October 2, 2008

Mr. Carlos Gutierrez  
United States Secretary of Commerce  
1401 Constitution Ave., N.W.  
Washington, DC 20230

Mr. Thomas Street  
NOAA Office of General Counsel for Ocean Services  
1305 East-West Highway  
RM 611  
Silver Spring MD 20910

Re: Save Panhe and Save San Onofre State Beach -- Stop the Proposed Toll Road:  
Reject Override Request—Consistency Certification for the Foothill-South Toll Road [FR Doc. E8-5247]

Dear Mr. Gutierrez and Mr. Street:

I. Overview

We submit these comments on behalf of the United Coalition to Protect Panhe – a grassroots coalition of Native American Acjachemen tribal members – and The City Project. We urge in the strongest possible terms that the Department of Commerce reject the Transportation Corridor Agencies’ (“TCA”) appeal, which seeks to override California Coastal Commission. The Coastal Commission voted 8-2 to deny consistency certification for the proposed Foothill-South Toll Road. We urge the Department to uphold the Commission’s decision, and to protect California’s coastal and cultural resources and the rights of the Native American people and working class people of color. The toll road would violate the Coastal Zone Management Act (“CZMA”), the California Coastal Management Plan, and the equal protection laws for the Acjachemen people, working class people, and low income people of color.

Four state agencies formally oppose the toll road: the California Coastal Commission, the California Native American Heritage Commission, the California State Historic Preservation Officer (SHPO), and the California Parks and Recreation Commission, as well as other State elected officials. Indeed, the SHPO has testified that the impacts on Panhe cannot be mitigated. The federal Advisory Council on Historic Preservation has condemned the failure of the Federal Highway Administration to consult with Native American tribal leaders, and the failure to assess the impact of the toll road on Native American tribes and historic properties. Acjachemen Tribal Resolutions have been passed supporting the protection of Panhe and full sovereign participation by the Acjachemen in any and all land and water use decisions likely to impact Panhe. The United States Army has highlighted the misleading statements in the TCA appeal.
A growing and diverse alliance of national, state, and local organizations and tribes have joined together to Save Panhe and San Onofre and stop the toll road that would devastate both. See Ex. 66. The diverse and national alliance includes (partial list): UNITED COALITION TO PROTECT PANHE * ANAHAUK YOUTH ASSOCIATION * CALIFORNIA PAN ETHNIC HEALTH NETWORK * BARBARENO CHUMASH TRIBE * BERNARD BRUCE, BRUCE’S BEACH * CALIFORNIA INTERTRIBAL WATER COMMISSION * CHUMASH MARITIME ASSOCIATION * DESAL RESPONSE GROUP * ENVIRONMENTAL JUSTICE COALITION FOR WATER * ENVIRONMENTAL JUSTICE RESOURCE CENTER AND PROF. ROBERT D. BULLARD, CLARK ATLANTA UNIVERSITY * GABRIELINO/ TONGVA TRIBAL COUNCIL * GABRIELENO/TONGVA TRIBE OF SAN GABRIEL * INTERTRIBAL SINKYONE WILDERNESS COUNCIL * JUANENO BAND OF MISSION INDIANS, ACJACHENM NATION * KUMEYAAY CULTURAL REPATRIATION COMMITTEE * MUJERES DE LA TIERRA * NATIONAL HISPANIC ENVIRONMENTAL COUNCIL * NATIONAL LATINO CONGRESO * NATIVE AMERICAN LAND CONSERVANCY * NORTHERN CHUMASH TRIBAL COUNCIL * POLICYLINK * PROTECT SACRED SITES, INDIGENOUS PEOPLE ONE NATION * SANTA ROSA RANCHERIA TACHI TRIBE * SAN LUIS REY BAND OF LUISENO INDIANS * SAVE THE PEAKS COALITION * SEVENTH GENERATION FUND FOR INDIGENOUS DEVELOPMENT * SPARC (SOCIAL AND PUBLIC ART RESOURCE CENTER) AND UCLA PROF. JUDITH F. BACA * SOUTHERN CALIFORNIA WATERSHED ALLIANCE * THE CITY PROJECT * THE PRAXIS INSTITUTE * TI’AT SOCIETY/ TRADITIONAL COUNCIL OF PIMU * URBAN SEMILLAS * WILLIAM C. VELAZQUEZ INSTITUTE * WINNEMEM WINTU TRIBE * WISHTO FOUNDATION * WOMYN IMAGE MAKERS.

More than 3,500 people attended the February 6, 2008, hearing before the Coastal Commission, the largest public turnout in the history of the Commission. Up to 6,000 more attended the September 22, 2008, Commerce Department hearing.

The proposed toll road would severely impact the local Native American people, who are members of the Acjachemen Nation, and the sacred site of Panhe, and harm affordable recreation including hiking, biking, camping, swimming, and surfing; threaten endangered species; and diminish precious coastal open space.

San Onofre State Beach is one of California’s most popular state parks, receiving over 2.4 million visitors per year. More than 88% of campers in San Onofre’s San Mateo campground reside in California, and 93% of these California campers reside in the 8 counties with the greatest green space needs — in combined terms of the fewest acres of green space per thousand residents, and highest levels of child obesity, children, poverty, and people of color. San Onofre is in one of those counties. 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 national precedent, threatening coastal parks, open space, and cultural, historical, and Native American rights and resources everywhere in the State and nation.

Panhe bears a special meaning in Native American -- as well as non-Indian -- life, culture and history. Panhe is an ancient Acjachemen village that is over 9,000 years old and a current sacred, cultural, ceremonial, and burial site. Many Acjachemen trace their lineage back to Panhe. 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. 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. Acjachemen people built the mission at San
Juan Capistrano. Destroying Panhe would hurt not only the Acjachemen but all the people of California and the nation.

According to Prof. Duthu, a nationally regarded scholar of Native American law, Native Americans bear a special relationship with their ancestral lands:

> From the Indian perspective, the relationship with their ancestral lands operates in the form of a sacred covenant between the community and the land, in which Indian people regularly minister to the land as stewards and the land reciprocates by supporting, nurturing and teaching the community to live in proper balance with its surroundings.

N. Bruce Duthu, *American Indians and the Law* 79 (2008). Land is not just a fungible commodity that can be traded as a resource that serves as a foundation for personal or corporate wealth. *Id.*

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, recreation, animals, plants, and the physical environment. Saving Panhe and San Onofre and stopping the toll road is necessary to achieve justice for all.

