

SUPREME COURT  
OF THE  
ROSEBUD SIOUX TRIBE

ROSEBUD SIOUX  
TRIBE COURT

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FILED

SINTE GLESKA UNIVERSITY  
LIONEL BORDEAUX AND  
OTHER INTERESTED PARTIES,  
Plaintiffs/Appellants,

CA # 2006-23

BY: *dm*

vs.

MEMORANDUM OPINION  
AND ORDER

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,<sup>1</sup> 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."

<sup>1</sup> 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.”<sup>2</sup>

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,<sup>3</sup> 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

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<sup>2</sup> 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.

<sup>3</sup> 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),<sup>4</sup> 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.

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<sup>4</sup> 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 (of 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.