



1055 Wilshire Blvd., Suite 1660 Los Angeles, CA 90017-2499

T: (213)977-1035

F: (213)977-5457

www.cityprojectca.org

January 21, 2008

Mr. Patrick Kruer, Chair
California Coastal Commission
45 Fremont Street
Suite 2000
San Francisco, CA 94105-2219

**Re: Save Panhe and Save San Onofre Stop the Proposed Toll Road:
Opposition to Coastal Consistency Certification (CCC-018-07)**

Dear Commissioner Kruer and Honorable Commissioners:

I. Overview

We submit these comments on behalf of the United Coalition to Protect Panhe and The City Project to save Panhe and San Onofre and stop the proposed Foothill South 241 toll road. We raise concerns that the Coastal Commission needs to address in evaluating compliance of the proposed toll road with the Coastal Act and other governing law, while ensuring the fair treatment of people of all races, cultures, and incomes with respect to the development, adoption, implementation, and enforcement of environmental laws, regulations, and policies. There is no legitimate legal or factual basis for the consistency certification requested. Certification of the toll road must be denied under the Coastal Act and state and federal civil rights and environmental justice laws.

We appreciate the discussion of Panhe and its significance to the Acjachemen people in the staff report and recommendation on consistency certification, CC-018-07-Th 19a (September 2007). We anticipate submitting additional comments on behalf of a growing and diverse alliance to the Coastal Commission on or before the scheduled hearing on February 6, 2008.

The proposed toll road would violate the Coastal Act and civil rights, environmental justice, and environmental laws; harm recreation including hiking, camping, and surfing; threaten endangered species; diminish precious coastal open space; and severely impact the local Native American people, who are members of the Acjachemen Nation, and the sacred site of Panhe. San Onofre State Beach is one of California's most popular state parks, receiving over 2.4 million visitors per year. The proposed toll road would represent the first time in California that state park lands were taken by a local governmental entity for a major infrastructure project. Allowing this project to proceed would set a dangerous precedent, threatening coastal parks, open space, and cultural, historical, and Native American resources everywhere in the State.

Panhe bears a special meaning in Acjachemen -- as well as non-Indian -- life, culture and history. Panhe is an ancient Acjachemen village that is over 8,000 years old and a current sacred site, ceremonial site, cultural site, and burial site for the Acjachemen people. Many Acjachemen

people trace their lineage back to Panhe. Panhe is the site of the first baptism in California, and the first close contact between Spanish explorers, Catholic missionaries, and the Acjachemen people in 1769. The Acjachemen people built the mission at San Juan Capistrano. Destroying Panhe would hurt not only the Acjachemen people but all the people of California and the nation.

The proposed toll road would impermissibly discriminate against the Acjachemen people, impair their access to Panhe, and impair their ability to practice their religion. The toll road will impair their freedom of religion, freedom of association, and beach access rights under federal and state statutory and constitutional protections including the First Amendment.

The toll road would also discriminate against the working poor with limited or no access to a car, people of color, and low income communities in several ways. The toll road through the park would disproportionately deprive them of affordable world class recreation and access to a public beach. San Onofre provides such opportunities at the San Mateo Campground, on hiking trails, and through surfing at Trestles. These communities disproportionately cannot afford to pay tolls for commuter or recreational travel.

United Coalition to Protect Panhe is a grass roots alliance of Acjachemen people working to protect the sacred Native American site of Panhe. The City Project works with diverse coalitions in strategic campaigns to shape public policy and law, and to serve the needs of the community as defined by the community. The City Project has long worked on equal access to the California Coast.

We join in the January 17, 2008, comments submitted by Natural Resources Defense Council and others. We submit these comments to emphasize the values and equal justice principles and laws at stake to save Panhe and San Onofre State Beach. Part II addresses the meaning of Panhe and San Onofre State Beach to the people of the Acjachemen nation, the state, and the United States. Part III discusses the history of the Acjachemen people, Panhe, and state and federal actions against California Indians. Part IV discusses Coastal Act section 30244. Part V discusses the application of the Coastal Act consistently with governing state and federal civil rights and environmental justice laws that prohibit discriminatory impacts as well as intentional discrimination against the Acjachemen people through the destruction of Panhe. Part VI addresses additional concerns.

II. The Meaning of Panhe and San Onofre State Beach to the Acjachemen People and the People of California and the Nation

Panhe is located within the area of direct impact for the proposed toll road that would traverse San Onofre State Beach. *Ex. 6*, Letter from Michael Sampson, Associate State Archaeologist Southern Services Center, re: Proposed Extension of State Route 241 and the Ethnographic Village of Panhe, Sept. 7, 2007.