No legitimate legal or factual basis exists to override the State of California’s denial of consistency certification for the toll road. First, no national interest is furthered by the local road in a “significant or substantial manner.” 15 C.F.R. § 930.121(a). It is a local road proposed by a local agency. Second, even if national interests were served, any benefits would be dwarfed by the road’s discriminatory impacts against Native Americans and those who need affordable transportation and recreation, and the extensive damage to environmental, archeological, and cultural resources. *Id.*, § 930.121(b). Third, reasonable transportation alternatives are available. *Id.*, § 930.121(c). The Commission identified alternatives that “if adopted by the applicant, would permit the proposed activity to be conducted in a manner consistent with the enforceable policies of the CCMP.” The Interstate 5 Freeway can be improved, car pools can be implemented, and transit including bus and rail service can improve transportation.

Finally, no reasonable basis exists to deem the project “necessary in the interest of national security.” It is a local toll road. See 16 U.S.C. § 1456(c)(3)(A); 15 C.F.R. § 930.122. National security does not justify discrimination against the Acjachemen people to build a local toll road. *Cf. Korematsu v. United States* (1944).

At least one Commissioner explicitly concluded that the harm against the Acjachemen people is reason enough to deny certification. The Acjachemen people will lose an ancient village, and current religious, sacred, ceremonial, and burial site. No one else will. The proposed toll road would impermissibly discriminate against the Acjachemen people, unduly burden their freedom of religion, and unduly burden their access to Panhe and San Onofre. There is a history and pattern of depriving Native Americans of their land, culture, sacred sites, and freedom of religion under state and federal law. *See, e.g., Thompson v. U.S.*, 8 Ind. Cls. Comm. 1, 17 (1959).
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. The toll road through the park would disproportionately deprive them of affordable world class recreation and access to a public beach. 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 their rights and the sacred site. 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.

Part II addresses TCA’s failure to meet the standards on appeal before the Department of Commerce. Part III discusses the decisions to save Panhe and San Onofre by the California Coastal Commission, the California Native American Heritage Commission, the Advisory Council on Historic Preservation, the California Department of Parks and Recreation, and Acjachemen Tribal leaders. Part IV presents the evidence in support of the decisions to save Panhe and San Onofre and stop the toll road. Specifically in Part IV, section A analyzes the special meaning of Panhe and San Onofre to the Acjachemen people and the people of California and the nation. Section B discusses the history of the Acjachemen people, Panhe, and state and federal discrimination against Native Americans. Section C discusses 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. Section D addresses the freedom of religion, freedom of association, and right of access by the Acjachemen to Panhe. Section E addresses affordable recreation at San Onofre and just transportation.
II. There Is No Legitimate Basis to Override the Denial of Consistency Certification for the Toll Road

No legitimate legal or factual basis exists to override the State of California’s denial of consistency certification for the toll road.

First, no national interest is furthered by the local road in a “significant or substantial manner.” 15 C.F.R. § 930.121(a). It is a local road proposed by a local agency. Second, even if national interests were served, any benefits would be dwarfed by the road’s discriminatory impacts against Native Americans and those who need affordable recreation and transportation, as discussed in Parts III and IV below, and the extensive damage to environmental, archeological, and cultural resources. § 930.121(b). Third, reasonable transportation alternatives are available. Id., § 930.121(c). The Commission identified alternatives that “if adopted by the applicant, would permit the proposed activity to be conducted in a manner consistent with the enforceable policies of the CCMP.” Ex. 61, Letter from Mark Delaplane, Manager, Energy, Ocean Resources, and Federal Consistency Division, California Coastal Commission re: CC-018-07 Consistency Certification, Transportation Corridor Agencies (TCA), Foothill Transportation Corridor – South (FTC-S), northern San Diego and southern Orange County, to Thomas E. Margo, Chief Executive Officer, Transportation Corridor Agencies, Feb. 13, 2008.

Finally, no reasonable basis exists to deem the project “necessary in the interest of national security.” It is a toll road. See 16 U.S.C. § 1456(c)(3)(A); 15 C.F.R. § 930.122. See generally Respondent California Coastal Commission’s Principal Brief on Appeal under the Federal Coastal Zone Management Act (April 11, 2008), in Foothill/Eastern Transportation Corridor Agency et al. v. California Coastal Commission. UCPP and The City Project incorporate by reference the April 11, 2008, brief by the Commission to the extent it is not inconsistent with the positions stated here.

National security does not justify discrimination against the Acjachemen people to build a local toll road. The United State Supreme Court attempted to justify racial discrimination under a claim of national security when it upheld the executive order relocating Japanese and Japanese-Americans to concentration camps in Korematsu v. United States. That decision has been overruled in the court of history. See Korematsu v. United States, 323 U.S. 214 (1944); Korematsu v. United States, 584 F. Supp. 1406, 1420 (N.D. Ca. 1984) (vacating Mr. Fred Korematsu’s conviction and noting that “‘today the decision in Korematsu lies overruled in the court of history’”).

TCA seeks to justify a local toll road by relying on trumped up claims of national security. The record refutes those claims. "This construction is one more encroachment venture that will hinder our [Marine Corps] ability to prepare for war," according to Camp Pendleton Marine Crops Commandant James Jones. Ex. 82, Letter from Gen. J.L. Jones, Commandant, U.S. Marine Corps, Letter to Christine Todd Whitman, Environmental Protection Agency, Feb. 9, 2002, at 2.
Colonel Thomas H. Magnes of the United States Army Corps of Engineers has described inaccuracies in TCA’s toll road claims in public comments to NOAA “I am compelled to highlight a few areas of the public record where I have found inaccurate statements as well as inferences that misrepresent the Corps preliminary determinations within the context of our CWA [Clean Water Act] and NEPA [National Environmental Policy Act] statutory responsibilities.” Ex. 40, Letter from Thomas H. Magness, Colonel, United States Army, District Commander, to Mr. Thomas Street, Staff Attorney, National Oceanic and Atmospheric Administration, April 7, 2008, at 2.

The proposed toll road is not necessary to protect public safety: the existing roadway system is safe. According to the U.S. Nuclear Regulatory Commission, “in reference to the San Onofre Nuclear Generating Station (SONGS) evacuation routes, our emergency planning regulations ensure adequate protection of the public health and safety.” Letter from Roy Zimmerman, Director, U.S. Nuclear Regulatory Commission, Office of Nuclear Safety and Incident Response, to NOAA, Aug. 26, 2008.

