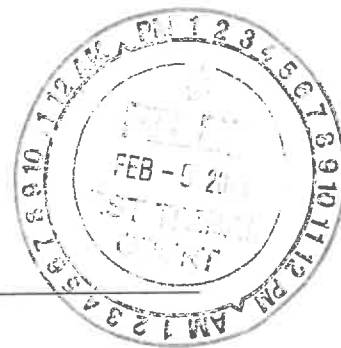


IN THE SUPREME COURT
OF THE
ROSEBUD SIOUX TRIBE



NORMAN RUNNING JR.,
Plaintiff/Appellant

CA 14-
04

v.
ROSEBUD SIOUX TRIBE ELECTION
BOARD,
Defendant/Appellee.

MEMORANDUM OPINION
AND ORDER

Per curiam (Chief Justice Charles Abourezk and Associate Justices Patrick Donovan and Frank Pommersheim)

I. Introduction

Norman Running, Jr., Plaintiff/Appellant, filed a timely application to run as a candidate for Tribal Council Representative from Soldier Creek Community in the 2014 election. Mr. Running's candidacy was subsequently challenged and the Rosebud Sioux Election Board upheld the challenge and declared Mr. Running ineligible to run for election to the Rosebud Sioux Tribal Council. As a result, his name did *not* appear on the ballot for either the primary or general election.

The core of the Election Board's determination was based on the finding that Mr. Running was a convicted felon who had been previously found guilty in federal court of the crime of 'larceny' in violation of 18 U.S.C. §§ 1154 and 661. The Rosebud Sioux Tribal Election Board found that this conviction violated Rosebud Sioux Tribal Ordinance #86-10 which deals with the requirements to run for office and states in pertinent part 'who has not been found guilty of any major crimes (felony) by any jurisdiction'.

Mr. Running subsequently filed an action in the Rosebud Sioux Tribal Court seeking a declaratory judgment that Tribal Ordinance #86-10 conflicted with the Rosebud Sioux Tribal

Constitution, specifically with Article III ('Governing Body') Section 6 which deals with the requirements to run as a candidate "at least 30 years of age" for the Rosebud Sioux Tribal Council. Specifically, that Article 3, Section 6 disqualification provision identifies only a conviction of a "felony offense involving violence".

Judge Sherman Marshall disagreed and dismissed the action in an order dated July 11, 2014. Judge Marshall's order rested on the above-quoted language in Tribal Ordinance 86-10. No stay was granted in the matter.¹ Therefore the election proceeded without the candidacy of Mr. Running. A timely notice of appeal was filed with this Court. After the initial briefs were filed, this Court issued a subsequent order requesting both parties to file simultaneous briefs on the issue of mootness.

Oral argument was held before this Court on December 12, 2014.²

II. Issues

This appeal raises two issues, namely the issue of mootness, as well as the issue of the constitutionality of Tribal Ordinance #86-10.

Each issue will be discussed in turn.

III. Discussion

A. Mootness

¹ The motion for the stay contained no legal argument. Specifically, the Plaintiff/Appellant did not assert, much less prove, his likely success on the merits, irreparable harm, lack of substantial harm to other parties, and no harm to the public interest. See, e.g., *Hilton v. Braunskill*, 481 U.S. 770 (1987); *Winter v. Natural Resources Defense Council*, 555 U.S. 7 (2008). Presumably, the absence of any legal argument foreclosed the possibility of granting the stay. The issuing of a stay is never automatic and plaintiff/appellant failed to meet his necessary burden to obtain the stay.

² Judge Marshall's order also denied the Election Board's motion to dismiss on sovereign immunity grounds. Judge Marshall found that "Article XI of the Rosebud Sioux Tribe Constitution clearly provides that this Court has the authority to overturn any Election Board action that violates the Rosebud Sioux Tribe Constitution or the Indian Civil Rights Act of 1968." Slip Opinion at 5. The Order also (correctly) cited this Court's opinion in the case of *Whiting v. Rosebud Sioux Tribe Election Board* (2009) for the proposition that the Election Board does not have the benefit of sovereign immunity in disputes challenging its determination of a candidate's eligibility to run for office. No cross-appeal was filed on this issue.

