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Debate, Mitigate or Wait:
Addressing Unexpected Archeological Features
Or Burials On The Construction Site

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I. INTRODUCTION

In the 1990 mafia dark comedy “Goodfellas,” mobsters Jimmy Conway, Henry Hill and Tommy DeVito (Robert De Niro, Ray Liotta and Joe Pesci) bury one of Tommy DeVito’s victims in an unmarked grave in a vacant New Jersey field. Later, when they learn the land is slated for development, they return with shovels under cover of darkness to move the body before it is discovered by construction workers. As they are digging up the remains, Henry gets sick. Tommy DeVito jokes, “Hey Henry, Henry, hurry up will you? My mother’s gonna make some fried peppers and sausage for us. Oh hey, Henry, Henry. Here’s an arm ... Hey, here’s a leg. Here’s a wing.”

But life does not always imitate art. There are no Henry Hills or Tommy DeVitos to sanitize a job site before excavation begins. With ever increasing frequency, modern construction projects are brought to a screeching halt when an unsuspecting contractor discovers human remains. And as is often the case, the remains are not recently buried victims of a mafia hit, but unmarked, ancient burials of Native Americans, Alaskans or Hawaiians, or other historic burial grounds or archeological sites.

So what happens when a contractor unexpectedly discovers either a human burial or an archeological site during a construction project? Should the contractor stop work? Should anyone be notified? What if the owner orders that work proceed? What risks does the contractor face for disturbing the site in the first instance? What if the work continues and the remains or features are destroyed? What if the owner refuses to give an extension of time or to pay for the contractor’s added costs? In short, what are the risks inherent for contractors and owners when there is an inadvertent discovery of bones, relics or other archeological resources? Does a contractor debate, mitigate or wait?

As explained below, there are several statutory schemes that can apply to the inadvertent discovery of human remains or archeological features during a construction project. Thus, the contractor making the potentially gruesome discovery would do well to wait, rather than debate or mitigate. This is true regardless of contractual provisions addressing such a discovery because the laws contain penalties that can expose a contractor or its employees to civil or criminal liability. Responsibility for increased costs or delay attributable to the discovery of remains or resources can be addressed later, through the normal differing site condition/delay provisions.

In Section II, this paper will summarize the operative provisions of several of the Federal laws regarding human remains and burials, and other archeologically significant resources. In Section III, examples of several state regulatory systems are discussed, as well as common law tort liability. In Section IV, several typical construction contract provisions are examined, including the very recent 2007 revision to the AIA 201 General Conditions, which specifically addresses the discovery of human burials. Finally, in Section V, some general recommendations are made concerning what a contractor should do when human remains or archeological features are inadvertently discovered during construction.

II. FEDERAL RESTRICTIONS AND CASES

There are several Federal regulatory schemes that can apply to the inadvertent discovery of burial sites or archeological features during a construction project. These include: the National Historic Preservation Act (“NHPA”); the Historical and Archeological Data Preservation Act (“HADPA”); the Archeological Resources Protection Act (“ARPA”); and, the Native American Graves Protection And Repatriation

Act (“NAGPRA”). These statutes apply primarily, but not exclusively, to Federal projects.

A. The National Historical Preservation Act.

The purpose of the NHPA, 16 U.S.C. § 470(a), is to prevent the destruction of or damage to significant archeological resources during construction by identifying such resources at the project planning phase. The NHPA applies to Federal projects or Federally funded projects. Because the NHPA is addressed at the planning stage, its provisions will frequently have been fulfilled before ground is broken on a project, and therefore it will be of little direct application in the instance of inadvertent discoveries. Nevertheless, as demonstrated below, the NHPA can be used by opponents to challenge a project and can be the basis for injunctive relief that delays or interrupts construction.

The NHPA involves a series of measures designed to encourage the preservation of sites and structures of historic, architectural, or cultural significance. *Pit River Tribe v. United States Forest Service*, 469 F.3d 768, 787 (9th Cir. 2006). It requires a Federal agency to “take into account the effect of [any] undertaking on any district, site, building, structure or object that is included in or eligible for inclusion in the National Register [of Historic Places].” *Id.*; 16 U.S.C. § 470(f). When a project may affect properties of historic value to an Indian tribe on non-Indian lands, the tribe must be afforded an opportunity to participate in the consultation. *Id.*; 36 C.F.R. § 800.1(c)(2)(iii).

Thus, the NHPA is similar to the National Environmental Protection Act (“NEPA”), “except that it requires consideration of historic sites, rather than the environment.” *Pit River Tribe v. United States Forest Service*, 469 F.3d 768, 787 (9th Cir. 2006). The two statutory schemes are “closely related” and both are “stop, look and

listen” provisions. *Apache Survival Coalition v. Unites States*, 21 F.3d 895, 906 (9th Cir. 1994). NHPA and NEPA reviews are to be closely integrated and can be performed at the same time.

