



# ADVISORY BULLETIN

A RISK MANAGEMENT  
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DESIGN PROFESSIONALS

## TRIBAL LAW CONSIDERATIONS

When providing design services for sovereign Native American tribes, design professionals should be aware of the underlying rules and potential risks involved. Sovereign immunity issues, dispute resolution questions, tribal council authority, and the role of the federal government are some of the key issues design professionals should address when providing professional services in Native American Country.

There are approximately 260 federal Native American reservations and almost 500 federally recognized Native American tribes in the United States. Native American tribes and individuals own more than 50 million acres of land in the lower 48 states and in excess of 40 million acres in Alaska. Native American tribes employ thousands of Native American and non-Native American workers. Through natural resource development, water purification and transportation projects, and Native American health and gaming construction projects, the construction industry in Native American country has created a tremendous market for design professional services.

Following are some basic rules when contracting for professional services with Native Americans. Implementing these rules can be complicated so you should always consult with your attorney.

### BUREAU OF INDIAN AFFAIRS (BIA) INVOLVEMENT

Native American tribes are distinct, independent political communities, retaining their original natural rights in their relations with the federal government and outside interests. They remain a separate people, with the power of regulating their own internal affairs and business relations. Nevertheless, tribes enjoy a unique trust relationship with the United States government. As such, the BIA is very much involved in almost all tribal transactions, including contracts for the provision of design professional services. This trust and funding relationship has importance for design professionals, and many professional service agreements require BIA approval under the provisions of 25 U.S.C. §81.

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A potential difficulty created by the federal government’s role in tribal contracts involves the availability of a construction lien. Typically, design professionals can lien for unpaid design fees. However, no lien could be foreclosed on property held in trust for a tribe by the government. Accordingly, an adequate payment bond might also be requested or else pay very close attention to any accounts receivable issues.

### COLLECTION DIFFICULTIES AND SOVEREIGN IMMUNITY

If a tribe does not pay for your design services, you may have a difficult time collecting in any type of breach of contract suit. Tribes enjoy sovereign immunity and cannot be sued absent some type of unequivocal congressional authorization of the suit or a clear waiver of sovereign immunity by the tribe. There is a strong presumption against waivers of tribal sovereign immunity so any waiver must be express. A clause to include in any contract with a Native American tribe, if possible, is a limited waiver of sovereign immunity that will at least provide for compensation for services rendered, if not for broader monetary damages in the event of a breach. Tribal sovereign immunity generally extends to agencies of the tribe such as tribal casinos, tribal development corporations, and other tribal business enterprises. Courts routinely dismiss both personal injury and breach of contract actions against tribes for lack of jurisdiction based on the failure to obtain a waiver of sovereign immunity. As such, even if you have provided exemplary service and your designs have been constructed to a tribe’s great benefit, a suit to recover any unpaid fees will be dismissed absent an express waiver of sovereign immunity.

## FORUM SELECTION CLAUSE

If a dispute arises out of a project in Native American country, the first question is often where will the dispute be resolved? The answer may depend upon the title of the land on which the project rests and the type of contract entered into by the design professional. If a design professional has contracted with a Native American tribe, tribal enterprise, or individual Native American for work on tribal or trust land, it is likely that the dispute will be resolved in tribal court. On the other hand, if the design professional contracts with a non-Native American entity for work on non-Native American fee land, or with the state or federal government for work on a state or federal highway, railroad, or other federally granted right-of-way, they are likely to end up in state or federal court, even if the project is on a Reservation. When contracting with a tribal entity, design professionals should include forum selection and choice of law clauses in their agreements to provide for dispute resolution in state court according to state law.

The forum selected can have significant ramifications to the outcome of the dispute. There are major differences between tribal courts and state and federal courts. Tribal judges, who are often tribal members, typically do not have to be a lawyers. Tribal courts also operate under both written and unwritten codes of law. A tribal code often includes references to “customary and traditional practices,” which are based on oral history and may not be codified in any type of statute or regulation to which the defendant can readily refer. Moreover, many tribal courts lack any type of official court reporter and precedents are not kept on file in such a way as to be easily obtained and referenced to the court. Non-Native Americans are typically excluded from tribal court juries, so the dispute will not be heard by a jury of peers but by a jury of tribal members. Finally, the United States Constitution does not apply in tribal court. For all these reasons, professional services contracts should include, in addition to a waiver of sovereign immunity, a forum selection and choice of law clause that provides that disputes will be resolved either through mediation, arbitration, or, if necessary, litigation in state or federal court.

## RULES OF CONSTRUCTION

Courts will typically apply a rule of construction requiring that agreements be construed in favor of Native American tribes. A simple clause to include in any agreement with a tribe is one stating that state law will apply to contract interpretation questions and that the agreement is not to be construed for or against either party to the contract. The contract could also reflect that it was the product of negotiation between the contracting parties, thus negating the contract of adhesion argument.

## TRIBAL COUNCIL AUTHORITY

Another unique issue that arises when contracting with Native American tribes is whether tomorrow’s tribal council will honor the agreements of a previous government. Tribal leadership can change rapidly and it is important for a contract to expressly bind successive tribal councils. Such a provision is enforceable, provided the language is express.

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