

work on site. A checklist of the work that was completed at each dump site was signed by both the Tribe's representative and an employee of First Dakota Enterprises, Inc.

In November, 2005, First Dakota Enterprises, Inc. sub-contracted with Rosebud Motors, LLC to assist with the performance of the solid waste clean up project. First Dakota Enterprises, Inc. also utilized the services of inmates from the Rosebud Sioux Tribal Jail to perform some of the clean up activities.

In a letter dated November 5, 2005 from Russell Eagle Bear, Director of the Tribal Historical Preservation Office (THPO) to Syed Huq, Director of the RST Water and Resources program, Mr. Eagle Bear requested a meeting to discuss a reconnaissance survey of land use development concerning the dump clean up project.

In correspondence dated December 29, 2005, Russell Eagle Bear informed First Dakota Enterprises, Inc. of the enforcement and compliance requirements of Section 106 of the National Historic Preservation Act (NHPA) of 1966 (as amended in 1992). First Dakota Enterprises, Inc. was advised that before the use of heavy equipment in ground disturbance at the landfills is commenced an investigation by an archeologist must be conducted for the presence or non-presence of prehistoric or historic resources.

On January 27, 2006, Steven Sandven, attorney for the Rosebud Sioux Tribe, sent a letter to Archie Baumann, President of the First Dakota Enterprises, Inc. as a second notification of violation of the National Historic Preservation Act. In his letter, Mr. Sandven explained the NHPA Section 106 process as follows:

1. The "responsible agency" (emphasis provided) determines if an undertaking could affect historic properties that are included in the National Register of Historic Places or meet criteria for the National Register. If so, a State Historic Preservation Officer (SHPO) must be consulted with by the "agency" (emphasis provided). The public and other consultants must be involved in this process. If the undertaking has no potential to affect historic properties, no further obligations are required.
2. Historic properties must be identified. If an agency's undertaking could affect historic properties, the agency reviews background information, consults with the state and others and conducts additional studies. If no historic properties are present or affected, the undertaking can proceed.
3. If historic properties are present, an assessment of possible adverse effects must be completed.

4. To resolve adverse effects, consultation of the parties and a memorandum of agreement must be made to avoid, minimize or mitigate adverse effects. The parties could also agree that no measures are possible to avoid, minimize or mitigate the adverse effects and can accept the effects.

Mr. Sandven stated in his letter that the Tribal Historic Preservation Officer (THPO) is the tribal official appointed by the Rosebud Sioux Tribal Council and assumes the responsibilities of the State Historic Preservation Officer (SHPO) for Section 106 compliance purposes. Mr. Sandven further stated that the lack of an assessment as required by Section 106 and the use of heavy equipment in landfills was a violation of federal and tribal laws. He referred to First Dakota Enterprises, Inc. as the "agency" responsible for coordination of NHPA activities and requested compliance by First Dakota Enterprises, Inc. within fourteen (14) days of the letter.

On March 16, 2006 Dana Hanna, Attorney General for the Rosebud Sioux Tribe, requested information from First Dakota Enterprises, Inc. On April 3, 2006, Mr. Hanna wrote a letter to First Dakota Enterprises, Inc. directing that work on the land fill project cease and First Dakota Enterprises, Inc. attend a meeting during the week of April 10 through April 14, 2006.

A meeting was held on April 14, 2006 to discuss Section 106 of the National Historic Preservation Act, sub-contracting, and use of Rosebud Jail inmates and other matters. Archie Baumann of First Dakota Enterprises, Inc. submitted a letter dated April 16, 2006 to Rodney M. Bordeaux, President of the Rosebud Sioux Tribe concerning the April 14 meeting.

On April 18, 2006, Mr. Hanna wrote a letter to First Dakota Enterprises, Inc. stating that issues discussed at the April 14 meeting, including the requirements of the Tribal Historic Preservation Office, would have to be resolved before further work could be done on the project. On June 21, 2006, President Rodney M. Bordeaux sent a letter to First Dakota Enterprises, Inc. allowing completion of the clean up project.

A letter dated September 27, 2006 was sent to First Dakota Enterprises, Inc. by Dana Hanna stating that First Dakota Enterprises, Inc. was not making substantial progress to clean up the project.

