

08-19-00272-CV

No. 08-19-00272-CV

In The Eighth Court of Appeals  
El Paso, Texas

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ELIZABETH G. FLORES  
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Max Grossman,  
*Appellant*

*v.*

The City of El Paso,  
*Appellee*

**BRIEF OF APPELLANT**

*From the 384<sup>th</sup> Judicial District Court,  
El Paso County, Texas  
Cause No. 2017-DCV2528*

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## STATEMENT OF THE CASE

### *Nature of the Case:*

In the Summer of 2017, Plaintiff Max Grossman sued the City of El Paso for its violations and threatened violations of the Texas Antiquities Code—for its failure to provide notice to the Texas Historical Commission before commencing an Arena project planned in the Duranguito neighborhood of downtown El Paso—and applied for a Temporary Injunction.<sup>1</sup> The City filed a Plea to the Jurisdiction,<sup>2</sup> which was denied.<sup>3</sup> Before the trial court could rule on the application for temporary injunction, the City noticed an appeal, which prompted an automatic stay of trial court proceedings.<sup>4</sup> The City later dropped the appeal.<sup>5</sup>

New and groundbreaking research published in October 2018 indicated the existence of a large Mescalero Apache encampment within the Arena footprint. This encampment stood for many years, peaking at 800 to 1,000 Apaches in the 1790s, and would have left significant archeological remains.

This discovery prompted Dr. Grossman to amend his petition for continued violations (or threatened violations) of the Texas Antiquities Code because the City's permit application and scope of work submitted to the Texas Historical Commission prior to the discovery of the remains did not adequately account for or protect the remains as required by the Texas Antiquities Code.<sup>6</sup> Grossman re-urged his application for temporary injunction, and the City filed another Plea to the Jurisdiction.<sup>7</sup>

### *Trial Court:*

The Honorable Patrick Garcia, 384th District Court, El Paso County, Texas.

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<sup>1</sup> 1CR13.

<sup>2</sup> 2CR614.

<sup>3</sup> 2CR754.

<sup>4</sup> 2CR755.

<sup>5</sup> The interlocutory appeal was originally docketed in this Court as No. 08-17-00200-CV but was later transferred to the Second Court of Appeals and docketed as No. 02-17-00384-CV. The appeal was dismissed, upon the City's motion, on August 30, 2018.

<sup>6</sup> 6CR3060.

<sup>7</sup> 6CR3205.

*Disposition:*

On October 21, 2019, the trial court denied the City's Plea to the Jurisdiction<sup>8</sup> and denied Grossman's application for temporary injunction.<sup>9</sup> Grossman perfected his appeal<sup>10</sup> and sought emergency relief in order to prohibit commencement of the Arena project pending appeal, which was granted. The City filed a notice of appeal of the trial court's denial of its Plea to the Jurisdiction,<sup>11</sup> which was assigned Cause No. 08-19-00277-CV. The City moved to consolidate the two appeals, which this Court granted, and issued a briefing schedule in the consolidated cross-appeals.

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<sup>8</sup> 7CR3766.

<sup>9</sup> 7CR3767. A copy of the order is attached as Appendix A.

<sup>10</sup> 7CR3768.

<sup>11</sup> 7CR3775.



## **STATEMENT REGARDING ORAL ARGUMENT**

Appellant believes that this appeal is ripe for oral argument. While this brief raises a single issue, the City has also noticed a cross-appeal. The history and background of the Texas Antiquities Code, as well as other litigation that the City insists is case-dispositive, warrant a face-to-face discussion with the Court.

## STATEMENT OF JURISDICTION

Jurisdiction is not challenged in these consolidated appeals. The Court has jurisdiction under Section 51.014 of the Texas Government Code for both the appeal of the denial of the temporary injunction and the denial of a governmental entity's plea to the jurisdiction. *See* TEX. CIV. PRAC. & REM. CODE §51.014(4),(8).

## **ISSUE PRESENTED**

Dr. Grossman pleaded a viable cause of action under the Texas Antiquities Code, which charges all Texas citizens with preserving Texas' archeological resources, including preserving and protecting Native American remains. Grossman also presented overwhelming evidence that artifacts of the Mescalero Apache Tribe will be forever lost absent the issuance of an injunction prohibiting the City of El Paso from commencing its Arena project—including demolition of buildings within the Arena footprint—before first submitting a renewed application to the Texas Historical Commission that appropriately protects those remains from destruction during the performance of the archeological survey. Did the trial court abuse its discretion by denying the injunction and giving the green light to the City to proceed with its Arena project with no protections in place for safeguarding the Mescalero Apache remains?

TO THE HONORABLE EIGHTH COURT OF APPEALS:

The underlying litigation is brought under the Texas Antiquities Code, *see* Appendix B, a somewhat obscure but unique statute that charges every Texan with protecting and preserving Texas' natural resources, including remains of Native Americans that once inhabited Texas' soil, and that authorizes concerned citizens to file suit to ensure compliance with the law. *See* TEX. NAT. RES. CODE § 191.173(a) (“A citizen of the State of Texas may bring an action in any court of competent jurisdiction for restraining orders and injunctive relief to restrain and enjoin violations or threatened violations of this chapter.”) The City of El Paso (“the City”), through its agent Moore Archeological Consulting, Inc. (“Moore”), has violated (or threatens to violate) the Antiquities Code in that the permit application it submitted to the Texas Historical Commission to perform an archeological survey of the Arena project site does not require locating, much less protecting and preserving, the remains of the Mescalero Apache Tribe that are undisputedly located within the area of the City's Arena project, which is being planned in the historic area of downtown El Paso known as Duranguito. Yet the trial court irrationally refused to enjoin commencement of the Arena project, leaving the Mescalero Apache remains completely exposed to destruction unless this Court reverses the trial court's decision.

## STATEMENT OF FACTS

### **A. Grossman sues to ensure the City complies with the Texas Antiquities Code for a public project planned in Duranguito—a historic neighborhood in downtown El Paso.**

Dr. Max Grossman, who is Associate Professor of Art History at The University of Texas El Paso, along with unnamed litigation funder JP Bryan,<sup>12</sup> sued the City of El Paso in the summer of 2017 because the City refused to give notice to the Texas Historical Commission of a public project referred to as the “Arena Project.”<sup>13</sup> The City has chosen to build its Arena atop El Paso’s oldest continuously occupied downtown neighborhood, “Duranguito,” which is part of a larger area commonly known as “Union Plaza.”<sup>14</sup> To proceed with its plan, many historic buildings in the Duranguito neighborhood would have to be demolished. Over 11 acres will likely be affected by this project, including over 5 acres comprising the footprint of the proposed Arena.<sup>15</sup>

Many of the buildings the City intends to demolish as part of its Arena project have historical and architectural significance. In 2017, the County of El Paso conducted a comprehensive cultural resources survey of Downtown El Paso, including

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<sup>12</sup> Mr. Bryan, who owns the Bryan Museum in Galveston and funded the restoration of the Gage Hotel in Marathon, Texas, is funding this litigation. Mr. Bryan, a descendent of Stephen F. Austin, is an avid historian with a particular passion for the work of renowned architect Henry C. Trost. More about Mr. Bryan and his preservation work is available in this Texas Monthly article -- <https://www.texasmonthly.com/the-culture/marathon-man-2/>. More about Trost’s architectural legacy, including the Trost buildings at risk for demolition absent an injunction, is available here: <https://trostsociety.org/>.

<sup>13</sup> 1CR13.

<sup>14</sup> 1CR14.

<sup>15</sup> 1CR14-15.

Duranguito, and it has taken the first steps to placing several architectural treasures in Duranguito on the National Register of Historic Places, the most prestigious historical registry in the United States. Moreover, the County preparing to move forward with its plan to establish a new National Register District that will include all of Duranguito.<sup>16</sup>

The County's actions mirror the recommendations of the City's own cultural resources survey, published in 1998, which calls for establishing a local H-overlay historic district in the neighborhood.<sup>17</sup> The 1998 survey recommends adding seven buildings within the Arena footprint to the National Register of Historic Places and identifies an additional five locations as "high-probability" archeological sites.<sup>18</sup> The survey states that "The Union Plaza, part of the original Ponce de Leon ranch (El Paso's first community), contains historic sites and buildings that are potentially in danger of being impacted by construction during redevelopment."<sup>19</sup> Further, although it did not identify any prehistoric sites, the survey concluded that there is considerable potential for subsurface archeological remains, and this is reinforced by the results of a ground-penetrating radar study.<sup>20</sup>

The threatened destruction of the Duranguito has garnered attention near and far. The prestigious National Trust for Historic Preservation has expressed its

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<sup>16</sup> 2RR17-18.

<sup>17</sup> 2RR20-21, 33; *see also* 1CR1014-1279.

<sup>18</sup> 2RR18.

<sup>19</sup> 1CR1219.

<sup>20</sup> 2RR33; 2RR249-50; 1CR1256

opposition to losing a neighborhood that includes many unique historic buildings, including the only surviving landmark of the city’s early Chinese community—the 119-year-old Chinese Laundry building.<sup>21</sup>

**B. Early in the litigation, the City concedes that the Antiquities Code contains a limited waiver of immunity.**

After Dr. Grossman filed suit, the City filed a Plea to the Jurisdiction.<sup>22</sup> Importantly, the City conceded that the Texas Antiquities Code provides a limited waiver of immunity. To use the City’s own words: “Section 191.173 of the Antiquities Code Provides a Limited Waiver of Governmental Immunity.”<sup>23</sup> It continued in the body of its plea:

The narrow waiver of governmental immunity is expressly limited to restraining orders and injunctive relief, and is only for the purpose of restraining or enjoining violations or threatened violations of the Antiquities Code. There are no other causes of action or rights created under Section 191.173.<sup>24</sup>

The City continued this concession in the courts of appeals, noting that the “Antiquities Code provides only a limited waiver of governmental immunity.”<sup>25</sup> Ultimately, the City dropped its appeal of this Court’s denial of its original plea to the

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<sup>21</sup> 2RR28; *see also* <https://savingplaces.org/press-center/media-resources/texas-district-court-ruling-reinforces-effort-to-save-el-pasos-oldest-neighborhood-from-demolition#.XgUwzW5Fy3A> (last visited December 26, 2019).