The destruction of Panhe would hurt the Acjachemen people and the people of California and the nation. Panhe bears a special meaning in Acjachemen -- as well as non-Indian -- life, culture and

history. Panhe is an ancient Acjachemen village and a current sacred site, ceremonial site, and burial site for the Acjachemen people. ***Panhe is one of the few remaining Acjachemen sacred sites where the people can still gather for ceremony in an area that is secluded and exists in a pristine, natural state.*** Many Acjachemen/Juaneño tribal members today can trace their lineage directly to the Village of Panhe, which is estimated to be at least 8,000 years old.

Panhe is significant not only to Native Americans. Panhe is the site of the first baptism in California, and the first close contact between Spanish explorers, Catholic missionaries, and the Acjachemen in 1769. The Acjachemen people built the mission at San Juan Capistrano.

It is essential to emphasize that *people* would be hurt by the proposed toll road. The toll road would harm people, as well as the place of Panhe and San Onofre itself, animals, plants, and the physical environment. Saving Panhe and San Onofre and stopping the toll road is important to achieve justice for all.

As recognized in the determination of eligibility notification for the National Register of Historic Places:

1. As the physical location of a village within the Juaneno traditional tribal area, it is essential evidence of their culture and has significance distinct from any scientific value it may or (because of historic disturbance) may not have.
2. A burial was discovered during construction, and was preserved essentially *in situ* by CALTRANS and the Juaneno. Juaneno traditions hold places of burials to be sacred, and their beliefs do not allow for the removal of human remains or any associated personal belongings from their original place of internment. They consider it inevitable that there are additional burials on the site, increasing its sanctity.
3. Panhe was the location of the first close contact between Juaneno people and Europeans, when Spaniards of the Portola expedition camped at a spring in the vicinity during July 1769. Prior contacts had been limited by the fact that the Spanish were traveling at sea by ship. The contact event is memorialized from the white perspective as the occasion for the “first baptism in California.” . . .
4. “Earliest mission records document that our people from Panhe were among the first and most numerous of the Indians to be taken from their homes for the purpose of building the (San Juan Capistrano) mission compound and developing the ranches The descendents of the Juaneno people from the village of Panhe who were able to survive the trauma we have (experienced) can be numbered among us today. “We are still here.”

Ex. 5, Determination of Eligibility Notification, National Register of Historic Places, National Park Service, Dec. 30, 1981, citing M. Patterson and L. Munro, Native American Indian Culture:

A report prepared by the Juaneño Band of Mission Indians, M.S. on File at Caltrans District 07; *accord, Ex. 12*, Letter from Patricia Martz, President, California Cultural Resource Preservation Alliance, re: *South Orange County Transportation Infrastructure Improvement Project (SOCTIIP), Phase I Archaeological Inventory and on the SOCIITP Draft EIR/SEIR*, to Transportation Corridor Agencies, Aug. 4, 2004, at 1- 2.

Panhe was the largest Indian village in the region in prehistoric and early historic times. Panhe is listed on the Sacred Lands Inventory maintained by the Native American Heritage Commission. *See Ex. 6*, Letter from Michael Sampson, Associate State Archaeologist Southern Services Center, re: Proposed Extension of State Route 241 and the Ethnographic Village of Panhe, Sept. 7, 2007. Panhe is part of the San Mateo Archaeological District, which is listed on the National Register of Historic Places. *Ex. 5, Determination of Eligibility Notification*, National Register of Historic Places, National Park Service, Dec. 30, 1981.

Three Tribal Resolutions from the Juaneño Band of Mission Indians, Acjachemen Nation, have been passed supporting the Tribe's full sovereign participation in any and all land and water use decisions likely to impact the Village of Panhe. *Ex. 16*.

Rhonda Robles, an Acjachemen woman, eloquently describes the significance of Panhe in her life today:

I can tell you from my first hand experiences that the toll road would have devastating consequences on my relationship to this sacred site and the Ancestors that are buried in the ground. This is the place that my mother took me to do special ceremonies with her. It is also the beginning of our Annual Ancestor Walk, which is in its 11th year. In her last breaths, before she crossed over to the spirit world, my mother rose from her sick bed and spoke publicly for protection and preservation of this area. She had to be helped to walk up to the podium and back to her seat. TCA is in no position to state how I or any other Native Americans may or may not be affected by the proximity of the proposed toll road to this land and my spiritual practice. I can assure you that this road will seriously and irrevocably impair the ability of myself and others of the Acjachemen Nation to practice our traditional cultural and religious ceremonies.

Ex. 15, Letter from Rhonda Robles, Acjachemen Nation, to Patrick Kruer, Chair, California Coastal Commission, re: Foothill-South Toll Road CZMA Consistency Certification (Hearing Date: Oct. 11, 2007).

Robert Bracamontes, a voting member of the Acjachemen Nation, writes of the continuing significance of Panhe in his life today:

It was not long ago, fifteen years or so, that Ronnie Bracamontes was buried at Panhe. My father Joseph Bracamontes was present at his cousin's burial. This is a place of the living history of the Acjachemen, Juaneno people. . . .