On October 24, 2006, the Project Superintendent of First Dakota Enterprises, Inc. sent a letter to Russell Eagle Bear providing notice to the THPO of the intention to use heavy equipment at one of the dump sites.

The work on the thirty (30) land fill sites was completed by December 2, 2006.

In a letter dated December 8, 2006 to Archie Baumann, Dana Hanna informed Mr. Baumann that since First Dakota Enterprises, Inc. did not obtain prior authorization from the

THPO before digging, the contract with the Rosebud Sioux Tribe was terminated and that final payment would be withheld.

On January 22, 2007, the Plaintiff/Appellee RST Revenue Department issued a Show Cause Order contending that First Dakota Enterprises, Inc. committed the following three (3) violations:

First, First Dakota Enterprises, Inc. authorized digging and burial of waste on a number of dump sites on the Rosebud Indian Reservation without receiving prior approval from the Rosebud Sioux Tribe's Historical Preservation Officer as required under Section 106 of CFR, Part 800, concerning protection of historic properties, which is a violation of federal law, made applicable to the Tribe.

Second, First Dakota Enterprises, Inc. breached its contract with the Rosebud Sioux Tribe and violated tribal law by allowing prisoners from the Rosebud Sioux Tribal Jail perform labor that First Dakota Enterprises, Inc. contracted to do.

Third, First Dakota Enterprises, Inc. breached its contract with the Rosebud Sioux Tribe by entering into a sub-contract with Rosebud Motors without notice or approval from the Rosebud Sioux Tribe.

A two-part hearing was held on February 8, 2007 and on April 25, 2007 before Rosebud Sioux Tribal Court Judge Warren Arganbright. The tribal Court issued its Findings of Fact, Conclusions of Law and Order on December 31, 2007 finding that the Defendant/Appellant, First Dakota Enterprises, Inc. failed to comply with applicable laws regarding tribal historic preservation, particularly Tribal Historic Preservation Office requirements and 36 CFR 800, Section 106, despite being advised to do so. The Court ordered that the business license of First Dakota Enterprises, Inc. be revoked.

The Court further determined that the Plaintiff/Appellee, RST Revenue Department failed to meet its burden to prove that the Defendant/Appellant committed the second and third violations. The Plaintiff/Appellee RST Revenue Department did not appeal these findings.

Defendant/Appellant First Dakota Enterprises, Inc. appealed the Trial Court's Order revoking its business license.

II. ISSUE

The only issue before this Court is whether the Appellant, First Dakota Enterprises, Inc. violated a tribal law by failing to comply with the directives of the Tribal Historic Preservation Office (THPO), as required by Section 106 of the National Historic Preservation Act, by failing

to seek prior approval from the THPO before using heavy equipment to clean dump sites on the Rosebud Indian Reservation.

III. DISCUSSION

The Rosebud Sioux Tribe's Revenue Department has the responsibility for regulating the business licensing requirements on the Rosebud Indian Reservation. The Rosebud Sioux Tribal Law and Order Code provides the administrative process to follow when the RST Revenue Department seeks to regulate businesses, including revocation of the business' license. RSTLC Section 16-1-105. The Rosebud Sioux Tribal Court presides over administrative proceedings initiated by the RST Revenue Department. RSTLC Section 16-1-301.

The standard of reviewing an agency (or Court) decision to revoke a license is whether the Court's order to revoke the license was arbitrary, capricious, an abuse of discretion, or otherwise contrary to law. Hubbard v. United States, 496 F.Supp. 2nd 194 (D.D.C. 2007). An Appellate Court cannot substitute its judgment for the administrative decision and should only reverse the decision when the trial court's decision is against the clear weight of evidence or leaves the Appellate Court with a firm and definite conviction that a mistake was made. Matter of Gridley, 345 NW2nd 860 (S.D. 1984).

The Rosebud Sioux Tribal Law and Order Code specifies the conditions to maintain a business license. Section 16-1-206 provides that "each licensee shall comply with all applicable Tribal laws, including but not limited to: tax laws, Indian employment, contract, and preference laws, health and sanitation laws, and consumer protection laws." The section further provides that licensees must comply with any other additional laws that the Rosebud Sioux Tribal Council may enact and that notice of such laws may, but need not, be provided to licensees.

