INDIAN LAW AND THE ARCHITECT/ENGINEER

By

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INTRODUCTION

The current expansion of the American economy has made this era one of the most prosperous eras in American history. As businesses and the population have grown, the demand for commercial and residential construction has increased. Many Native American tribes have also benefited from the economic expansion, thanks in part to gambling revenues[1], federal economic assistance[2], and federal legislation serving to empower the tribes.[3] As has occurred in the general economy, the tribes' increased prosperity has resulted in an increased demand for construction and development on tribal land. For instance, the tribes have acknowledged a need to build better tribal housing;[4] the success of tribal gambling operations will likely induce others to build and operate casinos on tribal land; and tribes continue to develop valuable natural resources on their land.[5]

Furthermore, the tribes have begun to influence development and construction *beyond* tribal boundaries, the result of relatively recent federal legislation, a shift in federal policy implementing older legislation, and a growing appreciation for "cultural resources" at the state and federal levels.

The increased demand for construction has necessarily increased demand for architectural and engineering design professionals. Moreover, few Native American tribes have in-house design expertise, and there are few Native American design firms. Therefore, the tribes have sought the assistance of non-tribal design firms on many of their projects. Also, as a result of the tribes' expanded influence over non-tribal development, design firms may have to work with Native Americans more frequently on non-tribal projects. What may not at first appear to involve issues relevant to a nearby Indian tribe may well require the design professional to work with a tribal organization before a project may go forward or while the project work is underway.

Working with the tribes presents several unique challenges and issues for non-tribal design professionals and their counsel. Those challenges are the product of history, differences in culture and tradition, and evolving federal laws and policies. This paper addresses those challenges. In one case, ignorance of an applicable statute could subject the design professional to criminal prosecution. In all cases, ignorance of tribal history and culture could subject the

[1] Tribal gambling revenue was estimated to be $7 billion annually in 1997. New York Times, Sunday September 7, 1997

[2] The Indian Financing Act of 1974 established a revolving loan fund with guarantees and loan insurance for private lenders to foster Indian economic development. 25 U.S.C. sec. 1461-1469.

[3] See, e.g. National Historic Preservation Act, 16 U.S.C. 470-1 (6).

[4] New York Times, Sunday February 13, 2000.

[5] In 1997 Washington State's Native American Tribes contributed nearly $1 billion annually to the state's economy and employed over 14,000 residents. "Economic Contributions of Indian Tribes to the Economy of Washington State," Report, Governor's Office of Indian Affairs.

design professional to embarrassment, confrontation, and delays. This presentation will address the challenges that universally present themselves to design professionals on projects involving Native American tribes. This paper is divided into three discussions: (I) Indian law basics; (II) four significant federal statutes; and (III) state law issues.

INDIAN LAW BASICS

Historical Summary

We start with the obvious: Native Americans occupied North America before Europeans settled here. These first inhabitants lived throughout the continent in groups of various sizes. Some groups confederated with others, some conquered others, and some enslaved others.[6] Each had a distinct heritage, culture, and religion that passed from one generation to the next; and each lived in harmony with the land.

Although Holland and Russia claimed sections of North America,[7] the British, French, and Spanish wielded influence over most of the continent.[8] Each government encountered and developed relationships with the Native American tribes. British colonial governors treated the tribes as sovereign entities; to advance British commercial interests in the New World, the governors entered into treaties with the tribes.[9] The French allied themselves with the Indians in an effort to thwart the British imperial designs.[10] The Spanish, however, neither respected nor tolerated the Native Americans' ways. Spain, while intellectually recognizing the Indian people's inherent rights, saw its conquistadors and government administrators demand allegiance to the Christian God and the Pope under threat of death.[11]

When the United States was formed, the federal government adopted the British model of relations with Native Americans, and ostensibly treated Native Americans as sovereigns. This is shown in the Constitution itself, granting Congress the power to "regulate Commerce with the Indian Tribes," and the President power to make treaties with the tribes upon consent of the Senate.[12] Treaties with Indian tribes are accorded the same dignity as that given to treaties with foreign nations.[13]

Traditionally, sovereignty includes dominion over land, control over the attributes of culture, and religious freedom. However, as the United States aged and expanded, the federal government found that it was increasingly inconvenient for Native Americans to exercise those attributes of sovereignty.[14] Consequently, the government took the Native Americans' land, forbade them to speak their own languages, and punished them for practicing their religions.[15] In the early-1800s, the federal government asserted it had entered a "trust relationship" with the Native Americans. Chief Justice John Marshall recognized this in Cherokee Nation v. State of

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[6] See for example, W. SUTTLES, HANDBOOK OF NORTH AMERICAN INDIANS, Vol. 7:465 (1990).
[7] C.A. SCHWANTES, THE PACIFIC NORTHWEST 42-49 (Rev. and enl. Ed. 1996).
[8] GETCHES, WILKINSON, WILLIAMS, FEDERAL INDIAN LAW 61 (3rd ed. 1993).
[9] GETCHES, et al, *supra* at 58.
[10] GETCHES, et al, *supra* at 61.
[11] F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 50-52 (1982 ed.), GETCHES, et al, *supra* at 48, 49.
[12] U.S. Const. Art. 1, sec. 8, cl. 3; Art. II, sec. 2, cl. 2.
[13] COHEN, *supra*, at 63, citing United States v. 43 Gallons of Whiskey, 93 U.S. 188 (1876).
[14] H. ZINN, A PEOPLE'S HISTORY OF THE UNITED STATES 86, 87 (20th Anniversary ed. 1999).
[15] COHEN, *supra* at 139, 141. See, H. H. JACKSON, A CENTURY OF DISHONOR (1885).

Georgia,[16] where he declared that tribes were "domestic dependent nations . . . in a state of pupilage; their relation to the United States resembles that of a ward to his guardian."[17] This remains the law.

Having established the "ward-like" status of Native Americans, the federal government's policy toward Native Americans has shifted over time between two essentially opposing views.[18] One view holds that the tribes are enduring entities that require a geographic base, which the federal government should preserve and protect for the tribes' exclusive use. The other view de-emphasizes the significance of geography, and asserts that Native Americans should assimilate into our plural society and be subject to the same rights and obligations as all other members of society.[19]

The history of the legislation, administrative rule making, and the reported decisions dealing with the Indian people shows a shift back and forth between these opposing views of the most appropriate policy toward the Native American people. Felix Cohen, who has been described as the Blackstone of American Indian Law,[20] describes it as an inconstant flow shifting between "idealistic" and "less altruistic."[21] For now, the Clinton Administration has declared that relations with the tribes will be handled on a "government to government" basis.[22] Regardless of the political landscape, one can safely assume which of these positions a Native American representative will advocate.