<sup>22</sup> 2CR614.

<sup>23</sup> 2CR623.

<sup>24</sup> 2CR624.

<sup>25</sup> Appellant’s Brief in No. 08-17-00200-CV at 11, available online at <http://www.search.txcourts.gov/SearchMedia.aspx?MediaVersionID=258c51b3-18e3-45f6-b344-989be2259cec&coa=coa08&DT=Brief&MediaID=3d106ac5-5a73-4d27-99b2-7eb8bd6eb685>.

jurisdiction, further conceding jurisdiction over this litigation.<sup>26</sup> Eventually the parties entered into a Rule 11 agreement to delay the case, pending resolution of other lawsuits.<sup>27</sup>

**C. Forced into compliance by Grossman’s lawsuit, the City finally provides statutory notice to the Texas Historical Commission, which grants the City a permit that Grossman believes to be unlawful.**

Before the agreed delay, however, the original lawsuit had its intended effect: the City stopped resisting compliance with the Antiquities Code (at least temporarily) and, on May 23, 2018, provided the statutorily required notice.<sup>28</sup> As part of the administrative process, the City’s agent and archeological consultant Moore prepared a document entitled *Research Design for the City of El Paso Multipurpose Arts and Entertainment Center*, dated July 10, 2018, and a Scope of Work.<sup>29</sup> These submissions called for the demolition of all buildings and structures in Duranguito while the survey was being conducted.<sup>30</sup> Based on these submissions, the THC approved the City’s permit (No. 8525) on October 15, 2018.<sup>31</sup>

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<sup>26</sup> The interlocutory appeal was originally docketed in this Court as No. 08-17-00200-CV but was later transferred to the Second Court of Appeals and docketed as No. 02-17-00384-CV. The appeal was dismissed, upon the City’s motion, on August 30, 2018.

<sup>27</sup> 4RR1856.

<sup>28</sup> 4RRPXA.

<sup>29</sup> 4RRPXB.

<sup>30</sup> *Id.* (at page 6 of Scope of Work).

<sup>31</sup> 4RRPXC.



**D. In 2019, Grossman learns of a Mescalero Apache peace camp located in Duranguito.**

In October 2018, a historian named Mark Santiago published a groundbreaking book entitled *A Bad Peace and a Good War – Spain and the Mescalero Apache Uprising 1795-1799*.<sup>32</sup> Santiago's book is enormously significant for the history of El Paso.<sup>33</sup> It established for the first time that there was a large Mescalero Apache Peace Establishment (a/k/a Peace Camp) on the north bank of the Rio Grande that included the area now known as Duranguito.<sup>34</sup> Mescalero Apaches were encamped at this Peace Camp intermittently between 1778 and 1825. But between 1790 and 1794 they occupied the site continuously and reached a peak population of between 800 and 1,000 men, women and children.<sup>35</sup>

Because most of the area within the Peace Camp has since been developed into downtown El Paso, Duranguito is now of the utmost significance in terms of its archeology and history. Essentially, Duranguito is the only place in downtown El Paso where the type of archeological excavations necessary for locating and investigating the Peace Camp can still be conducted.<sup>36</sup>

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<sup>32</sup> 4RRPXJ.

<sup>33</sup> 2RR54-58.

<sup>34</sup> *Id.*

<sup>35</sup> 2RR237.

<sup>36</sup> 2RR242-49.

**E. Grossman amends his Antiquities Code lawsuit to ensure the City complies with its obligation to protect and preserve Native American remains.**

Anxious to provide for the discovery and protection of Mescalero Apache remains, Dr. Grossman first wrote to the Texas Historical Commission to alert it to this unprecedented discovery and requested that the City be directed to amend the Scope of Work in its permit application to properly deal with the Mescalero Apache remains.<sup>37</sup> When the THC's response did not comport with its statutory obligations, Dr. Grossman amended his Antiquities Code petition, alleging that the City was not complying with Section 191.002 of the Texas Antiquities Code, which declares Texas' public policy that Indian campsite and habitation sites should be located, protected and preserved.<sup>38</sup> The trial court immediately (on October 7, 2019) granted a temporary restraining order, prohibiting the commencement of the Arena project, including any demolition of buildings within the Arena footprint, and held a hearing on the temporary injunction on October 21, 2019.<sup>39</sup>

**F. The trial court again denies the City's Plea to the Jurisdiction, but also denies Grossman's application for temporary injunction.**

The parties appeared on October 21, 2019 for a hearing on both the application for temporary injunction and the City's Plea to the Jurisdiction.<sup>40</sup> The hearing was continued until the following afternoon.<sup>41</sup> At the end of the hearing, the trial court

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<sup>37</sup> 4RRPXD.

<sup>38</sup> 6CR3060.

<sup>39</sup> 6CR3260.

<sup>40</sup> *See generally* Vol. 2 of the Reporter's Record.

<sup>41</sup> *See generally* Vol. 3 of the Reporter's Record.

took the matter under advisement.<sup>42</sup> On October 24, 2019, the trial court denied the City's Plea to the Jurisdiction<sup>43</sup> but also denied Dr. Grossman's application for temporary injunction.<sup>44</sup>

This appeal followed. Upon filing a notice of appeal of the trial court's denial of the temporary injunction,<sup>45</sup> Dr. Grossman moved for emergency relief to preserve this Court's jurisdiction; specifically, he sought to enjoin the commencement of the Arena project, including any demolition within the Arena footprint, pending final resolution of the interlocutory appeal. The motion was granted. The City also noticed an appeal of the trial court's denial of its Plea to the Jurisdiction.<sup>46</sup> The two appeals were later consolidated.

### **ARGUMENT**

Dr. Grossman understands his appellate burden. A trial court has broad discretion on whether to enter a temporary injunction. *Butnaru v. Ford Motor Co.*, 84 S.W.3d 198, 204 (Tex. 2002). An injunction should be granted if the applicant shows (1) a cause of action against the defendant; (2) a probable right to the relief sought; and (3) a probable, imminent, and irreparable injury in the interim. *Id.* The issue before the trial court in a temporary-injunction hearing is whether the applicant may preserve the

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<sup>42</sup> 3RR127-28.

<sup>43</sup> 7CR3766.

<sup>44</sup> 7CR3767; *see also* App. A.

<sup>45</sup> 7CR3768.

<sup>46</sup> 7CR3775.

status quo of the litigation’s subject matter pending trial on the merits. *Davis v. Huey*, 571 S.W.2d 859, 862 (Tex. 1978).

But the trial court’s discretion is not limitless. A trial court cannot act arbitrarily or unreasonably. *Butnaru*, 84 S.W.3d at 204. If the trial court does, it must be reversed. *See, e.g., Seaborg Jackson Partners v. Beverly Hills Sav.*, 753 S.W.2d 242, 244–45 (Tex. App.—Dallas 1988, no writ).

This is the rare case that mandates reversal of a denial of a temporary injunction. *Seaborg Jackson* is particularly instructive. In that case, a borrower sued his lender for breach of contract and, as part of its petition, applied for a temporary injunction to halt the foreclosure of the property at issue, which was a “unique and historical” property. The trial court refused to enjoin the sale of the property. The Dallas court of appeals reversed. *Id.* at 245. “Where, as in this case, there is a serious conflict in the evidence, a trial court must consider the entire context of the case before it issues an order that effectively determines valuable legal rights without a trial on the merits.” *Id.* Equity, the court explained, demanded judicial interference where unique property, on one hand, and mere delay, on the other hand, are being balanced:

[The borrower] stands to lose title to and possession of a unique property if the status quo is not maintained. If the temporary injunction is issued, [the lender] will suffer a delay in the enforcement of its right to foreclose. . . . We must conclude that the trial court either failed to balance the respective claims of the parties or, as a matter of law, made an incorrect determination. The trial court was not free to disregard these equitable considerations and, in doing so, abused its discretion.

*Id.*

Here, the evidence showed that Dr. Grossman has a valid claim under the Texas Antiquities Code for the City's failure to properly provide for a Scope of Work that will protect and preserve Mescalero Apache remains within the footprint of the City's Arena project; for unless a temporary injunction is issued, those remains will be forever lost. Texas will not only lose the Mescalero Apache remains but also, equally devastating, several historical buildings that are not necessary to destroy. On the other hand, the harm (if any) to the City in entry of a temporary injunction is mere delay. On these facts, as in *Seaborg Jackson*, the trial court abused its discretion in refusing to enter a temporary injunction that prohibits commencement of the project, including demolition of the buildings, until final trial on the merits. The trial court's order denying temporary injunctive relief should be reversed.

**I. Grossman has a viable cause of action under the Texas Antiquities Code.**

The Texas Antiquities Code is a somewhat unique statute in that, in addition to regulating the actions of governmental actors on public lands, it also makes each and every citizen of Texas a steward of Texas' natural resources and empowers each Texan with the right to protect those assets. To that end, Section 191.173(a) provides that:

A citizen of the State of Texas may bring an action in any court of competent jurisdiction for restraining orders and injunctive relief to restrain and enjoin violations or threatened violations of this chapter.

TEX. NAT. RES. CODE §191.173(a).

Relevant here, the Antiquities Code obliges the Texas Historical Commission to determine, in the first instance, whether the site of a public project necessitates an

archeological survey. TEX. NAT. RES. CODE §191.0525(a), (b). Once the Commission determines that a survey is necessary, the Antiquities Code is very clear: the “project may not commence until the archeological survey is completed.” TEX. NAT. RES. CODE §191.0525(b).