The NHPA is implemented through a “section 106 review” process that determines whether there are cultural resources on the project site:

The head of any Federal agency having direct or indirect jurisdiction over a proposed Federal or federally assisted undertaking in any State and the head of any Federal department or independent agency having authority to license any undertaking shall, prior to the approval of any Federal funds on the undertaking or prior to the issuance of any license, as the case may be, take into account the effect of the undertaking on any district, site, building, structure or object that is included in or eligible for inclusion in the National Register. The head of any such Federal agency shall afford the Advisory Council on Historic Preservation ... a reasonable opportunity to comment with regard to such undertaking.

16 U.S.C. § 470(f). Regulations implementing NHPA have been adopted. 36 C.F.R. § 800 *et seq.*

The NHPA is not regulatory just as NEPA is not regulatory. Instead, it is informational and provides the Federal government with information concerning the impact of the project on culturally or archeologically significant sites. However, as with NEPA, the failure to take a “hard look” at the impacts of the project and the possible alternatives can result in a preliminary injunction that stops or delays construction. *See, e.g., Apache Survival Coalition v. Unites States*, 21 F.3d 895 (9th Cir. 1994) (denial of preliminary injunction to enjoin construction of Mount Graham observatory complex because Indian tribe had notice of project but declined to participate in the NHPA consultation process and therefore could not complain about the impact of the

construction on three culturally significant shrines). In *Pit River Tribe v. United States Forest Service*, 469 F.3d 768 (9th Cir. 2006), the Ninth Circuit held that the failure of the Federal government to perform any NHPA analysis prior to extending leases for the construction of a geothermal power plant rendered the leases invalid.

The NHPA will have little direct applicability to the inadvertent discovery of human remains, because the purpose of the statute is to identify sensitive locations before construction commences. Nevertheless, the inadvertent discovery of human remains or archeological features during construction can lead to injunctive proceedings by those questioning the sufficiency of the section 106 review.

B. Historic And Archeological Data Preservation Act.

Because the NHPA as originally enacted provides only preconstruction protection of historical and archeological sites, Congress enacted the HADPA in 1974, to provide protection for historical or archeological data discovered during construction. *Attakai v. United States*, 746 F. Supp. 1395, 1410 (D. Az. 1990). HADPA applies to Federal construction projects and Federal dam projects.

HADPA requires that any Federal agency, whenever it finds or is notified in writing that its activities in connection with any Federal construction project may cause irreparable loss or destruction of significant historical or archeological data, must notify the Secretary of the Interior in writing. 16 U.S.C. § 469a-1. If the Secretary determines that the data is significant and is or may be irrevocably lost or destroyed, the Secretary must conduct a survey and other investigation and must recover and preserve such data. 16 U.S.C. § 469a-2. The survey must be commenced within sixty (60) days of notification. 16 U.S.C. § 469a-2(c).

Implicit in HADPA is a notice requirement; the government cannot initiate the review and survey process if it is not notified of a discovery. Frequently, the NHPA review process will identify potentially significant sites and will result in the observation of construction by archeologist or cultural descendants, who undertake the notification role in the event of an inadvertent discovery during construction. However, even in the absence of a contractual requirement to do so, a contractor on a Federal project must notify the responsible agency to insure compliance with the law.

Because of the survey requirement, a project can be delayed significantly with the inadvertent discovery of “significant” data. The statute, however, provides for compensation. In the event that any person is damaged by delays in construction caused by the HADPA survey and investigation, the Secretary shall compensate such, unless otherwise agreed in writing. 16 U.S.C. §§ 469a-1(b) & 469a-2(d). Obviously, because the right to compensation can be contracted away, a contractor should be aware of any contractual or other written waiver of the right to compensation.

C. Archeological Resources Protection Act.

ARPA, 16 U.S.C. § 470aa *et. seq.*, is the primary federal regulatory framework that protects “archeological resources” located on Federal or Indian lands. “Archeological resources” means “any material remains of past human life or activities which are of archeological interest [including but not limited to]: pottery, bottles, weapons, weapon projectiles, tools, structures or portions of structures, pit houses, rock paintings, rock carvings, intaglios, graves, human skeletal materials, or portions or pieces of the foregoing,” which are at least 100 years old. 16 U.S.C. § 470bb(1).¹ Ownership of

such resources found on Federal land is claimed by the United States. 16 U.S.C. § 470cc(b)(a)(3).

