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A Legislative Approach to the Protection of Sacred Sites

By Hon. Barry Goode*

The First Amendment simultaneously guarantees the right to the free exercise of one's religion *and* guards against the establishment of any religion. The problem of protecting sites sacred to Native Americans quivers between those two poles.

In 2003, California came close to adopting a law which would have provided greater protection to sites sacred to Native Americans than any other American jurisdiction. This article undertakes to explain the purpose and design of the law, Senate Bill ("S.B.") 18. The dispute S.B. 18 addressed is still a live one both in California and around the country. Other efforts will be made to deal with it. The law described here could be used, in part, as a model for those efforts.

I. The Problem That Gave Rise to S.B. 18

The traditional beliefs of many Indians invest certain natural places with

* Barry Goode is a Judge of the California Superior Court. From 2001 to 2003 he was Legal Affairs Secretary to Governor Gray Davis. Judge Goode acknowledges those members of the Davis Administration who devoted considerable time and attention to S.B. 18, including Mary Nichols and Margret Kim (Secretary and Chief Counsel, respectively, of the Resources Agency), Tal Finney, Carole Gaubatz and Scott Morgan (Director and staff members of the Office of Planning and Research) and Larry Meyers (Executive Secretary of the Native American Heritage Commission); as well as Senator Denise Ducheny and Wendy Mitchell (Senator Ducheny's chief of staff); Allison Harvey and Mary Shallenberger (of the office of Senator John Burton) and many tribal members and their attorneys who contributed generously of their time and knowledge.

sacred powers.¹ Their spiritual relationship with the divine is tied closely to such places: a lake, a mountain, a tree, a glade; all may be invested with great spiritual significance.

Places sacred to Native Americans have many different attributes. Some may be identified in a traditional myth as the birthplace of the world. Others may be places of vision quests or medicine making. Still others may be places where certain ceremonies have been practiced for generations. In one sense this is “religious” worship. In another, it is the preservation of cultural practices that give identity to a tribe.

Not all are “sacred” in the same sense. Some are burial sites. These can contain the remains of just one or two individuals, or they might contain the remains of a village. Some are gathering sites; e.g., places traditional practitioners go to gather reeds to make baskets used in ceremonies. Others may be used for traditional cultural purposes. Still others are what Westerners call “archaeological sites.” They may be places where a village stood or places containing artifacts from Native American ceremonies.

Imposing Western analogies in an attempt to understand the significance of these sacred places does little good. To say the sacred sites are like “churches” does not capture their meaning. Similarly, it is only a limited aid to under-

standing to say they are like places that gained historic significance through association with religion. Western sites such as the Wailing Wall in Jerusalem, the Cave of the Nativity in Bethlehem, or the Lourdes Holy Grotto convey some small sense of the importance of place; but none fully captures the meaning of these places in traditional Indian belief systems.

In addition, many sites sacred to Indians retain their power only as long as their location and use remain confidential. Disclosure of their identity destroys their power.

Regarded as sacred before the arrival of Europeans, the sites continued to be used for traditional practices in the centuries after contact. But, today, many of these sites are no longer on Indian lands. As Native Americans were moved from their aboriginal lands, their culturally important sites came to be owned by federal, state, and local governments, private corporations and individuals.

When California was still relatively unpopulated, Indians could go to their sacred sites without much notice. But as the state’s population grew, and as open space became “National Forests” or “utility watershed lands” or developed properties, these traditional sites became threatened. The modern concept of multiple use dedicates forest lands to logging, camping, hiking, off-roading, and other intrusive activities. And many traditional sites that were once remote are

1. For a general discussion of Native American sacred sites, see generally PATRICIA L. PARKER & THOMAS E. KING, U.S. DEP’T OF INTERIOR, NATIONAL REGISTER BULLETIN No. 38, GUIDELINES FOR EVALUATING AND DOCUMENTING TRADITIONAL CULTURAL PROPERTIES (1990) (This document is commonly referred to as “Bulletin 38.”); CULTURAL RESOURCES,

U.S. DEP’T OF INTERIOR, 16 CULTURAL RESOURCE MANAGEMENT, SPECIAL ISSUE ON TRADITIONAL CULTURAL PROPERTIES (1993); U.S. DEP’T OF INTERIOR, IMPLEMENTATION REPORT: EXECUTIVE ORDER No. 13007, INDIAN SACRED SITES (May 23, 1997). The following discussion of Native American sacred sites in this section relies on these sources.

now in the path of development. Like so much else, sacred sites have become a “competing land use.”

Another historic trend has been at work. From the mid-20th Century until the 1970s, the federal and state government pursued a policy of promoting assimilation of Native Americans.² There was little emphasis on preserving their tribes, cultures and beliefs. As that began to change in the early 1970s, and as tribal identity became more important to a growing number of Indians, there was a resurgence of interest in traditional tribal sites.³

In California, the resurgence led to a number of battles to preserve such sites from development. One arose in the early 1980s: the case of *Lyng v. Northwest Indian Cemetery Protective Association*.⁴ Historically, the Yurok, Karuk and Tolowa used what is now called the Chimney Rock area of the Six Rivers National Forest in Northern California. The Supreme Court described their “traditional Indian religious practices” thus:

Those practices are intimately and inextricably bound up with the unique features of the Chimney Rock area, which is known to the Indians as the

“high country.” Individual practitioners use this area for personal spiritual development; some of their activities are believed to be critically important in advancing the welfare of the tribe, and indeed, of mankind itself. The Indians use this area, as they have used it for a very long time, to conduct a wide variety of specific rituals that aim to accomplish their religious goals.⁵

But that land had become Forest Service property. The government regularly made tracts available for timber harvest.⁶ To facilitate the harvest, the Forest Service proposed building a road through the Chimney Rock area.⁷ Indians sued to enjoin the construction of the road and prevailed in the District Court⁸ and the Ninth Circuit.⁹

The Supreme Court reversed. It acknowledged that the road would interfere with the peace and tranquillity of an area sacred to traditional Indians.¹⁰ Yet, the Court held that neither the Free Exercise Clause nor any statutes cited by plaintiffs should impede the Forest Service’s decision to construct the

2. See generally OFFICE OF HISTORIC PRESERVATION, CALIFORNIA DEPARTMENT OF PARKS AND RECREATION, FIVE VIEWS: AN ETHNIC HISTORIC SITE SURVEY FOR CALIFORNIA (December 1988), available at http://www.cr.nps.gov/history/online_books/5views/5views.htm (last visited Sept. 1, 2004).

3. See ADVISORY COUNCIL ON CALIFORNIA INDIAN POLICY, REPORT ON CALIFORNIA INDIAN CULTURAL PRESERVATION 11 (September 1997).

4. 485 U.S. 439 (1988).

5. *Id.* at 451.

6. *Id.* at 443.

7. *Id.* at 442.

8. *Northwest Indian Cemetery Protection Ass’n v. Peterson*, 565 F.Supp. 586 (N.D. Cal. 1983).

9. *Northwest Indian Cemetery Protection Ass’n v. Peterson*, 795 F.2d 688 (9th Cir. 1986).

10. “It is undisputed that the Indian respondents’ beliefs are sincere and that the Government’s proposed action will have severe adverse effects on the practice of their religion.” *Lyng*, 485 U.S. at 447.

road.¹¹ Essentially, it held that the government should be permitted to use its property as it sees fit regardless of the impact on the Indians' ability to continue their traditional practices.¹²

Similar disputes arose in the late 1990s, in battles over Gregory Canyon, Medicine Lake, and Indian Pass.

- ♦ Gregory Canyon is the site of a proposed landfill for 30 million tons of San Diego County's trash.¹³ It is situated next to Gregory Mountain and Medicine Rock, sites of considerable significance to the Luiseño Indians:

Gregory Mountain, called "Chokla" by the Luiseño, is . . . believed to be one of the residing places of "Taakwic," a powerful and feared spirit that is the guardian spirit of many Shoshonean shamans. The entire mountain . . . is considered an important place for fasting, praying, and conducting ceremonies . . . Medicine Rock may have been made in association

with female puberty or *Wakenish* ceremonies held by the people of Pala.¹⁴

- ♦ Medicine Lake is in the far north of California. Its warm springs and natural setting are sacred to the Pit River, Modoc, Shasta, Karuk and Wintu.¹⁵ But the same geothermal steam that warms the water attracted Calpine Corporation, which wants to use that renewable energy to generate electric power.¹⁶
- ♦ Indian Pass is a starkly beautiful region in the Southeastern California desert. It has been used by the Quechan Indians for thousands of years "for Dreaming, . . . the Keruk Death Ceremony, . . . and spirit runs with tribal youth."¹⁷ But Glamis Gold, Ltd. of Canada gained rights to the area under the Mining Act of 1872 and planned to dig a pit 880 feet deep to produce gold.¹⁸ The Clinton Administration denied the company's proposal but the Bush Administration revived it.¹⁹

11. *Id.* at 453.

12. The Court drew an important distinction. "The Constitution does not permit government to discriminate against religions that treat particular physical sites as sacred, and a law prohibiting the Indian respondents from visiting the Chimney Rock area would raise a different set of constitutional questions. Whatever rights the Indians may have to the use of the area, however, those rights do not divest the Government of its right to use what is, after all, *its* land." *Id.*

13. DEP'T OF ENVIRONMENTAL HEALTH, COUNTY OF SAN DIEGO, GREGORY CANYON LANDFILL FINAL ENVIRONMENTAL IMPACT REPORT ES-3 (December 2002), available at http://www.sdcounty.ca.gov/deh/chd/gc_feir.html (last visited Sept. 1, 2004).