The Antiquities Code also determines the parameters of what should be surveyed. Specifically, the Code declares that it is the public policy in Texas that Native American campsite and habitation sites should be located, protected and preserved. TEX. NAT. RES. CODE §191.002. The Historical Commission’s own rules recognize this policy and specifically include Habitation Sites and Native American open campsites within the definition of an Archeological Site. *See* Rule 26.3(5) (TEX. ADMIN. CODE, Title 13, Chapter 26).<sup>47</sup>

Grossman sued for injunctive relief under the Texas Antiquities Code because the City, through its agent Moore, has refused to modify the Scope of Work in its Archeological Survey to allow discovery as well as to require protection and preservation of the Mescalero Apache remains that are likely to be present in the footprint of the City’s planned basketball arena in Duranguito. The City is also in violation (or threatened violation) of the Antiquities Code because the City is prohibited from commencing the project until a valid archeological survey is complete; the demolition of buildings within the project footprint—planned to start immediately

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<sup>47</sup> *See* Appendix C.

unless enjoined by this Court—constitutes commencement of the project as a matter of law.

Grossman’s claims are likely to succeed. Importantly, though, Grossman was not required to establish that he ultimately will prevail at trial—only that he is entitled to preserve the status quo pending trial on the merits. *See Walling v. Metcalfe*, 863 S.W.2d 56, 58 (Tex. 1993).

Here, the evidence was undisputed that remains of Mescalero Apaches are very likely within the Arena footprint. Dr. David Romo, a local historian who reviewed primary source materials to support his testimony and opinions in this case,<sup>48</sup> testified that a previously unknown but large Mescalero Apache Peace Establishment (a/k/a Peace Camp) existed on the north bank of the Rio Grande that included the area now known as Duranguito.<sup>49</sup> He noted that the geographical references in the primary documentation and the location of a bridge over the then-existing river support his opinion as to the location of the Peace Camp.<sup>50</sup> He also noted that, while the Mescalero Apaches’ encampments were intermittent between 1778 and 1825, they occupied the site continuously—with a peak population of between 800 to 1,000—between 1790 and 1794.<sup>51</sup> Thus, in his expert opinion, the subsurface of Duranguito very likely contains archeological remains of this tribe.<sup>52</sup> Historian Dr. Max Grossman agreed, based on

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<sup>48</sup> 2RR221-31.

<sup>49</sup> 2RR242-44.

<sup>50</sup> 2RR247-50.

<sup>51</sup> 2RR237.

<sup>52</sup> 2RR247-50.

his study of Santiago's groundbreaking book and his own independent review of the primary sources.<sup>53</sup>

The City did not dispute the existence of or location of the Peace Camp. Their expert, archeologist Doug Mangum, testified that he agreed with Dr. Romo's and Dr. Grossman's conclusions that the subsurface of Duranguito likely contains archeological remains of the Mescalero Apaches.<sup>54</sup>

The primary dispute, though, is how deep below the subsurface the remains are likely to be located. Mangum believes any remains will likely be found immediately below the surface<sup>55</sup> and that his current plan to excavate only 3 feet below ground is sufficient to discover any remains that may exist.<sup>56</sup> He candidly admits, however, that he does not know how deep the remains might be.<sup>57</sup>

Mangum's opinion, as well as his Scope of Work and Research Design, are unacceptable to Dr. David Carmichael, an archeologist and professor of archeology with more than 35 years of experience excavating project sites that contain Native American remains and teaching students about best practices for archeological surveys intended to recover and preserve Native American remains.<sup>58</sup> In Carmichael's expert opinion, Mangum's Research Design is insufficient to deal with buried Mescalero

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<sup>53</sup> 2RR27; 2RR65-66.

<sup>54</sup> 2RR159-60, 173.

<sup>55</sup> 2RR141.

<sup>56</sup> 2RR134.

<sup>57</sup> 2RR156.

<sup>58</sup> 2RR175-76.



Apache archeological materials because it does not establish a systematic scope of work designed to search for and recover Mescalero Apache material remains. Carmichael opined that a proper scope of work would excavate to a depth of between 17 and 20 feet.<sup>59</sup> He explained that other projects that he has worked on in the area found Native American remains as deep as 15 feet (the Kohlberg parking lot)<sup>60</sup> and that a 1970 excavation in the area found cultural remains as deep as 17 to 20 feet below ground, including Native American artifacts.<sup>61</sup>

In addition to faulting Mangum's Scope of Work for failing to acknowledge and account for the likely depth of Native American remains, Carmichael also faulted Mangum's process for excavation because it ignores best practices for identifying material such as Mescalero Apache remains. Carmichael explained that ground-penetrating radar has been ineffective for finding the kind of low-visibility remains that will likely be discovered in the archeological strata corresponding to the period of Mescalero Apache occupation.<sup>62</sup> Although Mangum's Scope of Work for the Arena project does contemplate trenching, it does not include a systematic scheme for locating the Mescalero remains: "The concern is, when you start looking for something that's below the surface, has no surface indication of where it might be, then you can't just hunt and peck. You have to produce some kind of systematic scheme for where you're

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<sup>59</sup> 2RR185, 202.

<sup>60</sup> 2RR201-02

<sup>61</sup> 2RR202. *See also* 2RR59-60.

<sup>62</sup> 2RR182-83

going to test; otherwise, it's very hit or miss.”<sup>63</sup> Carmichael also faulted Mangum for his plan to use quarter-inch screens. While that size screen can be effective for Euro-American sites, it is ineffective “with Native American sites because there’s too many small items that will go through a quarter-inch screen. You'll miss them entirely, and especially in the case with Apache sites.”<sup>64</sup>

Finally, it is also undisputed that Mangum did not know of the presence of Mescalero Apache remains when his firm, Moore Archeological Consulting, submitted its application for a permit to the Texas Historical Commission. Mangum admits as much,<sup>65</sup> and Santiago’s groundbreaking book was not published until October 2018, months after the permit was submitted.<sup>66</sup> Most disturbing, Moore never even considered revising its Scope of Work to account for this new discovery and has no plans to do so now.<sup>67</sup>

In summary, the testimony at the temporary injunction hearing overwhelmingly showed that Grossman will likely succeed on his claim that the City, through its agent Moore Archeological Consulting, has violated or threatened to violate the Antiquities Code because the permit application it submitted to the Texas Historical Commission does not account for locating, much less protecting and preserving, Native American

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<sup>63</sup> 2RR183.

<sup>64</sup> 2RR184.

<sup>65</sup> 2RR160

<sup>66</sup> 2RR54-58

<sup>67</sup> 2RR151-52.

archeological remains that are likely to be present in the footprint of the City's planned basketball arena in Duranguito.

## **II. The City's defenses are meritless.**

Rather than attack the evidence Grossman presented to show the merits of his claim under the Antiquities Code, the City took the position that Grossman's claims have somehow been resolved in prior litigation.<sup>68</sup> Primarily, in its answer and response to Grossman's claim for injunctive relief, the City claims Grossman's claims are barred by res judicata (or other related preclusion doctrines). The basis for these defenses all relate to the Austin Court of Appeals' decision in *Grossman v. Wolfe*, 578 S.W.3d 250 (Tex. App.—Austin 2019, pet. denied).

To invoke res judicata, the City must show a judgment on the merits by a court of competent jurisdiction involving the same parties (or those in privity) and involving the same claims that were raised or could have been raised in the first action. The City cannot meet this test because:

- This case is brought against the City of El Paso and not Mark Wolfe, the Executive Director of the Texas Historical Commission. The City and Wolfe are not in privity.
- This case involves a claim that was not brought in *Grossman v. Wolfe* because the existence of the Mescalero Apache Peace Camp in Duranguito was not known by any of the parties at that time. The evidence showed that the existence of the Peace Camp in Duranguito was not known until after

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<sup>68</sup> The City also argued that Grossman's claims were barred by sovereign immunity—despite its prior admissions that the Texas Antiquities Code provides a limited waiver of immunity. Grossman will address the City's weak immunity arguments in his Brief of Cross-Appellees.

October 2018, the month in which Mark Santiago published his book entitled *A Bad Peace and a Good War – Spain and the Mescalero Apache Uprising 1795-1799*.

- The claim made in this case is distinctly different from the claim in *Grossman v. Wolfe*. There, the claim was that Wolfe had issued the archeological permit without the joinder of the Texas Historical Commission as required by statute. Here, the claim is that the Scope of Work and Research Design of the archeological survey to be conducted by the City requires revision to comply with the Antiquities Code due to the discovery of the Mescalero Apache Peace Camp in Duranguito.

The pleadings in the prior *Grossman v. Wolfe* suit primarily attacked the manner in which the THC approved *the permit, i.e.*, without involvement by the THC, an ultra vires act by Mr. Wolfe. The Amended Petition in that prior suit also attacked *the permit* in that it allowed for commencement of the project before completion of the archeological survey, also an ultra vires act by Mr. Wolfe. But the Amended Petition *never* challenged the validity of Moore's *application* to the THC, *i.e.*, its Research Design and Scope of Work. Indeed, it could not have done so. The existence and location of the Mescalero Apache Tribe's Peace Camp in Duranguito at issue here was not known at the time the lawsuit against Mr. Wolfe was filed. In short, this is a suit against *the City*, seeking to compel *the City's* compliance with the Antiquities Code. It is not a suit against the THC and does not request relief from or action by the THC.

The City's outside counsel stated it best when, referencing a letter about the subject matter of this lawsuit from Grossman's counsel to the Texas Historical Commission,<sup>69</sup> he candidly told a witness:<sup>70</sup>

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<sup>69</sup> 4RRPXD.

<sup>70</sup> 3RR71.