When working with an Indian tribe, one should first learn about the origin of the tribe and the history of the ownership of its land. The federal government recognized most tribes by treaty, and Congress often ratified those treaties. Under the Supremacy Clause, treaties are superior to any conflicting state law or constitutional provision.[23] More than once, the federal government unilaterally abrogated those treaties[24] and replaced them with new treaties, usually when it coveted the Indian land and resources.[25] Notably, the general rule is that if a tribe did not explicitly relinquish its rights when negotiating a treaty, the tribe retains those rights.[26] For example, if a tribe relinquished its rights to own and exclusively access a large tract of land, the tribe did not necessarily relinquish the right to protect and use its spiritual places or to protect the burial places of its ancestors within that land unless it explicitly said so at treaty time.

In 1871, Congress passed a statute providing that no tribe thereafter was to be recognized as an independent nation with which the United States could make treaties.[27] In 1887, Congress passed the General Allotment Act, which provided for the forced transfer of Indian land allotments to individual Indian tribal members, the sale of the "unalloted" or "surplus" land to the public, and ultimately the dissolution of tribal government and Indian reservations.[28] The

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[16] 30 U.S. (5 Pet.) 1 (1831).
[17] *Id.* at 17.
[18] GETCHES, et al, *supra*, at 167-283.
[19] W. C. CANBY, Jr., AMERICAN INDIAN LAW 10 (3RD Ed. 1998).
[20] COHEN, *supra*, at viii.
[21] COHEN, *supra*, at 49.
[22] PRESIDENTIAL MEMORANDUM of April 29, 1994, 3 C.F.R., 1994 Comp., p. 1007.
[23] U.S. Const., Art. VI, cl.2, COHEN, *supra* at 62.
[24] Lone Wolf v. Hitchcock, 187 U.S. 553 (1903).
[25] COHEN, *supra* at 66.
[26] Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978).
[27] 25 U.S.C. sec. 71.
[28] General Allotment Act of 1887, 24 Stat. 388.

allotment policy was a systematic attempt to eradicate Indian heritage and tribalism.[29] Some tribes resisted the policy of surveying their aboriginal territories into parcels and taking personal ownership of the land.[30]

The primary effect of this legislation was to reduce Indian land holdings from 156 million acres in 1881 to 48 million acres in 1934.[31] The Allotment policy proved to be a disaster for Native Americans, and Congress responded in 1934 with enactment of the Indian Reorganization Act (IRA).[32] With the IRA, Congress sought to encourage economic development, self-determination, cultural plurality, and a revival of tribalism.[33] Then shifting back again, in 1953, Congress adopted a policy chillingly known as "termination," its purpose being to assimilate the Indians into the non-Indian society.[34] Pursuant to this policy, several tribes were "terminated" by statute.

In some cases, the rights and obligations of parties doing business with an Indian tribe are affected by the tribe's historical relation to the State in which the tribe's land is located. Also, the legislation enabling the formation of the State and its admission to the Union sometimes dictates the status of tribal rights. *See e.g*, Three Affiliated Tribes of Fort Berthold Reservation v. Wold Engineering.[35]

In Three Affiliated Tribes of Fort Berthold Reservation v. Wold Engineering, a tribe sued an engineering firm in North Dakota state court alleging professional negligence against the firm, which had designed and built a water supply system wholly within the reservation. The tribe filed its complaint in state court because the tribal code at the time did not grant the tribal court jurisdiction over claims against non-Indians. The trial court granted the engineer's motion to dismiss, holding that the state court did not have jurisdiction over a project that arose in Indian country.[36] The North Dakota Supreme Court affirmed. Perhaps saving the engineer from his own too clever lawyer---because by this time the tribe had amended its tribal code to grant the tribal court jurisdiction over such claims---the United States Supreme Court reversed, in a decision that seeks to find a sense of fairness in the historical relation of the tribe to the State.

Practical Considerations

In a typical project setting, there are rarely any questions about who is the owner, how decisions are made, or how much time is necessary to complete a particular phase of the work. When working in Indian country, the design professional should consider differing decision making approaches. The designer should ensure that the person with whom he or she is

[29] COHEN, *supra*, at 143.
[30] MOURNING DOVE, A SALISHAN AUTOBIOGRAPHY 182-184 (J. Miller ed. 1990).
[31] COHEN, *supra* at 138.
[32] 25 U.S.C. sec.460, et seq.
[33] COHEN, *supra* at 147.
[34] H. Con. Res. 108, 83rd Cong., 1st Sess., 67 Stat. B132 (1953)
[35] 467 U.S. 138 (1984).
[36] Indian country is defined in 18 U.S.C. sec. 1151: the term "Indian country", as used in this chapter, means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

negotiating has actual authority to contract for services. The designer should be aware of the potential that a change in the representatives governing the business affairs of the tribe may impact the project.[37] In addition, the process by which the tribe makes decisions may be substantially more time consuming than would be expected for a similar project outside Indian country.

Many times, tribes engaging in a development project will form an entity to complete the work. The Indian Reorganization Act authorized Indian tribes to organize constitutional and corporate entities.[38] These entities are subject to legislation and the regulations of the Secretary of the Interior.[39] It may be difficult to distinguish the entity from the tribe. Most courts that have considered the issue have recognized the distinctness of these two entities.[40]

Although it is usually foolhardy to generalize, many Indian tribes govern by consensus.[41] Often a business council headed by a chairperson may manage the day-to-day business of the tribe, with advice from a cultural committee. But do not be lulled by such descriptive terms into believing that business with an Indian tribe is business as usual. The decision making process is likely very different. One knowledgeable person described it to me like this:

> The white man thinks like a road with gates. You open the gate, enter, close the gate and walk down the road to the next gate. The Indian thinks like a tree.

Try not to analyze this analogy literally. One consequence of this differing decision making process should be apparent. It takes substantially less time to open and shut a gate than it does to grow a tree.

Jurisdiction

Jurisdiction is the power to enter enforceable judgments in disputes. To understand fully the jurisprudence of Indian country jurisdiction, one must study the evolution of the power accorded to the tribes, the states, and the federal government. That analysis is too complex for the purposes of this paper.[42] As discussed below, the analysis of jurisdiction in the field of Indian law includes an often confusing and sometimes seemingly inconsistent emphasis on the role of place. Principles of sovereign immunity, comity, and exhaustion impact the outcome. The application of the full faith and credit clause of the Constitution illustrates the unique treatment accorded the tribes.

