"Sacred Sites" Protection: Be Careful What You Ask For

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May 28, 2002

In the 1980s, when we were working on amendments to the National Historic Preservation Act, the late Robert R. Garvey, Jr., then Executive Director of the Advisory Council on Historic Preservation and my boss, used to chuckle at some of my wilder ideas and say: "Be careful what you ask for; you just might get it." Garvey's advice comes to mind often these days as I read proposals for legislation to improve protection of "Indian sacred sites."

I put those words in quotes not only because "Indian" is a word that some people think is all right while others find offensive, but because years ago several tribal elders convinced me that "sacred site" is a misleading term.

"To you," they said, "it means a particular place, where Jesus was born or something. What's spiritual to us is a lot bigger. Everything's got a spirit, and you've got to respect that spirit. You talk about "sacred sites" and people think there's just a few of them, that you can put on a map. That's not the way it is."

This made sense to me, and it still does. I support efforts to protect "sacred sites," but the words worry me. A sacred site seems like something that's absolutely sacrosanct, or at least that ought to be. Unquestionably, there are areas valued by Indian tribes that really ought to be sacrosanct, but I fear that if we focus all our attention on gaining rigorous protection for such places, we'll miss getting any protection at all, any consideration at all, for the vast, vast number of places and things that are simply regarded as spiritual, and that we ought to respect. And I think we'll inevitably wind up protecting only a very small number of places from a very small range of impacts. Finally, I'm afraid we'll buy such protection only at great cultural and spiritual cost to tribes themselves.

But it's easy to generate moral outrage for the violation of "sacred sites," so that's what people are talking about and drafting legislation to halt. Without, as far as I can see, a whole lot of thought about what will happen if they get what they're working for. In this paper I'd like to explore some possible implications of a couple of current legislative proposals and one more general proposed initiative.

California SB No. 1828

Senate Bill 1828 in California, as amended through May 1 2002, would amend elements of the State Public Resources Code implementing the California Environmental Quality Act (CEQA), which requires environmental impact analyses on actions undertaken by state agencies and subdivisions of the state, including local governments. Since private actions like subdivisions require the approval of local governments, CEQA effectively requires review of all substantial construction projects in California.

SB No. 1828 would require any agency undertaking CEQA review on a project to notify "any affected tribe" if the proposed action was "within one mile of the exterior boundary of a Native American reservation or sacred site." If a tribe then notified the agency that "the project will have an adverse impact on a sacred site," the agency would be prohibited from issuing a permit for the project, provided the site was certified sacred by either the government of a Federally recognized tribe or the State's Native American Heritage Commission. There is further rather convoluted language about issuing the permit if mitigation measures are accepted by the tribe.

Strong protection, it seems, but let's think through the consequences. What would California tribes get if the law were enacted? Here's a hypothetical scenario.

Joe Landowner applies for a permit to put in a subdivision. The local government receives his application and initiates CEQA review.

Let's suppose âfi" as is the case in most of California âfi" that there's no Indian reservation or rancheria within a mile of the project site. In such a case the local government needs to notify tribes only if the project is within a mile of a "sacred site."

What is a "sacred site?" According to proposed Section 21067.5 of the Public Resources Code, as outlined in the bill, it means:

"any geophysical or geographical area or feature that is sacred by virtue of its traditional cultural or religious significance or ceremonial use, or by virtue of a ceremonial or cultural requirement, including a religious requirement that a natural substance or product for use in Native American tribal ceremonies be gathered from that particular location."

How is the local government to know if there's such a site in the vicinity? Somebody's going to have to tell them. Who can do that? Surely no one but the two entities who are entitled to "certify" that a site is sacred âfi" a Federally recognized tribe and the State Native American Heritage Commission. But the Native American Heritage Commission isn't notified of the proposed action, and tribes âfi" Federally recognized or not âfi" are not contacted unless the agency finds that there's a sacred site within a mile, which of course they don't know unless someone has already told them.