19 Q. Let me just tell you this letter has nothing  
20 to do with this case.  
21 A. Okay.

This statement is true. This case has nothing to do with the Texas Historical Commission. The THC is not a party to this suit. The relief requested in this lawsuit is not directed towards the THC. And any prior action, or inaction, by the THC is irrelevant to the claims in this lawsuit. The doctrine of res judicata has no application to this case, and the City's reliance on *Grossman v. Wolfe* does not change the likelihood of Grossman's success on his injunctive claim under the Texas Antiquities Code.

Equally meritless is the City's intimation that the Third Court of Appeals' decision is binding precedent on the trial court or this Court. Courts in one appellate district are not bound by the decisions of a different appellate district. *See generally Am. Nat'l Ins. Co. v. IBM*, 933 S.W.2d 685, 692 (Tex. App.—San Antonio 1996, writ denied) (discussing the issue in the context of transferred appeals); *see also* 1 William V. Dorsaneo III, Texas Litigation Guide §2.01[2], at 2-12 to 2-21 (2012) (Texas court of appeals decisions are ordinarily only binding within a specific geographic area because each of Texas's fourteen intermediate appellate courts have "jurisdiction coextensive with the geographic limits of its district"). This basic principle is why conflicts arise among the courts of appeal, and those conflicts guide the Texas Supreme Court in whether a given case is important to the jurisprudence of the State and thus within their jurisdiction. *See generally* TEX. GOV'T CODE §22.001 (supreme court has jurisdiction of

issues important to the jurisprudence of the state); TEX. R. APP. P. 56.1 (establishing criteria for issues important to the jurisprudence of the state). *See also Wagner & Brown, Ltd v. Horwood*, 53 S.W.3d 347 (Tex. 2001) (J. Hecht dissenting from dismissal of petition for review for want of jurisdiction) (lamenting a conflict between the two Houston courts of appeals and the high court’s “mulish aversion” to resolving the conflict).

In any event, the holding from the Third Court of Appeals, as it relates to the merits of this case, is very narrow. The Court simply held that Grossman had not stated an ultra vires claim against the Texas Historical Commission because the Antiquities Code “does not establish any parameters for the Commission to use in making the determination” of whether to require an archeological survey, thus granting the Commission broad discretion in how it permits public projects. *Grossman v. Wolfe*, 578 S.W.3d at 261. The discretion defeated Grossman’s claims against the Commission’s Executive Director, according to the Court. *Id.* The opinion, however, did not make the broad factual or legal determinations that the City insisted below that it does: a wrong assertion that can only be made if one reads the decision outside of the context in which the issues on appeal were presented in that case.

### **III. Absent an injunction, harm is irreparable and imminent.**

The harm that will result if a temporary injunction is not issued is irreparable and imminent. If the City, through its agent Moore, excavates in Duranguito without a Scope of Work that accounts for the Peace Camp, the damage will be irreversible. As Carmichael’s testimony established, Moore’s Scope of Work and Research Design are

insufficient for locating the low-visibility remains of the Mescalero Apache Tribe.<sup>71</sup> Absent a proper survey that comports with best practices for locating these remains, they will be forever lost, along with a unique opportunity for historians and archeologists to better understand this tribe during the Spanish colonial period.<sup>72</sup>

Any demolition of buildings in Duranguito prior to the completion of a proper archeological survey, as required by the Antiquities Code, would also cause irreparable harm. The City's own archeologist, Mangum, contends that any Native American remains are within a shallow stratum beneath these buildings (within 3 feet below ground).<sup>73</sup> Dr. Carmichael testified that, although he believes the remains are deeper within the subsurface, if Mangum is correct, disturbing the foundation of the buildings would easily disturb remains at that depth,<sup>74</sup> particularly with the use of heavy equipment.<sup>75</sup> He also testified that a proper survey, which comports with archeological standards, would never contemplate demolition as a first phase: a survey should only require assessment of a small portion of a project site (typically only 10-15% of a site) and thus industry standards are intended to preserve as much of a site as possible (including surface structures) through the duration of the survey.<sup>76</sup> Dr. Grossman, who

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<sup>71</sup> *See supra* at 12-14.

<sup>72</sup> 2RR57-58

<sup>73</sup> 2RR134, 156.

<sup>74</sup> 2RR204.

<sup>75</sup> 2RR208

<sup>76</sup> 2RR193-95.

also has an archeological background, also testified that demolition of the buildings could disturb the earth and damage subsurface artifacts.<sup>77</sup>

In any event, proof of a violation of a statute alone establishes a case for injunctive relief. *See, e.g., San Miguel v. City of Windcrest*, 40 S.W.3d 104, 108 (Tex. App.—San Antonio 2000, no pet.) (“A city seeking to enjoin a violation of its zoning ordinance, however, need not prove that a violation would cause injury to it or its residents. Similarly, an act that violates a statute or city ordinance may be enjoined without a showing that the legal remedy is inadequate.” (citations omitted)).

Time is certainly of the essence. The City has stipulated that it “plans on proceeding with the archeological survey permitted by the Texas Historical Commission which will include the demolition of the buildings in the footprint of the planned multipurpose performing arts and entertainment center as soon as practical once there are no injunctions or other legal impediments to doing so.”<sup>78</sup>

This stipulation is consistent with the pattern and practice of the City throughout this case and other litigation that involves Duranguito. Demolishing these historic buildings in the Duranguito neighborhood to clear space for a sports arena is a high priority for the City. For example, on September 10, 2017, demolition crews were on site within an hour or less of the City’s calculated gamesmanship of filing a notice of appeal for the sole purpose of depriving the trial court of jurisdiction to enter an

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<sup>77</sup> 2RR58-59, 85.

<sup>78</sup> 4RRPXG.



injunction that it was presumably about to enter. Ultimately, this Court entered an injunction.<sup>79</sup> But the City ignored it and, the very next morning at 7:30 am, authorized demolition which knocked large holes in 5 of the buildings protected by the appellate court's judgment. This stunning action prompted this Court to issue yet another injunction, finally halting demolition.<sup>80</sup>

Equally telling is the City's conduct in the *Grossman v. Wolfe* litigation in Austin. Towards the beginning of that litigation, and to prevent the entry of a temporary restraining order, the City agreed to enter into a Rule 11 agreement that prohibited demolition in Duranguito so long as Grossman's application for temporary injunction and Wolfe's Plea to the Jurisdiction were pending in the trial court in that case.<sup>81</sup> But when the trial court ruled, the City refused to extend the terms of the Rule 11 agreement, even temporarily, while the case went up on appeal.<sup>82</sup> As in this case, and consistent with the City's stipulation, the City's conduct shows that it will demolish these buildings at the first opportunity that it is not enjoined from doing so.

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<sup>79</sup> 2RR26-37; 6CR3349.

<sup>80</sup> 6CR3350. The shocking events that transpired ultimately resulted in this Court issuing a "show cause" order, demanding that the City account for its conduct. *See generally* Docket No. 08-17-00199-CV.

<sup>81</sup> 6CR3352.

<sup>82</sup> 6CR3354.

**PRAYER**

For these reasons, Appellant Dr. Max Grossman requests that the Court (1) reverse the trial court's order denying a temporary injunction; and (2) remand the case to the trial court with instructions that the trial court enter a temporary injunction enjoining the City from commencing the Project, including any demolition of buildings within the Project's footprint, pending a trial on the merits.

Dated: December 27, 2019

Respectfully submitted,

By: /s/ Lisa Bowlin Hobbs

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## CERTIFICATE OF COMPLIANCE

Pursuant to TEX. R. APP. P. 9.4, I hereby certify that this brief contains 5,304 words. This is a computer-generated document created in Microsoft Word, using 14-point typeface for all text, except for footnotes which are in 12-point typeface. In making this certificate of compliance, I am relying on the word count provided by the software used to prepare the document.

\_\_\_\_\_  
/s/ Lisa Bowlin Hobbs

Lisa Bowlin Hobbs

**CERTIFICATE OF SERVICE**

I certify that on December 27, 2019, I electronically served a copy of this brief on the following attorneys of record:

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# APPENDIX

Appendix A	Order Denying Temporary Injunction (October 24, 2019)
Appendix B	Texas Antiquities Code
Appendix C	13 TEX. ADMIN. CODE 26.3(5)

IN THE 384<sup>TH</sup> JUDICIAL DISTRICT COURT  
OF EL PASO COUNTY, TEXAS

MAX GROSSMAN,  
Plaintiff,

v.

CITY OF EL PASO,  
Defendant.

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Cause No. 2017-DCV2528

**ORDER**

This Court has considered Plaintiff's Application for Temporary Injunction and after hearing the evidence presented, arguments of counsel and reviewing the pleadings in this matter, finds the Application should be denied.

IT IS, THEREFORE, ORDERED that Plaintiff's Application for Temporary Injunction is denied.

SIGNED 24 October 2019

  
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HONORABLE PATRICK GARCIA

NATURAL RESOURCES CODE

TITLE 9. HERITAGE

CHAPTER 191. ANTIQUITIES CODE

SUBCHAPTER A. GENERAL PROVISIONS

Sec. 191.001. TITLE. This chapter may be cited as the Antiquities Code of Texas.

Acts 1977, 65th Leg., p. 2683, ch. 871, art. I, Sec. 1, eff. Sept. 1, 1977.

Sec. 191.002. DECLARATION OF PUBLIC POLICY. It is the public policy and in the public interest of the State of Texas to locate, protect, and preserve all sites, objects, buildings, pre-twentieth century shipwrecks, and locations of historical, archeological, educational, or scientific interest, including but not limited to prehistoric and historical American Indian or aboriginal campsites, dwellings, and habitation sites, archeological sites of every character, treasure imbedded in the earth, sunken or abandoned ships and wrecks of the sea or any part of their contents, maps, records, documents, books, artifacts, and implements of culture in any way related to the inhabitants, pre-history, history, natural history, government, or culture in, on, or under any of the land in the State of Texas, including the tidelands, submerged land, and the bed of the sea within the jurisdiction of the State of Texas.