“[B]uilding a highway through Camp Pendleton . . . is more likely to undermine homeland security and military training than to protect them.” Ex. 53, Letter from John Garamendi, Lieutenant Governor, Don Perata, Senate President pro Tem, Darrell Steinberg, Chair, Senate Natural Resources Committee, and Christine Kehoe, California State Senator re: Foothill/Eastern Transportation Corridor Agency Appeal for Secretary of Commerce Override of California Coastal Commission Objection to Consistency Certification for Foothill-South Toll Road to Carlos M. Gutierrez, Secretary of Commerce, April 7, 2008.

III. The Department Must Defer to State, Federal and Tribal Authorities That Support Protecting Panhe and San Onofre and Stopping the Toll Road

The Department must defer to the state and federal agencies and officials that oppose the toll road. The Department must defer to the elected Native American leaders and tribal members under the national policies favoring Native American self-determination and respectful government to government consultation. The Department must defer to the expertise of these agencies and Native Americans. The bases for these decisions is demonstrated in the record.

A. The California Coastal Commission Denial of Certification

The California Coastal Commission voted 8-2 to save Panhe and San Onofre and denied certification of the toll road proposal. Ex. 61. The Commission determined that the toll road failed to conform to enforceable policies of the California Coastal Management Program (CCMP) in the areas of archeological resources, public access and recreation, surfing, environmentally sensitive habitat, wetlands, and energy consumption and vehicle miles traveled. The Commission also determined that TCA did not satisfy its burden of supplying sufficient information to determine the project’s consistency with enforceable archeology, water quality, and wetlands policies of the CCMP, despite requests for the information. The Commission identified alternatives that “if adopted by the applicant, would permit the proposed activity to be conducted in a manner consistent with the enforceable policies of the CCMP.” Id.
The denial of certification is supported by the evidence in the record, as demonstrated below.

The California Native American Heritage Commission, the federal Advisory Council on Historic Preservation, the State Historic Preservation Officer for California, and the State Parks and Recreation Commission agree with the Coastal Commission. Tribal Group leaders and members concur.

Commissioner Mary Shallenberger explicitly stated that protecting Native American rights and the sacred site of Panhe is reason enough to deny certification of the toll road. Ex. 51, Statement of Mary Shallenberger, Reporter’s Transcript of Proceedings, Feb. 6, 2008, at 401, 402-03. The Commissioner has special expertise on these matters in light of her years of prior work with the California State Senate on bills to protect Native American sites. Id. at 400.

The Commissioner specifically cited the “rather grim” history of discrimination by the government of California against Native Americans. Id. The Commissioner cited the California State Library report on discrimination by the State of California against Native Americans, and the public comments submitted to the Commission by UCPP and The City Project. Id., citing Ex. 1, Kimberly Johnston-Dodds, Early California Laws and Policies related to California Indians (California Research Bureau, California State Library 2002); Ex. B, Public Comments by UCPP and The City Project re: Opposition to Coastal Consistency Certification (Jan. 21, 2008); Ex. C, Public Comments by UCPP and The City Project, Opposition to Coastal Consistency Certification (Feb. 6, 2008).

The Commissioner concluded:

“This is a rather grim research paper . . . because it does have the history, some of the history, of how we, the government of California, have treated our Native Americans. That is background to where we are today.” Ex. 51 at 400. “[J]ust because the project’s proponents say that their project will adequately protect sacred sites, when the Native Americans, whose sites they are, say it will not, this project is inconsistent with the Coastal Act.” Id. at 402-03. “We cannot define for them what is reasonable to protect their sacred sites.” Id. at 401.

The Commissioner emphasized the significance of sacred sites including Panhe in Native American culture:

[There is] a huge disconnect in understanding between the Native American culture, and the – what would I call it? – the rest of the culture of California. . . . [W]hat I learned and came to respect is that for the Native Americans, quite often, their sacred sites are different. They are absolutely tied to, and integral to a specific place on the earth. Churches, synagogues, and I believe mosques can be moved. They can be moved, and they can be reblessed, or whatever that particular religion calls for, and the worship can go on in a different building in a different place. With the Native Americans, that is often not the case.
In addition to Commissioner Shallenberger, Commissioner Sara Wan criticized TCA for "waiv[ing] away impacts to . . . even the ancestral connections and religious rights . . . of the Acjachemen people." Statement of Commissioner Sara Wan, Reporter’s Transcript of Proceedings, Feb. 6, 2008, at 350-51.

The State Historic Preservation Officer for California, Milford Wayne Donaldson, testified that the impacts of the proposed toll road on the Acjachemen people and the sacred site of Panhe "are simply not mitigatable. . . . These things are simply not able to be mitigated." Ex. 47, Statement of Milford Wayne Donaldson, State Historic Preservation Officer, Reporter’s Transcript of Proceedings, Feb. 6, 2008, at 395-96 (emphasis added). The SHPO concluded that TCA had not disclosed the impacts of the toll road on Panhe and had not proposed reasonable mitigation. Id. at 310.

In response to direct questioning by the Coastal Commission, the SHPO emphasized that the impacts on Panhe cannot be mitigated in light of the special meaning of the sacred site to the Acjachemen people.

There is no mitigation for certain things that you have on traditional cultural properties. In the case with the Acjachemen, they have been using this site for not only 8,000 years, but they practice ceremonial stuff. They are known as star people. They practice their thing at night in a relatively calm area, where they have total vision of the stars, which is still pretty nice out there. And, those things are simply not mitigatable. . . . These things are simply not able to be mitigated. The gathering of the plants that they have for their ceremonial uses, and all of that, to be affected . . . . All we know is the impact from that freeway is sitting right on top of the site.

Ex. 47 at 395-96. The SHPO presented detailed testimony that supports the Commission’s decision, in direct response to Commissioner Shallenberger’s questions. Ex 51 at 392-400.

The Coastal Commission staff presented live testimony about the impact of the toll road on the sacred site of Panhe. Ex. 41, Reporter’s Transcript of Proceedings, Feb. 6, 2008. As the staff noted, “The proposed mitigation for the Acjachemen ceremonial site is a sound wall.” Id. at 36. The staff concluded that the proposed mitigation was not reasonable:
Avoidance, by allowing these resources to be preserved in place, or left in an undisturbed state, is the preferred method of mitigation. . . . The mitigation proposed for the Acjachemen, and for Panhe, is not reasonable. Avoidance measures were not included, nor was an adequate case made for why avoidance is not possible. Furthermore, these impacts will go unmitigated.

