tribe has provided for the possibility of a pardon only for tribal felony crimes. No pardon is available for a misdemeanor or offense.

president to grant pardons.

fact, every example that was cited of other tribes recognizing a pardon power was based on positive law enacted by that tribe's tribal council. Appellant did not cite a single example, presumably because none exist, of any tribe recognizing the *inherent* authority of a tribal

the proposed pardon, the pardon is not approved. The Chief Executive Office may refer the same to a vote of the Tribal Members at the next regular election. If no disapproval is filed, the pardon becomes effective after the expiration of the 60-day period.

The Sault Ste. Marie Tribe of Chippewa Indians has enacted a detailed provision at Chapter 76 of its Tribal Code that establishes a Tribal Pardon Commission and sets out the procedures by which pardons may be considered and issued. Convictions for certain crimes may not be pardoned under the code. At the appropriate time, an application may be filed with the prosecutor, who obtains a complete criminal history on the applicant and forwards the information and application to the sentencing judge. The judge then files any objections or comments, which are provided to the pardon commission along with the prosecutor's recommendations. The pardon commission then has the authority to consider the application and to grant the pardon. The commission may grant the pardon if it is determined that the applicant is not likely to engage in offensive criminal conduct again.

The Blackfeet Tribe has adopted, as part of its Law and Order Code, a section

providing for a Board of Pardons and Parole, with the authority to, among other things, grant a pardon to persons convicted in the Blackfeet Tribal Court. Law and Order Code, Chapter 4, § 4. It requires the Board to follow rules and regulations adopted by the Blackfeet Law Enforcement Commission, and requires a majority vote of the Board in order to grant a

*pardon. Id.*

As these examples indicate, tribes have taken various legislative approaches to the power to pardon including placing it in the Tribal Council, the Tribal Chief, or a Tribal Pardon Commission. And while it remains clear that the Rosebud Sioux Tribal Council

<sup>5</sup> See, e.g., Art. IV(1)(k), Rosebud Sioux Tribe Constitution which provides: Section 1. Enumerated powers. – The Council of the Rosebud Sioux Tribe shall exercise the following powers, subject to any limitations imposed by the statutes of the Constitution of the United States, and subject further to all express restriction upon such powers contained in this constitution and attached bylaws. [Amendment No. 1, effective June 19, 1962.] (k) To promulgate and enforce ordinances providing for the maintenance of law and order and the administration of justice by establishing a reservation court and defining its duties and powers. [Amendment No. XVIII, effective September 23, 1985.] There would also be due process and equal protection concerns as embedded in Art. X, Sec. 3, Rosebud Sioux Tribe Constitution and the Indian Civil Rights Act, 25 U.S.C. § 1302 (8). Such “custom and usage” is often referred to as Tribal common law and thus those terms are often used interchangeably.

and usage” existed in the past, continues to exist today, and is applicable to the case at bar. In burden of proof by a preponderance of the evidence to persuade the Court that such “custom It also goes without saying that the proponent of any such “custom and usage”<sup>6</sup> has the usages.” (emphasis added)

of any tribe or state which is consistent with the policies underlying tribal law, custom and and the United States, *then according to the customs and usages of the Tribe*, then to the law the sources of law available to the Court as “the applicable laws of the Rosebud Sioux Tribe This is expressly recognized in the Tribal Law and Order Code at Sec. 4-2-8, which identifies and custom are to be made. Tradition and custom is a valid, even vital, source of Tribal law. Despite this limitation, several necessary observations on the broad issue of tradition before the Court.

Court cannot make a definitive precedential ruling on this issue based on the sparse record power to pardon is not presented in a fully developed manner in this appeal. As a result, this The issue of Tribal tradition and custom as a potential source for the Tribal President’s B. Tribal Tradition and Custom and the Power to Pardon

has chosen not to exercise that power. possesses the power under the Tribal Constitution to establish a process to grant pardons,<sup>5</sup> it

Indian Civil Rights Act, 25 U.S.C. § 1302 (8).  
 equal protection as set out in Art. X, Sec. 3 of the Rosebud Sioux Tribal Constitution and the  
 parties in private disputes) could only be exercised within the parameters of due process and  
 such "custom and usage" relevant to the authority of Tribal officials (as opposed to private  
*prove the existence of such "custom and usage."* There is also the further *caveat* that any  
 the record before the Court and does not foreclose more thorough attempts in the future to  
 but to affirm the decision below. Nevertheless, as noted at the outset, this ruling is limited to  
 As a result of this unusual poverty and absence of evidence, this Court has no choice

Therefore, the Board is requesting that you acknowledge that the Sicangu  
 Lakota Treaty Council did not or will not at any time acknowledge any pardon  
 by written document for any tribal member.  
 The Sicangu Lakota Treaty Council is an entity of abiding by the treaties and  
 by the custom of old traditional laws.

which stated in relevant part:  
 Treaty Council of the Rosebud Sioux Tribe, signed by its Vice-Chairman, Darrel Marcus,  
 presented on this issue was a letter to Chief Judge Sherman Marshall from the Sicangu Lakota  
 As Special Judge Jensen noted in his memorandum opinion the *only* evidence

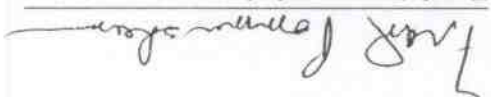
"custom and usage" is not evidence and cannot be evaluated as such.  
 this issue. *Mere statements* by counsel at the motion hearing (or even on appeal) about  
 such matters – to give testimony. Appellant submitted no documentary evidence relevant to  
 expert witnesses such as Tribal elders or academic scholars with reliable knowledge about  
 decision not to present any evidence on the issue. Appellant called *no* witnesses – much less  
 this case, the Appellant has completely failed to discharge his burden by his inexplicable

IV. Conclusion

For all the above-stated reasons, the decision of the trial court is affirmed and the stay of the Defendant's sentence is dissolved.

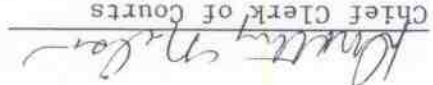
IT IS SO ORDERED.

For the Court:

  
Frank Pommersheim  
Chief Justice

Dated March 27, 2007.

ATTEST:

  
Chief Clerk of Courts