Acts 1977, 65th Leg., p. 2683, ch. 871, art. I, Sec. 1, eff. Sept. 1, 1977.

Sec. 191.003. DEFINITIONS. In this chapter:

- (1) "Committee" means the Texas Historical Commission.
- (2) "Landmark" means a state archeological landmark.
- (3) "State agency" means a department, commission, board, office, or other agency that is a part of state government and that

is created by the constitution or a statute of this state. The term includes an institution of higher education as defined by Section 61.003, Texas Education Code.

(4) "Political subdivision" means a local governmental entity created and operating under the laws of this state, including a city, county, school district, or special district created under Article III, Section 52(b)(1) or (2), or Article XVI, Section 59, of the Texas Constitution.

Acts 1977, 65th Leg., p. 2683, ch. 871, art. I, Sec. 1, eff. Sept. 1, 1977. Amended by Acts 1983, 68th Leg., p. 2001, ch. 364, Sec. 1, eff. Sept. 1, 1983; Acts 1987, 70th Leg., ch. 948, Sec. 1, eff. Sept. 1, 1987; Acts 1995, 74th Leg., ch. 109, Sec. 18, eff. Aug. 30, 1995.

Sec. 191.004. CERTAIN RECORDS NOT PUBLIC INFORMATION. (a) Information specifying the location of any site or item declared to be a state archeological landmark under Subchapter D of this chapter is not public information.

(b) Information specifying the location or nature of an activity covered by a permit or an application for a permit under this chapter is not public information.

(c) Information specifying details of a survey to locate state archeological landmarks under this chapter is not public information.

Added by Acts 1981, 67th Leg., p. 959, ch. 365, Sec. 1, eff. June 10, 1981.

#### SUBCHAPTER B. ADMINISTRATIVE PROVISIONS

Sec. 191.021. COMPLIANCE WITH OPEN MEETINGS ACT AND ADMINISTRATIVE PROCEDURE AND TEXAS REGISTER ACT. (a) Repealed by Acts 1995, 74th Leg., ch. 109, Sec. 29, eff. Aug. 30, 1995.

(b) If an institution of higher education notifies the committee in a timely manner (as established by the committee's rules) that it protests the proposed designation of a building or land under its control as a landmark, the matter becomes a contested



case under the provisions of Sections 12 through 20 of the Administrative Procedure and Texas Register Act. In the conduct of proceedings under the Administrative Procedure and Texas Register Act, both the hearing officer in his or her recommendations to the committee and the committee in its determinations of findings of fact and conclusions of law shall consider, in addition to such other objective criteria as the committee may establish pursuant to Section 191.091 of this chapter:

(1) that the primary mission of institutions of higher education is the provision of educational services to the state's citizens;

(2) that the authority for expenditure of the portion of the state's resources allocated to institutions of higher education for construction and repair purposes is entrusted to the governing boards of institutions of higher education for the purpose of the furtherance of the primary mission of the respective institutions of higher education;

(3) whether the benefit to the state from landmark designation outweighs the potential inflexibility of use that may be a consequence of the designation; and

(4) whether the cost of remodeling and/or restoration that might be required under the permit procedures of the committee if the building were designated as a landmark may be so substantially greater than remodeling under procedures established by law for the review of remodeling projects for higher education buildings not so designated as to impair the proper use of funds designated by the state for educational purposes at the institution.

(c) If an institution of higher education notifies the committee in a timely manner (as established by the committee's rules) that it protests the terms of a permit proposed to be granted to an institution of higher education under this chapter, the matter becomes a contested case under the provisions of Sections 12 through 20 of the Administrative Procedure and the Texas Register Act. The hearing officer in his or her recommendations to the committee and the committee in its determination of findings of fact and conclusions of law shall consider:

(1) that the primary mission of institutions of higher education is the provision of educational services to the state's citizens;

(2) that the authority for expenditure of the portion of the state's resources allocated to institutions of higher education for construction and repair purposes is entrusted to the governing boards of institutions of higher education for the purpose of the furtherance of the primary mission of the respective institutions of higher education;

(3) whether the legislature has provided extra funds that may be required to implement any proposed requirements;

(4) the effect of any proposed requirements on maintenance costs;

(5) the effect of any proposed requirements on energy costs; and

(6) the appropriateness of any proposed permit requirements to the uses to which a public building has been or will be dedicated by the governing board of the institution of higher education.

(d) Weighing the criteria set forth in Subsections (b) and (c) of this section against the criteria it adopts pursuant to Section [191.092](#) of this chapter and such criteria as it may adopt with regard to permit requirements, the committee shall designate a building or land under the control of an institution of higher education as a landmark or include a requirement in a permit only if the record before the committee establishes by clear and convincing evidence that such designation or inclusion would be in the public interest.

Added by Acts 1983, 68th Leg., p. 2003, ch. 364, Sec. 6, eff. Sept. 1, 1983. Amended by Acts 1995, 74th Leg., ch. 109, Sec. 29, eff. Aug. 30, 1995.

Amended by:

Acts 2009, 81st Leg., R.S., Ch. 1182 (H.B. [3632](#)), Sec. 5, eff. June 19, 2009.

Sec. 191.051. IN GENERAL. (a) The committee is the legal custodian of all items described in this chapter that have been recovered and retained by the State of Texas.

(b) The committee shall:

(1) maintain an inventory of the items recovered and retained by the State of Texas, showing the description and depository of them;

(2) determine the site of and designate landmarks and remove from the designation certain sites, as provided in Subchapter D of this chapter;

(3) contract or otherwise provide for discovery operations and scientific investigations under the provisions of Section [191.053](#) of this code;

(4) consider the requests for and issue the permits provided for in Section [191.054](#) of this code;

(5) prepare and make available to the general public and appropriate state agencies and political subdivisions information of consumer interest describing the functions of the committee and the procedures by which complaints are filed with and resolved by the committee; and

(6) protect and preserve the archeological and historical resources of Texas.

Acts 1977, 65th Leg., p. 2685, ch. 871, art. I, Sec. 1, eff. Sept. 1, 1977. Amended by Acts 1983, 68th Leg., p. 2002, ch. 364, Sec. 5, eff. Sept. 1, 1983; Acts 1987, 70th Leg., ch. 948, Sec. 4, eff. Sept. 1, 1987.

Sec. 191.052. RULES. The committee may promulgate rules and require contract or permit conditions to reasonably effect the purposes of this chapter.

Acts 1977, 65th Leg., p. 2685, ch. 871, art. I, Sec. 1, eff. Sept. 1, 1977.

Sec. 191.0525. NOTICE REQUIRED. (a) Before breaking ground at a project location on state or local public land, the person primarily responsible for the project or the person's agent shall

notify the committee. The committee shall promptly determine whether:

(1) a historically significant archeological site is likely to be present at the project location;

(2) additional action, if any, is needed to protect the site; and

(3) an archeological survey is necessary.

(b) Except as provided by Subsection (c), the committee shall make a determination not later than the 30th day after the date the committee receives notice under Subsection (a). If the committee fails to respond in the 30-day period, the person may proceed with the project without further notice to the committee. If the committee determines that an archeological survey is necessary at the project location, the project may not commence until the archeological survey is completed.

(c) The committee shall make a determination not later than the 15th day after the date the committee receives notice under Subsection (a) for project locations regarding oil, gas, or other mineral exploration, production, processing, marketing, refining, or transportation facility or pipeline projects. If the committee fails to respond in the 15-day period, the person may proceed with the project without further notice to the committee. If the committee determines that an archeological survey is necessary at the project location, the project may not commence until the archeological survey is completed.

(d) A project for a county, municipality, or an entity created under Section 52, Article III, or Section 59, Article XVI, Texas Constitution, requires advance project review only if the project affects a cumulative area larger than five acres or disturbs a cumulative area of more than 5,000 cubic yards, whichever measure is triggered first, or if the project is inside a designated historic district or recorded archeological site.

(e) There exist categorical exclusions since many activities conducted on nonfederal public land have little, if any, chance to damage archeological sites, and therefore should not require notification under this section. The following are categorical exclusions at a minimum:

(1) water injection into existing oil and gas wells;

(2) upgrading of electrical transmission lines when there will be no new disturbance of the existing easement;

(3) seismic exploration activity when there is no ground penetration or disturbance;

(4) building and repairing fences that do not require construction or modification of associated roads, fire breaks, or previously disturbed ground;

(5) road maintenance that does not involve widening or lengthening the road;

(6) installation or replacement of meter taps;

(7) controlled burning of fields;

(8) animal grazing;

(9) plowing, if the techniques are similar to those used previously;

(10) installation of monuments and sign posts unless within the boundaries of designated historic districts;

(11) maintenance of existing trails;

(12) land sales and trades of land held by the permanent school fund and permanent university fund;

(13) permanent school fund and permanent university fund leases, easements, and permits, including mineral leases and pooling agreements, in which the lessee, grantee, or permittee is specifically required to comply with the provisions of this chapter;

(14) oil, gas, or other mineral exploration, production, processing, marketing, refining, or transportation facility or pipeline project in an area where the project will cross state or local public roads, rivers, and streams, unless they contain a recorded archeological site or a designated state land tract in Texas' submerged lands;

(15) maintenance, operation, replacement, or minor modification of an existing oil, gas, or other mineral exploration, production, processing, marketing, refining, or transportation facility or pipeline; and

(16) any project for which a state permit application has been made prior to promulgation of rules under this section.

(f) This section does not apply to any state agency or political subdivision that has entered into a memorandum of understanding for coordination with the committee.