My father and I have traveled from Los Angeles to participate in gatherings where sage is burned and talks of protecting our loved ones go on for hours. Stories of bonfires and ghost dances that draw the sacred spirits to the group are shared. We walked down the trail and saw trees planted by many tribal members when they were young. The trees are tall filling the sky with histories of our youth and now aged through time with our elder's wisdom.

Ex. 15, Letter from Robert Bracamontes, Acjachemen Nation, to Patrick Kruer, Chair, California Coastal Commission, re: Foothill-South Toll Road CZMA Consistency Certification (Hearing Date: Oct. 11, 2007) – OPPOSITION.

Panhe remains an important site for Acjachemen cultural and religious ceremonies today. For example, Panhe is the beginning of the Annual Ancestor Walk, which is in its eleventh year and which includes Native Americans from Southern California. Images of the Ancestor Walk through Panhe and other Native American sacred sites in October 2007 are available on the web at www.flickr.com/photos/cityprojectca/collections/72157603408713554.

The National Latino Congreso passed a resolution recognizing that “a proposed toll road threatens the San Onofre State Beach in Southern California, compromising sacred Native American grounds, eliminating precious open space on the California coast, impacting recreation opportunities for hiking, surfing, and camping, and destroying habitat for endangered or threatened species,” and resolving that “federal, state, and local agencies should take all necessary steps to save San Onofre State Beach and stop the toll road through the beach and park.” *Ex. 18*, Resolution 7.11, approved by the Second Annual National Latino Congreso on Oct. 7, 2007.

Then-Attorney General Bill Lockyer and the California Department of Parks and Recreation have noted the significance of San Onofre for low cost recreation including hiking, camping, and surfing; endangered species; and precious coastal open space. *Exs. 7, 8*.

Additional letters about the significance of Panhe are included in Exhibits 2, 10-11, and 13-15, and will be submitted at or before the Coastal Commission hearing on February 6, 2008.

III. The History of the Acjachemen People, Panhe, and State and Federal Action

A. The Acjachemen People and Panhe

The Acjachemen/Juaneño, Luiseño, and Gabrieleño people of Southern California were speakers of Takic, a family of the Uto-Aztecan stock. These groups have Spanish names based on the three missions that were established on their lands. The village was the unit of Acjachemen social and political organization before European contact. Panhe was located in the area of the present day Pendleton Coast District. The first contact with Europeans was in 1769 with the Portola expedition that traveled from San Diego to Monterey in what became the Rancho Santa Margarita y Las Flores. San Juan Capistrano was founded in 1776. By 1797, the mission had a

population of 1107 Indian neophytes, who built the mission. Villagers from Panhe were included in the mission baptismal records and the people of the San Onofre area were included in the mission population. The missions were secularized under Mexican rule in 1833. That year San Juan was organized as an Indian pueblo and the neophytes were given limited emancipation and some land. The Juaneno-Luiseno land that became Rancho Santa Margarita y Las Flores was administered by Mission San Luis Rey. *See generally Ex. 4, Betty Rivers, The Pendleton Coast District: An Ethnographic and Historic Background* at 36-43 (undated typescript on file with The City Project).

California was ceded by Mexico to the United States in 1848. The Acjachemen people were driven from the San Mateo area before 1873 and settlers colonized the land. The United States government established Camp Pendleton Marine Corps Base on Rancho Santa Margarita y Las Flores in 1942 by taking everything south of the Orange County line and paying \$4.25 million to the Flood and Baumgartner families who held the ranch lands. San Juan Capistrano grew rapidly after World War II. *Id.* at 43-51.

During this rapid growth, the Juaneño, noted as residents here in the 1930s and 1940s, were submerged as a people.

“In March, 1979, the Juaneño organized as a band, and publicly re-affirmed their ethnic identity. They are now working to preserve their heritage, to ensure that their traditions are passed on in an increasingly overdeveloped region. They are concerned with the protection of their ancestral sites, and with those which are part of their more recent history.” *Id.* at 51.

B. State and Federal Action against the California Indians

The history of the Acjachemen people and Panhe can be understood only in the context of state and federal action against the California Indians. As the Indian Claims Commission recognized:

The evidence is plain, and in fact, not disputed, that after [the United States] acquired California, and as a result of the great influx of white people, the Indian communities were disrupted and destroyed, many of their members were killed, and those remaining were largely scattered throughout the state, and their tribal or band origin generally lost.

Thompson v. U.S., 8 Ind. Cls. Comm. 1, 17 (1959).

The State of California has a history of laws that prohibited California Indians from practicing their religion, speaking their languages, and practicing traditional ceremonies and customs, according to the California State Library Research Bureau. State laws separated California Indians from their lands, and separated at least a generation of children and adults from their families, languages, and cultures. *Ex. 1, Kimberly Johnston-Dodds, Early California Laws and*

Policies related to California Indians (California Research Bureau, California State Library 2002).

