

**CalTHPO-SHPO Tribal Summit on Historic Preservation and Government
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TITLE: Beyond 'In Perpetuity:' The Potential for Tribally-Held Conservation Easements under SB-18

SUMMARY: SB-18 adds California Native American tribes (federally or non federally recognized) to the list of entities that "may acquire and hold conservation easements." A conservation easement is a restriction on development on a parcel that follows chain in title, and often encumbers the property "in perpetuity." Conservation easements have proven to be powerful tools for incentivizing and implementing environmental conservation, and they have much promise for use in cultural conservation. To date, there may be only one conservation easement held by a Native American tribe in California following SB-18. I will give a brief overview of conservation easements and Native land trusts, offer some examples of successful California Indian conservation using easement tools, and speculate on possibilities for increased tribal applications of conservation easements around the state for cultural (including environmental) protection.

PRESENTATION NOTES

SB-18

- Sec. 2 of SB-18 amends Section 815.3 of the Civil Code to add Tribes to the list of entities approved to hold conservation easements:

(c) A federally recognized California Native American tribe or a nonfederally recognized California Native American tribe that is on the contact list maintained by the Native American Heritage Commission to protect a California Native American prehistoric, archaeological, cultural, spiritual, or ceremonial place, if the conservation easement is voluntarily conveyed.

What are Conservation Easements?

- An easement is usually a grant of *affirmative* right *between neighbors* (appurtenant): "you can cross my land for X purpose"
- In contrast, a conservation easement is *restrictive* (prohibits an action) and *affirmative* (permits action), and *in gross* (pertaining to distant users):

*The landowner **retains fee interest** in the property, but the easement holder holds **the rights to prevent** the landowner and successors from developing the land*

The Uniform Conservation Easement Act offers a blueprint for states:

*[A] **non-possessory interest** [2nd party] imposing **limitations or affirmative obligations**...[to] retain or protect natural, scenic, or open-space values...assuring availability for agricultural, forest, recreational, or open-space use, protecting natural resources, maintaining or enhancing air or water quality, and preserving the historical, architectural, archaeological, or **cultural aspects** of real property.*

Some general applications of conservation easements:

- Restore/ protect areas of cultural importance
- Protect watershed health for migratory species (i.e., salmon, waterfowl), and to protect treaty rights
- Mitigation for development (on- and off-reservation)
- Leverage money to buy other lands
- Eco-tourism/ increase surrounding land values
- Federal tax incentive: for landowners who donate/sell an easement to approved entity
- Federal/ state funding for land purchase, restoration (USDA-NRCS, state conservation monies, etc.)

What are cultural conservation easements (CCEs)? How are they different?

- Greater emphasis on stewardship, cultural importance, cultural perpetuation
- Affirm certain land uses, ensure access
- Legal stake in land in perpetuity
- Useful on lands out of tribal ownership

Legal considerations for CCEs:

- UCEA: easements may be used to preserve the "...historical...archaeological, or **cultural aspects** of real property."
- Internal Revenue Code: parcels qualify for tax deduction for conservation, and/or "preservation of a historically important land area or a **certified** historic structure."

Audited if focus on culture instead of environment?

- ***Need for more specific state and federal regulations enabling tribal use of CEs and CCEs***

SB-18 may be a California example

Sogorea Te as example

Native Land Trusts

- Tribes can hold easements in California, but tribes may also want to consider forming Native land trusts to hold conservation easements

*A land trust is a **nonprofit organization** that, as all or part of its mission, actively works to **conserve land** by undertaking or assisting in **land or conservation easement acquisition**, or by its **stewardship** of such land or easements.*

- LTA Census 2010

Outcomes of Native Land Trusts and Conservation or Cultural Conservation Easements:

- Native land access
- Native land acquisition
- Cultural protection
- Cultural education and interpretation on the land
- Cultural perpetuation
- Improved conservation partnerships

Summary: The potential of SB-18 as regards tribally held conservation easements

- Opportunity to increase the number of tribes negotiating, acquiring, and holding conservation easements
- Need clear tax incentives for cultural protection
- Need funding for cultural and environmental protection and specifically for Native land conservation (appropriations)
- Need to support emerging Native Land Trust Alliance (organizing/ collaboration/ education)
- Opportunity to obtain land through conservation settlement processes like the Pacific Forest and Watershed Lands Stewardship Council process, with use of the easement tool