(g) (1) If, during the course of a project or class of projects that have complied with the notification requirements of this section, a person encounters an archeological site, the person shall abate activity on the project at the project location and shall promptly notify the committee. Within two business days of notification under this subsection, the committee shall determine whether:

(A) a historically significant archeological site is likely to be present in the project area;

(B) additional action, if any, is needed to protect the site; and

(C) an archeological investigation is necessary.

(2) If the committee fails to respond within two business days, the person may proceed without further notice to the committee.

(h) The notification required by this section does not apply to a response to a fire, spill, or other emergency associated with an existing facility located on state or local public lands if the emergency requires an immediate response.

(i) The committee by rule shall establish procedures to implement this section.

Added by Acts 1995, 74th Leg., ch. 109, Sec. 19, eff. Aug. 30, 1995.  
Amended by Acts 1997, 75th Leg., ch. 1070, Sec. 51, eff. Sept. 1, 1997.

Sec. 191.053. CONTRACT FOR DISCOVERY AND SCIENTIFIC INVESTIGATION. (a) The committee may contract with other state agencies or political subdivisions and with qualified private institutions, corporations, or individuals for the discovery and scientific investigation of sunken or abandoned ships or wrecks of the sea, or any part of the contents of them, or archeological deposits or treasure imbedded in the earth.

(b) The contract shall:

(1) be on a form approved by the attorney general;

(2) specify the location, nature of the activity, and the time period covered by the contract; and

(3) provide for the termination of any right in the investigator or permittee under the contract on the violation of any of the terms of the contract.

(c) The executed contract shall be recorded by the person, firm, or corporation obtaining the contract in the office of the county clerk in the county or counties in which the operations are to be conducted prior to the commencement of the operation.

(d) Title to all objects recovered is retained by the State of Texas unless and until it is released by the committee.

Acts 1977, 65th Leg., p. 2685, ch. 871, art. I, Sec. 1, eff. Sept. 1, 1977. Amended by Acts 1983, 68th Leg., p. 2006, ch. 364, Sec. 7, eff. Sept. 1, 1983; Acts 1987, 70th Leg., ch. 948, Sec. 5, eff. Sept. 1, 1987.

Sec. 191.054. PERMIT FOR SURVEY AND DISCOVERY, EXCAVATION, RESTORATION, DEMOLITION, OR STUDY. (a) The committee may issue a permit to other state agencies or political subdivisions or to qualified private institutions, companies, or individuals for the survey and discovery, excavation, demolition, or restoration of, or the conduct of scientific or educational studies at, in, or on landmarks, or for the discovery of eligible landmarks on public land if it is the opinion of the committee that the permit is in the best interest of the State of Texas.

(b) Restoration shall be defined as any rehabilitation of a landmark excepting normal maintenance or alterations to nonpublic interior spaces.

(c) The permit shall:

(1) be on a form approved by the attorney general;

(2) specify the location, nature of the activity, and the time period covered by the permit; and

(3) provide for the termination of any right in the investigator or permittee under the permit on the violation of any of the terms of the permit.

Acts 1977, 65th Leg., p. 2685, ch. 871, art. I, Sec. 1, eff. Sept. 1, 1977. Amended by Acts 1983, 68th Leg., p. 2006, ch. 364, Sec. 7,

eff. Sept. 1, 1983; Acts 1987, 70th Leg., ch. 948, Sec. 6, eff. Sept. 1, 1987.

Sec. 191.055. SUPERVISION. All scientific investigations or recovery operations conducted under the contract provisions in Section 191.053 of this code and all operations conducted under permits or contracts set out in Section 191.054 of this code must be carried out:

- (1) under the general supervision of the committee;
- (2) in accordance with reasonable rules adopted by the committee; and
- (3) in such manner that the maximum amount of historic, scientific, archeological, and educational information may be recovered and preserved in addition to the physical recovery of items.

Acts 1977, 65th Leg., p. 2686, ch. 871, art. I, Sec. 1, eff. Sept. 1, 1977. Amended by Acts 1983, 68th Leg., p. 2002, ch. 364, Sec. 7, eff. Sept. 1, 1983.

Sec. 191.056. ACCEPTANCE OF GIFTS. The committee may accept gifts, grants, devises, or bequests of money, securities, or property to be used in the pursuance of its activities and the performance of its duties.

Acts 1977, 65th Leg., p. 2686, ch. 871, art. I, Sec. 1, eff. Sept. 1, 1977. Amended by Acts 1983, 68th Leg., p. 2006, ch. 364, Sec. 7, eff. Sept. 1, 1983.

Sec. 191.057. SURVEY, EXCAVATION, OR RESTORATION FOR PRIVATE PARTIES. The committee may survey, excavate, or restore antiquities for private parties under rules promulgated by the committee. All real and administrative costs incurred in the survey, excavation, or restoration shall be paid by the private party.

Acts 1977, 65th Leg., p. 2686, ch. 871, art. I, Sec. 1, eff. Sept. 1, 1977. Amended by Acts 1987, 70th Leg., ch. 948, Sec. 7, eff. Sept. 1, 1987.



Sec. 191.058. CURATION OF ARTIFACTS. (a) As far as is consistent with the public policy of this chapter, the committee, on a majority vote, may arrange or contract with other state agencies or political subdivisions, and qualified private institutions, corporations, or individuals, for public display of artifacts and other items in its custody through permanent exhibits established in the locality or region in which the artifacts were discovered or recovered. The committee, on a majority vote, may also arrange or contract with these same persons and groups for portable or mobile displays.

(b) The committee is the legal custodian of the items described in this chapter and shall adopt appropriate rules, terms, and conditions to assure appropriate security, qualification of personnel, insurance, facilities for preservation, restoration, and display of the items loaned under the contracts.

(c) Arrangements for curation of artifacts, data, and other materials recovered under Texas Antiquities Committee permits are specified in the body of the permit. Should a state agency or political subdivision lack the facilities or for any reason be unable to curate or provide responsible storage for such artifacts, data, or other materials, the Texas Antiquities Committee will arrange for curation at a suitable institution. The Texas Antiquities Committee may by rule assess costs for the curation.

(d) The committee may contract with a qualified institution for the institution to serve as a repository for artifacts and other items in the custody of the committee. The Corpus Christi Museum of Science and History is the repository for marine artifacts. The committee may contract with other qualified institutions to serve as additional repositories for marine artifacts. The committee may authorize an archeological repository to loan artifacts and other items curated by the repository to a qualified institution for public display. The Corpus Christi Museum of Science and History:

(1) does not own the artifacts for which it serves as a repository; and

(2) shall make available for loan to a qualified institution for display the marine artifacts for which it serves as a repository.

Acts 1977, 65th Leg., p. 2687, ch. 871, art. I, Sec. 1, eff. Sept. 1, 1977. Amended by Acts 1983, 68th Leg., p. 2008, ch. 364, Sec. 8, eff. Sept. 1, 1983; Acts 1987, 70th Leg., ch. 948, Sec. 8, eff. Sept. 1, 1987; Acts 1997, 75th Leg., ch. 797, Sec. 1, 2, eff. June 17, 1997.

Sec. 191.059. COMPLAINTS. (a) The committee shall keep an information file about each complaint filed with the committee.

(b) If a written complaint is filed with the committee, the committee, at least as frequently as quarterly and until final disposition of the complaint, shall notify the parties to the complaint of the status of the complaint.

Added by Acts 1983, 68th Leg., p. 2009, ch. 364, Sec. 9, eff. Sept. 1, 1983.

#### SUBCHAPTER D. STATE ARCHEOLOGICAL LANDMARKS

Sec. 191.091. SHIPS, WRECKS OF THE SEA, AND TREASURE IMBEDDED IN EARTH. Sunken or abandoned pre-twentieth century ships and wrecks of the sea, and any part or the contents of them, and all treasure imbedded in the earth, located in, on, or under the surface of land belonging to the State of Texas, including its tidelands, submerged land, and the beds of its rivers and the sea within jurisdiction of the State of Texas, are declared to be state archeological landmarks and are eligible for designation.

Acts 1977, 65th Leg., p. 2687, ch. 871, art. I, Sec. 1, eff. Sept. 1, 1977. Amended by Acts 1987, 70th Leg., ch. 948, Sec. 9, eff. Sept. 1, 1987.

Sec. 191.092. OTHER SITES, ARTIFACTS, OR ARTICLES. (a) Sites, objects, buildings, artifacts, implements, and locations of historical, archeological, scientific, or educational interest,

including those pertaining to prehistoric and historical American Indians or aboriginal campsites, dwellings, and habitation sites, their artifacts and implements of culture, as well as archeological sites of every character that are located in, on, or under the surface of any land belonging to the State of Texas or to any county, city, or political subdivision of the state are state archeological landmarks and are eligible for designation.

(b) For the purposes of this section, a structure or a building has historical interest if the structure or building:

(1) was the site of an event that has significance in the history of the United States or the State of Texas;

(2) was significantly associated with the life of a famous person;

(3) was significantly associated with an event that symbolizes an important principle or ideal;

(4) represents a distinctive architectural type and has value as an example of a period, style, or construction technique; or

(5) is important as part of the heritage of a religious organization, ethnic group, or local society.

(c) An individual or a private group that desires to nominate a building or site owned by a political subdivision as a state archeological landmark must give notice of the nomination at the individual's or group's own expense in a newspaper of general circulation published in the city, town, or county in which the building or site is located. If no newspaper of general circulation is published in the city, town, or county, the notice must be published in a newspaper of general circulation published in an adjoining or neighboring county that is circulated in the county of the applicant's residence. The notice must:

(1) be printed in 12-point boldface type;

(2) include the exact location of the building or site;

and

(3) include the name of the group or individual nominating the building or site.

(d) An original copy of the notice and an affidavit of publication signed by the newspaper's publisher must be submitted to the commission with the application for nomination.