Governors and others called for the extermination of California Indians. For example, Governor Burnett told the legislature:

[That] a war of extermination will continue to be waged between the two races, until the Indian race becomes extinct, must be expected. While we cannot anticipate this result but with painful regret, the inevitable destiny of the [Indian] race is beyond the power or wisdom of man to avert.

Peter H. Burnett, Governor's Annual Message to the Legislature, Jan. 7, 1851, quoted in *Ex. 3*, William Wood, *The (Non-)Extinguishment of Aboriginal Title in California* at 16 n.60 (unpublished master's thesis 2005 on file with The City Project). *See generally* William B. Secrest, *When the Great Spirit Died: The Destruction of the California Indians 1850-60* (2003).

Particularly in Southern California, there arose a form of Indian peonage, reinforced by the criminal justice system, that was slavery in everything save name only. The indenturing of Indians to whites, sanctioned by the state government in 1850, fostered the rise of a slave trade. In the northern counties, genocidal warfare was waged against the Indians. "Such slaughter, reinforced by the devastating effects of disease, reduced an estimated population of 150,000 in 1845 to less than 30,000 in 1870, with 60 percent of the deaths attributable to disease, the rest to murder." Kevin Starr, *California: A History* 99 (2007).

The federal government has a history of separating California Indians from their lands. Between 1851 and 1852, eighteen treaties were negotiated with over 100 California Indian tribes. Under these treaties, California Indians were to retain 8.5 million acres (about one-seventh of the state of California) and receive educational, agricultural, technical, and other services in exchange for the 66.5 million acres they ceded. At the request of the California legislature, California's United States senators opposed ratification of the treaties. The United States Senate formally rejected the treaties and classified them as secret and sealed them in a vault. The lands that had been reserved by the Indians in the treaties were treated as part of the public domain. The Indians were not informed of the Senate's refusal to ratify the treaties. According to historian Robert Heizer, "[i]n the history of California Indians no other single event (that is non-event) had a more rapid destructive effect on their population and culture than . . . [this] about-face . . . [by] the Senate." *Ex. 3*, William Wood, *The (Non-)Extinguishment of Aboriginal Title in California* at 23-36 (unpublished master's thesis 2005 on file with The City Project).

Today there are many California Indian tribes who do not have an established land base and/or who are not acknowledged by the United States or California government. The lands that were set aside as reservations were largely desert, mountains, grazing lands, isolated, ill-adapted to agriculture, largely without water, wastelands. *Id.*

The Acjachemen people today continue to live their culture and religion and to preserve their relationship to the land at Panhe. Robert Bracamontes writes: “We are here! Can you see me? Can you hear me? I do want to be part of this sacred land; lay me to rest at Panhe next to all my cousins. . . . Explain to the world: We are not inferior.” *Ex. 15*, Letter from Robert Bracamontes, Acjachemen Nation, to Patrick Kruer, Chair, California Coastal Commission, re: Foothill-South Toll Road CZMA Consistency Certification (Hearing Date: Oct. 11, 2007) – OPPOSITION.

IV. Native American Resources under Coastal Act § 30244

Coastal Act § 30244: *When development adversely impacts archaeological or paleontological resources identified by the State Historic Preservation Officer, reasonable mitigation measures shall be required.*

The Foothill-South would run adjacent to and through Panhe and its construction would pass within feet of the burial site and interfere with spiritual, cultural, and ceremonial uses. *See* Native American Heritage Commission, *Complaint for Injunctive Relief*, No. 06-GIN051370 (S.D. Super. Ct. filed March 22, 2006). In addition, if the road is built, increased scavenging and damage by relic collectors are anticipated.

On February 15, 2006, the Native American Heritage Commission held a public hearing on the Toll Road, and determined – based on testimony from Acjachemen community leaders and tribal members – that the Project would cause severe and irreparable damage to important cultural resources within San Onofre State Beach. Following approval of the Toll Road, the State of California filed a lawsuit against TCA on behalf of the Native American Heritage Commission, challenging the legality of these impacts. *Id.*

According to TCA’s own EIR, there will be “substantial adverse impacts related to archaeological and historic resources that cannot be fully mitigated.” SOCTIIP Final EIS/SEIR, Executive Summary at 110. Nevertheless, TCA fails to recognize the overwhelming spiritual importance of this area, which is a profoundly sacred site currently used for ceremony, song, and education by the living descendants of the people who once lived there. *Ex. 16*, Juaneño Band of Mission Indians, Acjachemen Nation, *Three Tribal Resolutions Supporting the Protection of Panhe and the Tribe’s Full Sovereign Participation in any and all Land and Water Use Decisions Likely to Impact the Acjachemen/Juaneno Village of Panhe*, July 10, 2007, July 21, 2007, and May 19, 2007. *See also* FSEIR, vol. IX, Comment Letter O-26 (from Christopher A. Lobo, Secretary/Treasurer and CEO, Juaneño Band of Mission Indians, Acjachemen Nation, Aug. 6, 2004. The Toll Road’s impacts on these values will be tremendous, permanent, and impossible to mitigate. In particular, “[t]he known presence of burials at this site elevates its importance beyond any possibility for impact mitigation.” *Id.* at 4.