So a first practical result of the bill's enactment would be that someone will have to do a survey to identify sacred sites âfi" not a project-specific survey, but a statewide survey. The legislation implies that the Native American Heritage Commission will make such a survey. Which means that tribes are going to have to tell the Commission (i.e., the state government), where their sacred sites are. And they'll have to do more than that. Since the presence of such a site will have economic impacts on citizens like Joe Landowner and on local governments like the one reviewing his proposal, the Commission is going to have to be able to justify its decisions, which means that they'll have to get the tribe to specify why it's sacred, what makes it sacred, what its major characteristics are. And because certifying a place will have implications for property owners, you can expect Joe

and many, many others like him to want to have a say in whether something is "certified sacred." They'll insist on some kind of organized public certification process, and there's no politically (or, I should think, legally, ethically, or morally) viable way the Commission will be able to deny them such a process. So tribes are essentially going to have to prove, in a public forum, that their sacred places "really are sacred." And in doing so, they're going to have to share a lot of information about their sites and their spiritual beliefs and practices.

Is this what tribes want? I doubt it, but it's what they're inevitably going to get.

In most cases, if a site isn't on the Commission's list, impacts on it are not going to get considered in review of a project application; the site will get wasted just like it can be wasted today. But in some cases âfi“ for example, where a tribe is notified because the project is within a mile of its reservation or rancheria âfi“ impacts on unlisted sites will be considered. In such a case the site's sacredness will have to be certified by the tribal government or the Commission in the context of individual project review âfi“ a very unpleasant political context, where the chance of litigation is even higher than it will be when the Commission considers adding a site to its statewide list. Tribes are going to find themselves having to "prove sacredness" not only in whatever process the Commission puts together, but in court as well. And because of the economic stakes involved, and the conflicts with property rights, and the dubious constitutionality of giving such absolute protection to places for religious reasons, the courts are likely to impose, at best, a pretty high standard of proof. The result almost inevitably will be that very few places will actually be accepted as legally, certifiably, "sacred."

If a tribe is successful in proving sacredness, the other thing they'll have to prove is "adverse impact." That may be easy enough where the sacred site is relatively small and the project will directly destroy it âfi“ bulldoze it into oblivion as happened at the Hopi shrine site known as Woodruff Butte in Arizona âfi“ but what about less obvious impacts on less constrained sites? A ski facility on Mt. Shasta; geothermal drilling on the Medicine Lake Highlands. Are these adverse effects? Of course they are, but do you think a smart lawyer can't get a judge to rule otherwise? And when that happens, what kind of precedent do you have? Very likely, you soon have a developing body of case law that steadily diminishes the range of impacts that are considered adverse.

My point is this: if a law like S.B. 1828 were to be enacted in California âfi“ or anywhere else âfi“ the tribes who support it as a way to protect sacred sites are going to find themselves on a very slippery slope, in which government agencies and courts of law will be deciding what's sacred to them and what's damaging to the sanctity of a place. Not very far down that slope lies a region in which only a few places are actually given protection, from a relatively narrow range of impacts. And all the way down the slope the tribes are going to be giving up confidential, special, spiritually powerful information.

That's assuming the law isn't found unconstitutional the first time it's challenged in court âfi“ a strong probability, to my admittedly non-lawyerly but not entirely uninformed mind.

It's also worth noting that a law like S.B. 1828 would do little or nothing to control destruction of "sacred sites" by activities like agriculture, since most agricultural work isn't subject to review under CEQA. So it wouldn't help the tribe on Clear Lake in northern California, who recently lost their traditional place of origin to vineyard expansion, or any other tribe in a similar position.

The Rahall Bill

Congressman Nick J. Rahall II of West Virginia has proposed Federal legislation to protect "sacred sites." In his formulation, tribes would have the right to petition land management agencies to have sacred sites "designated as unsuitable for any or certain types of Federal or federally assisted undertakings." Petitions would have to be supported by documentation, and there would be a public review process. The definition of "sacred site" is the same as in the California legislation.

Obviously Mr. Rahall's bill suffers from the same problems as does the California bill. It places the burden on the tribes to tell agencies where their spiritual places are and why they're important, and leaves decisions about whether they really are important enough to be protected up to the agencies. Moreover, it would affect only land management agencies like the Forest Service and Bureau of Land Management; it would do nothing to control impacts on non-federal lands, even when federal permits or assistance was involved in an action threatening sites there.

