History of Senate Bill 18 (SB 18)

Introduction

Before Senate Bill 18 (SB 18), California had passed a few, albeit inadequate, mechanisms to protect Native American cultural sites, such as environmental review under the California Environmental Quality Act (CEQA), site catalogues by the Native American Heritage Commission (NAHC), and the California Historical Resource Information System (CHRIS).[1] However, at the time, CEQA did not provide adequate protection because it only applied to sites considered environmentally sensitive or historically and archeologically significant, which are categories that did not necessarily include sacred sites, and CEQA did not require lead agencies to consider the value of preserving Native American traditional cultural values.[2] Similarly, the lists maintained by NAHC and CHRIS were not adequate for sacred site protection because both lists were underinclusive; NAHC's inventory only included sites that were nominated, and CHRIS, like CEQA, was primarily concerned with archeological sites.[3] These lists were confidential, so without consultation with NAHC or the Office of Historic Preservation, or Tribes themselves, agencies would not be aware of the sacred sites. This impacted the efficacy of the existing protections such as CEQA or the Native American Historic Resource Protection Act of 2002 (NAHRPA). For example, NAHRPA criminalized the willful excavation, removal, or destruction of Native American archeological or historic sites; the law did not criminalize accidental destruction of these sites during development projects.[4] Therefore, accurate and inclusive lists of sacred sites and robust consultation would be necessary to protect sacred sites under NAHRPA or CEQA.

These existing protections did not require consultation with Tribes, so California's cultural protection mechanisms did not provide Tribes the *right* to voice their concerns. In the development of new legislation, a group of Tribes proposed a set of principles for consultation on sacred sites. Tribes wanted California agencies to provide them with the earliest possible notice, meaningful consultation, and confidentiality.[5] Tribes also wanted to determine the importance of their sites, to partner in the management and protection of their sites, and to have a process to acquire or conserve their sacred places.[6] Tribal leaders

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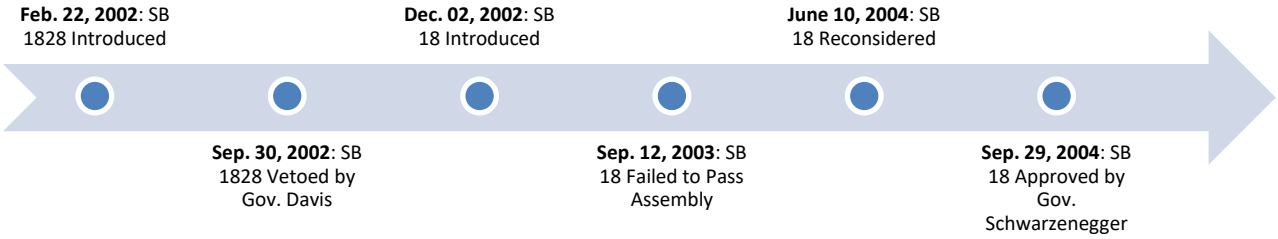
[1] *Revised sacred sites bill still too broad, unnecessary*, MODESTO BEE, July 28, 2003, at B-6.
[2] Jennifer Coleman, *Tribe bill heads to governor*, RECORD.NET (Aug. 20, 2004).
[3] Barry Goode, *A Legislative Approach to the Protection of Sacred Sites*, 10 HASTINGS W.-NW. J. ENVT'L L. & POL'Y 169, 178 (2004).
[4] Native American Historic Resource Protection Act, Cal. Pub. Res. Code § 5097.993 (West).
[5] Thank you to Michelle Lee (LaPena) for providing this information in a July 2022 interview with the Environmental Law Institute. Michelle is the founder of The Circle Law Group and a member of the Pit River Tribe; Michelle LaPena, Attorney Dry Creek Rancheria, Letter to Office of the Assistant Secretary- Indian Affairs (Nov. 30, 2016).
[6] *Id.*

also wanted consulting agencies to acknowledge and respect a Tribe's cultural and spiritual values and rights.[7]