(e) The commission may not consider for designation as a state archeological landmark a building or site owned by a political subdivision unless the notice and affidavit required by Subsection (d) are attached to the application.

(f) Before the committee may designate a structure or building as a state archeological landmark, the structure or building must be listed on the National Register of Historic Places.

(g) The committee shall adopt rules establishing criteria for the designation of a structure or building as a state archeological landmark.

(h) The committee shall consider any and all fiscal impact on local political subdivisions before any structure or building owned by a local political subdivision may be designated as a state archeological landmark.

Acts 1977, 65th Leg., p. 2687, ch. 871, art. I, Sec. 1, eff. Sept. 1, 1977. Amended by Acts 1981, 67th Leg., p. 193, ch. 90, Sec. 1, eff. Aug. 31, 1981; Acts 1987, 70th Leg., ch. 948, Sec. 10, eff. Sept. 1, 1987; Acts 1995, 74th Leg., ch. 109, Sec. 20, eff. Aug. 30, 1995.

Sec. 191.093. PREREQUISITES TO REMOVAL, ALTERING, DAMAGING, DESTROYING, SALVAGING, OR EXCAVATING CERTAIN LANDMARKS. Landmarks under Section [191.091](#) or [191.092](#) of this code are the sole property of the State of Texas and may not be removed, altered, damaged, destroyed, salvaged, or excavated without a contract with or permit from the committee.

Acts 1977, 65th Leg., p. 2687, ch. 871, art. I, Sec. 1, eff. Sept. 1, 1977. Amended by Acts 1981, 67th Leg., p. 193, ch. 90, Sec. 2, eff. Aug. 31, 1981; Acts 1987, 70th Leg., ch. 948, Sec. 11, eff. Sept. 1, 1987.

Sec. 191.094. DESIGNATING A LANDMARK ON PRIVATE LAND. (a) Any site located on private land which is determined by majority vote of the committee to be of sufficient archeological, scientific, or historical significance to scientific study, interest, or public

representation of the aboriginal or historical past of Texas may be designated a state archeological landmark by the committee.

(b) No site may be designated on private land without the written consent of the landowner or landowners in recordable form sufficiently describing the site so that it may be located on the ground.

(c) On designation, the consent of the landowner shall be recorded in the deed records of the county in which the land is located.

Acts 1977, 65th Leg., p. 2687, ch. 871, art. I, Sec. 1, eff. Sept. 1, 1977.

Sec. 191.095. PERMIT FOR LANDMARK ON PRIVATE LAND. All sites or items of archeological, scientific, or historical interest located on private land in the State of Texas in areas designated as landmarks, as provided in Section 191.094 of this code, and landmarks under Section 191.092 of this code, may not be taken, altered, damaged, destroyed, salvaged, or excavated without a permit from the committee or in violation of the terms of the permit.

Acts 1977, 65th Leg., p. 2688, ch. 871, art. I, Sec. 1, eff. Sept. 1, 1977.

Sec. 191.096. MARKING LANDMARK ON PRIVATE LAND. Any site on private land which is designated a landmark shall be marked by at least one marker bearing the words "State Archeological Landmark".

Acts 1977, 65th Leg., p. 2688, ch. 871, art. I, Sec. 1, eff. Sept. 1, 1977. Amended by Acts 1987, 70th Leg., ch. 948, Sec. 12, eff. Sept. 1, 1987.

Sec. 191.097. REMOVING DESIGNATION AS LANDMARK. (a) Any landmark on public or private land may be determined by majority vote of the committee to be of no further historical, archeological, educational, or scientific value, or not of sufficient value to warrant its further classification as a landmark, and on this determination may be removed from the designation as a landmark.

(b) On removal of the designation on private land which was designated by instrument of record, the committee shall execute and record in the deed records of the county in which the site is located an instrument setting out the determination and releasing the site from the provisions of this chapter.

Acts 1977, 65th Leg., p. 2688, ch. 871, art. I, Sec. 1, eff. Sept. 1, 1977. Amended by Acts 1987, 70th Leg., ch. 948, Sec. 13, eff. Sept. 1, 1987.

Sec. 191.098. NOTIFICATION OF ALTERATION OR DEMOLITION OF POSSIBLE LANDMARK. (a) A state agency may not alter, renovate, or demolish a building possessed by the state that was constructed at least 50 years before the alteration, renovation, or demolition and that has not been designated a landmark by the committee, without notifying the committee of the proposed alteration, renovation, or demolition not later than the 60th day before the day on which the agency begins the alteration, renovation, or demolition.

(b) After receipt of the notice the committee may waive the waiting period; however, if the committee institutes proceedings to determine whether the building is a state archeological landmark under Section 191.092 of this code not later than the 60th day after the day on which the notice is received by the committee, the agency must obtain a permit from the committee before beginning an alteration, renovation, or demolition of the building during the time that the committee's proceedings are pending.

(c) Should the committee fail to provide a substantive response within 60 days to a request for a review of project plans, application for permit, draft report review, or other business required under the Antiquities Code, the applicant may proceed without further reference to the committee.

Added by Acts 1983, 68th Leg., p. 2009, ch. 364, Sec. 10, eff. Sept. 1, 1983. Amended by Acts 1987, 70th Leg., ch. 948, Sec. 14, eff. Sept. 1, 1987.

#### SUBCHAPTER E. PROHIBITIONS

Sec. 191.131. CONTRACT OR PERMIT REQUIREMENT. (a) No person, firm, or corporation may conduct a salvage or recovery operation without first obtaining a contract.

(b) No person, firm, or corporation may conduct an operation on any landmark without first obtaining a permit and having the permit in his or its possession at the site of the operation, or conduct the operation in violation of the provisions of the permit.

Acts 1977, 65th Leg., p. 2688, ch. 871, art. I, Sec. 1, eff. Sept. 1, 1977.

Sec. 191.132. DAMAGE OR DESTRUCTION. (a) No person may intentionally and knowingly deface American Indian or aboriginal paintings, hieroglyphics, or other marks or carvings on rock or elsewhere that pertain to early American Indian or aboriginal habitation of the country.

(b) A person who is not the owner shall not wilfully injure, disfigure, remove, or destroy a historical structure, monument, marker, medallion, or artifact without lawful authority.

Acts 1977, 65th Leg., p. 2688, ch. 871, art. I, Sec. 1, eff. Sept. 1, 1977.

Sec. 191.133. ENTRY WITHOUT CONSENT. No person who is not the owner, and does not have the consent of the owner, proprietor, lessee, or person in charge, may enter or attempt to enter on the enclosed land of another and intentionally injure, disfigure, remove, excavate, damage, take, dig into, or destroy any historical structure, monument, marker, medallion, or artifact, or any prehistoric or historic archeological site, American Indian or aboriginal campsite, artifact, burial, ruin, or other archeological remains located in, on, or under any private land within the State of Texas.

Acts 1977, 65th Leg., p. 2688, ch. 871, art. I, Sec. 1, eff. Sept. 1, 1977.

Sec. 191.171. CRIMINAL PENALTY. (a) A person violating any of the provisions of this chapter is guilty of a misdemeanor, and on conviction shall be punished by a fine of not less than \$50 and not more than \$1,000, by confinement in jail for not more than 30 days, or by both.

(b) Each day of continued violation of any provision of this chapter constitutes a separate offense for which the offender may be punished.

Acts 1977, 65th Leg., p. 2689, ch. 871, art. I, Sec. 1, eff. Sept. 1, 1977.

Sec. 191.172. CIVIL ACTION BY ATTORNEY GENERAL. (a) In addition to, and without limiting the other powers of the attorney general, and without altering or waiving any criminal penalty provided in this chapter, the attorney general may bring an action in the name of the State of Texas in any court of competent jurisdiction for restraining orders and injunctive relief to restrain and enjoin violations or threatened violations of this chapter, and for the return of items taken in violation of the provisions of this chapter.

(b) Venue for an action instituted by the attorney general lies either in Travis County or in the county in which the activity sought to be restrained is alleged to be taking place or from which the items were taken.

Acts 1977, 65th Leg., p. 2689, ch. 871, art. I, Sec. 1, eff. Sept. 1, 1977.

Sec. 191.173. CIVIL ACTION BY CITIZEN. (a) A citizen of the State of Texas may bring an action in any court of competent jurisdiction for restraining orders and injunctive relief to restrain and enjoin violations or threatened violations of this chapter, and for the return of items taken in violation of the provisions of this chapter.



(b) Venue of an action by a citizen lies in the county in which the activity sought to be restrained is alleged to be taking place or from which the items were taken.

Acts 1977, 65th Leg., p. 2689, ch. 871, art. I, Sec. 1, eff. Sept. 1, 1977.

Sec. 191.174. ASSISTANCE FROM STATE AGENCIES, POLITICAL SUBDIVISIONS, AND LAW ENFORCEMENT OFFICERS. (a) The chief administrative officers of all state agencies and political subdivisions are directed to cooperate and assist the committee and the attorney general in carrying out the intent of this chapter.

(b) All state and local law enforcement agencies and officers are directed to assist in enforcing the provisions and carrying out the intent of this chapter.

Acts 1977, 65th Leg., p. 2689, ch. 871, art. I, Sec. 1, eff. Sept. 1, 1977. Amended by Acts 1987, 70th Leg., ch. 948, Sec. 15, eff. Sept. 1, 1987.

# Texas Administrative Code

<a href="#">TITLE 13</a>	CULTURAL RESOURCES
<a href="#">PART 2</a>	TEXAS HISTORICAL COMMISSION
<a href="#">CHAPTER 26</a>	PRACTICE AND PROCEDURE
<a href="#">SUBCHAPTER A</a>	GENERAL PROVISIONS
RULE §26.3	Definitions

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The following words and terms, when used in this chapter, shall have the following meanings unless the context clearly indicates otherwise. These definitions also clarify the interpretation of terms and phrases used in the Antiquities Code of Texas but not defined therein.