The Little Proposal

Charles E. Little has advanced a proposal in his article, "Toward a Sacred Lands Policy Initiative," that I think has much more merit than either the California bill or Congressman Rahall's approach âfi" though when it comes to controlling government impacts on "sacred sites" I'm afraid it suffers from the same fatal flaw.

Little puts considerable emphasis on appropriating funds to purchase "sacred sites." He would create a federally funded foundation to make grants to non-profit groups, charge the Bureau of Indian Affairs with acquiring sites and bringing them into trust status, and amend the Land and Water Conservation Fund Act to provide grants to tribes. I think these and perhaps other ways of funding outright fee-simple or less-than-fee acquisition (easements, etc.) are worth a great deal of attention. The only way a tribe can be really sure of protecting its spiritual places is to get possession of them.

When it comes to regulating the activities of Federal agencies, Little proposes amendments to the National Historic Preservation Act (NHPA) and the American Indian Freedom of Religion Act (AIFRA) requiring âfi"

"âfiıthe explicit application of the 'three-part test' regarding management decisions on public lands, namely, 'If a government action imposes a burden on religion, then the action must be justified by a compelling government interest that cannot be met through less restrictive means.'"

As a long-time practitioner of Section 106 review under NHPA, I think this approach has a good deal of merit, though it could be improved. For one thing, since Section 106 applies to all kinds of Federal actions, not just those on "public lands," that should be the scope of the proposed amendment as well. An agency should have to apply the three-part test to any decision it makes, whether the decision is about actions on land it controls, or about a permit or the provision of assistance. I also think there might be some alternatives to the "three-part test" that could be explored âfi“ for example, the "no prudent and feasible alternative" standard used in Section 4(f) of the Department of Transportation Act.

But in using NHPA as a major vehicle for deciding whether and how "sacred sites" should be protected from impact by government actions, Little falls into the same trap as do Congressman Rahall and the proponents of the California legislation. How? Because NHPA is built around the National Register of Historic Places; for a place to be considered under Section 106 of NHPA it must be eligible for inclusion in the National Register, a list of documented places of historical and cultural significance maintained by the National Park Service. And while it is possible for an agency, tribe, and others to agree that a place will be "considered eligible" without a lot of study and documentation, it's also possible for an agency, the Park Service, or others to insist on a lot of proof that the place really does meet the National Register's criteria. And in contentious cases the decision about eligibility is made by the Keeper of the National Register, a National Park Service official. So here again the tribes would find themselves having to give up a lot of information and hope that a Federal official would find it convincing enough to "certify" that their spiritual places were "really sacred." And with the NHPA approach as with the others, I think the inevitable result of politics and litigation surrounding the identification and management of "sacred sites" would result in protecting very few places from very few kinds of impacts.

The NHPA approach does have one great strength, however, which Little alludes to but doesn't make much of. The Section 106 review process is a consultative process. Unlike virtually any other such review provision in Federal law, Section 106 (via the implementing regulations of the Advisory Council on Historic Preservation) provides for multi-party negotiation aimed at reaching agreements about how the impacts of Federal actions will be managed. Where it's carried out well, the Section 106 process can be exceptionally effective at identifying and resolving a wide range of impacts on all kinds of places, based on only such information as is really necessary to address the situation at hand. If this aspect of NHPA were grafted onto a law that didn't depend on the National Register, or on any other such list, I think Little's proposal could be a workable and positive one.

A Suggested Alternative

Although it is probably too late to reverse course now, even if everyone could decide it's a good idea, I think that the strongest and best-modulated protection for "sacred sites" could be achieved through legislation that doesn't necessarily even mention such sites. As soon as you set out to give special protection to sacred places, you naturally find yourself having to define what such places are, and to come up with ways to identify them. You quickly wind up providing for lists and registers and certification, which inevitably require tribes to give up information to non-tribal decision makers. An alternative, I suggest, is to recognize the protection of "sacred sites" âfi“ and the spiritual qualities of the environment in general âfi“ as one among many tribal concerns that need to be addressed in planning Federal actions, and focus legislation on ensuring that tribal concerns, in general, are addressed in a sensitive, thoughtful, consultative way. My suggestion would be that amendments be made to the National Environmental Policy Act (NEPA) to strengthen and improve the way Federal agencies consult with tribes (and everyone else, for that matter) about projects that may affect their interests, and to make as sure as possible that such consultation, and consideration of impacts on culturally important places, takes place early in planning.

