

ROSEBUD SIOUX SUPREME COURT)
 ROSEBUD SIOUX RESERVATION) SS
 ROSEBUD, SOUTH DAKOTA)
 FILED 2007 AUG 17 PM 12:06

CA 2006-13

[Signature]

SINTE GLESKA UNIVERSITY
 LIONEL BORDEAUX, AND OTHER
 INTERESTED PARTIES,
 Plaintiff(s)/Appellant(s)

NOTICE OF ENTRY
 OF ORDER

ROSEBUD EDUCATIONAL SOCIETY,
 Defendant(s)/Appellee(s)

TO: THE ABOVE-NAMED PARTIES

Please take notice that on the 15th day of August, 2007, the Honorable Chief Justice FRANK POMMERSHIEM presiding, The Court entered a MEMORANDUM OPINION AND 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 17th day of August, 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:

Terry L. Pechota, Attorney At Law, 1617 Sheridan Drive, Rapid City, SD 57702
 Patrick Duffy, Attorney At Law, Box 8027, Rapid City, SD 57709

Dated this 17th day of August, 2007.

[Signature]
 Clerk of Courts

ROSEBUD SIOUX
2007 AUG 17 AM 11:46

SUPREME COURT
OF THE
ROSEBUD SIOUX TRIBE

FILED
CA # 2006-23

BY: *[Signature]*

MEMORANDUM OPINION
AND ORDER

SINTE GLESKA UNIVERSITY
LIONEL BORDEAUX AND
OTHER INTERESTED PARTIES,
Plaintiffs/Appellants,
vs.
ROSEBUD EDUCATIONAL SOCIETY,
Defendant/Appellee.

Per Curiam (Chief Justice Frank Pommersheim and Associate Justices Patrick Lee and Cheryl
Three Stars Valandra).

I. Introduction

This case began in the Spring of 2004 when Lionel Bordeaux and others,
Plaintiffs/Appellants, brought an action against the Rosebud Educational Society,

Defendant/Appellee, in the trial court seeking to prevent and to enjoin the tearing down of
Hartman Hall. Hartman Hall was built around the early part of the twentieth century by the

Jesuits and St. Francis Catholic Mission to provide housing and offices for the operation and
administration of educational and religious services to members of the Rosebud Sioux Tribe.

Hartman Hall is located on fee land within the exterior boundaries of the Rosebud Sioux
Reservation that was expressly granted by Congress to the Bureau of Catholic Indian Missions

for the provision of religious and educational activities to members of the Rosebud Sioux Tribe.
This conveyance, likely in violation of the Establishment Clause of the First

Amendment, contained a caveat that the Mission would own the land "so long as the same shall
be occupied and used by such Society for educational and missionary work among said Indians."

¹ The First Amendment to the United States Constitution provides:
Congress shall make no law respecting an establishment of religion, or prohibiting the free
exercise thereof; or abridging the freedom of speech, or of the press; or of the right of the people
peaceably to assemble, and to petition the Government for a redress of grievances.

35 Stat. 781-809 (1909). Hartman Hall (and other buildings at St. Francis Mission) hold historic, traditional, and cultural value to the Rosebud Sioux Tribe, its members and other institutions on the Rosebud Sioux Reservation, including Sinte Gleska University.

Special Judge B.J. Jones subsequently issued a temporary restraining and a preliminary injunction against the Rosebud Educational Society enjoining the demolition of Hartman Hall. The core of Judge Jones' orders rested on the failure of the Defendant/Appellee to obtain the necessary Tribal "permit" required of any entity seeking to demolish any building on the Reservation designated for historic preservation. Rosebud Sioux Tribal Code Title 18, Chap. 14, § 18-14-103(3). Hartman Hall is duly listed on the National Register of Historic Places.

What ensued forms the heart of the legal dispute in this case. *Both* sides, individually and jointly, sought for about two years to get the Tribe to carry out its self-imposed administrative responsibility. At times, it appeared that Tribal officials connected with the Tribal Land Office would move forward on this matter, but ultimately the Tribe was unable or unwilling to do so. No permit application form was created, no administrative rules were put in place, and no individual or administrative body was charged with the responsibility of making the permit decision.

Finally in November 2006, Judge Jones vacated the preliminary injunction noting that it would be "futile" to maintain it in light of the Tribe's inability or unwillingness to carry out its administrative responsibilities. Judge Jones, however, expressly noted that he was *not* granting "the Defendant/Appellee any type of court order authorizing it to tear down Hartman Hall

because it is still unclear to this Court whether the provisions of S.D.C.L. 1-19A-11.1 have been

strictly complied with here.”²

A stay was subsequently granted and this appeal followed. Oral argument was heard

(telephonically) on August 6, 2007.

II. Issue

This appeal raises a single issue, namely whether Judge Jones improperly vacated the

preliminary injunction prohibiting the Defendant/Appellee from demolishing Hartman Hall.