Id. at 36-37 (emphasis added). Accord, Respondent California Coastal Commission’s Principal Brief on Appeal under the Federal Coastal Zone Management Act (April 11, 2008) at 34-35, in Foothill/Eastern Transportation Corridor Agency et al. v. California Coastal Commission.

The Acjachemen people and The City Project presented live testimony before the Coastal Commission regarding the impact of the toll road on the Acjachemen people to save Panhe and San Onofre and stop the toll road, as discussed below. Exs. 43-46, 48, 49. The February 6 testimony is also available in YouTube videos on the web at www.savepanhe.org and www.savesanonofre.org.

The United Coalition to Protect Panhe and The City Project also provided to the Coastal Commission a documentary video of testimonials by Acjachemen people about the meaning of Panhe in their lives. The YouTube video documentary is available on the web at www.savepanhe.org and www.savesanonofre.org. The transcript of the documentary is included as Exhibit 70. The City Project provided the documentary on CD to the Coastal Commission at the February 6 hearing.

B. The California Native American Heritage Commission Action to Save Panhe

The California Native American Heritage Commission has filed suit to save Panhe at the request of the Acjachemen people, and has submitted comments to NOAA to express its agreement with the California Coastal Commission decision. The state Commission is entitled to deference here particularly because of its special expertise – its mission is to protect Native American heritage in California, and has been since 1976. Ex. 58, Dwight Dutschke and the Santa Barbara Indian Center, A History of American Indians in California, in Five Views; An Ethnic Historic Site Survey For California, 4-25 (California Department of Parks and Recreation, Office of Historic Preservation, 1988), at 25.

The Native American Heritage Commission held a public hearing on the toll road on February 15, 2006, and determined – based on testimony from Acjachemen community leaders and tribal members – that the road would cause severe and irreparable damage to important cultural resources within San Onofre State Beach. The State of California filed a lawsuit against TCA on behalf of the Commission, challenging the legality of these impacts. See Native American Heritage Commission, Complaint for Injunctive Relief, No. 06-GIN051370 (S.D. Super. Ct. filed March 22, 2006).

Acjachmen Tribal Chairs Joe O’Campo and Sonia Johnston — as well as the United Coalition to Protect Panhe, a coalition of Native American Acjachemen tribal members – have recently sent
letters to the NAHC requesting that NAHC continue prosecuting the litigation against the toll road. Ex. 42, 56, 57.

The California Native American Heritage Commission submitted comments to NOAA on May 27, 2008, expressing the Commission’s agreement with the decision of the Coastal Commission. The detailed comments state as follows:

Panhe is a place that continues to be an integral part of Juaneno culture as practiced today.

*The NAHC agrees with the determination of the Coastal Commission that the proposed mitigation will not reduce adverse impacts to below a level of insignificance. The NAHC believes that the impacts to the Juaneno people who use the site of Panhe for ceremony are completely unmitigated.*

In comments to the TCA in a letter dated January 10, 2006 regarding the FEIR the NAHC pointed out the need to fully consider the impacts to Panhe and consider avoidance, which TCA has not done to date.

... In addition the NAHC agrees with the determination of the Coastal Commission and State Historic Preservation Officer that Panhe should have been analyzed as a Traditional Cultural Property (TCP).

The NAHC believes that it is critical that Panhe be analyzed as a Traditional Cultural Property. Native American consultation on the project did not include descendents of Panhe, nor did it recognize that the NAHC has listed it as Sacred Lands site. ... However, without an evaluation of the qualities and values of the TCP, there cannot be genuine consideration of how the project will adversely impact these qualities and values which caused the property to be listed. There is also insufficient consideration of avoidance and inadequate discussion of preservation in place as possible alternatives.

There should have been consideration of mitigation of impacts on cultural use of the site, the issue of long term access to the site for ceremonial activities, the preservation of Panhe’s historical and cultural integrity through mitigation and through redesign of the project.

In addition the NAHC concurs with the Coastal Commission and the SHPO that TCA has not provided sufficient information to enable an evaluation of the full range of adverse impacts to cultural resources and their potential mitigation. The NAHC is of the opinion that all mitigation options including avoidance have not been explored. *As it stands the NAHC believes that the impact on Panhe is not mitigated.*
Ex. 52, Letter from Larry Myers, Executive Secretary, Native American Heritage Commission re: Comments: Foothill Transportation Corridor South (FTC-S) Toll Road, to NOAA Office of General Council for Ocean Services, May 27, 2008 (emphasis added).

The Native American Heritage Commission concurs with the SHPO, and the SHPO’s testimony supports the decision by the Commission, as discussed above. The Department must defer to the expertise of the Coastal Commission, the Native American Heritage Commission, and the SHPO on the protection of Native American rights and the unmitigated and unmitigatable impacts of the proposed toll road on the Acjachemen people and the sacred site of Panhe.

C. The Federal Advisory Council on Historic Preservation and FHWA’ Failure to Mitigate and Consult under 106

The federal Advisory Council on Historic Preservation (ACHP) in two separate letters has condemned the failure by the Federal Highway Administration (FHWA) to assess the effects of the toll road on the Acjachemen people and the sacred site of Panhe as a traditional cultural property, and to engage in required consultations under section 106 of the National Historic Preservation Act, 16 U.S.C. § 470, and its regulations, 36 C.F.R. 800.5-800.6. The required consultations have not taken place with the Acjachemen people. The decision to stop the toll road must be upheld on this ground. The Department must defer to the federal Advisory Council on Historic Preservation because of its special expertise on Native American, consultation, and historic preservation matters.

According to the Advisory Council on Historic Preservation:

On March 28, 2007, the ACHP elected to participate in consultation [with FHWA] because of the controversial nature of the undertaking and its likely impacts on the village of Panhe, a property of traditional cultural and religious significance to the Juaneno Indians. . . . However, the Section 106 process has not yet been completed, and the ACHP remains concerned about the Toll Road’s effect on traditional cultural practices associated with the village of Panhe. . . . The ACHP’s regulations require FHWA to consult with affected parties, including the Native American organizations that descend from Panhe, in order to seek agreement on measures to avoid, minimize, or mitigate the project’s adverse effects. This consultation has not yet been completed.