(1) Accession--The formal acceptance of a collection and its recording into the holdings of a curatorial facility and generally includes a transfer of title. For held-in-trust collections, stewardship but not title is transferred to the curatorial facility.

(2) Antiquities Advisory Board--A ten-member board that advises the commission in reviewing matters related to the Antiquities Code of Texas.

(3) Antiquities Permit or Permit--Authorization for work on a designated or potential State Antiquities Landmark, or survey investigations to determine if cultural resources are present. Permit types include Archeological Permits (§26.15 of this title) and Historic Buildings and Structures Permits (§26.22 of this title).

(4) Applicant--Relative to an Antiquities Permit, an applicant is the controlling agency, organization, or political subdivision having administrative control over a publicly owned landmark or the owner of a privately owned landmark. Applicant may also refer to an individual or private group that desires to nominate a building or site for landmark designation.

(5) Archeological site--Any land or marine-based place containing evidence of prehistoric or historic human activity, including but not limited to the following:

(A) Habitation sites. Habitation sites are areas or structures where people live or have lived on a permanent or temporary basis.

(B) Native American open campsites which were occupied on a temporary, seasonal, or intermittent basis.

(C) Rock shelters, in general, are a special kind of campsite. These sites are located in caves or under rock overhangs and have been occupied either: temporarily, seasonally, or intermittently.

(D) Non-Native American campsites are the cultural remains of activities by people who are not Native American.

(E) Residence sites are those where routine daily activities were carried out and which were intended for year-round use.

(F) Non-Native American sites may include, in addition to the main structure, outbuildings, water systems, trash dumps, garden areas, driveways, and other remains that were an integral part of the site when it was inhabited.

(G) Non-habitation sites. Non-habitation sites result from use during specialized activities and may include standing structures.

(i) Rock art and graffiti sites consist of symbols or representations that have been painted, ground, carved, sculpted, scratched, or pecked on or into the surface of rocks, wood, or metal, including but not limited to Native American pictographs and petroglyphs, historical graffiti and inscriptions.

(ii) Mines, quarry areas, and lithic procurement sites are those from which raw materials such as flint, clay, coal, minerals, or other materials were collected or mined for future use.

(iii) Game procurement and processing sites are areas where game was killed or butchered for food or hides.

(iv) Fortifications, battlefields, training grounds and skirmish sites including fortifications of the historic period and the central areas of encounters between opposing forces, whether a major battleground or areas of small skirmishes.

(v) Cache--A collection of artifacts that are deliberately hidden for future use. Caches are often discovered in burials or in caves and usually consist of ceremonial and ritual objects, functional objects or emergency food supplies.

(6) Archeological Survey Standards for Texas--Minimum survey standards developed by the commission in consultation with the Council of Texas Archeologists.

(7) Artifacts--The tangible objects of the past that relate to human life and culture. Examples include, but are not limited to projectile points, tools, documents, art forms, and technologies.

(8) Board--The Antiquities Advisory Board.

(9) Building--A structure created to shelter any form of human activity, such as a courthouse, city hall, church, hotel, house, barn, or similar structure. Building may refer to a historically related complex such as a courthouse and jail or a house and barn.

(10) Burials and burial pits--Marked and unmarked locales of a human burial or burials. Burials and burial pits may contain the remains of one or more individuals located in a common grave in a locale. The site area may contain gravestones, markers, containers, coverings, garments, vessels, tools, and other grave objects or could be evidenced by the presence of depressions, pit feature stains, or other archeological evidence.

(11) Cemetery--A place that is used or intended to be used for interment, and includes a graveyard, burial park, unknown cemetery, abandoned cemetery, mausoleum, or any other area containing one or more graves or unidentified graves.

(A) Abandoned cemetery--A non-perpetual care cemetery containing one or more graves and possessing cemetery elements for which no cemetery organization exists and which is not otherwise

maintained by any caretakers. It may or may not be recorded in the deed records of the county in which it lies.

(B) Unidentified grave--A grave that is not marked in a manner that provides the identity of the interment.

(C) Unknown cemetery--An abandoned cemetery evidenced by the presence of marked or unmarked graves that does not appear on a map or in deed records.

(12) Commission--The Texas Historical Commission and its staff.

(13) Committee, or Antiquities Committee, or Texas Antiquities Committee--As redefined by the 74th Texas Legislature within §191.003 of the Texas Natural Resources Code, committee means the commission and/or staff members of the commission.

(14) Conservation--Scientific laboratory processes for cleaning, stabilizing, restoring, preserving artifacts, and the preservation of buildings, sites, structures and objects.

(15) Council of Texas Archeologists--A non-profit voluntary organization that promotes the goals of professional archeology in the State of Texas.

(16) Council of Texas Archeologists Guidelines--Professional and ethical standards which provide a code of self-regulation for archeological professionals in Texas with regard to field methods, reporting, and curation.

(17) Cultural landscape--A geographic area, associated with a historic event, activity, or person or exhibiting other cultural or aesthetic values. Cultural landscapes include historic sites, historic designed landscapes, and historic vernacular landscapes, as further described in the National Park Service's Preservation Brief 36: Protecting Cultural Landscapes.

(18) Cultural resource--Any building, site, structure, object, artifact, historic shipwreck, landscape, location of historical, archeological, educational, or scientific interest, including, but not limited to, prehistoric and historic Native American or aboriginal campsites, dwellings, and habitation sites, archeological sites of every character, treasure embedded in the earth, sunken or abandoned ships and wrecks of the sea or any part of the contents thereof, maps, records, documents, books, artifacts, and implements of culture in any way related to the inhabitants' prehistory, history, government, or culture. Examples of cultural resources include Native American mounds and campgrounds, aboriginal lithic resource areas, early industrial and engineering sites, rock art, early cottage and craft industry sites, bison kill sites, cemeteries, battlegrounds, all manner of historic buildings and structures, local historical records, cultural landscapes, etc.

(19) Curatorial facility--A museum or repository.

(20) Default--Failure to fulfill all conditions of a permit or contract, issued or granted to permittee(s), sponsors, and principal investigator or investigative firm, before the permit has expired.

(21) Defaulted permit--A permit that has expired without all permit terms and conditions having been met before the permit expiration date.

(22) Designated historic district--An area of archeological, architectural, or historical significance that is listed in the National Register of Historic Places, either individually or as a historic district;

designated as a landmark, or nominated for designation as a landmark; or identified by State agencies or political subdivisions of the State as a historically sensitive site, district, or area. This includes historical designation by local landmark commissions, boards, or other public authorities, or through local preservation ordinances.

(23) Destructive analysis--Destroying all or a portion of an object or sample to gain specialized information. For purposes of this chapter, it does not include analysis of objects or samples prior to their being accessioned by a curatorial facility.

(24) Discovery--The act of locating, recording, and reporting a cultural resource.

(25) Disposal--The discard of an object or sample after being recovered and prior to accession, or after deaccession.

(26) District--A significant concentration, linkage, or continuity of sites, buildings, structures, or objects unified historically or aesthetically by plan or physical development. See also "designated historic district."

(27) Eligible--Archeological sites or other historic properties that meet the criteria set forth in §§26.10 - 26.12 and 26.19 of this title, are eligible for official landmark designation.

(28) Exhumation--The excavation of human burials or cemeteries and its associated funerary objects by a professional archeologist, or principal investigator.

(29) Groundbreaking--Construction or earth moving activities that disturb lands owned or controlled by state agencies or political subdivisions of the state.

(30) Held-in-trust collection--Those state-associated collections under the authority of the commission that are placed in a curatorial facility for care and management; stewardship is transferred to that curatorial facility but not ownership.

(31) Historic buildings and structures permit--Historic buildings and structures permits are those issued for work to buildings, structures, cultural landscapes, and non-archeological sites, objects, and districts designated or nominated for designation as landmarks.

(32) Historic property--A district, site, building, structure or object significant in American history, architecture, engineering, archeology or culture.

(33) Historic time period--For the purposes of landmark designation, this time period is defined as extending from A.D. 1500 to 50 years before the present.

(34) Human remains--The body of a decedent.

(35) Integrity--The authenticity of a property's historic identity, evidenced by the survival of physical characteristics that existed during the property's historic or prehistoric period, including the property's location, design, setting, materials, workmanship, feeling, and association.

(36) Interment--The intended permanent disposition of human remains by entombment, burial, or placement in a niche.

(37) Investigation--Archeological or architectural activity including, but not limited to: reconnaissance or intensive survey, testing, exhumation, or data recovery; underwater archeological survey, test excavation, or data recovery excavations; monitoring; measured drawings; or photographic documentation.

(38) Investigative firm--A company or scientific institution that has full-time experienced research personnel capable of handling investigations and employs a principal investigator, and/or project architect, or other project professional as applicable under "professional personnel" in paragraph (49) of this section. The company or institution holds equal responsibilities with the professional personnel to complete requirements under an Antiquities Permit.

(39) Land-owning or controlling agency--Any state agency or political subdivision of the state that owns or controls the land(s) in question.

(40) Landmark--A State Antiquities Landmark.

(41) Mitigation--The amelioration of the potential total or partial loss of significant cultural resources. For example, mitigation for removal of a deteriorated historic building feature might include photographs and drawings of the feature, and installing a replacement that matches the original in form, material, color, etc. Mitigation for the loss of an archeological site might be accomplished through data recovery actions, to preserve or recover an appropriate amount of data by application of current professional techniques and procedures, as defined in the permit's scope of work.

(42) Monuments--Includes markers and structures erected to commemorate or designate the importance of an event, person, or place, which may or may not be located at the sites they commemorate. Included in this category are certain markers erected by the commission and county historical commissions, and markers and statuary located on public grounds such as courthouse squares, parks, and the Capitol grounds.

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