14. *Id.* at 4.12-4.

15. See, e.g., Earth Island Institute's Sacred Land Film Project, *Medicine Lake*, at http://web.archive.org/web/20040216073552/http://www.sacredland.org/medicine_lake.html (archived on Feb. 16, 2004, on file with *West-Northwest*).

16. *Id.*

17. Earth Island Institute's Sacred Land Film Project, *Indian Pass*, at http://web.archive.org/web/20040304083130/http://www.sacredland.org/indian_pass.html (archived on Mar. 4, 2004, on file with *West-Northwest*).

18. *Id.*

19. *Id.*; National Trust for Historic Preservation, *America's 11 Most Endangered Historic Places 2002*, at <http://www.nationaltrust.org/>

Each of these battles reached the California legislature.²⁰ By 2002, it became clear that such conflicts would continue to be a regular occurrence. It was time to try to address the problem more comprehensively.

The first effort was Senate Bill ("S.B.") 1828 (Burton), which passed the legislature in 2002, only to be vetoed by Governor Gray Davis. S.B. 1828 allowed federally recognized tribes to assert that a site was sacred and insist that it be considered during the CEQA process. If the lead agency was unable to mitigate the project's impacts on the site, then the project could be approved only if there was "an overriding environmental, public health or safety reason based on substantial evidence presented by the lead agency that the project should be approved."²¹

The Governor's veto message explained that the law was poorly drawn, gave a veto power to Indians that other Californians did not enjoy in the land-use process, and was both under-inclusive and over-inclusive. The Governor directed

his Secretary of Resources and the Director of the Office of Planning and Research to draft better legislation.²²

II. The Other Side of the Problem

As with all land-use conflicts, there is another side to the issue. There is enormous pressure to develop land in California. As the state's population continues to grow, there is a demand for new homes, schools, shopping areas, energy and all the infrastructure of modern society.²³ Many segments of the economy get immediate benefits from such construction and development. Thus, there is an enormous constituency that supports development and is often opposed to legislation that might hinder it.

Development projects in California face a substantial permitting process. If the project may have a significant impact on the environment, the developer must comply with the California Environmental Quality Act ("CEQA").²⁴ Simply stated, CEQA affords the "lead agency" up to six months to complete the process for a neg-

11most/2002/sacredsites.html (last visited Aug. 12, 2004).

20. Legislation to protect Gregory Canyon passed the Legislature in 2000 (A.B. 2752), but was vetoed by the Governor because an intervening vote of the local community overwhelmingly supported the landfill. See A.B. 2752 Complete Bill History (Cal. 2000), available at http://www.leginfo.ca.gov/pub/99-00/bill/asm/ab_2751-2800/ab_2752_bill_20000925_history.html (last visited Sept. 1, 2004). Medicine Lake did not gain legislative protection, in part because California was in the midst of its energy crisis. Glamis Mine was halted by legislation. S.B. 483, 2002 Leg., 2001-2002 Sess. (Cal. 2002); S.B. 22, 2003 Leg., 2003-2004 Sess. (Cal. 2003). Medicine Lake is the subject of considerable litigation and administrative determinations. See, e.g., Eric Bailey, *Geothermal Plant Near Tribal Site Approved; Reversal of Clinton-era Agreement Angers Native Americans Who Call the*

California Lake Sacred, LOS ANGELES TIMES, Nov. 27, 2002.

21. S.B. 1828, 2002 Leg., 2001-2002 Sess. (Cal. 2002), available at http://www.leginfo.ca.gov/pub/01-02/bill/sen/sb_1801-1850/sb_1828_bill_20020829_enrolled.html (last visited Sept. 1, 2004).

22. The Governor's veto message is available at http://www.leginfo.ca.gov/pub/01-02/bill/sen/sb_1801-1850/sb_1828_vt_20020930.html (last visited Aug. 12, 2004).

23. CALIFORNIA GOVERNOR'S OFFICE OF PLANNING AND RESEARCH, GOVERNOR'S ENVIRONMENTAL GOALS AND POLICY REPORT 3 (November 10, 2003), available at <http://www.opr.ca.gov/EnvGoals/PDFs/EGPR-11-10-03.pdf> (last visited Aug. 8, 2004).

24. CAL. PUB. RES. CODE §§ 21000-21177 (West 2004); CAL. CODE REGS. tit. 14, §§ 15000-15388 (2003).

ative declaration and up to a year for a full environmental impact report.²⁵ An “environmental impact report” (“EIR”) is defined as “a detailed statement . . . describing and analyzing the significant environmental effects of a project and discussing ways to mitigate or avoid the affects.”²⁶ A “negative declaration” is defined as “a written statement by the Lead Agency briefly describing the reasons that a proposed project, not exempt from CEQA, will not have a significant effect on the environment and therefore does not require the preparation of an EIR.”²⁷

Members of the business community are typically concerned about any legislation that would complicate or lengthen the CEQA process. They are also vigilant to insure that any proposed change to CEQA does not provide yet more fodder for litigation over what are already contentious issues. Thus, they are alert to legislation that might introduce ambiguity or conflicting provisions to the law.

The level of concern raised by these issues can be measured by the support and opposition both for S.B. 1828 (2002) and for S.B. 18 (2003), the subject of this

article. Both bills were opposed by substantial coalitions of the regulated community, including, among many others, the American Planning Association California Chapter, Association of California Water Agencies, Association of Environmental Professionals, California Association of Realtors, California Building Industry Association, California Business Roundtable, California Chamber of Commerce, California Council for Environmental and Economic Balance, California Farm Bureau Federation, California Manufacturing and Technology Association, California Mining Association, California Municipal Utilities Association, California State Association of Counties, Calpine Corporation, Consulting Engineers and Land Surveyors of California, Home Builders Association of the Central Coast, Independent Oil Producers Agency, Regional Council of Rural Counties, and Western States Petroleum Association.²⁸

III. The Search for a Solution

Members of the Davis Administration undertook to study the matter.²⁹ They commissioned research on how the prob-

25. PUB. RES. CODE § 21100.2; CAL. CODE REGS. tit. 14, §§ 15107, 15108. For a very general overview of the California Environmental Quality Act, see CALIFORNIA GOVERNOR'S OFFICE OF PLANNING AND RESEARCH, A CITIZEN'S GUIDE TO PLANNING 10 (January 2001 ed.), available at http://www.opr.ca.gov/planning/PDFs/citizens_planning.pdf (last visited Aug. 9, 2004). More detailed information is available at <http://www.ceres.ca.gov/ceqa> (last visited Aug. 9, 2004).

26. CAL. CODE REGS. tit. 14, § 15362. A more detailed definition is contained in the statute. PUB. RES. CODE § 21061.

27. CAL. CODE REGS. tit. 14, § 15371; see also PUB. RES. CODE § 21064. Note that both an environmental impact report and a negative declaration are preceded by an “Initial Study,” which is “a preliminary analysis

prepared by the Lead Agency to determine whether an EIR or a Negative Declaration must be prepared or to identify the significant environmental effects to be analyzed in an EIR.” CAL. CODE REGS. tit. 14, § 15365.

28. A complete list of supporters and opponents of S.B. 18 can be found in the various legislative analyses of that bill. An example can be found at http://www.leginfo.ca.gov/pub/bill/sen/sb_0001-0050/sb_18_cfa_20030912_120347_sen_floor.html (last visited Sept. 1, 2004).

29. The author was one of the members of the Davis Administration involved with the development of S.B. 18. The descriptions of the research and drafting process throughout this article are based on his experience unless otherwise noted.

lem was treated in other states and throughout the world. They studied laws ranging from federal legislative proposals to enactments of the Northern Territories of Australia designed to protect aboriginal sites. They came to realize that the so-called “sacred sites” question could be analyzed more carefully if the sites were broken into discrete subcategories. Consequently, they developed a matrix by which to study the question:

	Private Lands	Federal Lands	State Lands	Other Public Lands
Burial Sites	1	2	3	4
Gathering Sites	5	6	7	8
Sacred Sites	9	10	11	12
Archaeological Sites	13	14	15	16

There are really at least sixteen different types of issues; e.g., burial sites on private lands (#1 on the matrix), gathering sites on federal lands (#6), sacred sites on state lands (#11) and so on. Each category need not be treated the same way—indeed, many should not be treated the same way.

30. PUB. RES. CODE §§ 21000-21177.

31. National Environmental Policy Act, 42 U.S.C. §§ 4321-4375 (2000).

32. PUB. RES. CODE §§ 21000-21002.1; *Friends of Mammoth v. Bd. of Supervisors*, 8 Cal. 3d 247, 254-58 (1972), *disapproved on other grounds by Kowis v. Howard*, 3 Cal. 4th 888 (1992); *Planning and Conservation League v. Dept't of Water Res.*, 83 Cal. App. 4th 892, 910-11 (2000); *County of Inyo v. Yorty*, 32 Cal. App. 3d 795, 807-11 (1973).

33. PUB. RES. CODE §§ 21002, 21002.1, 21081;

Ultimately, the analysis led to the conclusion that the “sacred sites problem” is essentially a variety of land-use conflict, involving competing and often incompatible uses. Such conflicts are common in modern America. One party wishes to use or develop his or her property in a certain way. Another party claims that use will impact the land in a manner that is harmful (e.g., by killing an endangered species, filling a wetland, or polluting a body of water) or that it will create external impacts (such as traffic, noise, or growth-inducing effects).