The mitigation measures outlined in the consistency application, such as monitoring,

cannot begin to compensate for such severe impacts. There is no “reasonable mitigation” that can address impacts to these ongoing cultural values. The project is inconsistent with section 30244 of the Coastal Act.

V. Equal Justice for All under Civil Rights and Environmental Justice Standards

The Coastal Act, including § 30244, is consistent with state and federal civil rights and environmental justice laws that prohibit both unjustified discriminatory impacts and intentional discrimination against the Native Americans people. The Acjachemen people will lose an ancient village, sacred site, religious site, cultural site, ceremonial site, historical site, and burial ground. No one else will. The toll road certification must be denied.

Running a toll road through Panhe and through San Onofre State Beach would constitute impermissible discrimination under California Government Code Section 11135 and its regulations, Title VI of the Civil Rights Act of 1964 and its regulations, and other state and federal civil rights and environmental laws. These issues previously have been raised with the Coastal Commission and staff. *Ex. 17*, Letter from Robert García to Meg Caldwell, Chair, California Coastal Commission, Feb. 17, 2006; Letter from Robert García to Peter Douglas, Executive Director, California Coastal Commission, Feb. 17, 2006.

Here’s my personal take on all this: Please be sensitive to our issues because I’ve seen how agencies say, “well, we don’t see anything out there, it’s just land,” but this is equivalent to knocking down a cathedral because ancestors are buried there, geez, have some dignity because if someone came along and said “we need to knock down Crystal Cathedral for a toll road, tons of people would say something in opposition. Agencies rely on little opposition from local native groups because there aren’t tons of them, especially when there’s nothing large on the grounds like a huge pyramid . . . but nevertheless this is sacred land, have some respect but be careful because money knows NO respect. Sorry we might not have any movie stars to help us! But again . . . have some basic respect, again, for us . . . [L]eave the Acjachemen alone!

Ex. 15, Letter from Martin Espino (Father) and Gracinha Espino (Daughter), Yaqui and Tepehuano Native nations, to Patrick Kruer, Chair, California Coastal Commission, re: Foothill-South Toll Road CZMA Consistency Certification (Hearing Date: Oct. 11, 2007) – OPPOSITION.

A. Governing Law

Title VI of the Civil Rights Act of 1964 and its implementing regulations prohibit both (1) intentional discrimination based on race, color or national origin, including Native American origin, and (2) unjustified discriminatory impacts for which there are less discriminatory alternatives, by applicants for or recipients of federal financial assistance, including the Transportation Corridors Agencies and the California Coastal Commission. Title VI provides:

“No person in the United States shall on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.” 42 U.S.C. § 2000d (2004). The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution and parallel state law also prohibits intentional discrimination. *See also* Section 1983 of the Civil Rights Act of 1871; Executive Order on Environmental Justice 12898 (Feb. 11, 1994).

The regulations that every federal agency has enacted pursuant to Title VI articulate the discriminatory impact standard. The regulations bar criteria or methods of administration by recipients of federal financial assistance that have the effect of subjecting persons to discrimination because of their race, color, or national origin, or have the effect of defeating or substantially impairing accomplishment of the objectives of a program with respect to individuals of a particular race, color, or national origin. *See, e.g.*, 49 C.F.R. 21.5(b)(2) (Department of Transportation regulations); 15 C.F.R. 8.4(b)(2) (Department of Commerce regulations). Intent to discriminate is not required.

According to the Los Angeles Times, TCA has sought federal financial assistance for the toll road. Dan Weikel, *U.S. Funds Sought for Foothill Toll Road; Operators to ask for \$100 million to help build Foothill South extension*, L.A. Times, Mar 14, 2003, B3. In addition, TCA board members apparently work for local agencies that apply for or receive federal financial assistance. In any event the Coastal Commission applies for and receives federal financial assistance. Therefore Title VI and its regulations apply in reviewing certification of the toll road.

California law also prohibits both intentional discrimination and unjustified discriminatory impacts under Government Code section 11135 and its regulations, which are analogous to Title VI and its regulations. *See* Cal Gov. Code § 11135 et seq.; 22 CCR § 98101 (2007). Section 11135 provides: “No person in the State of California shall, on the basis of race, national origin, ethnic group identification, religion, age, sex, sexual orientation, color, or disability, be unlawfully denied full and equal access to the benefits of, or be unlawfully subjected to discrimination under, any program or activity that is conducted, operated, or administered by the state or by any state agency, is funded directly by the state, or receives any financial assistance from the state.”