The doctrine of mootness is rooted in the (federal) concern that lawsuits contain an actual ‘case’ or ‘controversy’ in accordance with Article III of the United States Constitution. Mootness is doctrinally related to separation of power issues; that is the concern to avoid potential (unnecessary) conflict between different branches of (tribal) government. For example, if a case has proceeded to a point where no relief is possible, the case is moot.³ Such is the case at bar. Mr. Running’s name never appeared on the ballot. Both the primary and general election have come and gone. The election clock cannot be unwound. *See, e.g., Two Hawk v. Rosebud Sioux Tribe*, 534 F.2d 101 (8th Cir. 1970) and *Thompson v. Brown*, 434 F.2d 1090 (5th Cir. 1976).

The Court also notes that because ‘mootness’ is a federal constitutional doctrine, it does not automatically apply in the tribal court context, unless it is required by the Tribe’s Constitution. The Rosebud Sioux Tribe’s Constitution makes no reference to the term ‘case’ or ‘controversy’ or ‘mootness’ and it does not contain any bans on issuing advisory opinions or declaratory judgments. In many ways, this is similar to a decision of the Hopi Court of Appeals holding that the (federal) constitutional doctrines of standing and political question were contrary to Hopi tradition and custom. In addition, Hopi courts were courts of general jurisdiction rather than (federal) courts of limited jurisdiction. *Village of Mishongnovi v. Humeyestewa*, 1 AM. INDIAN TRIBAL LAW 295 (1998).

Despite these classic jurisprudential concerns, both parties (at oral argument) conceded that the underlying Tribal Constitution question was perplexing and likely to be raised again in subsequent elections. As a result, both sides urged the Court to render a ‘declaratory’ judgment opinion in this matter. This likelihood of ‘wrongs’ capable of repetition is itself a well-

³ ERWIN CHERMERINSKY, FEDERAL JURISDICTION 131-142 (Wolters Kluwer, 7th ed. 2012).

recognized exception to the mootness doctrine. *See, e.g., Dunn v. Blumstein*, 435 U.S. 765 (1978).

With deep respect for the Lakota value of harmony and the mainstream concern of avoiding separation of powers questions when there are alternative, non-constitutional means of disposition, the Court has decided to strike a unique, middle ground balance. As discussed *infra* at pp. 7-12, the Tribal Council shall be given the first opportunity to resolve this matter.

In sum, mootness is not a necessary doctrinal element of Rosebud Sioux Tribal Constitution jurisprudence. Nevertheless, it clearly contains a cultural and common sense element that the Court should be careful before wading into disputes that challenge the constitutionality of Tribal Council ordinances, when such disputes might (potentially) be resolved by other branches of tribal government, namely the Tribal Council itself.

B. Constitutionality of Tribal Ordinance #86-10

What follows is meant to provide guidance to the Tribal Council should it decide to accept the opportunity to resolve the (Tribal) constitutional problems herein described. The problem arises from the fact that in 2007 the people of the Rosebud Sioux Tribe in a Secretarial election mandated by 25 U.S.C. § 476 voted on twenty-seven constitutional amendments. *Two* of these amendments dealt with the requirements to run for office. Both of these amendments – Amendment H and Amendment I – passed.⁴ These results (as well as the vote on the rest of the amendments) were subsequently certified by the Secretary of the Interior pursuant to 25 U.S.C. § 476(d).

Both of these amendments now appear in the Rosebud Sioux Tribal Constitution in Article III Section 6. Each amendment appears as a *separate* Section 6.

⁴ Amendment H passed by a vote 553 for, 261 against, and 10 ballots spoiled or mutilated. Amendment I passed by a vote of 584 for, 212 against, and 10 ballots spoiled or mutilated.

Article III, Section 6 (Amendment H) reads in its entirety:

Any member of the Sicangu Lakota Oyate at least 30 years of age, who has not been found guilty by the Tribal Council of misconduct in tribal affairs, or who has not been found guilty in a court of law of felony offense involving violence and who can provide affidavit(s) that prove some history of leadership shall be qualified to seek and hold membership on the Tribal Council. Candidates for the position of President or Vice President of the Sicangu Lakota Oyate must be at least 45 years of age and meet all requirements of qualification for membership on the Tribal Council.