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[37] In Sokaogon Gaming Enterprise Corp. v. Tushie-Montgomery Associates, Inc., 86 F.3d 656 (7th Cir. 1996), new tribal leadership sued the architect for a refund of fees already earned and paid.

[38] 25 U.S.C. sec. 476, 477.

[39] "Economic enterprise" means any Indian-owned (as defined by the Secretary of the Interior) commercial, industrial, or business activity established or organized for the purpose of profit: Provided, that such Indian ownership shall constitute not less than 51 per centum of the enterprise. 25 U.S.C. sec.1452.

[40] Ramey Const. Co., Inc. v. The Apache Tribe of the Mescalero Reservation, 673 F.2d 315 (10th Cir. 1982).

[41] For an enlightening discussion of decision making in the Navajo Nation, see, Lieder, *Navajo Dispute Resolution and Promissory Obligation: Continuity and Change in the Largest Native American Nation*, 18 AM. INDIAN L. REV. 1 (1993).

[42] For an excellent summary of the evolution of the jurisdiction of these three governing entities see CANBY, *supra*, at 111-209.

The Constitution requires each state to give full faith and credit to the judgments of other states, which by definition does not include the tribes.[43] Consequently, other than Indian child custody proceedings, which is the subject of specific legislation, the judgments of tribal courts are not entitled to full faith and credit in state court proceedings.[44] Nevertheless, some states by statute or rule recognize tribal judgments.[45]

Federal Court Jurisdiction

The jurisdiction of federal courts is established by statute. For purposes of federal diversity jurisdiction, Indians are citizens of the state in which they reside. In 1924, Congress declared that all Indians born in the United States are United States citizens.[46] Therefore, under the Fourteenth Amendment, Indians are citizens of the States in which they reside.

The U.S. District Court has jurisdiction over suits brought by Indian tribes when the "matter in controversy arises under the Constitution, law or treaties of the United States."[47] Courts have applied the statutes narrowly to limit the opportunity to litigate negligent design claims in federal court. In a typical suit against a design professional arising out of the construction of a building in Indian country, the federal court will not have jurisdiction. Gila River Indian Community v. Henningson, Durham & Richardson, et al. [48]

In Gila River, the tribe sued an architectural firm and a building contractor for damages arising out of the construction of a youth center on the Gila River Indian Reservation. The complaint alleged that the youth center began to break up and come apart to the point that the tribe was forced to abandon the building. The alleged causes of the youth center's defects were: (1) the architect's negligent design, its failure to specify the proper manner of, and materials to be used in the construction, and its inadequate supervision and inspection during construction; and (2) the negligence of the contractor in construction of the building. The district court granted a motion to dismiss for lack of jurisdiction and the Court of Appeals affirmed.

The Court held that the dispute was an ordinary claim for breach of contract that arose under state law, and the claims did not impact the tribe's possessory right to the land or any right under a federal treaty or statute. The Court noted that the tribe did not assert the contract was governed by the requirements of 25 U.S.C. sec. 81.[49] That statute, which is discussed later, always will be in issue in contracts that are "relative" to Indian land.

State Court Jurisdiction

The general rule is that a state court does not have jurisdiction over a claim asserted by a non-Indian against an Indian if the claim arose in Indian country. In Williams v Lee, the Supreme Court unanimously ruled that state courts have no jurisdiction over civil claims involving an Indian for a transaction that arose on the Navajo reservation.[50] The general rule is subject to exceptions discussed below.

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[43] U.S. Const., Art. IV, sec.1.
[44] See, 25 U.S.C. sec.1911(d).
[45] CANBY, *supra*, at 212, 213.
[46] Now codified at 8 U.S.C. sec. 1401.
[47] 28 U.S.C. sec. 1362.
[48] 626 F.2d 708 (9th Cir. 1980).
[49] 626 F.2d at 714, n. 7.
[50] 358 U.S. 217 (1959).

Congressional Exception: Public Law 280

In 1953, Congress enacted Public Law 280, which expressly allowed five states to assert jurisdiction over claims in Indian country: California, Minnesota (except the Red Lake Reservation), Nebraska, Oregon (except the Warm Springs Reservation), and Wisconsin (except the Menominee Reservation). In 1958, Congress included Alaska (except the Annette Islands).[51] In addition, the statute granted all other states the option to exercise such jurisdiction if they so chose. State and tribal governments criticized Public Law 280, and as a result of amendments to the Indian Civil Rights Act of 1968, no state may assume jurisdiction without tribal consent.[52] The following states have totally or partially assumed jurisdiction under Public Law 280: Arizona, Florida, Idaho, Iowa, Montana, Nevada, North Dakota, Utah, and Washington.[53] Counsel should examine their own state's legislation to determine the extent to which their state has acquired jurisdiction over civil claims that involve an Indian party and arise in Indian country.

Sovereign Immunity

Even if a state has asserted jurisdiction over claims involving an Indian that arose in Indian country, Indian tribes have sovereign immunity that will bar suit against the tribe in state court. Furthermore, as discussed below, it appears that tribal immunity extends to off-reservation commercial activities.[54]

In Kiowa Tribe, a tribal entity known as the Kiowa Industrial Development Commission agreed to buy stock in a business venture. The chairman of the tribe's business committee signed a promissory note, which required that payment be made in Oklahoma City, off the reservation. The note contained a paragraph entitled "Waivers and Governing Law" that stated, "Nothing in this Note subjects or limits the sovereign rights of the Kiowa Tribe of Oklahoma."

The tribe defaulted on the note, and the payee sued on the note in Oklahoma state court. The state courts rejected the tribe's claim of sovereign immunity for what appeared to be off-reservation commercial activity. The United States Supreme Court reversed, holding that an Indian tribe is subject to suit only if Congress has authorized the suit, or the tribe has waived its immunity.

Waiver of Sovereign Immunity

Although the Supreme Court has not declared the manner in which tribes must waive their sovereign immunity, the Court has stated that a waiver "cannot be implied but must be unequivocally expressed."[55] Nevertheless, most courts have held that a tribe may waive its immunity by agreeing to submit all disputes to binding arbitration.[56]

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[51] 28 U.S.C. sec. 1360.
[52] CANBY, *supra* at 217.
[53] *Id.*, at 234-235.
[54] Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc., 523 U.S. 751 (1998).
[55] Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978).
[56] Sokaogon Gaming Enterprise Corp. v. Tushie-Montgomery Associates, Inc., 86 F.3d 656 (7th Cir. 1996).