Why will better and earlier consultation help? Because many, many of the conflicts we face over impacts on "sacred sites" arise because agencies don't consult well, or don't do it early enough, to catch problems before they become intractable. The current conflict over Mt. Graham in Arizona is largely the product of very poor consultation with tribes by the Forest Service early in planning the observatories on the mountain. The recent fight over the Valley of the Chiefs (Weatherman Draw) in Montana was largely the product of a policy by the Bureau of Land Management that defers environmental review of, and consultation about, mineral leases until the lessee is ready to start drilling holes in the ground. Getting agencies to take their environmental planning responsibilities more seriously, and to exercise those responsibilities in a more consultative, open way would go far toward preserving all kinds of environmental values, including spiritual values.

Note: spiritual values, not just sacred sites. Not just small plots of land that some outside authority certifies are sacred, but the spiritual values inherent in the rocks and trees and animals and water. A consultation process is flexible enough to address all these kinds of values; a proscription on impacting particular places is inherently inflexible, and cannot help but result in protection only of narrowly defined places from narrowly defined impacts.

In the final analysis, the only way to protect "sacred sites" is the way the Nixon administration was prevailed upon by Taos Pueblo to protect the Pueblo's sacred Blue Lake âfi“ turn them back over to the tribes. So the several vehicles proposed by Little for getting "sacred sites" into tribal ownership, into trust status, and into ownership by others who will protect them, ought to be at the core of any new "sacred sites" legislation. Protection of non-tribally owned places from federal actions, I suggest, should be

achieved by promoting better environmental impact assessment, based on broad, early, effective consultation with concerned parties.

To conclude with an illustration, let's return to Joe Landowner in California, and suppose that the requirement placed on him is not to protect whatever specific places the Native American Heritage Commission decides is sacred, but to consult early in planning his project with whatever tribes may be concerned about any aspect or impact of his project, and to try to reach accommodation with them. I think there's an excellent chance that accommodation can be reached, because it may very well be that what Joe wants to do âfi“ build ten houses on his property, let's say âfi“ doesn't need to damage the "sacred site" that's there, which might be, for example, a stand of medicinal plants on a rocky hillock. Joe might very easily and happily be able to incorporate the hillock in open space and agree to perpetual tribal access to it âfi“ if everybody sits down and talks about the potential conflict early, in a congenial, problem-solving way. And if they reach agreement, there's no need to release a lot of information about the hillock and its plants and what the tribal medicine people do there. But make it a matter of "thou shalt not" regulation, and Joe's back goes up, his heels dig in, and you've got a fight where there's absolutely no need for one.

Of course, there are cases where there is no accommodation, where there has to be a fight, but it seems to me that even in these cases we ought to try to focus the argument on what's actually at issue, rather than whether the place we're concerned about is "sacred.". Suppose we do end up with an intractable problem between Joe and the tribe. Suppose the tribe's traditional origin place, a very, very important spiritual place that's supposed to be kept very, very secret, is right in the middle of the only place Joe can put his gas station and make an economic go of it. So consultation reaches an impasse and the tribe and Joe go to the agency in charge and make their cases. At this point the tribe controls how much information it puts on the table âfi“ it decides how much it needs to reveal, how badly it wants to preserve the site. And while Joe may argue that the site really isn't important, he's not going to have much of a case if the tribe says it is. The task of the regulatory agency then is to try to find a solution. Will the solution always be in favor of the tribe? No, of course not, but it wouldn't be under the California or Rahall approach, either. Will it often be? That depends substantially on how the process is set up, and what other options âfi“ like having Little's foundation buy Joe out âfi“ are available. What is certain is that a consultation-centered process won't automatically require tribes to reveal all their spiritual areas and what makes them special, and defend their beliefs in public, and it won't result in âfi“ at best âfi“ protection of just a few places from just a few kinds of impacts. That sort of narrow protection, bought at the cost of much spiritual information and cultural hurt, will be what tribes get if they get what the proponents of "sacred sites" legislation are now asking for.