. . . We believe that the preferred alternative for the proposed toll road will have significant adverse effects on the traditional cultural values associated with Panhe and that these effects will be difficult to resolve.

---

1 According to David Belardes and Joyce Perry, discussions by the Juañeno Band of Mission Indians with TCA to establish safeguards in the event the toll road is established should not be interpreted as supporting development. Letter from Chairman David Belardes and Cultural Resource Director Joyce Perry to The City Project, May 14, 2008. In any event one tribal leader does not speak for all Acjachemen tribal members on the toll road, just as Arnold Schwarznegger does not speak for all the people of California on the toll road.
Ex. 74, Letter from John Fowler, Executive Director, the Advisory Council on Historic Preservation to NOAA, Aug. 29, 2008 (emphasis added).

The AHCP wrote to the FHWA on February 5, 2008, requesting that FHWA provide all consulting parties with documentation on its completion of identification and evaluation of historic properties. The AHCP has not received a response from FHWA.

The AHCP wrote to FHWA as follows: "we question FHWA's ability to evaluate the effects of the undertaking on the Trestles and the San Mateo Archeological District and Village of Panhe without first consulting with the SHPO, the affected tribes, and other consulting parties." The FHWA emphasized that “FHWA’s documentation of this step and its completion of the identification and evaluation of historic properties is critical to FHWA’s ability to properly assess the effects of the undertaking on historic properties.” Ex. 30. Letter from Advisory Council on Historic Preservation to FHWA, Feb. 5, 2008. According to ACHP, as of August 29, 2008, “we have not yet received a response to that request.” Ex. 74, Letter from John Fowler, Executive Director, the Advisory Council on Historic Preservation to NOAA, Aug. 29, 2008 (emphasis added). The Acjachemen people have not received a response and FHWA and TCA have not engaged in the required consultations. See Ex. 80, Letter from United Coalition to Protect Panhe and The City Project re: Save Panhe and Save San Onofre State Beach – Stop the Proposed Toll Road: Reject Override Request – Consistency Certification for the Foothill-South Toll Road [FR Doc. E8-5247], to Carlos Gutierrez, United States Secretary of Commerce and Thomas Street, Attorney-Advisor, NOAA Office of General Counsel for Ocean Services, Aug. 6, 2008.

Instead, the Federal Highway Administration flaunts its responsibilities to consult with the Acjachemen people and to mitigate or avoid the impacts on the sacred site of Panhe. The FHWA blithely wrote to this Department supporting the TCA appeal -- without even mentioning the devastating impacts of the proposed toll road on the Acjachemen people and on the sacred site of Panhe, without mentioning its obligations under section 106, without mentioning its failure to engage in consultation with the Acjachemen and the Advisory Council on Historic Preservation, and without mentioning its failure even to respond to the ACHP letter. The FHWA utterly ignores the law and Native American rights. See Ex. 72, letter from James D. Ray, Acting Administrator, FHWA, to Vice Admiral Conrad C. Lautenbacher, Jr., USN, Retired, Undersecretary of Commerce for Oceans and Atmosphere and Administrator, NOAA, May 23, 2008.

This Department must defer to the expertise of the ACHP. “The Advisory Council on Historic Preservation is an independent federal agency established under the National Historic Preservation Act (NHPA, 16 USC 470). We advise the President and Congress on national historic preservation policy and work to promote the preservation, enhancement, and productive use of our nation’s historic resources.” Ex. 74.

The FHWA has not mitigated the impacts on the Acjachemen people and the sacred site of Panhe. The Department must defer to the ACHP and uphold the denial of certification for the toll road on this ground.
D. Native American Tribal Actions To Save Panhe and San Onofre and Stop the Toll Road

The Department must defer to the elected Native American leaders and tribal members under the national policies favoring Native American self-determination and respectful government to government consultation.

Joe O’Campo, Chairman of the Juaneno Band of Mission Indians of the Acjachemen Nation, testified with simple eloquence before the Coastal Commission about the meaning of Panhe as a sacred site, and the encroachment on Indian lands.

My name is Joe O’Campo and I am the Chairman of the Juaneno Band of Mission Indians Acjachemen Nation.

I come before you to address the concerns that are inherent within our Band regarding the extension of the Foothill South 241 toll road.

How concerned is the Commission if by granting a favorable response that you are violating the Coastal Act, civil rights, and above all the encroachment on our sacred land?

Our sacred land is just a small spot in the Panhe area. Panhe at one time encompassed San Clemente, all of the creek area, and it took in hundreds of acres . . . .

When I talk about Indians, Indian groups, I am not a part of -- or we are not a part of the casinos, making hundreds of millions dollars, that is not us. I don’t think that we have a -- ours is a very, very -- well, we only exist with donations of people within our own tribal council, nothing else.

So, I think that it seems to me that you should not be content with taking our lands. As a matter of fact, you guys are trying to run a toll road through our Indian land, which at one time encompassed, of course, all of California. And, now we have to come to you with hat in hand, to say, please allow us to continue to have our sacred lands that we can come and pay tribute to those who are buried there. That is a shame.

I know that in 1860, California legislature passed a law, and put a bounty on our heads, but look around, folks, we are still here.

I, and my family, have given our all to this Country. I am a veteran of World War II. I served in the Korean conflict. My brother was awarded a high medal for his [service].

Let us, once again, then ask that you look upon us favorably, and that you forget the idea of running a toll road through our sacred grounds.
Sally Cruz-Wright, Vice-Chairman of the Juaneno Band of Mission Indians, testified at the hearing before the Department on September 22, 2008, about the history of discrimination against the Acjachemen people as well as the spiritual meaning of Panhe.

I stand before you today as a living testament to the existence of the Acjachemen People. A people who once occupied the village of Panhe. A village that has been estimated to be 9000 years old. . . . I stand before you as a living testament to the existence of a people and a village that can prove their existence prior to the birth of the United States.

When my mother was growing up her father would not allow her to wear her hair long unless she kept it curled, because uncurled she looked too Indian. It was my grandfathers attempt to shield her from a racial bias that was directed toward those of Indigenous heritage. She was shunned by the other children she went to school with, they would not hold her hands because they were stained black by the walnuts she picked to help her family survive. I also grew up feeling the shame of looking too Indian, I would not allow my mother to braid my hair . . . because it made me look like the Indians on TV.