In Sokaogon Gaming, an Indian tribe and its gaming subsidiary sought to recover fees paid to an architect for services in connection with a casino that the tribe wanted to have built. The owner/architect contract required the parties to arbitrate all disputes arising out of or related to the contract, and provided for entry of a judgment upon the arbitration award in any court having jurisdiction.[57] After the architect had performed substantial services and received payments totaling $150,000, new tribal leadership repudiated the contract.

The architect sought arbitration, the tribe failed to participate in the arbitration, the arbitrators awarded the architect more than $500,000, and the architect sought to enter a judgment on the award in state court. The tribe sued in United States District Court seeking, among other relief, a declaration that (1) the contract was void because it had not been approved by the Bureau of Indian Affairs, and (2) the tribe had not waived its sovereign immunity. The district court granted partial summary judgment declaring that the tribe had not waived its sovereign immunity; the Court of Appeals reversed.

The Court held that the agreement to arbitrate need not have more explicitly waived the tribe's sovereign immunity. To require the use of words like "waiver of sovereign immunity" would be paternalistic and condescending to the tribe, which must have understood that by agreeing to entry of a judgment in court, they were relinquishing their immunity to such proceedings.[58]

An agreement to arbitrate was held to be a waiver of the tribe's sovereign immunity in Native Village of Eyak v. GC Contractors[59] and Rosebud Sioux Tribe v. Val-U Construction Co..[60] However, the Supreme Court of South Dakota held that an agreement to arbitrate was not an effective waiver of the tribe's sovereign immunity in Calvello v. Yankton Sioux Tribe.[61] If the contract is "relative to their lands," a tribal waiver of immunity requires approval of the Secretary of the Interior.[62]

Tribal Court Jurisdiction

The limit of tribal court jurisdiction is probably the most troublesome issue facing the design professional working in Indian country. The legal landscape is changing, and as the tribes become more commercially attentive and politically empowered, a growing assertion of tribal court jurisdiction should be expected. Rightly or wrongly, the non-Indian design professional might fear that exercise of power, and therefore attempt to avoid litigation with Indians in tribal court. In the context of the appearance of growing power, two recent Supreme Court decisions define the limit of tribal court jurisdiction over non-Indians.

But first, be aware that each tribal court operates under a tribal constitution and code of laws; each is a creation of the tribal government, not of the federal government.[63] Today, more than 550 federally recognized tribal governments have some system of civil dispute resolution.[64]

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[57] The arbitration clause appears to match the American Institute of Architects B 141 standard form language.
[58] *Id.*, at 659.
[59] 658 P.2d 756 (Alaska 1983).
[60] 50 F.3d 560 (8th Cir. 1995).
[61] 584 N.W. 2d 108 (S. Dakota 1998).
[62] 18 U.S.C. sec. 81, discussed *infra*, COHEN, *supra*, at 325.
[63] McCarthy, *Native Justice: A Look at Tribal Court Jurisdiction in Washington State*, WASH. ST. BAR NEWS, August 1999.
[64] See 61 Fed. Reg. 58211-16 (1996) (listing 557 federally recognized tribes).

In all cases, the tribes are evolving societies, and as they have increasingly assumed control over their own affairs, their governments have struggled to formulate rules governing their commercial activities.[65] Usually they have traditional means of resolving disputes and customs concerning promissory obligations.[66] Most tribal codes authorize the tribal court to consider tribal culture and tradition when deciding cases.[67] This may be accomplished through testimony of tribal elders and historians, or by reference to previous decisions of the court. Yet, prior decisions of a particular tribal court may not be readily accessible outside Indian country. The *Indian Law Reporter* has published federal and state Indian law cases since 1974, and began including selected tribal court opinions only in 1983.

Still, the tension between the competing paradigms of the relation between the Indian nations and the rest of American society is revealed in two recent Supreme Court decisions. In Iowa Mut. Ins. Co. v LaPlante, the Supreme Court stayed its diversity jurisdiction to permit a tribal court to determine its own jurisdiction over litigation then pending in tribal court.[68] Returning to a traditional notion of sovereignty, the Court's approach explicitly recognizes a fundamental role of tribal dominion over land.

In LaPlante, a ranch hand was injured while employed on a ranch owned by Crow Indians and located within the Crow reservation. He sued his employer and the employer's general liability insurer in tribal court. In Montana, injured persons may bring a direct action against the tortfeasor's liability insurer for bad faith failure to settle.[69] Seeking refuge from the Indian attack like settlers huddling in a fort on the Bozeman Trail, the insurer filed a diversity suit in U. S. District Court, and prayed for a declaration of no coverage. Its prayers went unanswered, its complaint was dismissed, and the Supreme Court affirmed. Justice Marshall's opinion required the insurer to exhaust the tribal court process before seeking federal relief. The language from his decision reflected the tribal sovereignty model. The Court said:

> Tribal authority over the activities of non-Indians on reservation lands is an important part of tribal sovereignty…. Civil jurisdiction over such activities *presumptively* lies in the tribal courts unless affirmatively limited by a specific treaty provision or federal statute.[70]

One decade later in Strate v. A-1 Contractors, the Supreme Court eviscerated the presumption of tribal court jurisdiction over claims involving non-Indians that arise in Indian country.[71] The Court's approach showed yet another retreat from the traditional geocentric attribute of sovereignty.

Strate arose out of a car crash on a federally funded North Dakota state highway on a right-of-way that ran through an Indian reservation. Neither driver was an Indian, but the descendants of one driver were Indian. The defendant was employed by a non-Indian contractor with business on the reservation, but the driver was apparently not on company business at the

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[65] Leider, *supra* at 2.
[66] *Id.*
[67] McCarthy, *supra* at 39.
[68] 480 U.S. 9 (1987).
[69] Mont. Stat. 33-18-242
[70] *Id.*, at 18, emphasis added. The Court specifically rejected claims of Tribal court bias and incompetence.
[71] 520 U.S. 438 (1997).

time of the accident. Plaintiff sued the contracting company in tribal court. The tribal court asserted jurisdiction, and that decision was upheld by the Northern Plains Intertribal Court of Appeals. The defendants then commenced an action in federal court, seeking an injunction barring the tribal court from proceeding. The district court dismissed for lack of jurisdiction. The Eighth Circuit Court of Appeals reversed, and held that the tribal court had no jurisdiction. The Supreme Court agreed with the Eighth Circuit.