Article III, Section 6 (Amendment I) reads in its entirety:

Any enrolled member of the Rosebud Sioux Tribe possessing at least one fourth (1/4) or more Sicangu blood degree and least twenty five (25) years of age, who has not been found guilty of any major crimes by any jurisdiction, or who has not been found guilty by the Rosebud Sioux Tribal Council of misconduct in tribal affairs, or who has not been found, by any tribal, state, or federal court of law, or by the tribal ethics commission or by the Rosebud Sioux Tribal County, to have performed any act containing an element of perjury, forgery, bribery, dishonesty or abuse of public office compromising the welfare of the Rosebud Sioux Tribe or any of its members shall be qualified to seek and hold membership on the Rosebud Sioux Tribal Council. A candidate for president, vice-president, secretary and treasurer must have been living within the boundaries of the Rosebud Sioux Indian Reservation for at least one year preceding the date of the Primary Election, and a candidate for community representative must have been living in the community of candidacy for at least one year next preceding the date of the Primary Election.

If for any reason a community representative is absent from the community for a period exceeding 90 days, the position shall become immediately vacant and filled according to the Constitution and By-Laws of the Rosebud Sioux Tribe.

The basic question is can these *two* Section 6's be reconciled into a complementary, constitutional harmony or are they inevitably irreconcilable and contradictory? An analysis begins with the points of (apparent) difference. They include the following:

1. Membership

Amendment H says “Any member of the Sicangu Lakota Oyate.”

Amendment I says “Any enrolled member of the Rosebud Sioux Tribe with at least one-fourth (1/4) Sicangu blood degree.”

2. Age

Amendment H says “at least 30 years of age.”

Amendment I says “at least 25 years of age.”

3. Disqualification

Amendment H says “who has not been found guilty in a court of law of a felony offense involving violence.”

Amendment I says “who has not been found guilty of any major crimes by any jurisdiction, or has not been found guilty by the Rosebud Sioux Tribal Council of misconduct in tribal affairs, or who has not been found, by any tribal, state, or federal court of law, or by the tribal ethics commission or by the Rosebud Sioux Tribal Council, to have performed any act containing an element of perjury, forgery, bribery, dishonesty or abuse of public office compromising the welfare of the Rosebud Sioux Tribe or any of its members. . . .”

4. Residency

Amendment H has no residency requirements.

Amendment I says “A candidate for President, Vice President, Secretary and Treasurer must have been living within the boundaries of the Rosebud Sioux Indian Reservation for at least one year preceding the date of the

Primary Election, and a candidate for community representative must have been living in the community of candidacy for at least one year next preceding the date of the Primary Election.”

5. Other Eligibility Requirements

- (a) Amendment H says “A candidate for the position of President or Vice President of the Sicangu Lakota Oyate must be at least 45 years of age and meet all other requirements of qualification for membership on the Tribal Council.”

Amendment I says nothing about the age requirement to run for President or Vice President

- (b) Amendment H says “and who can provide affidavits that prove some history of leadership shall be qualified to seek and hold membership on the Tribal Council.”

Amendment I has no affidavit requirement.

Needless to say, many of these constitutional requirements to run for office appear to be quite contradictory.

The next step is to examine is how Rosebud Sioux Tribal Ordinance #86-10 implements these disparate elements. Rosebud Sioux Tribal Ordinance #86-10 reads in pertinent part as follows:

- “1. Reached his/her 25th/30th birthday on or before election day except that to seek office in the General Election, he/she must have reached this birthday on or before the Primary Election Day.
2. ¼ degree Indian blood/Sicangu blood to be a candidate for President, Vice President, Council Representative, Secretary or Treasurer.

3. Not been found guilty by the Tribal Council of misconduct in tribal affairs, or who has not been found guilty of any major crimes (felony) by any jurisdiction, or who has not been found guilty in a court of law of felony offenses involving violence and who can provide affidavit(s) that prove some history of leadership shall be qualified to seek and hold membership on the Tribal Council; who has not been found, by Rosebud Sioux Tribal Council of misconduct in tribal affairs, or who has not been found, by any tribal state, or federal court of law, or by the tribal ethics commission or the Rosebud Sioux Tribal Council to have performed any act containing an element of perjury, forgery, bribery, dishonesty or abuse of public office compromising the welfare of the Rosebud Sioux Tribe or any of its members shall be qualified to seek and hold membership of the Rosebud Sioux Tribal Council.
4. Candidates of the position of President or Vice President of the Sicangu Lakota Oyate must be at least 45 years of age and meet all requirements for membership on the Tribal Council.”