In California, land-use disputes are mediated through the CEQA process.³⁰ Like the National Environmental Policy Act (“NEPA”),³¹ CEQA requires disclosure, analysis, and discussion.³² The notion is that, by examining the competing values and expressly addressing environmental effects, the public agency will arrive at an informed decision that, in many cases, is more likely to protect the environment. But CEQA goes further than NEPA, and requires more mitigation and protection of environmental values.³³

Sacred sites were already being considered under CEQA. Existing law required consideration of a project’s impacts on both archaeological and historical resources.³⁴ But not all sacred sites fit neatly into either category. The law simply did not provide a

CAL. CODE REGS. tit. 14, §§15002(h), 15091. *Compare Sierra Club v. United States Forest Serv.*, 46 F.3d 835, 837 n.2 (8th Cir. 1995) (“NEPA . . . imposes procedural requirements, but not substantive results . . .”); *Northwest Env'tl. Def. Ctr. v. Bonneville Power Admin.*, 117 F.3d 1520, 1536 (9th Cir. 1997) (“NEPA exists to insure a process, not a result.”).

34 PUB. RES. CODE §§ 21060.5 (“environment” defined to include “objects of historic significance”), 21083.2 (“archaeological resources”), 20184.1 (“historical resources”).

clear, candid path for considering the value of preserving the traditional cultural values of Indians. The question then was how best to get these sites considered in the land-use process.

Through lengthy study and many conversations with tribes, certain principles emerged:

- ◆ The law should be amended to provide a clear, rational means of dealing with the kind of land use conflicts presented by the “sacred site” problem;
- ◆ Relations between tribes and state and local government should be strengthened;
- ◆ California should assist tribes in improving access to and protection of tribal cultural resources on federal lands;
- ◆ California should manage its own lands to provide greater protection to tribal cultural resources;
- ◆ California should increase the opportunity for protection of tribal cultural resources on private lands in a manner that respects the interests of both the tribes and private landowners;

35. At that point, it was only a “spot bill,” i.e., one which was deliberately scant; knowing the bill would still be subject to substantial amendment.

36. The full history of the legislation is available at http://www.leginfo.ca.gov/pub/bill/sen/sb_0001-0050/sb_18_bill_20040820_history.html (last visited Aug. 12, 2004).

37. *Id.*

38. Reconsideration was granted on January 8, 2004. *Id.*

39. S.B. 18 was enrolled on August 20, 2004. *Id.* As enrolled, the bill had a much more limited scope than the legislation described in this article. Essentially, the final version of S.B. 18 used lan-

- ◆ All California tribes (not just federally recognized tribes) should be afforded the benefits of new legislation regarding tribal cultural resources; and
- ◆ The confidentiality of tribal cultural properties should be protected to the maximum extent consistent with competing rights.

Ultimately, this led to the drafting of legislation that was introduced on December 2, 2002, as S.B. 18 (Burton, Chesbro, Ducheny). It passed the Senate on June 2, 2003, by a vote of 30-8³⁵ and was amended significantly in the Assembly.³⁶ The bill reached its most complex form on September 12, 2003, after it had been negotiated extensively by the legislative and executive branches as well as by many interested stakeholders. However, on that day (the last of the 2003 legislative session) it failed by three votes in the lower house.³⁷

After this article was written, S.B. 18 was reconsidered and amended in the 2003-2004 biennial legislative session.³⁸ At the time this article went to press, the legislature had passed, but the Governor had not yet acted upon a much more limited form of S.B. 18.³⁹

guage either identical to the September 12, 2003, version or modified or expanded language to accomplish five things: (1) it permits Indian tribes to hold conservation easements by amending California Civil Code section 815.3 (compare Section 2 of the September 12, 2003, version with Section 2 of the final version); (2) it requires the Governor’s Office of Planning and Research to adopt guidelines for consulting with tribes in the General Plan process for identifying and preserving certain sacred sites (i.e., those described in California Public Resources Code sections 5097.9 and 5097.995) while maintaining their confidentiality (compare Section 3 of the September 12,

Since the issue is unlikely to go away—in California or elsewhere in the nation, it is worth examining the structure of S.B. 18 in the form in which it was considered by the legislature on September 12, 2003. That version of the bill is instructive, both as a model for further legislative approaches to this issue, and as a lesson in the extent to which such an effort involves the competing concerns of a wide array of groups interested in land use in a large state.

IV. Senate Bill 18

A. Overview

S.B. 18 was designed to do several things. In brief, it provided for the creation of a list of traditional tribal cultural sites (“TTCS”). As to those sites, the first effort employed a “nip it in the bud” strategy—designed to give early warning to developers and property owners to consider avoiding or mitigating development of land on which a TTCS is present. If that failed, and there was a proposal to develop property in a manner that might adversely affect a TTCS, then the site was to be given consideration in the CEQA process. During that process, the Native American Heritage Commission (“NAHC” or “Commission”) would work with project proponents and the affected tribe to try to mediate acceptable mitigation measures.

2003, version with Section 3 of the final version); (3) it gives tribes notice and a right to consultation with respect to sacred sites whenever a jurisdiction adopts or amends a General Plan (compare Sections 4-5 of the September 12, 2003, version with Sections 4-7 of the final version); (4) it permits certain sacred sites to be included in the open-space element of a General Plan and gives the tribes the right of consultation with respect to that (compare Sections 7-8 of the September 12, 2003, version with Sections 9-10 of the final version); and (5) it defines “consultation” (compare Section 13 of the September 12, 2003, version with

If those efforts failed, then the project was to be considered by the lead agency under the normal CEQA process, with one exception as discussed in greater detail below. Finally, if the project was located on state lands or federal lands managed by the state, then the lead agency might vote to “override” the adverse impact on the TTCS only for reasons of “public health, safety or the environment.”

That is a quick outline of the leading features of the legislation. But each step requires more careful understanding.

B. The Creation of the TTCS Register

In drafting the bill, Davis Administration officials knew there were already two lists that might have some bearing on the problem. But neither was adequate to the task.

1. Existing Lists

California already has two lists that might be thought to include the kind of traditional cultural sites under consideration. The first was compiled by the NAHC.⁴⁰ The Commission was established in 1976.⁴¹ Among its duties was to “prepare an inventory of Native American sacred places that are located on public lands”⁴² However, the list that the

Section 8 of the final version). Both versions of the bill can be found by carrying out a search for S.B. 18 at www.leginfo.ca.gov.

40. PUB. RES. CODE § 5097.9-5097.991 (provides the law pertaining to the Native American Heritage Commission).

41. California Native American Heritage Commission, *Native American Heritage Commission History*, http://www.ceres.ca.gov/nahc/nahc_history.html (last visited July 31, 2004).

42. PUB. RES. CODE § 5097.96.

Commission compiled contains entries of varying description and quality.⁴³ Furthermore, no one outside the Commission has been allowed to see the list, limiting its utility.⁴⁴

The other list, contained in the California Historical Resource Information System ("CHRIS"), "functions as the official repository of site records, mapped locations, and survey or excavation reports for archaeological sites in California."⁴⁵ The system consists of twelve "Information Centers," most of which are university-based.⁴⁶ But CHRIS lists primarily archaeological sites.⁴⁷ It does not necessarily include all traditional tribal cultural sites. And it, too, is confidential.⁴⁸ Only certain people have access to it.⁴⁹

So, both of these lists are simultaneously over-inclusive and under-inclusive. They do not catalogue all the sites at issue.

43. Personal communication with Larry Meyers, Executive Director of the Native American Heritage Commission, August 8, 2003 (Director Meyers explained that the NAHC exercised no judgment regarding what to include. If a site was nominated, it was simply included in the inventory.).

44. *Id.*

45. State of California, *Archaeological Record Checks*, <http://www.indiana.edu/~e472/cdf/checks/> (last visited July 9, 2004) (This webpage is maintained by the Underwater Science Program at the University of Indiana. It is a product of the California Department of Forestry and Fire Protection Archaeology Program and is designed to provide current information to California Registered Professional Foresters and other resource managers in California. There is a web link from the California Department of Forestry and Fire Protection which can be accessed at <http://www.fire.ca.gov/php/index.php>).

46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.*; see PUB. RES. CODE §§ 5020-5029.5. The

2. The New TTCS Register

In light of the inadequacy of the older lists, the drafters of S.B. 18 proposed to have the NAHC create a new TTCS register.⁵⁰ The first task was defining a "traditional tribal cultural site." The drafters consulted a number of sources, including Bulletin 38, Executive Order 13007,⁵¹ Section 106 of the National Historic Preservation Act,⁵² and other similar precedents. After extensive negotiation, the legislation entrusted to the NAHC the job of adopting regulatory criteria for listing TTCSs.

However, the legislation bounded the NAHC's discretion. It required the adopted criteria to "identify a TTCS as a site that is traditionally associated with, or has served as the site for engaging in activities related to, the traditional beliefs, cultural practices, or ceremonies of a Native

Office of Historic Preservation, the State Historic Preservation Officer and the State Historical Resources Commission all have authority over CHRIS. See Cal. Office of Historic Preservation, *California Historical Resources Information System* (CHRIS), http://www.ohp.parks.ca.gov/default.asp?page_id=1068. (last visited July 9, 2004).