There were several iterations of the sacred sites bill before SB 18 finally passed both houses of the California Legislature and Governor Arnold Schwarzenegger signed it. The original bill, SB 1828 (2002), would have amended CEQA to require the affected Tribe's consent to projects affecting a Native American sacred site (save for a few exceptions).[8] Despite bipartisan support, Governor Gray Davis vetoed SB 1828 on September 30, 2002 because the bill did not "find the right balance" between the interests of Native American Tribes and developers.[9] According to the Governor, the bill protected the confidentiality of sacred sites at the expense of developers, who may "invest large sums of money in a project before learning the development implicates a sacred site."[10] The Governor also criticized the bill for relying on NAHC's inventory, which he noted was underinclusive of sacred sites because Tribes were reluctant to nominate their sites and overinclusive because "any site may be placed on the list by anyone, no matter the level of evidence that the site is sacred."[11] Governor Davis encouraged the formation of a new bill that would create a consistent policy for the resolution of land-use conflicts around sacred sites.[12]

Thus, SB 18 was introduced (December 2, 2002), passed by the Senate (June 2, 2003), and significantly amended by the Assembly for months (June through September), until it failed to pass in the Assembly (September 12, 2003). SB 18 was moved to the Inactive File and reconsidered in the next half of the legislative session.[13] On June 10, 2004, Senator Burton introduced the "gut-and-amend" version of SB 18, which removed all references to CEQA.[14] After a few rounds of minor amendments, the Assembly passed this version of SB 18 (August 9, 2004), and the Senate concurred with the Assembly amendments, passing SB 18 (August 19, 2004). Governor Schwarzenegger approved SB 18 on September 29, 2004. For more details on the enacted version of SB 18, see the Overview of SB 18.

[7] *Id.*
[8] S. B. 1828, 2001-2002 Leg., Reg. Sess. (Cal. 2002).
[9] Gray Davis, Veto Message, S. B. 1828, 2001-2002 Leg., Reg. Sess. (Cal. 2002) (Sep. 30, 2002), http://www.leginfo.ca.gov/pub/01-02/bill/sen/sb_1801-1850/sb_1828_vt_20020930.html.
[10] *Id.*
[11] *Id.*
[12] Goode, *supra* note 3, at 176.
[13] Assembly Committee Analysis, S. B. 18, 2003-2004 Leg., Reg. Sess. at 7 (Cal. 2004) (Jun. 16, 2004).
[14] *Id.*



Senate Bill 1828

On February 22, 2002, Senator Burton introduced SB 1828. Initially, SB 1828 was merely a policy statement, declaring that it shall be California's policy to protect Native American religious freedom.[15] On April 1, 2002, SB 1828 was amended to be more than a policy statement; SB 1828 now proposed to amend CEQA to recognize that projects that adversely affect a sacred site of a federally recognized Native American Tribe may have a significant effect on the environment.[16] Under the existing law, Native Americans had to prove their resources were environmentally sensitive or historically and archeologically significant before CEQA applied.[17] After months of negotiation, the final version of SB 1828 proposed to amend CEQA, requiring lead agencies to notify and consult with federally-recognized Native American Tribes prior to approving projects within 20 miles of the exterior boundaries of a reservation.[18] SB 1828 also proposed to amend the Surface Mining and Reclamation Act of 1975 (SMARA),[19] prohibiting lead agencies from approving plans for mining operations located within one mile of any sacred site of a federally recognized Native American Tribe and in "an area of special concern" *unless* the plan required the company to backfill its mining project to "[a]chieve the approximate original contours of the mined lands prior to mining."[20] Governor Gray Davis vetoed SB 1828 on September 30, 2002.[21]

The April 1, 2002, version of SB 1828 proposed the strongest consultation requirement, which, unlike later iterations of SB 1828 and SB 18, did not carve out a public interest exception. This version of SB 1828 completely prohibited any state agency from issuing a CEQA permit for a project that an "affected Native American tribe" declared would have an

[15] S. B. 1828, 2001-2002 Leg., Reg. Sess. (Cal. 2002) (as introduced, Feb. 22, 2002).
[16] S. B. 1828, 2001-2002 Leg., Reg. Sess. § 3 (Cal. 2002) (as amended by Senate, Apr. 1, 2002).
[17] Coleman, *supra* note 2.
[18] S. B. 1828, 2001-2002 Leg., Reg. Sess. § § 4-8 (Cal. 2002).
[19] *Id*. at § § 2-3.
[20] *Id*. at § 2.
[21] James May, *Davis vetoes sacred sites bill*, INDIAN COUNTRY TODAY (Oct. 4, 2002; last updated Sep. 12, 2018).