ARPA prohibits the damage or removal of archeological resources without a permit:

No person may excavate, remove, damage, or otherwise alter or deface, or attempt to excavate, remove, damage, or otherwise alter or deface any archeological resource located on public lands or Indian lands unless such activity is pursuant to a permit [] or the exemption [for Indian tribe members on Indian lands].

16 U.S.C. § 470ee(a).² There are criminal penalties for a violation, including monetary fines of up to \$20,000 and two years of imprisonment. 16 U.S.C. § 470ee(d).³ Vehicles and equipment involved in a violation can be forfeited to the United States. 16 U.S.C. § 470gg(b). In addition, there can be civil penalties imposed by the Federal land manager responsible, the amount of which should reflect the archeological or commercial value of the resource involved and the cost of restoration and repair of the resource and site involved. 16 U.S.C. § 470ff(a).

The regulations enacted under ARPA contain a significant exception that will often apply to contractors working on Federal or Indian projects:

No permit shall be required under this part for any person conducting activities on the public lands under other permits, leases, licenses, or entitlements for use, when those activities are exclusively for purposes other than the excavation and/or removal of archeological resources, even though those activities might incidentally result in the disturbance of archeological resources. General earth-moving excavation conducted under a permit or other authorization shall not be construed to mean excavation and/or removal as used in this part. This exception does not, however, affect the Federal land manager's responsibility to comply with other authorities which

protect archeological resources prior to approving permits, leases, licenses, or entitlements for use....

43 C.F.R. § 7.5(b)(1). Thus, while the statute contains a broad prohibition on the damage or destruction of resources, the regulations recognize that a contractor's inadvertent discovery and damage should not be actionable.

ARPA prosecutions typically involve intentional plundering and not inadvertent damage during construction. In an ARPA prosecution, it is not necessary that the defendant know that his actions are against the law. *United States v. Lynch*, 233 F.2d 1139, 1141 (9th Cir. 2000). Nor must the defendant know that the archeological resource is on Federal or Indian land. *United States v. Quarrell*, 310 F.3d 664 (10th Cir. 2002). However, to sustain a felony conviction for an ARPA violation, the defendant must know or have reason to know that the object taken is an "archeological resource." This will usually involve a showing that the defendant knew or should have known that the artifact was over 100 years old. *United States v. Lynch*, 233 F.2d at 1141 (collector who removed a skull did not know its age). All of the reported criminal ARPA prosecutions involve either grave robbers intentionally plundering archeological sites for profit, or souvenir hunters; there are no reported cases involving criminal charges against owners or contractors. This is not to suggest, however, that contractors need not have an understanding of ARPA because it can interrupt a construction project.

In *Attakai v. United States*, 746 F. Supp. 1395 (D. Ariz. 1990), the plaintiffs sought a preliminary injunction against the United States to prevent it from undertaking a range restoration project involving the construction of fences and water lines on Indian property. The plaintiffs alleged that the area in which the construction was to occur was "saturated" with Navaho burial sites. *Id.* at 1411. The Court held that the regulatory

exception to ARPA for general earth-moving excavations pursuant to other permits barred the claim. *Id.* at 1410 (*citing* 43 C.F.R. § 7.5(b)(1)). The Court also stated “the Act is clearly intended to apply specifically to purposeful excavation and removal of archeological resources, not excavations which may, or in fact inadvertently do, uncover such resources.” *Id.* Thus, the *Attakai* court recognized an exception from criminal liability for the inadvertent disturbance of archeological resources during construction.

However, in another construction case, the District Court for the Virgin Islands held that the foregoing statement in *Attakai* was “mere *dicta*.” *Fein v. Peltier*, 949 F. Supp. 374, 380 (D. V.I. 1996). In *Fein*, a private property owner deeded a large parcel of land to the National Park Service for inclusion on the Historical Register based on the presence of historical structures, but reserved a one acre site for the construction of a single family residence. The local permitting agency granted building permits despite comments from the National Park Service that the construction could affect historical property. While site preparation work was ongoing in the vicinity of historic subterranean slave quarters, Virgin Island National Park Service employees raided the site and ordered the workers to cease all site preparation work or they would “go to jail.” *Id.* at 377.

The homeowner, Mr. Fein, sued the agency to enjoin interference with the project and to obtain a declaration that ARPA did not apply. At a hearing on a temporary restraining order, the court permitted site preparation activities to continue based on the homeowner’s representation that no archeological resources would be disturbed. Shortly thereafter, however, the contractor demolished a historic rock wall. Later, in granting the

National Park Service's motion to dismiss for failure to exhaust administrative remedies, the court held that ARPA applied to the project. Significantly, the court stated:

Furthermore, the actions of the plaintiff in this case are easily characterized as "purposeful excavation and removal of archeological resources" inasmuch as Fein was made aware through the language of the Deed that historical ruins were present in the area he proposed to build a house. He and his agents were thus charged with knowledge that any digging on the site would certainly cause the excavation and removal of archeological resources, which would be "purposeful" and not inadvertent.