III. Discussion

The appropriate standard of review for the granting or dissolving of injunctive relief is

abuse of discretion. *Wigg v. Sioux Falls School District*, 382 F.3d 807 (8th Cir. 2004). “An

abuse of discretion occurs if the district court reaches its conclusion by applying erroneous legal

principles or relying on clearly erroneous factual findings.” *Randolph v. Rogers*, 170 F.3d 850,

856 (8th Cir. 1999).

The essential legal error made by the lower court in dissolving the preliminary injunction

in the matter was its notion that the failure of the Tribe to discharge its administrative

responsibilities under the Tribal Code’s permit requirement set out at §18-14-103(3) made the

maintenance of the preliminary injunction “futile.” A Court whose jurisdiction has been

properly invoked, as in this case,³ cannot decline to exercise its jurisdiction because of some

administrative failure to act by a coordinate branch of government. There is a fundamental duty

of courts to decide cases that come before them regardless of the difficulty or uncertainty of the

² S.D.C.L. § 1-19A-11.1 is a South Dakota statute, which provides that a building listed on the National Register of Historic Places cannot be demolished until the state office of history has been notified and had the chance to comment.

³ The Tribal Court clearly has jurisdiction pursuant to Tribal Code § 4-2-6, which asserts civil jurisdiction over all persons within its territorial boundaries. In addition, tribal jurisdiction is permissible under the standard set forth in *Montana v. United States*, 450 U.S. 544 (1981). See Judge Jones’ extensive analysis in his June 15, 2004 order granting the preliminary injunction in this matter. In this appeal, neither side challenges the tribal court’s jurisdiction.

legal issues presented. *County of Alleghany v. Frank Mashuda Co.*, 360 U.S. 185 (1959). For jurisdictional purposes, the failure to make the required administrative decision, such as the granting or denying of a permit, constitutes sufficient (administrative) action to allow for judicial review of the consequences of the failure to act. *Visage Exp. Inc. v. State Board of Cosmetologists*, 679 A.2d 525 (Md. 1996). This is a basic black letter principle of administrative law. See e.g., Bernard Schwartz, *Administrative Law* (3d ed. 1991) at § 8.34, pp. 544-547. See also *Smith v. Illinois*, 270 U.S. 587 (1926). To rule otherwise would allow administrative inaction to completely defeat the right of the parties to obtain judicial review of administrative

inaction and would also completely circumvent the Tribal Council's *legislative* intent in creating such administrative requirements in the first instance.

There are important Tribal legal issues of first impression raised by this case and they must be decided initially by the Tribal court. These issues include, but are not limited to, what are the legal consequences of the failure to have a permit process in place, what is the appropriate interpretation of the "renovation" formula set out at Tribal Code § 18-14-103(a),⁴ and the "45 day" provision which allows the Tribe to identify alternatives to demolition. Tribal Code § 18-14-103(b). Even the Appellee conceded the necessity and appropriateness of such Tribal Court decisionmaking, when it filed with the trial court its Motion for Permission to Demolish Hartman Hall on June 30, 2006.

⁴ Tribal Code § 18-14-103(3) provides:

- No person shall demolish a building designated for historic preservation without applying for a permit from the Director (or the Land Use and Environment Department).
- (a) If the building has been damaged in excess of 60% of its value, the permit for demolition shall be issued without any preservation conditions;
- (b) In all other cases, the permit shall not be issued for 45 days after the application for demolition, during which time the Director shall make reasonable efforts to identify alternatives to demolition with the goal of maintaining the structure. A lack of private or Tribal funding to pay to preserve the structure will be sufficient to allow demolition.

There is no doubt that much time has been expended in the effort to demolish Hartman

Hall, but the fault, if any, for this excessive delay does not lie with either of the parties or the

court, itself, but elsewhere. The Court is further cognizant of the fact that the

Plaintiffs/Appellants have also pled matters of federal law in their original complaint such as the

National Historic Preservation Act of 1966, 16 U.S.C. §§ 470-470x(c), the Native American

Graves Protection and Repatriation Act, 25 U.S.C. §§ 3000-13, and the National Environment

Protection Act of 1969, 42 U.S.C. §§ 4321 *et seq.* The substantive (and jurisdictional) impact, if

any, of these statutes in this matter remains unexplored and undetermined to date.

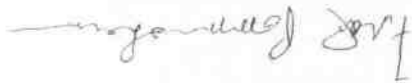
IV. Conclusion

For all the above-stated reasons, the decision to dissolve the preliminary injunction in this

matter is reversed and the case remanded for an immediate trial on the *merits*.

IT IS SO ORDERED.

For the Court:



Frank Pommersheim
Chief Justice

Dated August 15, 2007.

ATTEST:

Chief Clerk of Courts