adverse impact on a certified sacred site, as identified by the Tribe or NAHC.[22] The final version of SB 1828 would have amended SMARA to prevent approval of mining operations located within one mile of any Native American sacred site and in an area of special concern.[23] The SMARA amendment also required companies to backfill mines after completing mining.[24] The backfill requirement was uncontroversial, except for mining companies because backfilling projects adds to the cost of a mining project.[25] For example, according to Tribal attorney Courtney Coyle, the backfill requirement would have added $80-100 million to the Glamis Mine project, effectively killing the project.[26]

SB 1828 was supported by both Democrats and Republicans.[27] For example, Senator Bill Leonard (R-San Bernardino) supported SB 1828 because of the bill's protection of religious freedom, its perceived limited application (only a total of 75 acres statewide would fall under SB 1828's scope), and its potential to reduce red tape since the bill would require Tribal input at the beginning of a development project.[28] SB 1828 was also criticized by both Democrats and Republicans.[29] Opponents claimed the bill would delegate state power to Tribes and would lengthen the CEQA process, making development more costly.[30] Bill Crouse, a lobbyist for mining interests, said "The overarching concern is that the bill basically delegates the powers of the state to what is, in effect, a foreign nation."[31] Maureen Gorson, a lawyer who frequently represented developers, said, "It's basically taking a

[22] S. B. 1828, 2001-2002 Leg., Reg. Sess. § 4 (Cal. 2002) (as amended by Senate, Apr. 1, 2002).
[23] S. B. 1828, 2001-2002 Leg., Reg. Sess. § 4 (Cal. 2002) (as amended by Assembly, Aug. 26, 2002).
[24] *Id.*
[25] James May, *Sacred sites bill passes California Legislature*, INDIAN COUNTRY TODAY (Sep. 23, 2002; updated Sep. 12, 2018).
[26] *Id*.
[27] In the Assembly, S.B. 1828 was supported by Alquist (D), Aroner (D), Bogh (R), Calderon (D), Canciamilla (D), Cardenas (D), Cardoza (D), Cedillo (D), Chan (D), Chavez (D), Chu (D), Cohn (D), Corbett (D), Correa (D), Cox (R), Diaz (D), Dutra (D), Firebaugh (D), Florez (D), Frommer (D), Goldberg (D), Harman (R), Havice (D), Hertzberg (D), Horton (D), Jackson (D), Keeley (D), Kehoe (D), Kelley (R), Koretz (D), Leonard (R), Liu (D), Longville (D), Lowenthal (D), Maddox (R), Maldonado (R), Migden (D), Nakano (D), Nation (D), Negrete McLeod (D), Oropeza (D), Robert Pacheco (R), Pavley (D), Pescetti (R), Reyes (D), Runner (R), Salinas (D), Shelley (D), Simitian (D), Steinberg (D), Strickland (R), Strom-Martin (D), Vargas (D), Washington (D), Wayne (D), Wiggins (D), Wright (D), Wesson (D). *See* Senate Floor Analysis, S.B. 1828, 2001-2002 Leg., Reg. Sess. at 8 (Cal. 2002) (Sep. 12, 2002).
[28] May, *supra* note 25.
[29] Opponents included California Chamber of Commerce, California Mining Association, Glamis Gold, Inc., California Association of Realtors, California Building Industry Association, Consulting Engineers & Land Surveyors of California, California Business Properties Association, California Cattlemens Association, Resource Landowners Coalition, Sempera Energy, and Calpine Corporation. *Id.* at 7-8.
[30] John Ydstie, *Bill going through the California Legislature would give Native American tribes a say in stopping development that threatens sacred religious sites*, NPR (July 22, 2002).
[31] *Id.*

minority religious right and giving it veto power over all these other goals we're trying to achieve."[32]

Sacred Sites under SB 1828

SB 1828 provided two definitions of a "sacred site." For the purpose of CEQA,

> "sacred site" means any geophysical or geographical area or feature that meets both of the following criteria:
>
> (a) Is sacred to Native American Tribes by virtue of its traditional cultural or religious significance or ceremonial use, or by virtue of a ceremonial or cultural requirement.
>
> (b) Meets one of the following conditions:
>
> (1) The site is included in an inventory of sacred sites maintained by NAHC
>
> (2) A federally recognized Indian Tribe submits **substantial evidence** to the lead agency that identifies the site as sacred. That evidence may include, but is not required to include, or be limited to, previous site designations, ethnohistoric literature, oral histories, cultural resource reports, museum inventories, and archeological research.[33]