Id. at 380.⁴ This statement is *dicta* because the court held that the homeowner could not seek injunctive or declaratory relief without following the Administrative Procedures Act, and therefore the court lacked subject matter jurisdiction over the claim. This is troubling language for contractors however, because it suggests that any work in an area known to contain archeological resources could involve a criminal violation of ARPA if the resources are damaged during construction. Not only does this statement disregard the regulatory exception for inadvertent damage during permitted earth-moving activities, 43 C.F.R. § 7.5(b), but the court could have reached the same result simply by finding that the homeowner failed to comply with a condition agreed to at the hearing on the temporary restraining order.

For a contractor to navigate between the *Attakai* court's recognition that ARPA doesn't criminalize an inadvertent discovery and damage, and cases like *Fein*, suggesting that damage to a known "archeological resource" can be punished, suggest that the original inadvertent discovery and any damage caused thereby is not proscribed. However, once the items have been discovered, further damage, destruction or removal must be avoided and the responsible Federal official notified. The *dicta* in *Fein*, while

troubling, probably poses a greater risk for an “owner” of Federal property, *i.e.*, a leaseholder or licensee, who is on notice of archeological resources in the area and proceeds with construction nevertheless, without implementing adequate precautions to avoid damage. The contractor and its employees should nevertheless be instructed to cease work upon the discovery of any apparent archeological item appearing to be more than a few decades old, to avoid further damage and allow for ARPA and HADPA to be applied.

D. Native American Graves Protection And Repatriation Act.

NAGPRA, 25 U.S.C. § 3001 *et seq.*, provides for the protection and repatriation of Native American and Native Hawaiian remains and cultural items that are discovered on Federal or tribal lands after 1990. 25 U.S.C. § 3002(a). In addition to human remains, the statute protects funerary and sacred objects. 25 U.S.C. § 3001(3). NAGPRA does not apply to remains or cultural items found on non-Federal or municipal lands. *Romero v. Becken*, 256 F.3d 349 (5th Cir. 2001); *Pueblo of San Ildefonso v. Ridlon*, 103 F.3d 936 (10th Cir. 1996).

The statute contains a mandatory stop-work provision in the case of an inadvertent discovery or remains or objects, which is defined as “the unanticipated encounter or detection of human remains, funerary objects, sacred objects, or objects of cultural patrimony found under or on the surface of Federal or tribal lands.”⁵ The statute provides:

Any person who knows, or has reason to know, that such person has discovered Native American cultural items on Federal or tribal lands after [November 16, 1990] shall notify, in writing, the Secretary of the Department [of the Interior], or head of any other agency or instrumentality of the United States, having primary management authority

with respect to Federal lands and the appropriate Indian tribe or Native Hawaiian organization with respect to tribal lands, if known or readily ascertainable If the discovery occurred in connection with an activity, including (but not limited to) construction, mining, logging, and agriculture, the person shall cease the activity in the area of the discovery, make reasonable effort to protect the items discovered before resuming such activity, and provide notice under this subsection.

25 U.S.C. § 3002(d). The activity may resume thirty (30) days after certification of the notification requirement by the appropriate government agency or tribal entity. 25 U.S.C. § 3002(e).

Thus, an inadvertent discoverer of Native remains or cultural items has three duties. First, it must meet the notification and certification requirements. Second, it must refrain from the activity for at least thirty (30) days from the date of certification. Third, it must make a reasonable effort to protect the remains or items. *Yankton Sioux Tribe v. United States Army Corps of Engineers*, 194 F. Supp. 2d 977, 984 (D. S.D. 2002).

In addition to these statutory obligations imposed on the inadvertent discoverer, the regulations impose six additional duties on the responsible Federal officials. Within three days of receiving the notification of the discovery, the officials must: (1) certify receipt of the notification; (2) take immediate steps, if necessary, to further secure and protect the remains, including stabilization or covering; (3) notify Indian tribes which might be entitled to ownership and control of the remains; (4) initiate consultation with the tribe; (5) follow the regulatory process for intentional excavation and removal if the remains must be excavated or removed, and; (6) ensure the proper disposition of the items. 43 C.F.R. § 10.4(d)(1). The government agency's obligations are not limited to the thirty-day cessation period, and so the duty to secure and protect the remains can

continue beyond that period. *Yankton Sioux Tribe v. United States Army Corps of Engineers*, 194 F. Supp. 2d 977, 984 (D. S.D. 2002) (holding that the Corps of Engineers failure to protect remains contained in frozen soil that could be lost or damages during the raising and lowering of lake levels was a violation of its NAGPRA obligations).