I mention these things as examples of what has been taken away from the Indigenous American. Our identity, our language, our culture, our land, our heart. We have given up much to be assimilated into a society that would only accept us if we denounced who we were. A society that drove us to the shame of being Indian. A society that we never really accepted, that we never really felt comfortable with. In today’s modern society there is a new found resurgence and the Indigenous Americans are proud to proclaim their ethnicity.

Ms. Cruz-Wright described the spiritual meaning of Panhe to the Acjachemen people.

Panhe is regarded as a sacred site by the Acjachemen People. It has a cultural and religious significance to my people; this is where I come to refocus, to renew my inner spirit, to lay my problems down. This is where I come to speak with the ancient ones for guidance in the decisions I make. This is where I come to feel the wind and the comfort of my ancestors. This is where I come to honor them; this is where I call home, the home of my Indian heart, my Indian knowledge, my Indian passion, my Indian fire.

For the reasons stated above, I beseech the secretary of commerce to uphold the ruling made by the coastal commission.


**E. California Parks and Recreation Commission**

The California Parks and Recreation Commission unanimously passed a bipartisan resolution to save San Onofre and stop the toll road on November 18, 2005. *Ex. 54*. The Commission submitted public comments to the Coastal Commission on January 25, 2008. The letter emphasizes the “blunt and correct conclusion” that “[n]o measures exist that would enable the proposed [toll road] alignment to be found consistent with the Coastal Act,” quoting the Coastal Commission staff report. *Ex. 55*. The Commission is entitled to deference in light of its special expertise regarding State parks, recreation, and cultural and heritage resources.

**IV. The Evidence Supports the Decision to Save Panhe and San Onofre and Stop the Toll Road**

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

1. **The Significance of Panhe**

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.

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 California Native American Heritage Commission. *Id*. Panhe is part of the San Mateo Archaeological District, which is listed on the

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 9,000 years old. Aside from the San Mateo campground, the ceremonial site is the only site within Panhe that all Acjachemen have legal access to, under a lease with the Marines. Ex. 41 at 35.

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.

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 interment. 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.”
Panhe remains an important site for Acjachemen religious, ceremonial, and cultural ceremonies today. For example, Panhe is the beginning of the Annual Ancestor Walk. The Ancestor Walk is in its eleventh year and includes Native Americans and others throughout Southern California. Recent images of the Ancestor Walk through Panhe and other Native American sacred sites are included in Exhibit 19 and on the web at www.flickr.com/photos/cityprojectca/collections/72157603408713554.

“No road is worth the price that would be paid by the Acjachemen people, and all people of California and the nation if Panhe and San Onofre State Beach are destroyed.” Ex. 23, Letter from Anthony Morales, Tribal Chairperson, Gabrieleno/Tongva San Gabriel Band of Mission Indians, to Mr. Patrick Kruer, Chair, California Coastal Commission, Jan. 31, 2008.

2. Native American Voices to Save Panhe and San Onofre and Stop the Toll Road

Dana Parsons reported on the Coastal Commission decision to stop the toll road in the Los Angeles Times: “With all the talk of surfers and environmentalists, it seemed a concern for sacred sites was overlooked. But one observer sees the outcome as a convergence of interests.” Rebecca Robles, an Acjachemen woman who is co-founder and coordinator of the United Coalition to Protect Panhe, stated in a poignant interview:

“Places like this are important to us, because it’s our history, our connection to who we are,” she says. “But the other part that worried me is that I’m an American. I’m a Native American, but I’m an American. I love this country. I
love this country. I believe in all the stuff about freedom and justice and our ideals. We lose our greatness as a country if we lose our ideals, if we let everything be destroyed. If what’s important to native people is their religious freedom . . . a toll road through a sacred site would have destroyed something that was irreplaceable. Most of the people, I don’t think, got it. Our allies eventually got it.”

Ex. 63, Dana Parsons, A Native American applauds the tollway decision, L.A. Times, Feb. 9, 2008.

Louis Paul Robles, Jr., testified simply and eloquently about the meaning of Panhe to Acjachemen people.

I am a proud member of the Juaneno Band of Mission Indians, Acjachemen Nation.

My family has been along the creeks of the San Mateo Creek for hundreds of years, and to my friends from the TCA, that is fact. It is not a myth. We live here. We worship here. We pray.

I am able to stand in the exact spot that my ancestors did. This is not fairy tales. This is known, because my ancestors, Albaro, Nemencia, Marcaria, Bendinutia, were born in the village of Panhe, and I am able to pray where my ancestors prayed.

How do you mitigate that? I sit beneath the stars that they sat beneath. I buried ancestors there.

The times when you say “need over greed” do we need this toll road? Yes, there are things to gain, but what all of us here stand to lose, whether we realize it or not, that far outweighs any gain.

My ancestors left me a legacy that I am going to carry on for future generations, and Commissioners, each of you here have ancestors before you, and you have a legacy to leave for we, the people of California.

You have heard this is the last virgin canyon. It is the last habitat of these creatures. This is the last place I am burying my ancestors. This is the last place I am walking to gather sage where my ancestors did.

The song we sang to you earlier, we were honored to do -- -- the words said “Ancestors, hear me, listen to my heart.”

Commissioners, listen to your heart, listen to your ancestors, do not allow this ill-conceived, divisive destructive toll road.

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 Krue, 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 Krue, Chair, California Coastal Commission, re: Foothill-South Toll Road CZMA Consistency Certification (Hearing Date: Oct. 11, 2007) – OPPOSITION.

Sally Cruz-Wright, a member of the Juaneno Band of Mission Indians, poignantly expresses the impact of the toll road on her and her ancestors. “I weep when I stand on the ridge at Panhe. I can feel the wind wrap around me and I know it is the spirits of those long gone. They offer me comfort, I weep because I cannot offer them peace.” Ex. 24, Letter from Sally Cruz-Wright,
Juaneno Band of Mission Indians-San Juan Capistrano to Arnold Schwarzenegger, Governor of California, Jan. 23, 2008.

Members of the Acjachemen nation offer testimonials to the meaning of Panhe in their lives in a video available on the web at www.savepanhe.org and www.savesanonofre.org and introduced before the Coastal Commission. The transcript of the video is included as Ex. 70.

On behalf of Ti’at Society/Traditional Council of Pimu, and as a Most Likely Descendant (MLD) representing the interest of the Gabrieleno/Tongva Native Americans, Cindi M. Alvitre and others write of the continuing struggle to save Panhe: “as the original people of this land . . . our loss has been significant and yet we continue to fight for the dwindling remnants of land our family has known for countless generations.” Ex. 27, Letter from Traditional Council of Pimu/Ti’At Society to Mr. Patrick Kruer, Chair, California Coastal Commission, Feb. 4, 2008.