The Court held that jurisdiction over a non-Indian's conduct exists only in limited circumstances. Absent a statute or treaty, tribal courts do not have civil jurisdiction over non-Indians. Exceptions to this general rule exist where: (1) a non-Indian enters a consensual relationship with the tribe or its members, or (2) non-member conduct threatens or directly affects the tribe's political integrity, economic security, health, or welfare.[72]

The Court's apparent retreat might not help the design professional who is seeking to avoid tribal court. It is hard to see how entry into a contractual relationship is anything other than a consensual relation. In any event, an exercise of tribal court jurisdiction in such a case seems just. If you do business in Indian country, it is fair that you be subject to Indian country rules. Afterall, the Indian Civil Rights Act, which brought the Bill of Rights to Indian country, including the right to equal protection and due process of law, gives all persons in tribal court protection against unfair treatment in the tribal courts.[73]

Contracts "relative to their lands": 25 U.S.C. sec. 81

In 1872 Congress enacted legislation intended to protect the Indian tribes from improvident and unconscionable contracts.[74] 25 U.S.C sec. 81 imposes several requirements on any transaction made with "Indians relative to their lands." If the parties fail to fulfill any one of those requirements, the entire transaction will be declared null and void, and all money paid may be recovered by *qui tam* suit. The statute requires that all such contracts be executed and approved as follows:

1. It shall be in writing, and a duplicate of it delivered to each party;
2. It shall bear the approval of the Secretary of the Interior and the Commissioner of Indian Affairs endorsed on it;
3. It shall contain the names of all parties in interest, their residence, and occupations; it must specify the tribal authorities, the scope of their authority, and the reason for exercising that authority;
4. It shall state the time and place where made, the particular purpose, and the special thing or things to be done; and if money is paid, the basis of the claim, the source of the money, the disposition of the money, the amount, or rate of the fee; and it must recite specifically any contingent matter or condition; and
5. It shall have a fixed limited time to run, which shall be distinctly stated.

Aside from the obvious technical requirements of the statute, two key issues create problems for design professionals and their counsel: First, whether an Indian tribe is one of the contracting parties; and second, whether the contract is "relative to Indian lands."

[72] *Id.*, at 446, citing Montana v United States, 450 U.S. 544 (1981).
[73] 25 U.S.C. sec. 1302. Not all of the Bill of Rights extend to the tribes. COHEN, *supra* at 203.
[74] In re Sanborn, 148 U.S. 222 (1893).

The statute only applies to contracts with Indian tribes; it does not govern contracts with businesses that are only incidentally owned by Indian individuals or tribes.[75] The analysis used to determine whether the statute applies to the transaction is apparently similar to the analysis used to determine whether the entity can properly claim sovereign immunity.[76]

The statute applies only to contracts that are "relative to Indian lands." At first blush, one might conclude that a contract to design and construct a building on Indian land is "relative to Indian land." Although there is apparently no case on point, the reported decisions suggest that the statute would not apply to a typical building design contract, whereas it might apply to any other type of land development contract. Three decisions and Mr. Stock's Western Saga demonstrate the frontiers of the issue.

In Gila River Indian Community v. Henningson, Durham & Richardson, et al, supra, the tribe and the engineer executed what appears to have been a simple and standard form building design contract. The contract was not approved by the Secretary of Interior as the statute requires. However, in the ensuing litigation, the tribe did not seek to void the contract on that basis, and the court did not have to address that issue. Instead, alleging that the district court did not have subject matter jurisdiction, the tribe did argue that the dispute concerned its land. The district court granted the tribe's motion. While affirming the court's order granting the motion to dismiss for lack of jurisdiction, the Ninth Circuit Court of Appeals rejected the tribe's argument that its land was at issue. The Court declared that the dispute concerned a building, not the land on which it stood.

The Seventh Circuit Court of Appeals also narrowly construed the scope of the term "relative to Indian lands" in Altheimer & Gray v. Sioux Manufacturing Corp.[77] In this case, a law firm sued a tribal corporation for legal fees. The law firm incurred the fees while advising a non-Indian company that had contracted with a tribal corporation to sell the tribe expertise and technology, and to assist the tribe in developing a manufacturing facility on Indian land. The contract required payment of the legal fees in the event the deal did not close, and the deal failed to close. In defense of the law firm's claim, the tribe argued that the contract was null and void, because it did not comply with the requirements of 25 U.S.C. sec. 81. The district court agreed with the tribe, and the Court of Appeals reversed.

In ruling that the contract at issue was not "relative to Indian lands," the Court stated that the following factors must be taken into account:

1. Does the contract relate to the management of a facility to be located on Indian land?
2. If so, does the non-Indian party have the exclusive right to operate the facility?
3. Are Indians forbidden from encumbering the property?
4. Does the operation of the facility depend on the Indian tribe's sovereign status?

These factors suggest that the dispositive issue is whether the design firm obtains any control over the facility such that the income or benefits otherwise accruing to the tribe will be paid to the non-Indian. That circumstance does not exist in the typical design or design/build contract.

In dealing with this issue, be aware that an older case adopts a more general construction of the terms "relative to Indian lands." In Green v. Menominee Tribe, the Supreme Court, with

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[75] Vetter, *Doing Business With Indians and the Three "S"es: Secretarial Approval, Sovereign Immunity, and Subject Matter Jurisdiction*, 36 ARIZ. L. REV. 169 (1994).
[76] *Id.*, at 170.
[77] 983 F. 2d 803 (7th Cir. 1993), *cert. denied*, 114 S. Ct. 621 (1993).

no informative analysis, held that the statute applied to a contract to rent logging equipment that tribal members used on tribal land.[78]

Mr. Stock's Western Saga

The following journey through the reported decisions of the Bureau of Indian Affairs, the Colville Tribal Court, United States District Court, and the Ninth Circuit Court of Appeals illustrates how difficult it can be to do business with the tribes.

The Colville Reservation is located in north central Washington State, bounded on three sides by the Columbia and Okanogan rivers.[79] The tribal land consists of mountainous and heavily forested terrain with clear water, verdant valleys, and high elevation meadows. The U.S. government moved several bands of Native Americans to this reservation starting in 1872.[80] Chief Joseph of the Nez Perce was allowed to live out his life there after he surrendered to General Howard, who had chased Chief Joseph and his tribe 1,700 miles across what is now Oregon, Idaho, and Montana.[81] The reservation is rich in natural resources including timber.[82]

James Stock was a successful lumberman from Portland, Oregon. In 1983, the Colville Tribes invited Mr. Stock to the reservation to discuss the construction of a sawmill on tribal lands. Mr. Stock agreed that he would prepare a design and a marketing plan for a tribal sawmill. In January, 1984 Mr. Stock and a representative of the Colville Tribes signed a "Professional Services Agreement." In February 1984, Mr. Stock formed Stock West Corp. to do the job.