NAGPRA vests ownership and control of newly discovered Native American human remains in the decedent's lineal descendants, or, if lineal descendants cannot be ascertained, in a tribe affiliated with the remains. *Bonnichsen v. United States*, 367 F.3d 864, 875 (9th Cir. 2004) (citing 25 U.S.C. § 3002(a)). NAGPRA requires a two-part analysis. Are the remains Native American, *i.e.*, "of, or relating to, a tribe, people or culture that is indigenous to the United States?"⁶ If not, NAGPRA does not apply. If so, then which persons or tribes are most closely affiliated with the remains? *Id.* While these inquires are relevant to determine ownership of the remains or artifacts, they are not of immediate concern to the contractor. However, if determined to be Native American or Native Hawaiian, then the preservation requirements are invoked, which can result in lengthy discussions between the government and the tribe on the disposition of the remains. *See, e.g., Yankton Sioux Tribe v. United States Army Corps of Engineers*, 194 F. Supp. 2d 977 (D. S.D. 2002) (Indian tribe and government negotiated for two years on a final disposition plan for remains still in the ground).

III. STATE RESTRICTIONS AND CASES

Many states have enacted statutes similar in scope and purpose to the Federal legislation concerning archeological resources and/or ancient human remains and applicable to state, local or private projects. But even before enactment of these statutes,

and in states without any such regulatory schemes, there has always been common law liability without regard for the age or ethnicity of the human remains.

A. Tort Liability For Grave Desecration.

The courts have long recognized that a contractor who disturbs a grave in the course of construction activity can, in some circumstances, be liable in tort to the family of the decedent. Typically, a contractor that is reasonably without notice of the presence of a grave will not be held liable for disturbing the remains. *See, e.g., Kenny Constr. Co. v. Green*, 422 S.W.2d 423 (Ky. 1967) (road contractor would not be liable absent gross negligence for the destruction of five unmarked graves where there was no public record of the location and the graves were unrecognizable as such); *Johnson v. Kentucky-Virginia Stone Co.*, 149 S.W.2d 496 (Ky. 1941) (contractor on state highway project is not liable for desecration of a grave in the right of way, in a cultivated field, if the contractor was without notice of the presence of the grave). Conversely, if the contractor knew or should have known of the presence of unmarked graves, the contractor could be liable in tort to the descendants (without regard for the age or ethnicity of the remains).

In addition, the common law prohibits the removal of Native American artifacts, because the tribe is considered to be the rightful owners of the buried artifacts. *Charier v. Bell*, 496 So.2d 601 (La. App. 1986). Thus, a contractor that knowingly destroys ancient artifacts could be liable to the owner for property damage or conversion.

B. Statutory Liability.

Many states have enacted regulatory systems that proscribe the actions to be taken when, in the course of construction, either human remains or archeological resources are found. This article is not a survey of the laws of all states, but a discussion of some

examples. The laws of each state may differ dramatically and therefore practitioners should consult the statutes having applicability to a particular project.

For instance, Hawaii has enacted a comprehensive burial and historic property preservation statute. Haw. Rev. Stat. Ch. 6E. This statute, like NEPA and NHPA, requires pre-construction evaluation of the impact of the project on known burial sites and historic property. The statute also provides for inadvertent discoveries once construction is under way.

Whenever human remains are discovered or known to be buried, and which appear to be over fifty years old, the remains and any associated burial goods shall not be moved without the approval of the Hawaii Department of Land and Natural Resources. Haw. Rev. Stat. §6E-43. In the case of an inadvertent discovery, any activity in the immediate area “shall cease.” *Id.* at § -43.6(a). Notice must be provided to the medical examiner or coroner, the police department, and the Department of Land and Natural Resources, which must in turn notify the Island Burial Council. A mitigation plan must be developed. For discoveries related to development, the landowner, permittee or developer is responsible for implementing the mitigation plan, including relocation of the remains. Haw. Rev. Stat. § 6E-43.6(e)(1). Significantly, “[j]ustifiable delays resulting from the discovery of burials shall not count against any contractor’s completion date agreement.” *Id.* (emphasis added). Construction may resume after the archeological excavations provided for in the mitigation plan have been completed. *Id.* at (e)(2). It is unlawful for any person to knowingly “take, appropriate, excavate, injure, destroy, or alter any burial site or the contents thereof,” located on private or State or county land.