For the purpose of SMARA, the proposed definition of a "Native American sacred site" was

> a specific area that is identified by a federally recognized Indian tribe, Rancheria or Mission Band of Indians, or by the Native American Heritage Commission, as sacred by virtue of its established historical or cultural significance to, or ceremonial use by, a Native American group, including, but not limited to, any area containing a prayer circle, shrine, petroglyph, or spirit break, or a path or area linking the circle, shrine, petroglyph, or spirit break with another circle, shrine, petroglyph, or spirit break.[34]

For the provision of SMARA to apply, however, this sacred site also had to be located in an area of special concern, which was defined as "any area in the California desert that is

[32] *Id*.

[33] *Id*. at § 5.

[34] S. B. 1828, 2001-2002 Leg., Reg. Sess. § 2 (Cal. 2002) (as enrolled, Aug. 29, 2002).

designated as Class C or Class L lands or an Area of Critical Environmental Concern with the California Desert Conservation Area Plan of 1980."[35]

Under SB 1828, the Tribe or NAHC made the final determination that a site was sacred. The bill did not provide a mechanism for the lead agency to challenge the identification of a sacred site; the Tribe or NAHC simply submitted the identification, including "substantial evidence" supporting that identification. Potentially the agency could have challenged the Tribe's identification under the "substantial evidence" standard provided in the definition.

Consultation under SB 1828

SB 1828 would have required consultation with Tribes during the CEQA environmental review process. While SB 1828 described the goal of consultation, the bill did not propose a definition of consultation. During the lead agency's initial study, SB 1828 required a finding that a proposed project had a significant effect on the environment if it "may have a significant effect on a Native American sacred site."[36] SB 1828 required lead agencies to notify the potentially affected federally recognized Tribe and NAHC of any proposed project within 20 miles of the exterior boundary of a Native American reservation or rancheria, along with a copy of the initial study or notice of preparation.[37] After the notice, the federally recognized Tribe would inform the lead agency whether a proposed project may adversely affect a sacred site and request consultation.[38] SB 1828 did not provide a timeframe for the agency to notify the Tribe of a proposed project or for the Tribe to respond to this initial notice.[39] The bill required the Office of Planning and Research to prepare and develop guidelines on the preparation of environmental impact reports (EIRs) and negative declarations consistent with this amendment.[40]

After the Tribe requested consultation, the lead agency was required to convene a mutually agreeable time and place for the affected Tribe, project applicant, and NAHC to meet.[41] The goal of the meeting was to "to seek mutually agreeable methods of avoiding or otherwise resolving the potential adverse effects," where all parties may propose mitigation measures.[42] If the consultation resulted in any binding agreement, the agreement would be incorporated as mitigation measures in the final EIR or negative declaration.

If the Tribe and lead agency could not agree to mitigation measures during consultation, the lead agency must prepare an EIR or negative declaration that included the following

[35] *Id.*
[36] *Id*. at § 6.
[37] *Id*. at § 7(a).
[38] *Id*. at § 7(b).
[39] SB 1828 only established a 30-day notice later in the environmental review process.
[40] *Id*. at § 6.
[41] *Id*. at § 7(b).
[42] *Id*.

analyses: (1) whether the proposed project has a significant impact on the identified sacred site; and (2) whether the proposed alternatives or mitigation measures avoid or substantially lessen the impact to the identified sacred site.[43] The affected Tribe could submit a comment letter accepting or rejecting the lead agency's analyses during the review period of the draft EIR or negative declaration, and the lead agency must provide a written response to the Tribe and NAHC.[44] Then, if the Tribe objected, the lead agency could still make a determination that there was "no legal or feasible way to accomplish the project purpose without causing a significant effect upon the sacred site, that all feasible mitigation or avoidance measures have been incorporated, and that there is an overriding environmental, public health, or safety reason based on substantial evidence presented by the lead agency that the project should be approved."[45] However, the lead agency could only issue a permit in this instance if the agency provided the affected Tribe 30 days' notice of this determination and an opportunity to comment on the determination.[46] SB 1828 did not describe what happens after the Tribe comments on this determination. Perhaps the OPR would have answered this in its guidelines.