The parties agreed that the Colville Tribes would create two governmental corporations to enter into the contracts with Stock West. The Colville Tribes created the Colville Tribal Enterprise Corporation ("CTEC") to conduct business activities for the economic advancement of tribal members, and to build the sawmill. The Colville Indian Precision Pine Company ("CIPP"), was organized to operate the sawmill. On paper, Stock West was empowered to approve three members of CIPP's five member board of directors, and Mr. Stock was made a director and the President of CIPP.

Mr. Stock's attorneys in Bend, Oregon advised him to obtain Secretary of Interior approval of the contracts pursuant to 25 U.S.C. sec. 81. The tribe appointed its tribal attorney, Michael Taylor, as corporate counsel to CTEC and CIPP. Both sets of attorneys submitted the contracts to the Bureau of Indian Affairs (BIA) for approval. However, the BIA's reviewing official determined that departmental approval was not required under 25 U.S.C. sec. 81, because the contracts were with a corporate entity and not the tribe. Believing that the BIA official's decision sufficed, Mr. Stock charged ahead.

An Oregon bank agreed to finance the project with a $6.6 million loan to CTEP and CIPP. In connection with the loan agreement, Mr. Taylor wrote the bank and advised it that BIA approval of the contract was not required, because BIA had said so.

Inevitably, Mr. Stock fell out of favor with the tribe, the tribe terminated the contract, and it sued Mr. Stock in Colville Tribal Court. The tribe sought declaratory relief and recoupment of

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[78] 233 U.S. 558 (1914).
[79] DOVE, *supra*, at xiv.
[80] A. M. JOSEPHY, Jr., THE NEZ PERCE INDIANS AND THE OPENING OF THE NORTHWEST 642 (1997 ed.).
[81] JOSEPHY, *supra*, at 632, 643. Immediately following his surrender in 1877, Chief Joseph and his band were imprisoned in what is now Kansas and Oklahoma until 1885. *Id.*, at 641.
[82] K. FRANTZ, INDIAN RESERVATIONS IN THE UNITED STATES 266 (1999).

all money paid to Stock West Corp. In what should have been no surprise to Mr. Stock, the tribal court declared that the contracts were void because they had not been approved in accordance with 25 U.S.C. sec. 81.

Before the tribal court could rule, Stock West sued the tribe in U.S. District Court to compel arbitration under the contract. The district court dismissed the action out of deference to the Colville Tribal Court's concurrent jurisdiction under the principle of comity, and the Ninth Circuit affirmed.[83]

Thinking that his remedy was against Mr. Taylor, who had (as we now know) wrongly informed the bank that BIA approval was unnecessary, Stock West sued Mr. Taylor for legal malpractice.[84] The district court granted Taylor's motion to dismiss. The court ruled that comity required the federal court to defer to the tribal court until the tribal court remedies (or Mr. Stock's assets) were exhausted, and that Mr. Taylor was protected by the tribe's sovereign immunity. The Ninth Circuit at first reversed both rulings, declaring that there was no reason to require exhaustion, and that the tribe's immunity did not apply to Mr. Taylor.[85] Then, following a re-hearing, en banc, the Court agreed that the district court did not abuse its discretion in abstaining from ruling until the tribal court process was exhausted. However, the Court again ruled that Mr. Taylor was entitled to immunity.

Meanwhile, Mr. Stock, who must have really liked his lawyers, sued the Department of Interior, seeking to compel a retroactive approval of the original contracts. But, alas, he had not appealed the original official's decision to the Interior Board of Indian Appeals, so the district court dismissed the latest action for lack of "prudential standing" (apparently related to the timeliness of the appeal), and for failure to join the tribe as an indispensable party under FRCP 19.[86] Perhaps somewhat sympathetic to the Alice in Wonderland history of the case, the Ninth Circuit reversed, and held that Stock West did have standing to complain about the BIA ruling, and that the tribe was not an indispensable party.

I do not know what happened to Mr. Stock. However, the last time I drove up Highway 97, I saw truckloads of finished lumber stamped with "Precision Pine Co." heading down the road.

[83] Stock West, Inc. v. Confederated Tribes of the Colville Reservation, 873 F.2d 1221 (9th Cir. 1989).
[84] Stock West. Inc. v.Taylor, 737 F. Supp. 601 (D. Ore. 1990).
[85] Stock West v. Taylor, 942 F.2d 655 (9th Cir. 1991).
[86] Stock West v. Lujan, 982 F.2d 1389 (9th Cir. 1993).

FOUR OTHER SIGNIFICANT FEDERAL STATUTES

Every project involving an Indian tribe may implicate several sometimes overlapping federal statutes, several federal agencies charged with administering the statutes, and a whole set of evolving federal regulations that seek to implement the legislative policies reflected in the statutes. A comprehensive discussion of each of these statutes, their respective federal regulations, and practical advice to counsel is far beyond the limits of this presentation. My objective here is simply to alert counsel advising the design professional of the basic scope of the statutes, so that surprises will not ensnare counsel and client in a complex web of trouble. One such surprise could in fact result in criminal liability, with a potential for fines and imprisonment.

The National Environmental Policy Act (NEPA)[87]

In addition to a natural resource management authority, a pollution prevention authority, and a clean water authority, NEPA is a cultural resource management authority.[88] Cultural resources are those parts of the physical environment—natural and built—that have value to a sociocultural group.[89] Indian tribes are clearly one such sociocultural group that claims that there is special value to the physical environment, and that the value transcends the economic value of the land's natural resources.