50. S.B. 18, 2003 Leg., 2003-2004 Sess. § 17 (Cal. 2003) (amending PUB. RES. CODE § 5097.96) (All further references to S.B. 18 are to the section of law which would have been added or amended by the September 12, 2003, version of the bill, unless otherwise noted. Consistent with California legislative drafting practices, the bill contains the full text of any section of law that would be amended. All codes affected appear in a bill in alphabetical order; each section within a code appears in numerical order.).

51. Exec. Order No. 13007, 3 C.F.R. § 196 (1997) (signed by President Clinton on May 24, 1996).

52. The National Historic Preservation Act of 1966, 16 U.S.C. §§ 470-470x-6 (2000); see also 36 C.F.R. §§ 800.1-800.16 (2003) (implementing regulations entitled "Protection of Historic Properties").

American tribe.”⁵³ The words were carefully chosen. “Traditional” and “traditionally” were intended to mean that the site has a history of being used for the cultural practice that is to be preserved. “Traditional beliefs, cultural practices, or ceremonies” was chosen to protect more than strictly “religious” activities. A TTCS can be important to a belief system or to preservation of sites central to a tribe’s culture.

Similarly, the legislation stipulated that a TTCS “must be a reasonably delineated physical location identifiable by physical characteristics.”⁵⁴ Sites would have to be readily identifiable and reasonably well confined. Some tribes may consider all the earth or the water or the air to be sacred. But such all-encompassing notions would not define a TTCS.

The legislation further provided that, in formulating criteria to define a TTCS, the NAHC “shall acknowledge that Native American tribes possess special expertise in identifying TTCSs and shall consult with them and encourage active participation in developing [those] criteria.”⁵⁵ This (and similar provisions in S.B. 18) reflected existing CEQA provisions, which encourage the lead agency to “consult with any person who has special expertise with respect to any environmental impact involved.”⁵⁶

While permitting tribes to nominate sites, the bill was careful to state that listing is an option—not a requirement. Indeed, it said “the fact that a tribe has not nominated a site for inclusion in the TTCS Register may not be evidence that the site is not sacred or significant.”⁵⁷ The confidentiality issues are just too great to require the listing of sites. A tribe would be free not to list a site. It could simply wait to see what happens.⁵⁸

The bill was also careful to acknowledge the dual sovereignty issue that is present when dealing with tribal issues. For example, Section 5097.96 recites: “The TTCS Register is in no way intended to infringe on Native American tribes’ sovereign rights to define their own sites of religious and cultural significance for their own purposes.”⁵⁹ In response to concerns that surfaced during discussions with tribal leaders, Section 5097.96 aimed to make clear that the TTCS Register would be for purposes of *California* law only. Under *tribal* law, any tribe would still be free to make its own decisions, for its own purposes, with respect to these sites. Nothing in this new state law was intended to prejudice decisions a tribe may make in its own governmental processes. While the provision restated existing law, many tribes still wished to have the point made explicit.

53. S.B. 18, § 13 (adding PUB. RES. CODE § 5097.10(l)).

54. *Id.*

55. S.B. 18, § 17 (amending PUB. RES. CODE § 5097.96(b)).

56. PUB. RES. CODE § 21104(a).

57. S.B. 18, § 17 (amending PUB. RES. CODE § 5097.96(a)).

58. If a site were to become the subject of a CEQA project, the tribe could then (i) use the “eligible for listing” process found at Sec. 5097.96.1 of Section 18 of S.B. 18; or (ii) any individual member of the tribe might still appear at the public scoping session and raise archaeological or historical issues related to the site, simply as any other member of the public might.

59. S.B. 18, § 17 (amending PUB. RES. CODE § 5097.96(a)).

3. Who Could Nominate a TTCS

Anyone may nominate a site for inclusion on the existing NAHC list. That would not have been true of the TTCS Register established by S.B. 18. Individuals could not nominate sites, only tribes.⁶⁰ There were a few reasons for this. First, the S.B. 18 provision recognized the government-to-government nature of the relationship between tribes and the State. It would be unseemly for the state to adjudicate intra-tribe disputes about whether a site should be listed. Thus, it would require a decision by a tribe to nominate a site for listing.

Second, the provision addressed a concern voiced by members of the regulated community: that any individual (whether Indian or not) could seek to hinder development of a property by attempting to list a TTCS—simply for the purpose of interfering with a proposed development.

Third, requiring a tribal decision would help assure that a nominated TTCS was a *bona fide* traditional cultural site. It seemed less likely that a tribal council would vote to designate a site a TTCS unless there was some basis for doing so.

While taking precautions to ensure that only tribes could nominate TTCSs, the S.B. 18 provision broadly allowed non-federally recognized tribes to do so. The NAHC was to maintain a list of each “non-federally recognized California Indian

tribe, band, or nation” which was eligible to nominate TTCSs.⁶¹

4. The Nominating Process

S.B. 18 provided two ways to list a site.

a. The ordinary nominating process

A tribe could seek to have a site included on the TTCS Register at any time it wished to do so. While S.B. 18 provided for the NAHC to adopt regulations establishing criteria for listing,⁶² it also required that nominations “be supported by sufficient evidence to facilitate meaningful review of the request.”⁶³ The provision was broadly phrased to make it unnecessary to have a written, historical record of the traditional use of the site. In many cases, knowledge of a site’s use has been transmitted orally from generation to generation. In such cases, declarations of competent tribal members (e.g., elders) could provide the necessary evidence.

The fundamental notion behind the nominating process was to provide full due process to all parties, while protecting confidential information regarding the “specific identity, location, character, or use of the site.”⁶⁴ To ensure due process, S.B. 18 required that before acting on a nomination, the NAHC would notify “the Native American tribe nominating the site, all owners of property within the site’s boundaries, and other appropriate Native American tribes.”⁶⁵ The Commission

60. S.B. 18, § 17 (amending PUB. RES. CODE § 5097.96(c)). Any tribe on the NAHC contact list could make a nomination. S.B. 18, § 13 (adding PUB. RES. CODE § 5097.10). In addition, the NAHC could, on its own initiative, nominate a site. S.B. 18, § 17 (amending PUB. RES. CODE § 5097.96(c)).

61. S.B. 18, § 13 (adding PUB. RES. CODE § 5097.10(j)).

62. S.B. 18, § 17 (amending PUB. RES. CODE § 5097.96(b)).

63. S.B. 18, § 17 (amending PUB. RES. CODE § 5097.96(c)(1)).

64. S.B. 18, § 17 (amending PUB. RES. CODE § 5097.96(c)(4)).

65. S.B. 18, § 17 (amending PUB. RES. CODE §

was directed to provide not less than thirty days for written comments on a nomination, and it was empowered to hold hearings and seek the views of the public.⁶⁶ To provide confidentiality, where necessary, S.B. 18 provided that any hearing could be closed to the public.⁶⁷ Similarly, the Commission was required to prepare a proposed decision to “describe in *general terms* the traditional cultural significance of the site, define its boundaries, and identify any appropriate Native American tribes.”⁶⁸

Identifying “any appropriate Native American tribes” was considered significant for the future administration of the law. Once a TTCS was listed, it would be associated with one or more tribes. Thereafter, whenever a question arose about the site, the NAHC would know which tribes to contact about any proposed development on or around the site.

After the Commission released its proposed decision, the parties to the proceeding would have thirty days to comment.⁶⁹ If no comments were submitted, the proposed decision would become final.⁷⁰ If comments were received, the NAHC would consider them, if appropriate modify its decision, and then make its decision final.⁷¹ Notice of the final decision would be sent to “the . . . tribe nominating the site, all owners of property

within the site’s boundaries, and other appropriate . . . tribes.”⁷²

b. The review of existing lists

There was one other way to get a site on the TTCS list. S.B. 18 required the NAHC to review its existing catalogue of “sacred sites” (within two years of the adoption of regulations) to determine if any of those sites should be included on the new TTCS Register.⁷³ If the NAHC proposed not to list a site previously identified as having cultural significance, it was required to consult with the tribe which originally nominated the site before making its decision final.⁷⁴ Similarly, the NAHC was required to review the National and State Registers of Historic Places to determine whether to add to the TTCS register any site included on either of those lists.⁷⁵

5. The “Eligible for Listing” Process

The drafters of S.B. 18 recognized that it would take time for tribes to nominate sites for inclusion on the new Register for at least two reasons. One, a tribe would have to gather the evidence necessary to support a nomination. Two, each tribe would have to decide whether it could trust that the benefits of listing a site would outweigh the possible harm that would flow from a breach of confidentiality. Only experience could show

5097.96(c)(2)); S.B. 18, § 13 (adding PUB. RES. CODE § 5097.10(a), definition of “Appropriate Native American tribes”).

66. S.B. 18, § 17 (amending PUB. RES. CODE § 5097.96(c)(2)).

67. S.B. 18, § 17 (amending PUB. RES. CODE § 5097.96(c)(4)).

68. S.B. 18, § 17 (amending PUB. RES. CODE § 5097.96(c)(5)) (emphasis added).

69. *Id.*

70. *Id.*

71. *Id.*

72. S.B. 18, § 17 (amending PUB. RES. CODE § 5097.96(d)).

73. S.B. 18, § 17 (amending PUB. RES. CODE § 5097.96(g)).

74. *Id.*

75. S.B. 18, § 17 (amending PUB. RES. CODE § 5097.96(h)).

whether the S.B. 18 process would prove to be trustworthy, efficacious and beneficial. Thus, the list was expected to grow slowly.