Summary

SB 1828 would have amended CEQA to (i) require consideration of impacts on Native American sacred sites; (ii) allow Tribes the opportunity to consult on the impacts; and (iii) provide Tribes a say in the final project determination. The bill would have required a lead agency to notify federally-recognized Tribes of proposed projects within 20 miles of the exterior boundaries of a reservation or rancheria. After the federally-recognized Tribe notified the lead agency that a proposed project would adversely affect a sacred site, the lead agency would be required to consult with that Tribe to seek "mutually agreeable methods of avoiding or resolving the potential adverse effects."[47] If the site was not on the inventory of sacred sites maintained by NAHC, the affected Tribe could submit "substantial evidence" to the agency identifying the site as sacred. SB 1828 required information about a sacred site submitted by a Tribe to be published in a confidential appendix of the EIR or negative declaration, but SB 1828 did not establish criminal penalties for the disclosure of confidential information regarding sacred sites.

[43] *Id*. at § 7.
[44] *Id.* at § 7.
[45] *Id*. at § 7(f).
[46] *Id*.
[47] *Id.* at § 7.

SB 1828 did not promulgate specific guidelines for the consultation, but the bill required that consultation result in mutually agreeable mitigation measures. If the agency and Tribe could not agree to mitigation measures and the Tribe rejected the agency's findings in its EIR, the agency was prohibited from approving the proposed project unless there was an overriding environmental, public health, or safety reason for the project based on substantial evidence.

Senate Bill 18 (2003)

Senators Burton, Chesbro, and Ducheny introduced SB 18 on December 2, 2002.[48] SB 18 was drafted as "a measure that addresses critics' calls in 2002 for a more predictable and evidence-based way of identifying and protecting sacred sites."[49] As introduced, SB 18 proposed to make a technical amendment to Section 5097.94 of the Public Resources Code, which allows NAHC to bring action to prevent severe and irreparable damage to a Native American site.[50] The amendment only proposed to change "severe and irreparable damage" to "severe *or* irreparable damage."[51] The Senate passed the deliberately scant "spot bill" on June 2, 2003, knowing it would undergo substantial amendment in the Assembly.[52] After amendments, however, SB 18 (2003) failed to pass the Assembly on September 12, 2003.

On July 9, 2003, the Assembly completely overhauled SB 18 in its first amendment.[53] SB 18 proposed to expand the responsibilities of NAHC, establish the Native American Traditional Tribal Cultural Site Register (TTCS Register), include traditional Tribal cultural sites (TTCSs) for environmental review under CEQA, establish criminal penalties ($10,000 fine and/or up to one year imprisonment in county jail) for disclosing the location of TTCSs, and authorize Native American Tribes to hold conservation easements.[54] This version of SB 18 required NAHC to consult with Tribes to develop the criteria for listing on TTCS Register, complete an expedited listing of sites, and maintain a list of Tribal contacts for consultation.[55] For the first time, the proposed legislation expanded NAHC's and Tribes' participation in local land use and planning processes by requiring city and county planning agencies to consult with NAHC and affected Native American Tribes when adopting or amending a general plan or specific plan.[56]

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[48] S. B. 18, 2003-2004 Leg., Reg. Sess. (Cal. 2004) (as introduced, Dec. 2, 2002).
[49] Jake Henshaw, *Protecting Indian sacred sites draws anger from developers*, TULARE ADVANCE-REGISTER, July 15, 2003, at 2A.
[50] *Id.*
[51] S. B. 18, 2003-2004 Leg., Reg. Sess. (Cal. 2004) (as introduced, Dec. 2, 2002).
[52] Goode, *supra* note 3, at 176.
[53] S. B. 18, 2003-2004 Leg., Reg. Sess. (Cal. 2004) (as amended by Assembly, Jul. 9, 2003).
[54] *Id.*
[55] *Id.*
[56] *Id.*