Haw. Rev. Stat. § 6E-11(b). Fines can exceed \$10,000 per day, and equipment used can be seized by the State. *Id.*

With increasing frequency, construction projects in Hawaii are delayed as excavation reveals Native Hawaiian burials. These discoveries occur just as frequently on previously developed, urban lands, as on undeveloped or rural sites. Where space permits, a contractor would do well to create a buffer zone around known or suspected burial sites so that the remains can be preserved in place while the statutory consultation process is undertaken. This allows the balance of the project to move forward while ensuring compliance with the statutory requirement.

Similarly, many states have statutes that proscribe treatment of Native American remains discovered during construction. Washington's Indian Graves and Records Act is typical:

Persons disturbing native Indian graves through inadvertence, including disturbance through construction, mining, logging, agricultural activity, or any other activity, shall reinter the human remains under the supervision of the appropriate Indian tribe.

Wash. Rev. Code § 27.44.040(1) (2007).⁷ In operation, this statute requires that construction cease upon the discovery of Native American remains, and that the appropriate tribe be contacted for mitigation and reburial. *See Swinomish Indian Tribal Community v. Island County*, 942 P.2d 1034 (Wash. App. 1997). A contractor who violates the provisions of the Indian Graves and Records Act can face criminal or civil liability. *The Lummi Nation v. Golder Assoc., Inc.*, 236 F. Supp. 2d 1183 (W.D. Wash. 2002) (archeologist contracted to monitor construction was subject to suit for improper removal of native Indian remains from the construction site).

Nor are the state statutory schemes limited solely to Native American or Native Hawaiian burials. For instance, California law applies to the discovery of human remains regardless of the ethnicity or age:

In the event of discovery of human remains in any location other than a dedicated cemetery, there shall be no further excavation or disturbance of the site or any nearby area reasonably suspected to overlie adjacent remains until the coroner ... has [investigated] and the recommendations concerning the treatment and disposition of the human remains have been made to the person responsible for the excavation

Cal. Health & Saf. Code § 7050.5.⁸ Most states have similar provisions concerning the discovery of human remains. Thus, a prudent contractor should always stop work in the immediate area of a discovery and notify, at a minimum, local law enforcement or the coroner.

In another variation, a Tennessee statute requires the state to file a civil action to terminate the use of land as a cemetery, and this statutory procedure has been held to apply to previously undiscovered burials unearthed during construction. *Alliance for Native American Indian Rights in Tennessee v. Nicely*, 182 S.W.3d 333, 341 (Tenn. App. 2005) (discovery of three native American burial sites during a highway construction project required the state to file an action to terminate cemetery use under Tenn. Code Ann. § 46-4-103).

Because of the likelihood that any discovery of human remains will be governed by statute, a contractor making an inadvertent discovery should immediately cease activity in the area, preserve the location, and contact the authorities and the owner. Because many states have statutes that provide added protection and review in the event

of the discovery of either old or suspected Native remains or associated objects, local requirements should be followed, and delays anticipated.

IV. POTENTIALLY APPLICABLE CONTRACTUAL PROVISIONS

When a contract is silent about the obligations of the contractor and owner with respect to the inadvertent discovery of human remains or archeological resources during construction, several typical contractual provisions may come into play.

A. Differing Site Conditions/Changes.

Indicative of how common the discovery of human burials or archeological features has become, the 2007 AIA General Conditions now have a provision specifically addressing the inadvertent discovery:

If, in the course of the Work, the Contractor encounters human remains or recognizes the existence of burial markers, archeological sites or wetlands not indicated in the Contract Documents, the Contractor shall immediately suspend any operations that would affect them and shall notify the Owner and Architect. Upon receipt of such notice, the Owner shall promptly take any action necessary to obtain governmental authorization required to resume the operations. The Contractor shall continue to suspend such operations until otherwise instructed by the Owner but shall continue with all other operations that do not affect those remains or features. Requests for adjustments in the Contract Sum and Contract Time arising from the existence of such remains or features may be made as provided in Article 15.

AIA Document A201-2007 § 3.7.5.⁹ This provision now makes clear the contractor's obligation to cease work in the area and prevent further damage. It is also clear that the owner is obligated to obtain any governmental approvals necessary to allow resumption of work. Finally, the contractor's claim for additional time or money is recognized.

In the event the current A201 is not in use, however, many construction contracts contain a differing site condition clause that could also apply to the inadvertent discovery of human remains or archeological resources. The prior AIA provision, for example, provides:

If conditions are encountered at the site which are (1) subsurface or otherwise concealed physical conditions which differ materially from those indicated in the Contract Documents or (2) unknown physical conditions of an unusual nature, which differ materially from those ordinarily found to exist and generally recognized as inherent in construction activities of the character provided for in the Contract Documents, then notice by the observing party shall be given to the other party promptly before conditions are disturbed and in no event later than 21 days after first observance of the conditions.