The regulations pursuant to section 11135 articulate the disparate impact standard. The regulations bar criteria or methods of administration that have the purpose or effect of subjecting a person to discrimination on the basis of ethnic group identification, religion, or color. 22 CCR § 98101(i). Intent to discriminate is not required.

TCA, the toll road, and the Coastal Commission constitute a program or activity that is conducted, operated, or administered by the state or by any state agency. The Coastal Commission also applies is funded directly by the state, or receives financial assistance from the state.

In addition, California law defines environmental justice as “the fair treatment of people of all races, cultures, and incomes with respect to the development, adoption, implementation, and enforcement of environmental laws, regulations, and policies.” Cal. Gov. Code § 65040.12.

In 2002, the California Coastal Commission adopted a local coastal plan requiring Malibu to maximize public access to the beach while ensuring the fair treatment of people of all races, cultures, and incomes. This was the first time an agency implemented the statutory definition of environmental justice under California law. Commissioner Pedro Nava told the *Los Angeles Times* he hoped to set a precedent throughout the state. Malibu Local Coastal Program Land Use Plan, adopted by California Coastal Commission 33-36 (Sept. 13, 2002) at 9; Seema Mehta, *Land-Use Plan OK'd for Malibu*, L.A. TIMES, Sept. 14, 2002.

See generally Ex. 19, Robert García and Erica Flores Baltodano, *Free the Beach! Public Access, Equal Justice, and the California Coast*, 2 Stanford Journal of Civil Rights and Civil Liberties 143, 185-92 (2005), which is fully incorporated by reference here.

B. Compliance with the Discriminatory Impact Standard

There are three prongs to the discriminatory impact inquiry under the Title VI regulations and, by analogy, under the 11135 regulations: (1) whether an action has a disproportionate impact based on, here, Native American origin; (2) if so, the agency bears the burden of proving that such action is justified by business necessity; and (3) even if the action would otherwise be justified, the action is prohibited if there are less discriminatory alternatives to accomplish the same objective. *Larry P. v. Riles*, 793 F.2d 969, 983 (9th Cir. 1984).

The proposed toll road fails under the discriminatory impact standard for the following reasons.

1. The Acjachemen people will lose an ancient village, sacred site, religious site, cultural site, ceremonial site, historical site, and burial ground. No one else will.
2. The TCA has not demonstrated business necessity to justify the destruction of Panhe. For example, “No measures exist that would enable the proposed alignment to be found consistent with the Coastal Act. However, numerous alternative alignments are feasible, and could be found consistent with the Coastal Act” Staff report CC-018-07-Th 19a at 10.

Indeed, the lack of business necessity is demonstrated by the fact that the legality of TCA’s approval of the Project is being challenged in pending litigation, including two lawsuits filed by the California Attorney General. The first of these, brought on behalf of the People of California and the California State Parks Commission, is one of two lawsuits contending that TCA violated the California Environmental Quality Act (“CEQA”) in approving the project. *People ex rel. Attorney General Bill Lockyer and State Park and Recreation Commission v. Foothill/Eastern Transportation Corridor Agency et al.*, No. 06- GIN051371 (S.D. Super. Ct. filed March 23, 2006). The second was filed on behalf of the Native American Heritage Commission – at the request of Acjachemen people – for violation of laws protecting Native American resources. *Native American Heritage Commission v. Foothill/Eastern Transportation Corridor Agency et al.*, No. 06-GIN051370 (S.D. Super. Ct. filed March 23, 2006). These lawsuits spotlight TCA’s failure to adequately disclose to the public the environmental and cultural impacts of the Project, including impacts to a range of coastal resources, and other procedural and substantive

irregularities. The pending CEQA litigation also challenges TCA's failure to seriously consider alternatives to the Toll Road that would achieve similar traffic benefits without any of the impacts to San Onofre and coastal resources. The January 17, 2008, comments submitted by NRDC and others demonstrate procedural and substantive irregularities under environmental laws, and those comments are fully incorporated by reference here.

3. There are less discriminatory alternatives to running the toll road through Panhe and San Onofre State Beach. The toll road can be placed somewhere else where it does not destroy the Acjachemen site of Panhe. For example, "No measures exist that would enable the proposed alignment to be found consistent with the Coastal Act. However, numerous alternative alignments are feasible, and could be found consistent with the Coastal Act" Staff Report CC-018-07-Th 19a at 10.

C. Intentional Discrimination Standard

To evaluate an intentional discrimination claim, the following kinds of evidence are relevant: (1) the impact of the action and whether it bears more heavily on one racial, ethnic, or national origin group than another; (2) a history of discrimination against the group; (3) departures from procedural norms in reaching a decision; (4) departures from substantive norms; (5) whether the decision maker knows of the harm its decision will cause; and (6) a pattern or practice of discrimination. *See Village of Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 265 (1977); U.S. Dep't Justice, Civil Rights Division, *Title VI Legal Manual* at 49-53 and authorities cited (Sept. 1998).