The Court will now examine each section of Tribal Ordinance 86-10.

Section 1 deals with age. It makes no distinction concerning age. It uses the phrase ‘25/35 birthday’ which would appear ambiguous or contradictory on its face. It must be one or the other. As written, the age 35 requirement of Amendment H is superfluous.

Section 1 is further contradictory in that it says the relevant birthday must be “on or before election day”; but then it goes on to say “except to seek office in the General Election, he/she must have reached this birthday on or before the Primary Election Day”. So a potential candidate could be eligible to run in the primary if the potential candidate attained (or will attain) the relevant age ‘on or before election day,’ but (if the potential candidate made it to the general election) the age requirement bounces *back* to ‘on or before the Primary Election Day.’ This can’t be.

Section 2 deals with membership. It adopts the standard of ‘1/4 Indian blood/Sicangu blood.’ This does not reflect either Amendment H or Amendment I, but it does reflect Article III Section 3 (Amendment E⁵), which states:

All Council members and the President and Vice-President shall be at least ¼ degree Indian blood.

Section 3 deals with disqualification. It includes *all* of the requirements in *both* Amendment H and Amendment I in a single paragraph.

Section 4 deals with the requirements to run for office of President or Vice-President.

The question then becomes whether Rosebud Sioux Tribal Ordinance #86-10 constitutionally harmonizes the disparate elements of Amendment H and Amendment I. The argument for constitutionality is that the proper way to interpret Rosebud Sioux Tribal Ordinance #86-10 is simply to opt for the broadest reach of the language. For example, as to age, 25 trumps age 35. As to previous criminal record, the broad reach of Amendment H trumps the narrow reach of Amendment I. This is the case at bar. The narrow language of Amendment H – “a felony offense involving violence” – is completely subsumed in the broader language of Amendment I.

The membership requirements track neither amendment but appear to (properly) follow a completely different amendment, namely Amendment E found at Article III Section 3. The requirements to run for President or Vice President from Amendment H trump the (non-existent) requirements of Amendment I.

The problem with the approach of Ordinance 86-10 is that it renders much of the language of Amendment E ineffective and nugatory. Specifically, as noted above, it makes the age 30 requirement of Amendment H superfluous; swallowed up by the lesser age 25

⁵ Amendment E passed by a vote of 557 for, 246 against, and 3 ballots spoiled or mutilated.

requirement of Amendment I. It also makes the limited disqualification of a “felony involving violence” in Amendment H disappear, swallowed up by the broader grounds for disqualification described in Amendment I. Such an approach conflicts with a basic canon of statutory and constitutional interpretation, namely the presumption against superfluity. This canon refers to the principle that disfavors the construction of a statute or constitution, in whole or in part, so as to be merely duplicative or redundant of what has already been stated. *See e.g. Nat’l Ass’n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644 (2007).

Tribal Ordinance 86-10 clearly violates this canon of construction involving the presumption against superfluity in that it renders much of Amendment H superfluous and unnecessary. This is especially problematic in that this language was expressly adopted by the voters of the Rosebud Sioux Tribe in a Secretarial election to amend the Constitution. The Tribal Constitution is not a tribal ordinance, but the direct voice of the people. This is quite different from an error or conflict in ordinances *drafted and passed* by the Rosebud Sioux Tribal Council. Therefore, as written, Tribal Ordinance 86-10 is unconstitutional.

C. Alternative Analytical Approach

A second approach proceeds differently. It takes an interpretive tact to preserve as much as possible in *each* version of Article III Section 6. Such an analytical framework would work as follows. Amendment H could be preserved in *full* by understanding that it applied to any candidate age 30 and older. Amendment I could be preserved in full by understanding that it applies to any candidate between the ages of 25-30. This creates more harmony and greater respect for the will of the people than does the overly expansive and contradictory language that appears in Tribal Ordinance 86-10.