AIA Document A201 - 1997 at § 4.3.4. It is then incumbent on the architect to “promptly investigate such conditions” and consider an equitable adjustment in the contract sum or the contract time. *Id.* The inadvertent discovery of subsurface remains or archeological features could trigger these provisions, and the obligations that flow from them.

B. Delays.

Because most statutes concerning the inadvertent discovery of human remains or archeological resources require a cessation of work, at least until the appropriate authorities are notified, another potentially applicable contract provision is that pertaining to delays and time extensions. The AIA form provides:

If the Contractor is delayed at any time in the commencement or progress of the Work by an act or neglect of the Owner or Architect, or of an employee of either, or of a separate contractor employed by the Owner; or by changes ordered in the Work; or by labor disputes, fire, unusual delay in deliveries, unavoidable casualties or other causes beyond the Contractor’s control ... then the

Contract Time shall be extended by Change Order for such reasonable time as the Architect may determine.

AIA Document A201 - 2007 at § 8.3.1. Thus, even in the absence of a statutory time extension, such as Hawaii's Burial Act (“[j]ustifiable delays resulting from the discovery of burials shall not count against any contractor's completion date agreement”),¹⁰ there may well be a contractual basis for an extension. As noted above, some statutes provide for delays of 30 or 60 days, or more, and thus the impact on the project can be significant.

C. Compliance With Laws.

Most construction contracts contain provisions allocating responsibility for obtaining governmental permit and inspections, as well as requiring compliance with governmental regulations. Both of these provisions may be relevant to the inadvertent discovery of remains or artifacts.

As noted above, many of the statutory regimes regulating the inadvertent discovery of human remains require governmental inspection and oversight. In the absence of a contractual provision like § 3.7.5 of the 2007 General Conditions, a contractual allocation of permit/inspection responsibility could affect the resolution of a dispute following the discovery of remains.

Unless otherwise provided in the Contract Documents, the Contractor shall secure and pay for the building permit as well as for other permits, fees, licenses and inspections by government agencies necessary for proper execution and completion of the Work that are customarily secured after execution of the Contract and legally required at the time bids are received or negotiations concluded.

AIA Document A201 – 2007 at § 3.7.1. Whether this provision would require the owner or the contractor to undertake the mitigation and inspection requirements arising upon an inadvertent discovery might turn on what is “customary” in the industry.

In addition, most contracts would require the contractor to comply with all applicable laws:

The Contractor shall comply with and give notices required by applicable laws, statutes, ordinances, codes, rules and regulations, and lawful orders of public authorities applicable to performance of the Work.

AIA Document A201 – 2007 at § 3.7.2. Thus, such a provision would require the contractor to independently comply with burial and archeological laws, regardless of an owner’s requests or directions to the contrary.

D. Litigating Claims And Alternative Dispute Resolution.

Because the inadvertent discovery of human remains or archeological resources can significantly affect both the timing and cost of a project, claims can be expected. These claims, like any others, can result in litigation or alternative dispute resolution. There are reported cases involving litigation between a contractor and an owner involving claims arising out of the presence and impact of archeological features present on and interfering with a project.

In *American Line Builders, Inc. v. United States*, 26 Cl. Ct. 1155 (1992), the United States, through the Western Area Power Administration (“WAPA”), entered a contract with American Line Builders to replace a 188 mile transmission line in Montana. Because the project site included a number of sensitive archeological sites (the contract specified “approximately twenty”), the contract included a protocol for construction in or near these sites. The contractor brought a claim because the number of archeological sites actually encountered - thirty one - was significantly more than anticipated, and because WAPA took more time than contemplated in authorizing the contractor to perform its work in or near these areas, resulting in increased costs. The result of

WAPA's handling of the archeological sites was an interruption in the assembly-line installation process contemplated by the contractor.

The Court of Claims concluded that WAPA's actions constituted a constructive change to the contract for which the contractor was entitled to compensation. *Id.* at 1197.

The court explained the appropriate measure of damages:

In general, a contractor should be entitled to recover for those costs which are identifiable as additional to the work contracted for between the parties. This should include items, including but not limited to, extra travel time due to necessary skipping [of certain pole sites], changed installation procedures caused by the inability to follow the original construction plan and/or the need to move crews on and off parts of the project in response to the need to double back on skipped sites.

Id. The court held that the contractor was entitled to recover the costs incurred in having its crews return to the skipped archeological sites.

In *Frontier-Kemper Constructors, Inc. v. American Rock Salt Co.*, 224 F. Supp. 2d 520 (W.D.N.Y. 2002), the contractor on a \$70 million mine construction project sued the owner for fraud in the inducement, among other claims. The contractor alleged the owner knew, but failed to disclose, that the location of the mine may have included a Native American burial site, thereby resulting in unanticipated delay during the archeological assessment. The contract schedule contained a ten (10) day archeological assessment period. Applying New York law, the court held that the contractor's claim, if any, was for breach of contract rather than fraud. Consequently, the court granted the owner's motion to dismiss the fraud claim. *Id.* at 535.