Under the intentional discrimination standard:

1. The impact of the toll road would disproportionately impact the Acjachemen people, as discussed above. The Acjachemen people will lose an ancient village, sacred site, religious site, cultural site, ceremonial site, historical site, and burial ground. No one else will.

2. There is a history of discrimination against the Acjachemen people and other California Indians and Native Americans. "The evidence is plain, and in fact, not disputed, that after [the United States] acquired California, and as a result of the great influx of white people, the Indian communities were disrupted and destroyed, many of their members were killed, and those remaining were largely scattered throughout the state, and their tribal or band origin generally lost." *Thompson v. U.S.*, 8 Ind. Cls. Comm. 1, 17 (1959). *See generally Ex. 1*, Kimberly Johnston-Dodds, *Early California Laws and Policies related to California Indians* (California Research Bureau September 2002); *Ex. 3*, William Wood, *The (Non-)Extinction of Aboriginal Title in California* (part of unpublished master's thesis 2005 on file with The City Project); William B. Secrest, *When the Great Spirit Died: The Destruction of the California Indians 1850-60* (2003); Robert F. Heitzer, ed., *The Destruction of California Indians: A collection of documents from the period from 1847 to 1865 in which are described some of the things that happened to some of the Indians of California* (rev'd ed. 1993); Clifford E. Trafzer &

Joel R. Hyer, eds., *Exterminate Them!: Written Accounts of the Murder, Rape, and Enslavement of Native Americans during the California Gold Rush* (1999).

There are (3) substantive and (4) procedural irregularities in the process of seeking approval for the proposed toll road. Again, as discussed in Section V(B)(2), above the legality of TCA's approval of the Project is being challenged in pending litigation, including two lawsuits filed by the California Attorney General, contending that TCA violated the California Environmental Quality Act ("CEQA") in approving the project, and the second on behalf of the Native American Heritage Commission for violation of laws protecting Native American resources. *People ex rel. Attorney General Bill Lockyer and State Park and Recreation Commission v. Foothill/Eastern Transportation Corridor Agency et al.*, No. 06- GIN051371 (S.D. Super. Ct. filed March 23, 2006; *Native American Heritage Commission v. Foothill/Eastern Transportation Corridor Agency et al.*, No. 06-GIN051370 (S.D. Super. Ct. filed March 23, 2006). See also Staff Report CC-018-07-Th 19a at 10 ("No measures exist that would enable the proposed alignment to be found consistent with the Coastal Act. However, numerous alternative alignments are feasible, and could be found consistent with the Coastal Act . . .") The January 17, 2008, comments submitted by NRDC and others demonstrate procedural and substantive irregularities under environmental laws, and those comments are fully incorporated by reference here.

5. There is a pattern of discrimination against the Acjachemen people, as demonstrated above. See section II and III C 2.

6. Decision makers know of the impact against the Acjachemen people. This is demonstrated by Staff Report CC-018-07-Th 19a and *Ex. 9*, Letter from the Native American Heritage Commission on the *South Orange County Transportation Infrastructure Improvement Project (SCOCTIIP) Final Environmental Impact Statement/Subsequent Environmental Impact Report (EIS/SEIR)* to the Transportation Corridor Agencies Board of Directors, at 4.

VI. Additional Concerns

The proposed toll road would impact Acjachemen access and their ability to practice their religion. The toll road will impair their freedom of religion, freedom of association, and beach access rights under federal and state statutory and constitutional protections including the First Amendment.

The proposed toll road would violate civil rights, environmental justice, and environmental laws and the public trust doctrine, harm recreation including hiking, camping, and surfing, threaten endangered species, and diminish precious coastal open space.

The toll road would also disproportionately impact the working poor with limited or no access to a car, people of color, and low income communities in several ways. The toll road through the park would also disproportionately deprive them of affordable world class recreation and access

to a public beach. San Onofre provides such opportunities at the San Mateo Campground, on hiking trails, and through surfing at Trestles. These communities disproportionately cannot afford to pay tolls for commuter or recreational travel. *See generally* Thomas Sanchez and Marc Brenman, *The Right to Transportation: Moving to Equity* 58 and authorities cited (American Planning Association forthcoming 2008); *Ex. 19*, Robert García and Erica Flores Baltodano, *Free the Beach! Public Access, Equal Justice, and the California Coast*, 2 Stanford Journal of Civil Rights and Civil Liberties 143, 185-92 (2005), which is fully incorporated by reference here.

We fully incorporate by reference here the January 17, 2008, comments submitted NRDC and others to the extent not inconsistent with these comments.

VII. Conclusion

For the reasons stated and under the authorities cited above, we respectfully submit that the Coastal Commission must deny certification of the proposed toll road under the Coastal Act and state and federal civil rights and environmental justice laws.