Two smaller points. First, as to membership, it does make more coherent constitutional sense to defer to the membership requirements of “1/4 degree Indian blood/Sicangu blood” because it tracks very closely the language of Article 3, Section 3 (Amendment E)⁶ that states unequivocally that in order to run for the Tribal Council a candidate “shall be of at least ¼ degree Indian blood.”

Second, it also makes sense to defer to the language of Amendment H as to the age requirements (age 45) for President and Vice President as there are *no* age requirements for President and Vice President set out in Amendment I. Conversely, it makes sense to defer to the residency requirements set out in Amendment I, because there are no residency requirements set out in Amendment H. Such an approach takes a common sense approach that basic constitutional intent includes both age and residency requirements for *all* candidates for office. Does this analytical approach get the job done with more harmony and less conflict? The Court believes that the answer is yes.

D. Constitutional Dilemma?

Yet there remains another potential overarching problem. And that is the possibility that there was an administrative error of some kind committed by the Bureau of Indian Affairs in its statutory mandated review of proposed amendments.⁷ Since the *two* Article III Section 6 amendments are closely related, but far from complementary, perhaps only *one* of them was actually intended to be submitted to the people. The B.I.A. may well have erred in allowing two similar but contradictory (proposed) amendments to be voted on. And if this is so, perhaps there needs to be a new constitutional amendment proposal⁸ to deal with the apparent constitutional

⁶ Yet it remains true that the term ‘1/4 degree Indian blood/Sicangu blood’ is itself somewhat contradictory.

⁷ See 25 U.S.C. § 476 and 25 C.F.R. Pt. 81 (2014).

⁸ See Article IX of the Rosebud Sioux Tribe Constitution, which provides:

tension and conflict between Amendment H and Amendment I. The Tribal Council is encouraged to consider this possibility as well as the problems with Tribal Ordinance 86-10.

IV. Conclusion

For all of the above-stated reasons, the decision of the trial court is reversed. Inasmuch as this Court's decision indicates that the Rosebud Sioux Tribal Ordinance #86-10 is constitutionally flawed, the Court requests that the Rosebud Sioux Tribal Council draft a new or revised ordinance that avoids these constitutional pitfalls. The Court's opinion includes one (but not necessarily the only) way to approach this problem.

To be clear, the Court is not ordering, but merely requesting – in accord with the concern for the Lakota virtue of harmony – the Tribal Council to undertake and adopt the necessary revision.

The Court further requests that said revision be completed within ninety (90) days of this order. Mr. Terry Pechota, legal counsel for Defendant/Appellee Election Board, is specifically directed to inform, in writing, the Tribal Council and the Tribal Attorney General of the Court's decision and provide each of them with a copy of the Court's opinion.

Section 1. This Constitution and By-Laws may be amended by a majority vote of the qualified voters of the Rosebud Sioux Tribe voting at an election called for that purpose by the Secretary of the Interior, provided that at least thirty (30) percent of those entitled to vote shall vote in such election; but no amendment shall become effective until it shall have been approved by the Secretary of the Interior. It shall be the duty of the Secretary of Interior to call an election on any proposed amendment, upon receipt of a written resolution signed by at least three-fourths (3/4) of the membership of the Council.

Section 2. Upon receipt of a petition that contains the signatures of at least thirty (30) percent of the voters in the last tribal election, the Tribal Secretary shall refer this petition to the next Tribal Council meeting which shall call a Tribal Constitution Convention to commence within thirty (30) days and to appoint a seven-member Tribal Constitutional Task Force, consisting of tribal members outside the Tribal Council, to conduct this convention for that purpose of hearing proposed amendments and to approve those of which shall be referred to the Secretary of the Interior, and upon receipt of them, it shall be the duty of the Secretary of the Interior to set an election as described in Section 1 above.

If no action is taken by the Tribal Council within the specified ninety (90) days, the Court will revisit the questions concerning Rosebud Sioux Tribal Ordinance #86-10 and issue its own final order.

IT IS SO ORDERED.

FOR THE COURT



Frank Pommersheim

Associate Justice

Dated this 5 day of February, 2015.