

CULTURAL RESOURCE PROTECTION: THE STATE OF THE LAW

Society For California Archaeology
2007 Annual Meeting



Presented by
CALIFORNIA INDIAN LEGAL SERVICES
March 23, 2007



REGULATING "SPEECH," CONT'D

- One argument is that preventing "daylighting" will prevent looting and other illegal destruction of protected sites
- On that point, the Supreme Court has said,
 - "The normal method of deterring unlawful conduct is to impose an appropriate punishment on the person who engages in it. If the sanctions...do not provide sufficient deterrence, perhaps those sanctions should be made more severe. But it would be quite remarkable to hold that speech by a law-abiding possessor of information can be suppressed in order to deter conduct by a non-law abiding third party."
 - *Barnicki v. Yopper* (2001) 532 U.S. 514, 529.

WHY ARE WE HERE?

- James Benney and others who feel "daylighting" sites previously undisclosed to the public is of some value to the community at large
- Ultimately, we are concerned about damage to these sites, which is prohibited by state and federal law
- However, state and federal laws are inadequate to address the real issue here:
 - Disclosure by PRIVATE PERSONS is not PROHIBITED by state or federal law
 - Any prohibition on disclosure is on agency officials and protection from formal requests

Creating Statutory Liability

- The problem with amending California law to create liability for private persons who disclose previously unknown sites that later suffer destruction is that there is no DUTY of these persons to not disclose the location of these sites
- Prohibiting disclosure by private parties of sites located on public lands is problematic (as discussed previously) because the state is then regulating speech

NEW SOLUTIONS?

- CA Common Law – Injunction
- Amend state law to protect against disclosure by agencies, private citizens and professionals
- Create liability for those who publish the location of sites for resulting damage to those sites
- Permitting Process

SUMMARY

- California law does not protect cultural and sacred sites from disclosure by private parties
- California law does prohibit the destruction of these sites
- Federal law prohibits agencies from disclosing, but what about private persons?
- The answer lies in advancing legislation creating liability for disclosure and subsequent destruction
 - Be mindful of Constitutional protections and other legal issues
- Communication with state agencies