Like Justice Marshall's characterization of a trustee relationship of the federal government to the tribes, the federal policy adopted in NEPA asserts that the government is a trustee of the environment. Among other goals, NEPA requires the federal government to:

> use all practicable means, consistent with other essential considerations of national policy, to improve and coordinate Federal plans, functions, programs and resources to the end that the Nation may---
> 1) fulfill the responsibilities of each generation as trustee of the environment for succeeding generations;
> 2) assure for all Americans safe, healthful, productive, and esthetically and culturally pleasing surroundings;
> ***
> 4) preserve important historic, cultural, and natural aspects of our national heritage, and maintain, wherever possible, an environment which supports diversity, and variety of individual choice.…[90]

If major federal actions will significantly affect the quality of the human environment, then NEPA requires an analysis of the project's impact. Any land development that receives Federal Agency approval will be subject to NEPA.[91] Furthermore, there are other kinds of analyses that effectively extend NEPA's scope to *all* federal actions.[92] Projects requiring some

[87] 42 U.S.C. sec. 4321, *et seq.*
[88] T. KING, CULTURAL RESOURCES LAW & PRACTICE: AN INTRODUCTORY GUIDE, 35 (1998).
[89] *Id.*, at 9.
[90] 42 U.S.C. sec. 4331
[91] Davis v. Morton, 469 F. 2d 593 (10th Cir. 1972).
[92] KING, *supra*, at 37.

level of review include "projects approved by permit or other regulatory decision and federally assisted activities."[93] The extent of the review may be a limited "environmental assessment" that concludes with a finding of no significant impact, or a full environmental impact statement may be required.

In either event, in evaluating the severity of the impact, the regulations require the agency to take into account, among other factors:

- Unique characteristics…such as proximity to historic or cultural resources…;
- The degree to which the effects on the quality of the human environment are likely to be highly controversial;
- The degree to which the possible effects … are highly uncertain…; and
- The degree to which the action may adversely affect … objects listed in or eligible for listing in the National Register of Historic Places, or may cause loss or destruction of significant scientific, cultural, or historical resources.…[94]

Without Federal Agency involvement, the extent to which NEPA applies within Indian Country, if at all, is not clear and likely will be determined by reference to the principles of sovereignty.[95] Every project involving an Indian tribe will raise each of these concerns, and if NEPA applies to the project, counsel should become familiar with NEPA practice and procedure.

The National Historic Preservation Act[96]

Congress first enacted the National Historic Preservation Act (NHPA) in 1966 to preserve the nation's historical and cultural foundations. The Act established policy, it created a new agency to implement the policies, and it established the National Trust for Historic Properties and the National Register of Historic Properties. Among its many far-reaching exercises of power, the Act required the federal government to "assist State and local governments, Indian tribes and native Hawaiian organizations and the national Trust for Historic Preservation in the United States to expand and accelerate their historic preservation programs and activities."[97]

To implement these new policies, the Act created the Advisory Council on Historic Preservation.[98] The Advisory Council is the mother of all agencies, composed of the secretaries of the Departments of Interior and Agriculture; four other agency heads, the activities of which affect historic preservation; one governor and one mayor; the president of the National Conference of State Historic Preservation Officers; the chair of the National Trust for Historic Preservation; four experts, including an architect, an historian, and an archeologist; three at-large citizens; and one member of an Indian tribe. Nine members constitute a quorum.

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[93] 40 C.F.R. 1508.18.
[94] KING, *supra*, at 45, citing 40 C.F.R. 1508.27.
[95] *See*, Ex Parte Crow Dog, 109 U.S. 556 (1883), J. MARZUK, J. WREND, C. SMITH, AMERICAN INDIAN LAW DESK BOOK, 276-308 (2ND Ed. 1998).
[96] 16 U.S.C. 470.
[97] 16 U.S.C. 470-1 (6).
[98] 16 U.S.C. 470i.

Section 106 of the Act requires that the head of any agency that licenses or funds an undertaking to take into account the effect of the project on any "district, site, building, structure or object that is included or eligible for inclusion in the National Register."[99] In addition, the agency must give the Advisory Council on Historic Preservation a reasonable opportunity to comment on the undertaking.[100] The regulations implementing Section 106 are found at 36 C.F.R. 800.

In 1992, the Act was amended to provide that properties of traditional religious and cultural importance to an Indian tribe are eligible for inclusion in the National Register.[101] It appears that such properties are not necessarily confined to Indian country. The National Register Criteria for Evaluation are found at 36 C.F.R. 60.4.

The Act defines "Undertaking" as any:

> … project … funded in whole or in part under the direct or indirect jurisdiction of a Federal agency, including---
> (A) those carried out by or on behalf of the agency;
> (B) those carried out with Federal financial assistance;
> (C) those requiring a Federal permit, license, or approval; and
> (D) those subject to State or local regulation administered pursuant to a delegation or approval by a Federal agency.[102]

For example, construction of a sewage treatment plant with federal grants on non-Indian-owned land containing Indian burials would be subject to the Section 106 process.

And what a process it can be. The regulations implementing Section 106 require consultation with the affected Indian tribes, the State Historic Preservation Officer (SHPO), and the Advisory Council. If, after all of this consultation, anyone wants to proceed with the project, the regulations require execution of a Memorandum of Agreement (MOA). The MOA ideally should allocate responsibility for implementing whatever plan is made to accommodate the adverse effects the project will have on the cultural resources at the site.

On February 15, 2000, the National Mining Association sued the Advisory Council on Historic Preservation to contest the latest version of the regulations implementing Section 106.[103] Among other things, the lawsuit alleges that the revised regulations unlawfully:

- exceed the role assigned to the Advisory Council, giving the Council substantive regulatory authority over other federal agencies;
- extend the Section 106 process to properties not formally determined eligible for the National Register of Historic Property; and
- enlarge the role of Indian tribes in the Section 106 process beyond that which Congress intended.

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[99] 16 U.S.C. 470f.
[100] *Id*.
[101] 16 U.S.C. 470a.
[102] 16 U.S.C. 470w(7).
[103] National Mining Assoc. v. Catherine Buford Slater, Chairperson, Advisory Council for Historic Preservation, et al, No. 1:00CV00288 (D. Col.).

The Native American Graves Protection and Repatriation Act

In November 1990, President Bush signed into law the Native American Graves Protection and Repatriation Act (NAGPRA).[104] It is, in essence, civil rights legislation intended to accord to the Native American dead the respect and dignity that most civilized people would grant to their own. Most people are amazed to learn that such a law was necessary. However, many state court decisions inadequately protected Native American graves and grave sites, so Congress acted accordingly.[105] Every design professional working in Indian country should become generally familiar with NAGPRA.

The Act has two essential features: First, it requires that museums inventory their collections of Native American human remains and funerary objects, and return them to their descendants if the descendants can be determined. When the legislation was passed, it was estimated that between 100,000 and 2,000,000 deceased native people had been dug up from their graves for storage or display by government agencies, museums, universities, and tourist attractions.[106] Second, the Act prohibits the intentional excavation of Native American cultural items on federal land without a permit issued under the Archaeological Resources Protection Act, 16 U.S.C. sec. 470. If Native American remains and objects are inadvertently discovered, then the work must cease, reasonable steps to protect the discovery must be taken, and written notice must be given to the Department of Interior and the tribe.