Sincerely,

Rebecca Robles
Coordinator
United Coalition to Protect Panhe

Robert García
Executive Director and Counsel
The City Project

Angela Mooney D'Arcy
Policy Director
The City Project

Exhibit List

- Exhibit One: Kimberly Johnston-Dodds, *Early California Laws and Policies related to California Indians* (California Research Bureau, California State Library 2002).
- Exhibit Two: Letter from Tribal Chair David Belardes to John Romani, Greenwood & Associates, dated October 8, 1996.
- Exhibit Three: William Wood, *The (Non-)Extinguishment of Aboriginal Title in California* (part of unpublished master's thesis 2005 on file with The City Project).
- Exhibit Four: Betty Rivers, *The Pendleton Coast District: An Ethnographic and Historic Background* (undated typescript on file with The City Project).
- Exhibit Five: *Determination of Eligibility Notification*, National Register of Historic Places, National Park Service, Dec. 30, 1981.
- Exhibit Six: Letter from Michael Sampson, Associate State Archaeologist Southern Services Center, re: Proposed Extension of State Route 241 and the Ethnographic Village of Panhe, Sept. 7, 2007.
- Exhibit Seven: Comments for Attorney General Bill Lockyer on the *Draft Environmental Impact Statement/Subsequent Environmental Impact Report and Draft Section 4(f) Evaluation for the South Orange County Transportation Infrastructure Improvement Project (DEIS)*, to Macie Cleary-Milan, Foothill-Eastern Transportation Corridor Agencies, Maiser Khaled, California Division of the Federal Highway Administration, and Susan De Saggi, U.S. Army Corps of Engineers, Aug. 4, 2004.
- Exhibit Eight: Letter from Ruth Coleman, Director, California Department of Parks and Recreation, on the *South Orange County Transportation Infrastructure Improvement Project (SCOCTIIP) Draft Environmental Impact Statement/Subsequent Environmental Impact Report (EIS/SEIR)*, to Macie Cleary-Milan, Foothill-Eastern Transportation Corridor Agencies, Aug. 2, 2004.
- Exhibit Nine: Letter from the Native American Heritage Commission on the *South Orange County Transportation Infrastructure Improvement Project (SCOCTIIP) Final Environmental Impact Statement/Subsequent Environmental Impact Report (EIS/SEIR)* to the Transportation Corridor Agencies Board of Directors.

- Exhibit Ten: Letter from Rebecca Robles, Chairperson of the Orange County Native American Sacred Sites Task Force re: *South Orange County Transportation Infrastructure Improvement Project (SOCTIIP), Phase I Archaeological Inventory and on the SOCIITP Draft EIR/SEIR*, to Stephanie Stoermer, Federal Highways Administration, California Division, Mar. 28, 2005.
- Exhibit Eleven: Letter from Rebecca Robles, Chairperson of the Orange County Native American Sacred Sites Task Force, re: *Draft EIR/SEIR*, Aug. 5, 2004.
- Exhibit Twelve: Letter from Patricia Martz, President, California Cultural Resource Preservation Alliance, re: *South Orange County Transportation Infrastructure Improvement Project (SOCTIIP), Phase I Archaeological Inventory and on the SOCIITP Draft EIR/SEIR*, to Transportation Corridor Agencies, Aug. 4, 2004.
- Exhibit Thirteen: Juaneño Newsletter, August 1988.
- Exhibit Fourteen: Acjachemen-Juaneño Indian Tribe Meeting Minutes, Mar. 16, 1990.
- Exhibit Fifteen: Seven letters from Acjachemen tribal members and others re: proposed 241 Foothill South toll road.
- Exhibit Sixteen: Juaneño Band of Mission Indians, Acjachemen Nation, *Three Tribal Resolutions Supporting the Protection of Panhe and the Tribe's Full Sovereign Participation in any and all Land and Water Use Decisions Likely to Impact the Acjachemen/Juaneno Village of Panhe*, July 10, 2007, July 21, 2007, and May 19, 2007.
- Exhibit Seventeen: Letter from Robert Garcia to Meg Caldwell, Chair, California Coastal Commission, re: Save San Onofre State Beach, Protect Public Access to the Beach, and Oppose 241 Toll Road Extension, Feb. 16, 2006; Letter from Robert Garcia to Peter Douglas, Executive Director, California Coastal Commission, re: Save San Onofre State Beach, Protect Public Access to the Beach, and Oppose 241 Toll Road Extension, Feb. 16, 2006.
- Exhibit Eighteen: Resolution 7.11, approved by the Second Annual National Latino Congreso on Oct. 7, 2007.
- Exhibit Nineteen: Native American Ancestor Walk at Panhe, October 2007

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Exhibit Twenty Robert García and Erica Flores Baltodano, *Free the Beach! Public Access, Equal Justice, and the California Coast*, 2 *Stanford Journal of Civil Rights and Civil Liberties* 143 (2005).