But, in the interim, there would continue to be CEQA projects that could cause an adverse impact on an unlisted site. A tribe might have chosen not to reveal the presence of a TTCS until it was actually threatened by such a project. Under existing law, that tribe could go to a scoping meeting⁷⁶ and raise the impact on the TTCS as a factor to be considered in the CEQA process (as an archaeological or historical resource).⁷⁷ Under S.B. 18, that option would have continued to be available. But it would not necessarily result in the TTCS being considered by the NAHC in the more comprehensive process established by S.B. 18 if it was not listed. So the drafters of the new law included a process by which a tribe could seek a quick determination from the Commission that a site is “eligible for listing.”⁷⁸

The idea was to have a quick review of a site threatened by a development project. The Commission (or its executive secretary)⁷⁹ would determine whether

in his or her opinion . . . the site likely meets the criteria for listing established pursuant to

76. Scoping meetings are convened by the lead agency “to discuss the scope and content of the environmental information a responsible agency will need in the E[nvironmental] I[m]pact R[e]port as soon as possible but no later than 30 days after receiving a request for the meeting.” CAL. CODE REGS. tit. 14, § 15104.

77. PUB. RES. CODE §§ 21060.5, 21083.2, 20184.1.

78. S.B. 18, § 18 (adding PUB. RES. CODE § 5097.96.1(b) and (c) (making reference to CEQA, PUB. RES. CODE § 21097)); *see also* S.B. 18, § 13 (adding PUB. RES. CODE § 5097.10(f), definition of “eligible for listing”).

Section 5097.96. In making this determination, the executive secretary shall comply with criteria adopted by the Commission. The executive secretary shall seek the input of, and consult with, appropriate consulting parties in making a determination pursuant to this subdivision.⁸⁰

The intent was to employ a standard similar to the one that governs issuance of a temporary restraining order: if the site were nominated in the formal nomination process, was there a likelihood that the applicant would succeed on the merits in having the site listed? If so, the site would be deemed eligible for listing and given consideration in the CEQA process.⁸¹

If the Commission had delegated the “eligibility for listing” determination to the executive secretary, an aggrieved party could have appealed the secretary’s decision within ten days of the decision.⁸² The appeal would have to be heard and decided by the full Commission within thirty days.⁸³

C. The “Nip It In the Bud” Strategy

One of the principal ideas behind the bill was to avoid land-use conflicts. So,

79. The Commission would have been able to delegate this determination to its executive secretary. S.B. 18, § 18 (adding PUB. RES. CODE § 5097.96.1(b)).

80. S.B. 18, § 18 (adding PUB. RES. CODE § 5097.96.1(b)).

81. S.B. 18, §§ 18, 29 (adding PUB. RES. CODE §§ 5097.96.1(a) and 21097(a) respectively).

82. S.B. 18, § 18 (adding PUB. RES. CODE § 5097.96.1 (b)).

83. *Id.*

there were certain provisions of the bill which would have used the new TTCS Register to try to head off conflicts. Often, land use battles are hard fought because a developer invests millions of dollars in a project not knowing there is a potential problem. Only after he has a deep financial interest in the property does he realize he is in for a fight. S.B. 18 tried to minimize these situations by putting potential developers and landowners on notice that a particular parcel contains a TTCS, with the hope that they would at least be alert to a potential issue and either consult the relevant tribe or consider not investing money in that land. There were three ways in which this would be done: 1) land use plans, 2) recorded notice, and 3) the site check service.

1. Land Use Plans

S.B. 18 would have brought TTCSs into California's land use planning process. When a city or county prepared or amended its General Plan, it would have been required to provide an opportunity for Native American tribes (identified on a Native American contact list maintained by NAHC) to participate in the planning process.⁸⁴ Similarly, when a city or county adopted, revised, amended or updated its general plan or a specific plan, it would have been required to consult with the NAHC and any appropriate tribe located within its jurisdiction.⁸⁵ S.B. 18 also made TTCSs eligible for inclusion in

the open-space element of a general plan.⁸⁶ When including TTCSs as an open-space element in a general plan or in a specific plan⁸⁷ the local agency would have been required to consult with the appropriate tribes "for the purposes of determining the level of confidentiality required to protect the specific identity, location, character, or use of the listed site, and developing proper treatment of the site in any corresponding management plan if one will be developed for the listed area."⁸⁸

2. Recorded Notice

The legislation also directed the Commission to record notice of the existence of a TTCS in the office of the county recorder, "refer[ring] generally and without specificity to the identity, location, character, and use of the TTCS."⁸⁹ The purpose was to have the existence of a TTCS show on a title report. Thus, when a prospective developer did her due diligence, she would discover the property could be problematic, and make a more fully informed decision.

Recording of such a notice would have "satisfied any legal duty of the owner to disclose material facts with respect to the registered TTCS."⁹⁰ The intent was to relieve the landowner of the burden of disclosing confidential information about the site when she sold her property.

84. S.B. 18, § 4 (amending CAL. GOV'T CODE § 65351). The final version of S.B. 18 included some provisions like those described here. See S.B. 18, sections 3-8, as enrolled Aug. 20, 2004 and described *supra* note 39.

85. S.B. 18, § 5 (adding GOV'T CODE § 65351.1); S.B. 18, § 6 (amending GOV'T CODE § 65453).

86. S.B. 18, § 7 (amending GOV'T CODE § 65560).

87. *Id.*

88. S.B. 18, § 8 (adding GOV'T CODE § 65562.5); *see also* S.B. 18, § 5 (adding GOV'T CODE § 65351.1).

89. S.B. 18, § 17 (amending PUB. RES. CODE § 5097.96(d)).

90. *Id.*; *see* CAL. CIV. CODE § 1102 et seq.

3. The Site Check Service

The NAHC was also directed to provide a “site check” service, so that any person could have called the Commission to inquire about the presence or absence of a TTCS on a particular piece of property.⁹¹ The Commission could have told the caller whether the property contained either a listed TTCS or a site that had been nominated for listing. It could also have told the caller the identity of the tribes affiliated with the TTCS, so the developer might begin consultation with them.⁹² Any information released by the NAHC would have been limited to preserve the confidentiality of the information.⁹³

Again, the notion was that a developer considering buying or developing a property could learn, early in the process, whether the site would pose difficulties. If so, the site check service would have directed her to the appropriate Indian contacts, so she might begin discussing whether development was possible, and if so, what mitigation measures were likely to be necessary.

D. The Addition To The CEQA Process

S.B. 18 recognized that not all land-use conflicts would be avoided. So, it provided a mechanism for including consideration of TTCSs in the CEQA process. To

understand how S.B. 18 would have worked, it is necessary to read together its amendments to Section 5097 et seq. and Sections 21000 et seq. of the Public Resources Code.

1. Early Consultation

S.B. 18 encouraged early consultation between project proponents and tribes. When a proponent filed an application for a permit, the lead agency would first determine if the project was exempt from CEQA.⁹⁴ (A project that could cause a substantial adverse change to a TTCS could not be given a categorical exemption except in very limited circumstances.⁹⁵) If the project was not exempt, then the lead agency was required to provide written notice of the project to the NAHC and to the relevant tribes on the Commission’s contact list.⁹⁶ The notice would have contained “sufficient information describing the proposed project, including a project map, to enable the tribes to consult with the Commission to identify any TTCS that may be affected by the proposed project.”⁹⁷ The notice also had to inform the tribes of their right to request consultation and to seek an “eligibility for listing determination” within twenty days of receiving the notice.⁹⁸

91. S.B. 18, § 16 (amending PUB. RES. CODE § 5097.94(r)).

92. *Id.*

93. *Id.*

94. *See* S.B. 18, § 29 (adding PUB. RES. CODE § 21097(d)).

95. S.B. 18, § 28 (adding PUB. RES. CODE § 21084.3). This is consistent with the treatment of historical resources, scenic highways, and other impacts under existing law. *See* CAL. CODE REGS.

tit. 14, § 15300.2. Note that at the request of Pacific Gas & Electric Company, S.B. 18 repeated certain exemptions found in existing law. *See* S.B. 18, §§ 18, 29 (adding PUB. RES. CODE §§ 5097.96.1(h) and 21097(v) respectively).

96. S.B. 18, § 29 (adding PUB. RES. CODE §. 21097(d)).

97. S.B. 18, § 29 (adding PUB. RES. CODE § 21097(d)(2)).

98. S.B. 18, § 29 (adding PUB. RES. CODE § 21097(d)(1)). The notice also had to include a copy

Because S.B. 18 sought to promote early consultation it permitted a project proponent to ask the lead agency to provide this notice to the tribes and the Commission even before a project application was filed.⁹⁹ If the proponent took advantage of the expedited notice provision, then the time for consultation would run from the date of notice.¹⁰⁰ The pre-application notice would have permitted the applicant to determine—before he filed his application—whether he would be likely to be able to secure a categorical exemption, negative declaration or mitigated negative declaration.¹⁰¹

2. Tribe's Option to Begin Consultation

If, but only if, a tribe requested consultation, the NAHC would begin a forty-five day period in which it would determine whether a TTCS may be affected by the proposed project.¹⁰² However, if a tribe failed to request consultation, that would not have prevented it, or any individual, from raising the issue during the regular CEQA public process.¹⁰³

3. The First Phase of Consultation

If a tribe requested consultation, the NAHC would contact the “consulting parties to determine whether the proposed project may cause a substantial adverse change in a TTCS, and, if so, whether there are project changes or mitigation measures, that will avoid or reduce the sub-

of the service list so the tribe would know what other parties were involved in the consultation.