Members of the Yaqui and Tepehuano Native Nations ask that the Acjachemen be left alone:

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.

3. Diverse Support to Save Panhe and San Onofre

The National Latino Congreso passed a resolution recognizing that “a proposed toll road threatens the San Onofre State Beach in Southern California, compromising Panhe, a 9,000 year old Native American Acjachemen village, burial ground, ceremonial site, and religious site; eliminating precious open space on the California coast; impacting recreation opportunities for hiking, biking, surfing, and camping; and destroying habitat for endangered or threatened species.” The Congreso resolved that “federal, state, and local agencies should take all necessary steps to save San Onofre State Beach and the sacred Native American site of Panhe and stop the toll road through the beach and park,” and that “the Federal Commerce Department should deny the Transportation Corridor Agency’s appeal and support the California Coastal Commission decision to deny certification of the toll road and save San Onofre State Beach and the sacred

Bernard Bruce and his family lost their beach front property known as Brucés’ Beach when the City of Manhattan Beach seized in the 1920s through eminent domain what was then the only place where African-Americans could go to the beach in the Los Angeles region. Mr. Bruce writes: “Please don’t let what happened to my family and thousands of African American families at Brucés’ Beach happen to the Acjachemen people, their sacred site Panhe, San Onofre Beach, and the millions of people who are enriched by the natural, cultural and historic resources located at San Onofre.” Ex. 22, Letter from Bernard Bruce to Mr. Patrick Krue, Chair, California Coastal Commission, Jan. 28, 2008.

Additional letters about the significance of Panhe include Exhibits 2, 7, 8, 10-11, 13-15, 25, 28, 29, and 31-39, and 53.

Testimony about the significance of Panhe at the Commerce Department hearing is included in Exhibits 67 (Robert García), 68 (Robert Bracamontes), and 69 (Sally Cruz Wright).

B. The History of the Acjachemen People, Panhe, and State and Federal Discrimination

1. 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. *Id.*

As a result of the modern civil rights movement, a new era began for Native Americans in the 1960s and ‘70s. For example, people who had not previously identified themselves as Indians because of discrimination and hostility did so. *Ex. 58* at 23.

The Acjachemen people have been organizing to affirm their Native American identity and to protect their sacred sites including Panhe for decades. “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.” *Ex. 4*, at 51.

2. State and Federal Discrimination against 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.


The United States Supreme Court summarized the history of Native American efforts to preserve their lands in unfortunate language which itself reflects the history of discrimination:

> Every American schoolboy knows that the savage tribes of this continent were deprived of their ancestral ranges by force and that, even when the Indians ceded millions of acres by treaty in return for blankets, food, and trinkets, it was not a sale but the conquerors’ will that deprived them of their land.


As Commissioner Shallenberger emphasized in voting against the toll road, 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 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 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.


According to Kevin Starr, the Dean of California historians, there arose a form of Indian peonage, reinforced by the criminal justice system, that was slavery in everything save name only, particularly in Southern California. 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).

A major tool the government used to break down the role of tribal government and disband tribal organization from the 1880s to the 1930s was the redistribution of tribal land to individuals under the General Allotment Act, also known as the Dawes Act. The act essentially privatized tribal land holdings in the hands of individuals. Tribal lands and tribal organization were lost as

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 governments. The lands that were set aside as reservations were largely desert, mountains, grazing lands, isolated, ill-adopted 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.

C. Equal Justice under Civil Rights Laws

Federal and State civil rights and environmental justice laws prohibit both intentional discrimination and unjustified discriminatory impacts against Native American people. The Acjachemen people will lose an ancient village, and current religious, sacred, ceremonial, and burial site. No one else will. The proposed toll road would impermissibly discriminate against the Acjachemen people, unduly burden their freedom of religion, and unduly burden their access to Panhe and San Onofre. The evidence demonstrates TCA’s and FHWA’s disregard for the equal protection of the laws for the Acjachemen people. A toll road through Panhe and through San Onofre State Beach would constitute impermissible intentional and disparate impact 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.

Mitigation is not reasonable under Coastal Act section 30244 and other environmental laws that that the Coastal Commission cited if the project or mitigation constitutes intentional or disparate impact discrimination.

1. 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 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).² Intent to discriminate is not required.

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 discriminatory 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.

The federal District Court for the Northern District of California recently upheld the plaintiffs’ right to sue for discriminatory impacts and intentional discrimination involving the quality of life for people of color caused by publicly funded transportation inequities under 11135 in Darensburg v. Metropolitan Transportation Commission, No. C-05-01597 EDL (N.D. Ca. Aug. 21, 2008).

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. See Malibu Local Coastal Program Land ² Recipients of federal funding remain obligated to comply with the federal prohibition against disparate impact discrimination, although individuals have no standing to enforce the regulations in court. See Alexander v. Sandoval, 532 U.S. 275, 293 (2001).

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.

These civil rights grounds have been consistently raised before the Coastal Commission. See, e.g., 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.

2. TCA Receives Federal and State Financial Assistance

TCA is a recipient of federal and state financial assistance. Therefore the federal and state civil rights laws apply to the proposed toll road under Title VI and its regulations, and 11135 and its regulations. TCA and the proposed toll road constitute a program or activity that is conducted, operated, or administered by the state or by a state agency. Therefore 11135 and its regulations apply to TCA and the proposed toll road.

Admissions by TCA and documents obtained by The City Project from TCA under a Freedom of Information Act request confirm that TCA is a recipient of federal and state financial assistance. The following are some examples. TCA has certified that “it will comply with all Federal statutes relating to non-discrimination. These include but are not limited to (a) Title VI of the Civil Rights Act of 1964 (P.L. 88-352) which prohibits discrimination on the basis of race, color, or national origin.” Ex. 75, Assurances – Non-construction Programs, certified by Walter D. Kreutzen, Chief Executive Officer, Foothill/Eastern Transportation Corridor Agency, June 11, 2002.

An “SLTPP Funding Summary” spreadsheet dated July 29, 2008, provided by TCA to The City Project shows funding percentages ranging from 6.07% to 30.02% for a total of $41,483,276 in funds received under the State & Local Transportation Partnership (SLTPP). Ex. 76.