In its final form, SB 18 narrowed who was liable for criminal penalties for breaking confidentiality of sacred sites,[57] allowed mitigated negative declarations instead of full CEQA review,[58] and exempted replacement, repair, or reconstruction projects for the manufacture, storage, and transport of oil, gas, and other fuels from consultation requirements.[59] SB 18 failed by a vote of 38-14 in the Assembly on September 12, 2003.[60] California state agencies, municipalities, and many associations representing business, development, and agriculture interests opposed the CEQA amendment that considered TTCSs in the environment review and required consultation with Tribes. They believed such amendments would complicate the CEQA process, delay development projects, or harm the real estate market at a time when California was "flat broke."[61] Critics said that Tribal consultation could add four months to the environmental review process and that the bill would take away power from the local government and give it to NAHC.[62] Opponents of SB 18 also claimed that the consultation and privacy provisions would make it difficult for community groups, city planners, and government officials to "challenge claims that particular sites need protecting."[6364]

Sacred Sites Under SB 18 (2003)

Unlike SB 1828, SB 18 (2003) did not define "sacred sites."[65] Instead, SB 18 (2003) mandated NAHC to consult with federally recognized and non-federally recognized California Native American Tribes to develop criteria for determining **traditional Tribal cultural sites** (TTCSs).[66] As defined by the bill, a TTCS was a site listed on, or determined by NAHC to be eligible for listing on, the TTCS Register based on the criteria for listing established by NAHC.[67] The bill also mandated that a TTCS would be "a site that is traditionally associated

[57] Originally any person who disclosed information about a sacred site was liable, but this version limited liability to people who participated in the consultation process about the site with NAHC. *See* Assembly Floor Analysis, S. B. 18, 2003-2004 Leg., Reg. Sess. at 13 (Cal. 2004) (Sep. 8, 2003).
[58] If the consulting parties agreed to mitigation measures that addressed the impacts, the lead agency may adopt a mitigated negative declaration rather than complete the full CEQA review process. *See Id.* at 12; *see also* Goode, *supra* note 3, at 185.
[59] Assembly Floor Analysis, S. B. 18, 2003-2004 Leg., Reg. Sess. at 12-13 (Cal. 2004) (Sep. 8, 2003); *see* Goode, *supra* note 3, at 193.
[60] Goode, *supra* note 3, at 176.
[61] Henshaw, *supra* note 30; Jake Henshaw, *Assembly rejects bill on sacred sites*, DESERT SUN, Sep. 14, 2003, at A5; Jake Henshaw, *Bill requires local officials to consult on sacred sites*, VISALIA TIMES-DELTA, June 17, 2004, at 4C; *Revised sacred sites bill still too broad, unnecessary*, MODESTO BEE, July 28, 2003, at B-6.
[62] Jake Henshaw, *Debate on sacred lands legislation begins*, DESERT SUN, July 15, 2003, at B4.
[63] Steve Johnson, *Bill giving tribes more control criticized*, FRESNO BEE, Sep. 7, 2003, at B3.
[64] Edward Sifuentes, *Bill adds new level of review to state's environmental quality act*, NORTH COUNTRY TIMES, July 15, 2003, at A-4.
[65] S. B. 18, 2003-2004 Leg., Reg. Sess. (Cal. 2004) (as amended by Assembly, Sep. 12, 2003).
[66] *Id.*
[67] *Id.* at § 13.

with, or has served as the site for engaging in activities related to, the traditional beliefs, cultural practices, or ceremonies of a Native American tribe. A TTCS shall be a reasonably delineated physical location identifiable by physical characteristics."[68] Tribes did not define their own TTCS; rather, Tribes nominated their sites for listing on the Register and NAHC made the final determination. During consultation for a site not on the TTCS Register, the Tribe could request NAHC to determine whether the site likely met the criteria for listing.[69] SB 18 emphasized that TTCSs were a distinct legal category, and the fact that a site was not nominated for inclusion on the Register was not evidence that a site was not sacred of significant.[70]

Consultation Under SB 18 (2003)

> SB 18 (2003) defined **consultation** as
> the meaningful and timely process of seeking, discussing, and considering carefully the views of others, in a manner that is cognizant of all parties' cultural values, and where feasible, seeking agreement. Consultation between government agencies and Native American tribes shall be conducted in a way that is mutually respectful of each party's sovereignty. Consultation shall also recognize the tribe's potential need for confidentiality with respect to sites that have traditional tribal cultural significance.[71]

This definition of consultation was carried over into the enacted version of SB 18 (2004) and in AB 52.