The Appellee, RST Revenue Department sought to revoke the business license of the Appellant, First Dakota Enterprises, Inc. for failing to comply with the requirements of Section 106 of the National Historic Preservation Act, which was made applicable to the Tribal Historic Preservation Office.

The Section 106 process of the National Historic Preservation Act requires federal agencies to consider the effects of their undertakings on historic properties through consultation among agency officials and other parties with an interest in the undertaking on historic properties. The goal of the consultations is to identify historic properties that would potentially be affected by the undertaking, make an assessment of the effects, and seek ways in which to avoid, minimize or mitigate any adverse effects on the historic properties. *30 CFR Part 800.1(a)*.

The agency official has the legal and financial responsibility for Section 106 compliance and has approval authority for any undertaking. The agency official may be a state, local or tribal

government official who has been delegated legal responsibility for compliance with Section 106. *30 CFR 800.2(a)*.

The agency official may develop programmatic agreements to govern actions to be taken when historic properties are discovered during implementation of an undertaking. *30 CFR 800.13(a)*. The official also has the authority to make findings of no adverse effects or develop a process to resolve any adverse effects that an undertaking will have upon historic properties. *Sec. 800.13(a)(2)*.

Section 106 of the National Historic Preservation Act was made applicable to the Rosebud Sioux Tribe by the establishment of a Tribal Historic Preservation Office and appointment of Russell Eagle Bear as the Director (agency official) of the Tribal Historic Preservation Office. The Appellee, RST Revenue contends that a tribal ordinance was enacted by the Rosebud Sioux Tribal Council establishing the office and appointment.

The Appellant, First Dakota Enterprises, Inc. entered into a contract with the Rosebud Sioux Tribe to clean up dump sites on the Rosebud Indian Reservation. To conduct business on the Rosebud Indian Reservation, First Dakota Enterprises, Inc. was required to obtain a business license through the RST Revenue Department. Section 16-1-206 of the Rosebud Sioux Tribal Law and Order Code sets forth conditions for having a business license, including compliance with tribal laws that are not necessarily specified or provided to the licensee.

The Rosebud Sioux Tribal Council incorporated the National Historic Preservation Act (NHPA) as a tribal law by the establishment of a Tribal Historic Preservation Office (THPO) and appointment of a Director to comply with the provisions of the NHPA. It was the responsibility of the THPO Director to ensure that any undertaking by the Appellant, First Dakota Enterprises, Inc. was in compliance with NHPA. Mr. Eagle Bear and the Rosebud Sioux Tribe, through the President and attorneys for the Tribe, notified the Appellant of the law and the process in which to govern actions by the Appellant during implementation of the clean up of dump sites on the Rosebud Reservation.

Despite repeated warnings and requests for the Appellant to comply with the process developed by the THPO which was basically to provide notice to the THPO Director of the Appellant's proposed use of heavy equipment to dig at the sites so that he could hire an archeologist to assess the presence or non-presence of historic properties and any adverse effects of the undertaking, the Appellant proceeded with heavy equipment digging without adequate notice and approval from the THPO Director. While the Appellant may have mailed letters to the THPO Director notifying him of the proposed use of heavy equipment digging, the Appellant did not allow the THPO Director the opportunity to hire an archeologist and obtain an assessment concerning the presence of historic properties.

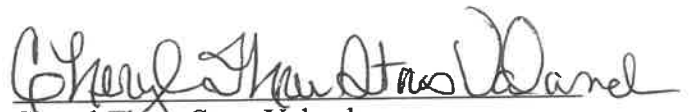
The trial Court's decision to revoke the business license of the Appellant First Dakota Enterprises, Inc. for not complying with the National Historic Preservation Act, which was adopted by the Rosebud Sioux Tribe as tribal law, was not arbitrary, capricious, an abuse of discretion or otherwise contrary to law.

IV. CONCLUSION

Based upon the above stated reasons, the trial Court's decision to revoke the business license of the Appellant, First Dakota Enterprises, Inc. is affirmed.

IT IS SO ORDERED.

For the Court:



Cheryl Three Stars Valandra
Associate Justice

Dated: May 14, 2010