99. S.B. 18, § 29 (adding PUB. RES. CODE § 21097(m)).

100. *Id.*

101. *See id.*

102. S.B. 18, §§ 18, 29 (adding PUB. RES. CODE §§ 5097.96.1(d)) and 21097(e) respectively).

103. S.B. 18, § 29 (adding PUB. RES. CODE § 21097(e)).

stantial adverse change.”¹⁰⁴ The object was to determine, within forty-five days, whether the project would have any impacts on a TTCS, and if so, whether the impacts could be addressed by adoption of a mitigated negative declaration.

“Consulting parties” was defined to include:

- ♦ the tribes which have attached traditional tribal cultural significance to the TTCS at issue;
- ♦ owners of the property within the site's boundaries;
- ♦ the project proponent;
- ♦ the lead agency; and
- ♦ public agencies with jurisdiction over the area in which the effects of a project may occur or having principal responsibility for carrying out or approving a project.¹⁰⁵

In addition, an earlier version of S.B. 18 also permitted others who had an interest in the project “due to the nature of their legal, cultural, or economic relation to the project or affected property” to participate, but only at the Commission's discretion.¹⁰⁶ The Commission would adopt criteria to govern this participation.¹⁰⁷ It was expected that the Commission would exercise its discretion liberally, consistent with the need for confidentiality in appropriate cases.

104. S.B. 18, § 18 (adding PUB. RES. CODE § 5097.96.1(a)).

105. S.B. 18, § 13 (adding PUB. RES. CODE § 5097.10(d)). The bill also defined consultation (in Section 13) and that language was included in the final version of S.B. 18 (in Section 8).

106. *Id.* (struck language at p.11, l.40 to p.12, l.5).

107. *Id.*

a. The site visit

To facilitate the consultation process, the lead agency was required to consult with the NAHC to arrange for a site visit by authorized representative of an affected tribe if a series of conditions were met: (i) the tribe made such a request in writing before the close of the public comment period, (ii) the written request showed a site visit was needed to determine the location or boundaries of the TTCS, to evaluate the potential for impact on the TTCS, or to help develop mitigation measures; and (iii) the lead agency either had the authority to inspect the property or secured the landowner's consent.¹⁰⁸

b. The "quick out"

The development community asked for a process by which an early decision could be made to determine which (generally small) projects need not be subject to these new procedures. That led to the drafting of what was called the "quick out" provision.

The Commission would first consider whether there was even a TTCS present that may be affected by the project.¹⁰⁹ If there were a TTCS in the vicinity, the Commission would consider whether the project would alter the physical characteristics of the TTCS. If there were no TTCS in the vicinity, or its physical characteristics would not be altered, then the Commission would report that to the lead agency and the consultation would be concluded.¹¹⁰ The developer would not

have to be concerned any further with any issue regarding TTCSs.

If the Commission could not make either of those findings, then it would proceed to consider whether the project could result in a substantial adverse change to the TTCS, and if so, whether mitigation measures, if any, would be sufficient to permit adoption of a negative declaration, i.e., to reduce adverse effects below the CEQA threshold requiring a complete study of potential environmental impacts.¹¹¹

c. Time frame for the first phase of consultation

As noted, the first phase of consultation was intended to be accomplished within a forty-five day period. If, however, the NAHC determined the lead agency's notice did not provide sufficient information, then the Commission could extend the forty-five days by notifying the lead agency that the time period has not begun and identifying the missing information.¹¹² The forty-five days would begin to run from the time the Commission notified the lead agency that the missing information had been received. Once the forty-five day period began to run, the Commission would be entitled to extend the period by fifteen days by notifying the lead agency. Any further extension would be left to the discretion of the lead agency.¹¹³

There was a concern that the NAHC could "pocket veto" a project by simply

108. S.B. 18, § 29 (adding PUB. RES. CODE § 21097(h)).

109. See S.B. 18, § 18 (adding PUB. RES. CODE § 5097.96.1(c)).

110. *Id.*

111. S.B. 18, § 18 (adding PUB. RES. CODE § 5097.96.1(d)).

112. S.B. 18, § 18 (adding PUB. RES. CODE § 5097.96.1(e)).

113. *Id.*

failing to comment. To cure that, S.B. 18 provided that if the Commission did not issue a written determination within the time prescribed, then its inaction would be “deemed a final determination by the Commission that the proposed project will not result in a substantial adverse change to a TTCS.”¹¹⁴

d. “Baseline”

There was also a concern about the “baseline” against which the Commission would measure whether there was a “substantial adverse change.” Accordingly, the drafters accepted an amendment that defined “baseline,” for these purposes, much as it is defined in the CEQA guidelines:

The baseline conditions by which the commission makes the determination . . . shall be the physical environmental conditions as they exist, from both a local and regional perspective, at the time of making the request for consultation with the commission or the filing of the application for a proposed project with the lead agency, whichever occurs earlier.¹¹⁵

e. The end of the first phase of consultation

The Commission’s work would be completed if, as a result of the Section

114. *Id.*

115. S.B. 18, §§ 18, 19 (adding PUB. RES. CODE §§ 5097.96.1(g) and 5097.96.2(f) respectively). Compare CAL. CODE REGS. tit. 14, § 15125. The new sections were intended to have substantially the same meaning as existing law.

116. S.B. 18, §§ 18, 29 (adding PUB. RES. CODE §§ 5097.96.1(f) and 21097(f) respectively).

117. S.B. 18, § 18 (adding PUB. RES. CODE §

5097.96.1 consultation described above, the Commission determined that there would be no impact on a TTCS, or if it determined that there would be an impact, but the parties agreed to mitigation measures which would result in the issuance of a negative declaration.¹¹⁶ If neither of those scenarios materialized, the Commission would be required to pursue a second phase of consultation and analysis.¹¹⁷

4. The Second Phase of Consultation

The second phase of consultation and analysis would take place pursuant to Section 5097.96.2, which would require the Commission to determine whether the proposed project *would* (not *could*) result in a substantial adverse change to a TTCS.¹¹⁸ To make this determination, the Commission would have an additional seventy-five day period, which could be extended for another fifteen days upon the Commission’s request.¹¹⁹ The period could be extended further if the lead agency agreed.¹²⁰

S.B. 18 ensured that consultation would continue during the allotted period by requiring the Commission to provide notice to all consulting parties within five days of completing the Section 5097.96.1 process.¹²¹ Within thirty days after receiving that notice, the consulting parties could submit written comments regarding

5097.96.1(f)).

118. S.B. 18, § 19 (adding PUB. RES. CODE § 5097.96.2(a)).

119. *Id.*

120. *Id.*

121. That is, assuming the section 5097.96.1 process results in a need to progress to the section 5097.96.2 process. See S.B. 18, § 19 (adding PUB. RES. CODE § 5097.96.2(b)).

the “potential for the proposed project to result in a substantial adverse change in a TTCS.”¹²² Presumably, they would also describe their views on appropriate mitigation measures, if any. The Commission could also solicit public comment¹²³ and hold a public hearing.¹²⁴ If necessary to protect confidential information, the Commission could close the hearing to the public.¹²⁵

a. The Commission’s findings

Since the Commission’s findings were to be given serious consideration by the lead agency, the bill required it to prepare proposed written findings describing the basis for its tentative decision.¹²⁶ This tentative decision was to be sent to all consulting parties who would then have ten days in which to comment on it.¹²⁷ If no comments were received, the tentative decision would become final.¹²⁸ If there were comments, then the Commission was required to consider them and was permitted to modify its tentative decision before rendering a final decision.¹²⁹

b. If the parties reach agreement

It was hoped that, in most cases, the consultation would result in agreement about how to protect the TTCS while per-

mitting the project to go forward. If all participating consulting parties “agree[d] to incorporate project changes or mitigation measures that would avoid or reduce substantial adverse changes in a TTCS to a less than significant level,” then the Commission was required to so notify the lead agency.¹³⁰ The lead agency would report these changes and mitigation measures in a confidential appendix to the final environmental impact report or mitigated negative declaration.¹³¹ The changes to the project, with the concurrence of the appropriate tribe(s), would constitute substantial evidence that the adverse changes were less than significant and the project could proceed.¹³²

c. If the parties could not reach agreement

However, if the consulting parties could not reach agreement then the NAHC would provide a report to the lead agency, describing project changes or mitigation measures, if any, that would reduce the impact to the TTCS to a less than significant level.¹³³ The lead agency would be required to consider the Commission’s recommendation and adopt all feasible measures which would reduce the impact on the TTCS to a less than significant level.¹³⁴ In determining

122. *Id.*

123. “Except where appropriate to protect the confidentiality of information concerning the specific identity, location, character or use of the TTCS.” *Id.*

124. S.B. 18, § 19 (adding PUB. RES. CODE § 5097.96.2(c)).

125. *Id.*

126. S.B. 18, § 19 (adding PUB. RES. CODE § 5097.96.2(d)).

127. *Id.*

128. *Id.*

129. *Id.*

130. S.B. 18, § 20 (adding PUB. RES. CODE § 5097.96.3(a)).

131. S.B. 18, § 29 (adding PUB. RES. CODE § 21097(i)(1)).

132. *Id.* Of course, if there were other issues to be decided under CEQA (such as traffic, noise, growth inducement and so on) the project would not proceed until they were also fully considered.