At the time the agency determined a proposed project was not exempt from CEQA, the agency must send notice to the potentially affected Tribe and NAHC; the notice must inform the Tribes of their right to request consultation and provide sufficient information describing the proposed project.[72] Receipt of the agency's notice triggered the 45-day review period. Within 20 days of receiving the agency's notice, the Tribe could send NAHC a written request for consultation. NAHC "shall promptly" initiate consultation with the appropriate Tribes, project proponent, and lead agency ("consulting parties"). [73] Within the 45-day review period, NAHC, in consultation with the consulting parties, determined whether substantial adverse changes to a TTCS could be avoided or reduced below a level of significance.

[68] *Id.*
[69] *Id.* at § 18.
[70] *Id.* at § 13.
[71] *Id.*
[72] *Id.* at § 29.
[73] *Id.* at § 18.

If NAHC decided that substantial adverse changes to a TTCS could not be avoided or reduced below a level of significance, a new 75-day review period begins. Within five days of this decision, NAHC must send notice of this decision to the consulting parties. Within 30 days of receiving NAHC's notice, the consulting parties may provide written comments to NAHC. NAHC must accept and consider these written comments, but NAHC "shall acknowledge" that the affected **Tribes have special expertise**.[74] After the comment period, NAHC provided notice of its proposed determination and findings to the consulting parties, who had 10 days to submit comments on the proposed determination and findings.[75] If the consulting parties submitted comments, NAHC must consider the comments and modify its proposed determination and findings before making its final determination.[76] The agency could not veto NAHC's final determination, but the consulting parties could seek judicial review of NAHC's final determination under a writ of mandate.[77] Thus, NAHC had the power to stop projects, unless a judge overruled its determination.

Summary

SB 18 (2003) differed from SB 1828 (2002) in a several ways. First, SB 18 (2003) applied to non-federally recognized Tribes, and it entitled California Native Americans Tribes to hold conservation easements.[78] SB 18 not only required consultation during CEQA but also during land use planning. SB 18 (2003) did not give Tribes a mechanism to define their own sacred sites; NAHC made all the final determinations. Further, SB 18 proposed to grant NAHC substantial responsibilities in the CEQA environmental review process, including making the final determination whether a proposed project would cause a substantial adverse change in a TTCS, and this determination could only be challenged in court.[79] Notably, SB 18 required determinations under CEQA to recognize that Tribes have special expertise over their TTCSs. However, unlike SB 1828, which empowered Tribes to have the final say over projects, SB 18 empowered NAHC to make final determinations.

Senate Bill 18 (2004)

On June 10, 2004, Senator Burton introduced the "gut-and-amend" version of SB 18, which removed all references to CEQA and the TTCS Register but retained the land use planning

[74] *Id.* at § 21.
[75] *Id.*
[76] *Id.*
[77] *Id.*
[78] *Id*. at §§ 13(j), 2.
[79] *Id*. at § 21.

provisions.[80] SB 18 had been negotiated until it no longer amended CEQA to include consultation during environmental review. Indeed, the legislative committee reports from this session do not list any opponents of the bill, and the only negative comments concerned delays in the local planning process and the potential lack of capacity of OPR and NAHC to develop consultation guidelines.[81] According to Vince LaPena, a Wintu tribal member, SB 18 was "mainly about acknowledging the (native) people, instead of building with no concern for them."[82] Senator Denise Ducheny (D-San Diego) also recognized the limits of SB 18, saying that the bill only provided "the opportunity on the front end to plan for mitigation and avoid sites that may cause conflict with culturally sensitive sites."[83] After a few rounds of minor amendments, the Assembly passed this version of SB 18 (August 9, 2004), and the Senate concurred with the Assembly amendments, passing SB 18 (August 19, 2004). Governor Schwarzenegger approved and signed SB 18 on September 29, 2004.