V. GENERAL RECOMENDATIONS

As demonstrated above, there are a number of regulatory regimes that can apply to the inadvertent discovery of human remains or archeological objects during a construction project. The following recommendations are therefore general, and any lawyer assessing an inadvertent discovery should proceed immediately to the applicable laws and ordinances to insure proper treatment.

If human remains are discovered during construction, regardless of whether the project is a Federal, state or private project, the contractor should immediately cease all activity in the vicinity of the remains. The contractor should also take immediate steps to secure the location and prevent further disturbance or destruction.

The next step should be to notify the owner, owner's representative and/or the architect, particularly if the contract contains a notice requirement. Because many of the Federal and state regulations make no distinction between an owner and a contractor with respect to the work cessation requirements, anyone violating such a requirement could have exposure.

In addition, the contract must be consulted for several reasons. It may allocate responsibility for initiating the ensuing governmental investigation. *See, e.g.*, AIA Document A201 – 2007 at § 3.7.5. In addition, the contract terms will determine how to prepare for and compensate that almost certain delay that will result from the discovery. Both the owner and the contractor will want to anticipate how the eventual inefficiencies and delays will be addressed.

Finally, the contractor (and the owner, if already on notice) should notify government officials of the discovery. At a minimum, notice should promptly be

provided to the local law enforcement agency, as well as the coroner or medical examiner. Many state statutes require notification of a State Historic Preservation Officer or other similar agency. The Federal statutes require notice to the responsible Federal land manager or agency.

VI. CONCLUSION

The presence of human remains or archeological resources on a construction site is often not a surprise because modern Federal and state statutes require before-the-fact study and assessment. In many of these cases, the construction contract will be specifically tailored to address archeological issues, as in the *American Line Builders* and *Frontier-Kemper Constructors* cases. Regardless of the contractual treatment, however, the obligation to work around such conditions can give rise to claims. The 2007 version of AIA A201 now provides for the unanticipated discovery of remains or artifacts.

Even where the contract is silent, however, owners and contractors must be aware of their legal responsibilities upon discovering human remains or artifacts during construction. Immediately upon discovery, work should cease to insure that further damage or disruption does not occur. The contractor should provide notice to the owner, as well as local authorities. In addition, the state and federal regulatory framework should be analyzed to determine what other agencies are entitled to notice, and who must provide it.

When the delay and/or increased costs arising from the discovery and subsequent treatment of the finds results in claims, the regulatory framework may contain provisions that alter the traditional contractual components, such as Hawaii's exclusion of delays from the completion date calculation, or the HADPA delay compensation provision.

Whether the contractual expectations are statutorily modified, or not, delay claims should be anticipated by the owner and the contractor.

¹ Arrowheads located on the surface of the ground are excluded. 16 U.S.C. § 470ee(g) & 470ff(a)(3).

² ARPA also prohibits trafficking in archeological resources in violation of federal or state law. 16 U.S.C. § 470ee(b)&(c). Thus, the federal trafficking offense can apply even when the archeological resource was taken from private property. *United States v. Gerber*, 999 F.2d 1112 (7th Cir. 1993).

³ Because the United States asserts ownership of the “archeological resources,” criminal charges often include theft of government property under 18 U.S.C. § 1361, as well as the ARPA violation.

⁴ The homeowner did not help himself when he represented to the Court at a temporary injunction hearing that the site preparation work would not damage any historical property, but then his contractor destroyed a portion of a historical stone wall on the site. *Id.* at 380.

⁵ 43 C.F.R. § 10.2(g)(4)

⁶ In *Bonnechsen*, *supra*, the Ninth Circuit held that the tribe must be “presently existing” and thus Kennewick Man, the 9,000 year old skeleton discovered on Federal land near the Columbia River in Washington, was not subject to repatriation under NAGPRA because there was no evidence connecting the skeleton to any presently existing Native American tribe.

⁷ The Statute also prohibits the intentional disturbance of burials and imposes more significant penalties for such conduct.

⁸ The California Code has additional requirements when the remains are Native American.

⁹ The AIA 201 – 2007 Instructions specifically state “Since 1997, many construction projects have suffered delays due to the discovery of burial grounds, archeological sites and wetlands. New Section 3.7.5 addresses the Owner’s and Contractor’s responsibilities in the event these are not noted on the Contract Documents, but discovered during construction.”

¹⁰ Haw. Rev. Stat. § 6E-43.6(e)(1).