133. S.B. 18, §§ 20, 29 (adding Cal. Pub. Res. §§ 5097.96.3(b) and 21097(i)(2) respectively).

134. S.B. 18, § 29 (adding PUB. RES. CODE § 21097(i)(2)).

what was feasible, the lead agency would have to base its decision on substantial evidence in light of the whole record.¹³⁵

5. The Process Following Consultation: The Hurdle and the Override

The procedures described above would ensure that that the Commission's recommendations would be fed back into the lead agency's usual CEQA analysis. But, S.B. 18 would also have made two important changes to the decision-making process. Both involved the CEQA provision for "overriding considerations."

The first change would have applied to all projects. Currently, CEQA provides that a lead agency may override significant environmental impacts and approve a project if it finds that "[s]pecific economic, legal, social, technological, or other considerations ... make infeasible the mitigation measures or alternatives identified in the environmental impact report" and that those overriding considerations or "other benefits of the project outweigh the significant effects on the environment."¹³⁶ S.B. 18 would have added Section 21097(j)(1), which imposed the following additional "hurdle" before an agency could override environmental impacts:

[the lead agency] may not approve or carry out a project that will result in a substantial adverse change in a TTCS unless

135. *Id.*

136. PUB. RES. CODE § 21081(a)(3), (b). Also, the lead agency may, instead make the findings described in Public Resources Code Section 21081(a)(1) or (2): that mitigation measures have been incorporated into the project to reduce impacts below significant levels, unless those measures are within the jurisdiction of another

it has provided notice to, and made a good faith effort to consult with the Native American Heritage Commission and all appropriate Native American tribes, and unless the public agency finds that all means for preserving the TTCS have been considered to the maximum extent practicable.¹³⁷

This was not intended to be a very high hurdle. It was largely meant to ensure two things. (1), that the lead agency has engaged in consultation with the NAHC and relevant tribes during the consultation process described in Sections 5097.96.1 and 5097.96.2.; and (2), that the agency had fully considered all practicable means for preserving the TTCS. The provision was not intended to require the agency to devise new mitigation measures not already considered during the 5097.96.1 and 5097.96.2 consultations. Indeed, S.B. 18 provided that anyone who had consulted with the NAHC pursuant to Sections 5097.96.1, .2 and .3 (and presented their objections during the comment period) would be deemed to have exhausted their administrative remedies to the extent required by CEQA Section 21177.¹³⁸

The second change regarding "overriding considerations" was more significant. It would have applied only to projects "located on state lands or federal lands managed by the state."¹³⁹ As to

agency and "have been, or can and should be, adopted by that other agency."

137. S.B. 18, § 29 (adding PUB. RES. CODE § 21097(j)(1)).

138. S.B. 18, § 29 (adding PUB. RES. CODE § 21097(p)).

139. "Federal lands" is defined in S.B. 18, § 29 (adding PUB. RES. CODE § 21097(j)(2)).

those projects, however, the lead agency could not “approve, carry out or subsidize a project”¹⁴⁰ unless the lead agency were to find two things: (1) that all feasible mitigation or avoidance measures had been incorporated into the project; and (2) that there was an overriding environmental, public health, or safety reason to approve the project.¹⁴¹ In other words, for a project on state lands or federal land managed by the state, the lead agency could not override for the usual CEQA reasons of “economic, legal, social, technological or other” considerations.¹⁴² It could only override for public health, public safety or environmental reasons.¹⁴³ Essentially, the bill required that the lead agency make either the findings contained in Section 21081(a)(1) or (2)¹⁴⁴ or the following finding:

[that] there is no legal or feasible way to accomplish the project purpose without causing the substantial adverse change, all feasible mitigation or avoidance measures have been incorporated into the project, and there is an overriding environmental, public health or public safety reason to approve the project.¹⁴⁵

In addition, the lead agency was required to give thirty-days notice to the

appropriate tribes and to provide an opportunity for comment, before it could make those findings.

The controlling idea was that there should be a different balance struck when a TTCS is on public land rather than private land. On private land, where there are competing private values, the full panoply of CEQA overrides was preserved. Thus, the TTCS would have been treated like any environmental resource scrutinized in the CEQA process. But, on public lands, the balance was tipped more in favor of preserving these remaining traditional tribal cultural sites. There was less reason to insist on developing public land in a way that would disregard the value of the cultural site. Although there could be important projects on state lands, as a matter of public policy more weight could be given to protecting these sites.

6. Certified Regulatory Programs

S.B. 18 also addressed the new law’s interaction with the so-called “certified regulatory programs.” Under CEQA, a number of state agencies have certified regulatory programs.¹⁴⁶ Essentially, if another program “includes protection of the environment among its principal purposes” and gives a state agency, board, or commission authority to adopt rules and

140. The drafters were aware that “subsidize a project” is already covered by CEQA, and need not be said here. *See* CAL. CODE REGS. tit. 14, § 15378(a)(2). However, some of the tribal lawyers wanted there to be “no doubt” about that. Indeed, at times representatives of both the tribes and the business community expressed such views about one provision or another. Although the drafters believed these unnecessary, since “superfluity does not vitiate,” CIV. CODE § 3537, they agreed to include such redundant provisions; they are sprinkled throughout the bill.

141. S.B. 18, § 29 (adding PUB. RES. CODE § 21097(j)(2)(B)). The lead agency may, instead make the findings described in PUB. RES. CODE Section 21081(a)(1) or (2). *See supra* note 136.

142. *Id.*

143. S.B. 18, § 29 (adding PUB. RES. CODE § 21097(j)(2)).

144. *See supra* note 136.

145. *Id.*

146. PUB. RES. CODE, § 21080.5; CAL. CODE REGS. tit. 14, §15250 et. seq.

regulations (and those regulations largely embody a CEQA-style analysis and decision-making process), then the Secretary for Resources may certify that regulatory program.¹⁴⁷ Once certified, the agency administering the certified program may follow its own regulations in lieu of preparing initial studies, negative declarations or environmental impact reports. A certified program “remains subject to other provisions of CEQA, such as the policy of avoiding significant adverse effects on the environment where feasible.”¹⁴⁸

Seventeen programs have been certified by the Secretary for Resources.¹⁴⁹ Thus, in drafting S.B. 18, the question arose: how should the new requirements for consultation with tribes and the NAHC be incorporated in these certified programs? There were two possibilities, colloquially identified as “guilty until proven innocent” and “innocent until proven guilty.” In other words, should the program have to prove it had sufficient protections for TTCSs to retain certification or should it be allowed to continue as a certified program until shown to be inadequate for protecting TTCSs. The original draft of the bill took the former position.¹⁵⁰ But, over time the bill was amended so that it reflected the latter.¹⁵¹ Each department, commission or board would have had to show the Secretary for

Resources on or before January 1, 2005, how it included these issues in its analysis; how it provided appropriate consultation with tribes and the NAHC; how it incorporated the NAHC’s comments; and how it provided meaningful consultation as defined elsewhere in the bill.¹⁵² If the Secretary believed the showing were not sufficient, he or she would notify the submitting agency and suggest changes.

E. Other Provisions

The draft bill made a number of other changes. A few are worthy of note here.

1. The NAHC

First, S.B. 18 changed the composition of the NAHC. Under existing law, the NAHC has nine members, at least five of which must be “elders, traditional people, or spiritual leaders of California Native American tribes.”¹⁵³ S.B. 18 would have increased that number from five to six and required there to be geographical diversity—two from the northern part of the state, two from the central region and two from the south.¹⁵⁴ In addition, two members of the Commission would have had to be “recognized professionals in one or more of the following disciplines: ethnohistory, archaeology, anthropology, ethnography, or other related disciplines.”¹⁵⁵ There were at least three rea-

147. *Id.* The requirements for certification are detailed and beyond the scope of this article. The text only attempts to convey a simplified statement of the basic purpose of the certified programs.

148. CAL. CODE REGS. tit. 14, § 15250.

149. They are listed at CAL. CODE REGS. tit. 14, § 15251.

150. See the August 18, 2003 version of S.B. 18, Section 29 (adding PUB. RES. CODE § 21097(l)).

151. See the September 12, 2003 version of S.B. 18, Section 29 (adding PUB. RES. CODE § 21097(l)).

152. S.B. 18, § 29 (adding PUB. RES. CODE § 21097(l)).

153. PUB. RES. CODE § 5097.92.

154. S.B. 18, § 15 (amending PUB. RES. CODE § 5097.92(a)(1)).

155. S.B. 18, § 15 (amending PUB. RES. CODE § 5097.92(a)(2)).

sons for the change. First, since the NAHC would be assuming a greater workload, it needed to be able to meet in subcommittees around the state. Having two tribal members from each part of the state would facilitate that. Second, experience had shown that the tribal elders—being elderly—were sometimes unable to attend full Commission meetings in Sacramento. The increase in the number of elders from five to six increased the likelihood that there would be a significant Indian presence at the meetings. Third, since there would be more detailed work to do to compile the list of TTCSs and to evaluate potential impacts, it was desirable to have some professional academic expertise on the Commission.