Enacted Legislation Compared to Proposed Legislation

The primary distinctions between SB 18 (2004) and SB 18 (2003) are that the enrolled version did not amend CEQA or empower NAHC to define traditional tribal cultural sites.[84] Rather than create a new register maintained by NAHC, SB 18 (2004) partially relied on the existing California Register of Historic Resources to identify **traditional Tribal cultural places** (TTCPs), which include any Native American historic, cultural, or sacred site, including any historic or prehistoric ruins, any burial ground, any archaeological or historic site, that is listed on or may be eligible for listing on the California Register of Historic Resources.[85] However, TTCPs could also include any Native American sanctified cemetery, place of worship, religious or ceremonial site, or sacred shrine located on public property regardless of its eligibility for the California Register of Historic Resources.[86]

While the enacted version of the bill did not amend CEQA, SB 18 (2004) still preserved several provisions of SB 18 (2003). First, the bill still allowed California Native American Tribes, whether they were federally recognized or not, to hold conservation easements. [87] Second, the bill still required consultation during the local planning process, such as proposed general plans and open space designations. Additionally, the final version of SB 18 kept the definition of "consultation" proposed in SB 18 (2003).[88] Rather than defining the

[80] Assembly Committee Analysis, S. B. 18, 2003-2004 Leg., Reg. Sess. at 7 (Cal. 2004) (Jun. 16, 2004).
[81] Senate Committee Analysis, S. B. 18, 2003-2004 Leg., Reg. Sess. at 4-5 (Cal. 2004) (Aug. 10, 2004).
[82] Kevin Yamamura, *Sacred-sites bill requires consultation over land use*, SACRAMENTO BEE, Aug. 20, 2004, at A4.
[83] *Id*.
[84] David Melmer, *Watered down sacred sites bill passes California Senate*, INDIAN COUNTRY TODAY (Sep. 1, 2004; last updated Sep. 12, 2018).
[85] Places, features, and objects described in Cal. Pub. Res. Code § 5097.993.
[86] Places, features, and objects described in Cal. Pub. Res. Code § 5097.9.
[87] S. B. 18, 2003-2004 Leg., Reg. Sess. § 2 (Cal. 2004) (enacted).
[88] *Id.* at § 8.

consultation procedures in statute, SB 18 (2004) required the Office of Planning and Research (OPR) to work with NAHC to develop consultation guidelines by March 1, 2005.[89] Unlike the procedures created by SB 18 (2003), the guidelines are not the law.

Tribal Consultation Guidelines

To develop the Tribal Consultation Guidelines, the OPR consulted NAHC, academic institutions, the League of California Cities, the California State Association of Counties, and representatives from California Native American tribes, California state agencies, federal agencies, and local governments.[90] On February 22, 2005, the OPR released its draft guidelines for public review and comment. During the 45-day comment period, OPR held four stakeholder meetings and a public workshop on the guidelines. On April 15, 2005, OPR published the *Tribal Consultation Guidelines: Supplement to General Plan Guidelines*, which incorporated feedback from its meetings and written comments. On November 14, 2005, OPR released an updated version of the guidelines, which can be found on its website.

The *Guidelines* explain the responsibilities of local governments under SB 18 and provide "advice" for how local governments conduct consultations. [91] For example, the *Guidelines* recommend the local governments official to ask for the Tribe's consultation protocols to use as a model for SB 18 consultation.[92] The *Guidelines* also provide a list of considerations for the development of a consultation procedure, encouraging Tribes and local governments to discuss procedures for giving and receiving notice, a procedure for allowing the Tribe to access the local government's consultation records, and the preferred method and location of consultation meetings.[93]

In the *Guidelines*, the OPR clarified that SB 18 required tribal consultation when a city or county adopt or amend specific plans because "existing state planning law requires local governments to use the same processes for adoption and amendment of specific plans as for general plans."[94] The OPR also clarified that all of SB 18, including the consultation requirements, not just the cultural easement provision, applied to California Native American Tribes on the contact list maintained by NAHC, whether they were federally recognized or not.[95]

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[89] *Id.* at § 3.
[90] Director's Message, GOVERNOR'S OFF. OF PLAN. AND RSCH., TRIBAL CONSULTATION GUIDELINES: SUPPLEMENT TO GENERAL PLAN GUIDELINES (November 14, 2005).
[91] GOVERNOR'S OFF. OF PLAN. AND RSCH., TRIBAL CONSULTATION GUIDELINES: SUPPLEMENT TO GENERAL PLAN GUIDELINES, 3 (November 14, 2005).
[92] *Id.* at 21-22.
[93] *Id.* at 22.
[94] *Id.* at 3.
[95] *Id.* at 4.