Litigation over NAGPRA's scope is pending in the United States District Court in Portland, Oregon.[107] The litigation arose out of the discovery of a fully intact skeleton on federally owned land along the banks of the Columbia River in Kennewick, Washington. Testing shows that the skeleton, now known as "Kennewick Man", is probably 9,500 to 10,000 years old, and reconstruction of the skull and facial features suggest strongly that Kennewick Man is not related to any North American Indian tribe. Several Washington Indian tribes, working together and citing NAGPRA, claimed they are "culturally affiliated" with Kennewick Man, and demanded repatriation of the remains to them for reburial. Because the U.S. government declared its intent to repatriate the remains to these tribes, several scientists sued for the opportunity to conduct further study on the remains. Unless the litigation is settled, the courts will decide how "cultural affiliation" is determined, and under what circumstances the Indian tribes will be empowered to control this type of cultural resource off the reservation.

NAGPRA and its implementing regulations are one example of how the federal government has empowered the Native American community to exercise influence over events outside Indian country. The design professional generally should be aware of the heightened attention paid to the discovery of Indian remains and artifacts. Such discoveries can occur in any land development activity undertaken in a previously undeveloped area.

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[104] 25 U.S.C sec. 3001-3013.

[105] See, e.g. Newman v. State of Florida, 174 So.2d 479 (1965) (reversing a conviction for removing the skull of a deceased Seminole Indian because the defendant did not act maliciously), Wana the Bear v. Community Construction, Inc., 128 Cal. App. 3d 536 (1982) (court declined to treat a subdivision as a cemetery even though excavation during site grading disinterred over 200 Indian burials).

[106] Trope and Echo-Hawk, *The Native American Graves Protection and Repatriation Act: Background and Legislative History*, 24 ARIZ. ST. L.J. 35, 39.

[107] Bonnichsen, et al v. United States, No. 96-1481 JE (D. Ore.).

The Archaeological Resources Protection Act

Failure to be aware of the heightened scrutiny given to Indian remains and artifacts can result in significant exposure to criminal prosecution. The Archaeological Resources Protection Act (ARPA) establishes a permitting system for activities that will require the excavation and removal of archaeological resources from Indian land and federal lands.[108] "Archaeological resources" are defined more broadly than simply human remains, funerary objects, and objects of sacred or patrimonial significance, which are addressed in NAGPRA. Under ARPA, archaeological resources are:

> any material remains of past human life or activities which are of archaeological interest, as determined under uniform regulations promulgated pursuant to this chapter. Such regulations containing such determination shall include, but not be limited to: pottery, basketry, bottles, weapons, weapon projectiles, tools, structures or portions of structures, pit houses, rock paintings, rock carvings, intaglios, graves, human skeletal materials, or any portion or piece of any of the foregoing items.[109]

The Act imposes civil and criminal penalties on persons who violate its requirements. The criminal penalties do not apply if one picks up an arrowhead lying on the ground.

STATE LAW ISSUES

Because there are over 550 federally recognized Indian tribes, every state certainly has reported decisions that address Indian law issues; counsel should use state resources when necessary. In addition, many states have passed legislation intended to preserve historic properties and to protect Native American grave sites. By way of example, the following discussion briefly summarizes statutes that generally apply in the state of Washington. Counsel should examine their own state's legislation.

State Historical Society—Historic Preservation

In 1983, Washington adopted legislation modeled after the National Historic Preservation Act.[110] Among other objectives, the Act's purpose is to designate, preserve, protect, enhance, and perpetuate sites that reflect outstanding elements of the state's historic, archaeological, architectural, or cultural heritage. The Act established an appointed position entitled the State Historic Preservation Officer. Under the National Historic Preservation Act and Section 106, this state official is referred to by its acronym, "SHPO." The Washington Act created an Advisory Council with a diverse membership, including a Native American. The Advisory Council serves as an advisor to the Department of Community, Trade, and Economic Development. The design professional can expect that the SHPO will always be involved when a project impacts a Native American interest.

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[108] 16 U.S.C. sec. 470aa-470mm.
[109] 16 U.S.C. 470bb(1).
[110] RCW 27.34.

Archaeological Sites and Resources

On all land, public and private, RCW 27.53.060 makes it unlawful for any person to knowingly remove, alter, dig into, or excavate by use of any mechanical, hydraulic, or other means; or to damage, deface, or destroy any historic or prehistoric archaeological resource or site without first obtaining a permit. An archaeological site is any land that contains archaeological objects. Such objects are the physical evidence of an indigenous and subsequent culture, including material remains of past human life, such as monuments, symbols, tools, facilities, and technological by-products.

Indian Graves and Records

Although Washington made removing, injuring or destroying any grave a gross misdemeanor in 1941, the legislation was significantly revised in 1989, and the revised legislation granted significant new rights to the Indian tribes.[111] Indeed, between 1988 and 1990, almost every state in the country amended its laws to include protection for Native American burial sites.[112] The legislation protects Indian grave sites, whether located on public *or* private land. It is a felony to knowingly remove, deface, injure, or destroy any grave of any Native American. Persons who disturb a Native American grave inadvertently by construction or any other activity are required to reinter the remains under the supervision of the appropriate Indian tribe. Perhaps the most significant aspect of the 1989 legislation is its civil provisions.

The Act creates a civil cause of action for injunction, damages, or other appropriate relief by the Indian tribe or its member for violation of the criminal statute. The recoverable damages include actual damages, emotional distress, attorney fees, and punitive damages.[113] And, saving the best for last, the statute provides that this cause of action may be brought in the superior court of the county in which the act occurred *or* in tribal court.

CONCLUSION

The design professional is in a unique position to assist in the efforts of the Native American community to help them build a better life. Although the challenges to maintaining a successful working relationship are great, if the A/E can bring to this work a careful recognition of the state and federal laws that may apply, a sincere respect for the tribal history and culture, and some flexibility, the opportunities are substantial.

Michael J. Bond

[111] RCW 27.44.

[112] Hutt, *Native American Cultural Property Law: Human Rights Legislation*, ARIZ. LAWYER, January 1998.

[113] Washington is one of the very few states that does not allow the recovery of punitive damages, except by contract, statute, or recognized ground in equity. Kammerer v. Western Gear, 96 Wn.2d 416, 635 P.2d 708 (1981).