2. Confidentiality

Other noteworthy provisions involved the confidentiality of the Commission's proceedings. Repeatedly, the drafters were told that disclosure has the potential to destroy either the spiritual power or utility of the site. There was also concern that public proceedings would lead to depredation of the site by pothunters or "New Agers." For the tribes to trust that listing a TTCS would do more good than harm, there had to be some degree of confidentiality. But the opponents of the bill argued that listing a site could have a significant impact on the value of a piece of property. If the proceedings were confidential, then the

156 There is precedent for having closed proceedings in sensitive situations. *See, e.g.*, CAL. WELF. & INST. CODE § 676 (juvenile proceedings), CAL. PENAL CODE § 868 (preliminary examinations). *But see*, *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1 (1986); *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501 (1984).

owner (or others with an interest in the land) could have their property rights impaired without so much as a hearing.

Throughout the entire process, the problem of confidentiality was a prominent and thorny one. In the end, the solution was to design proceedings that provided all the due process rights normally available to litigants in an administrative proceeding, while closing the proceeding to others.¹⁵⁶ Those with a legitimate interest would be able to be heard fully. Those that had no such interest could be excluded from the proceedings. A variety of provisions were included in the bill to effectuate this.¹⁵⁷

3. Some Special Issues

a. State lands

During the debate on the bill, a number of business interests pointed out that there are many private projects on land leased from the state that might be unfairly blocked by virtue of this bill. For example, ports, wharves and other transportation facilities may be on land owned in fee by the State Lands Commission and leased to a Port District, other special purpose district, or even a private entity. There was discussion of an amendment that would permit the lead agency to override if the project fulfilled an "essential public service." But in the end, there was only limited agreement on such an excep-

157. *See, e.g.*, S.B. 18, § 17 (amending PUB. RES. CODE § 5097.96(c)(4)); S.B. 18, § 19 (adding PUB. RES. CODE § 5097.96.2(b) and (c)); S.B. 18, § 21 (adding PUB. RES. CODE § 5097.96.4(b), allowing the sealing of court records); S.B. 18, § 22 (adding PUB. RES. CODE § 5096.96.5(b), exempting certain proceedings from Open Meeting and Public Records Act provisions, and § 5096.96.5(d), criminalizing release of confidential information).

tion.¹⁵⁸ Thus, many of those with interests in projects dependent on state lands would have been bound by the more restrictive override provisions of Section 21097(j)(2). Were this bill to be considered again, that provision might be re-examined to address this concern.

b. The military

Early in the drafting process, the United States military expressed concerns that its ability to manage its lands and to engage in military preparedness exercises off-base could be impaired by the S.B. 18 protections for TTCSs. To address these concerns, S.B. 18 stated that the law would “not apply to a project that the United States Secretary of Defense, or his or her designee, has determined is necessary for national security.”¹⁵⁹

c. Energy-related land uses

In the closing days of the legislative session, some other last minute changes were made to the bill in an effort to defuse opposition. The provisions sought by Pacific Gas & Electric, noted above, fall into that category.¹⁶⁰

A provision sought by the Western States Petroleum Association (“WSPA”) was incorporated into the bill for similar reasons. WSPA was concerned that the stricter override provision on state-owned lands might make it difficult to continue to run certain port facilities on state lands leased to private entities. In the end, the proponents of S.B. 18 agreed to include a section that excluded from the limited

override projects relating to manufacture and handling of some energy-related products.¹⁶¹

V. Lessons from the S.B. 18 Drafting Process

The task of providing protection to sacred sites raises very complex legal and political problems in a state in which there is considerable development pressure. The astute reader will have seen how many stakeholder interests pushed the development of the legislation in one direction or another.

In places, the final draft of the bill accommodated particular concerns. Many are described above, such as the changes made at the insistence of the military, Pacific Gas & Electric Company, and the Western States Petroleum Association. But anyone attempting another effort at protection should be aware of additional concerns this effort stirs.

For example, local government representatives and professional land-use planners were very concerned about the impact of S.B. 18 on the orderliness of their planning process. In California, cities and counties have principal responsibility for land-use decisions. They were concerned that the role of the NAHC and the uncertainty of the S.B. 18 process would leave them less able to make comprehensive plans for their jurisdictions.

Similarly, one of the principal concerns of many in the development com-

158. See *supra* note 95 (one of the few limited exceptions that was created was in response to PG&E’s request). See also S.B. 18, § 29 (adding PUB. RES. CODE § 21097(j)(3)).

159. S.B. 18, § 29 (adding PUB. RES. CODE §

21097(u)).

160. See *supra* note 95.

161. S.B. 18, § 29 (adding PUB. RES. CODE § 21097(j)(3)).

munity was that the addition of the NAHC to the CEQA process—and the consideration of TTCSs by a separate commission—would add to the time needed to gain approval of a project. There were very long, detailed discussions about whether the NAHC process really dovetailed appropriately with the CEQA process. Many amendments were addressed simply to this “timeline” issue.

Timber interests were active in the debate. Many TTCSs are in areas which are subject to logging. The timber interests argued that they already have to consider protection of TTCSs when they submit a timber harvest plan to the Department of Forestry.¹⁶² Thus, they argued, they should be exempt from the legislation.

The building associations were concerned about any change in the law that would make it more difficult to develop property. Although they said, repeatedly, that they were sympathetic to the need to protect cultural sites, many of the amendments they proposed appeared, at least to the tribes’ negotiators, to weaken the protections. Labor unions sometimes shared the building associations’ concerns. Understandably enough, they did not want their members to lose jobs.

Realtors were concerned about the disclosure problems that the bill might

create. Generally speaking, when property is sold in California, the seller must disclose known or reasonably ascertainable matters that might have an adverse effect on its value.¹⁶³ Thus, the realtor interests were alert to the impact of this bill on those obligations.

The newspaper publishers argued hard against the confidentiality provisions of the bill. They are devoted to the notion of “open-government” and were critical of those provisions of the bill that restricted the information to parties who had an interest in the property at issue. They were particularly concerned about a provision that imposed criminal penalties on those who wilfully breached confidentiality.¹⁶⁴

Those representing agricultural interests were concerned about the impact of S.B. 18 on their landholdings. Farmers have been known to uncover artifacts or remains when plowing a field. They were concerned about the legal obligations imposed on them by such a discovery.

Energy companies paid close attention to S.B. 18. In many cases, their transmission lines run through lands which might contain a TTCS.¹⁶⁵ Similarly, Calpine was seeking to develop geothermal power on property that some tribes consider sacred.¹⁶⁶

162. See CAL. CODE REGS. tit. 14, §§ 929.1, 949.1, 969.1. See generally *id.* at Art. 14 (Archaeological and Historical Resource Protection).

163. CIV. CODE §1102 et seq. Even an “as is” clause in real estate sale contracts will not relieve a seller from a duty to disclose known “material defects not otherwise visible or observable to the buyer.” *Loughrin v. Superior Court*, 15 Cal. App. 4th 1188, 1192 (1993).

164. S.B. 18, § 22 (adding PUB. RES. CODE § 5097.96.5(d)).

165. See, e.g., CAL. PUBLIC UTILITIES COMM’N, INTERIM PRELIMINARY REPORT ON ALTERNATIVE SCREENING FOR SAN DIEGO GAS & ELECTRIC COMPANY VALLEY-RAINBOW 500 kV INTERCONNECT PROJECT, at ES-21 n.3 (Certain routes of proposed transmission line would impact Pechanga Tribe’s Greak Oak.), available at <http://www.cpuc.ca.gov/environment/info/dudek/valleyrainbow/valleyrainbow.htm> (last visited Aug. 11, 2004).

166. See *supra* note 15 and accompanying text.

Urban interests were concerned about the radius of potential TTCS restrictions. There was considerable discussion about a hypothetical situation in which a TTCS was discovered in West Hollywood. Could that result in restrictions on development in the whole city? If it made sense to restrict development in a five mile radius around a TTCS in a forested area, what would that mean for an urban area?

Even the University of California had concerns about the bill. It had run into Native American remains and artifacts when building on some of its campuses.¹⁶⁷ So, its representatives paid close attention to the provisions of the bill that might prevent further construction on its campuses.

Mining interests had already seen the impact of a sacred site on the proposed Glamis Mine.¹⁶⁸ They were concerned that the bill would make it even harder to continue mining in California.

All of these constituencies, and others, raised legitimate competing concerns with which the S.B. 18 effort had to deal. In the end, the proponents came within three votes of striking an adequate bal-

ance. But the lesson should be clear. Anyone attempting to provide legislative protection to sacred sites must be prepared to recognize and deal with many competing concerns.

VI. Conclusion

Although it failed by three votes in the second house, S.B. 18 represents the most serious effort to date to design a politically acceptable bill that would provide significant protection to traditional tribal cultural sites, while respecting the private property rights of California landowners. Dozens of stakeholders, administration officials and Indian leaders spent hundreds of hours trying to come to agreement on a proposal that would work for all. They failed. But the issue will not disappear. If anything, it will only continue to gain prominence as more land in California is developed, impinging on an increasing number of sites that have significance to Indians experiencing a resurgence in their traditional beliefs. There will, no doubt, be continued legislative efforts on this front. As they continue, S.B. 18 may provide a useful starting point for further discussions in California and elsewhere.

167. The University is also building an entirely new campus in Merced. See University of California, *About UC Merced*, at http://www.ucmerced.edu/about_merced (last visited Aug. 14, 2004). No doubt it was concerned about the possible impact of S.B. 18 on that too.

168. See *supra* Part I.