TCA submitted a request for $1.1 billion in federal loans from the FHWA under the Transportation Infrastructure Finance and Innovation Act (“TIFIA”), 23 U.S.C. 601-609, on June 8, 2008.\(^3\) Ex. 77.

---

\(^3\) The $1.1 billion loan application states as follows:

*This TIFIA application to the Federal Highway Administration represents the culmination of a five-year process which began with the creation of the Transportation Corridor System (“TCS”) in 2003 as a joint powers agency for the purpose of acquiring the toll road assets of the San Joaquin Hills Transportation Corridor Agency (“SJHTCA”) and the Foothill/Eastern Transportation Corridor Agency (“FETCA”); the members of the TCS are the SJHTCA and the FETCA (collectively, the “Original Agencies”). Upon the acquisition of the toll road assets of its members, the TCS will take over responsibility for the operation and maintenance of the San Joaquin Hills Toll Road, the Foothill Toll Road and the Eastern Toll Road, (collectively, the “System”), and*
Thomas Margo, the executive director of TCA, in May 2008 confirmed that TCA had applied for federal financial assistance for the proposed toll road, and that federal funds had been earmarked. Letter from Rebecca Robles et al. to Thomas Margo, May 13, 2008.

“The TCA remains committed to utilize federal funding to the maximum extent possible to enhance the streamlining of the environmental process for the SOCTIIP” (Southern California Transportation Infrastructure Improvement Project). Ex. 78, Letter from Walter D. Kreutzen, Chief Executive Officer, TCA, to Honorable Mary Peters, Administrator, FHWA, July 1, 2002.

TCA has a $120,000,000 federal line of credit through FHWA and CalTrans through 2009. See, e.g., Ex. 79, $120,000,000 Federal Line of Credit Agreement, Dated as of July 1, 1999, between Foothill/East Transportation Corridor Agency and the United States Department of Transportation, Federal Highway Administration, signed by Walter D. Kreutzen, Chief Operating Officer, TCA, and Kenneth Wykle, Administrator, Federal Highway Administration.

The Los Angeles Times has reported on TCA’s request for federal funds. 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 work for local agencies that receive federal financial assistance.

---

4 The $1.1 billion loan application states as follows:

The Transportation Corridor System (“TCS”) is the applicant and borrower. TCS is a Joint Powers Authority organized under the provisions of the laws of the State of California (the “State”) and a Joint Exercise of Powers Agreement creating the Exploratory Joint Powers Agency (the “TCS JPA Agreement”) between the San Joaquin Hills Transportation Corridor Agency (“SJHTCA”) and the Foothill-Eastern Transportation Corridor Agency (“FETCA”). SJHTCA and FETCA are themselves joint exercise of powers agencies (“JPAs”) organized under the provisions of the laws of the State (Chapter 5, Division 7, Title 1 of the Government Code of the State (the “Act”)). The cities in the County of Orange (“County”) that benefit from the System as
3. TCA Violates 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. See Larry P. v. Riles, 793 F.2d 969, 983 (9th Cir. 1984); Darensburg v. Metropolitan Transportation Commission, No. C-05-01597 EDL (N.D. Ca. Aug. 21, 2008) (discriminatory impacts against quality of life for people of color caused by transportation inequities under 11135 and its regulations).

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

1. The Acjachemen people will lose an ancient village, and current religious, sacred, ceremonial, and burial site. No one else will.

2. TCA has not demonstrated any business necessity to justify the destruction of Panhe. For example, the Coastal Commission has identified alternatives that “if adopted by the applicant, would permit the proposed activity to be conducted in a manner consistent with the enforceable policies of the CCMP.” Ex. 61. The Interstate 5 Freeway can be improved, car pools can be implemented, and transit including bus and rail service can improve transportation.

The lack of business necessity is demonstrated by the fact that proposed toll road is being challenged in pending litigation, including lawsuits filed by the California Attorney General. One was filed on behalf of the Native American Heritage Commission – at the request of well as the County are members of SJHTCA and FETCA. SJHTCA and FETCA were formed for the purpose of planning, designing, constructing, financing, administering funds for and operating the San Joaquin Hills Toll Road and the Foothill/Eastern System, respectively. SJHTCA and FETCA are governed by a board of directors comprised of representatives from the member agencies. The agencies have the power to, among other things, incur debt and establish and collect tolls. Ownership of the actual corridors themselves and improvements made to them, once complete, vests with the California Department of Transportation (Caltrans). Caltrans has the responsibility of regular maintenance of the corridors. . . .

TCS is a separate legal entity distinct from its members, SJHTCA and FETCA, though TCS, SJHTCA and FETCA are supported by the same staff. The TCS Governing Board is composed of representatives of the member entities of the organizing agencies, including the County of Orange and nineteen cities . . . . Following the proposed issuance of toll road revenue bonds ("2008 Bonds"), execution of the TIFIA loan and the transfer of substantially all of the assets and liabilities associated with the System to TCS, the remaining responsibilities of SJHTCA and FETCA will be to administer the Development Impact Fee Program and to prosecute existing litigation. FETCA will also continue to act as “lead agency” for purposes of the California Environmental Quality Act ("CEQA") and the National Environmental Policy Act ("NEPA") with respect to the development of the 16-mile Foothill South Corridor, which completes the System.

The finance team is led by Thomas Margro, CEO of TCS . . . .
Acjachemen people – on the grounds that the road would cause severe and irreparable damage to important cultural resources within San Onofre State Beach. Native American Heritage Commission v. Foothill/Eastern Transportation Corridor Agency et al., No. 06-GIN051370 (S.D. Super. Ct. filed March 23, 2006). The other suit, 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). These lawsuits spotlight TCA’s failure to adequately disclose to the public the impacts of the toll road on the Acjachemen people and on Pane, and other procedural and substantive irregularities.

3. There are less discriminatory alternatives to running the toll road through Panhe and San Onofre State Beach. Again, the Coastal Commission has identified alternatives that “if adopted by the applicant, would permit the proposed activity to be conducted in a manner consistent with the enforceable policies of the CCMP.” Ex. 61. The Interstate 5 Freeway can be fixed, car pools can be implemented, and transit including bus and rail service can improve transportation. The toll road can be placed somewhere else where it does not destroy the Acjachemen site of Panhe.

4. TCA Violates the 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).

TCA has not complied with 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, and current religious, sacred, ceremonial, and burial site. 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).
The United States Supreme Court has summarized the history of discrimination against Native Americans: “the savage tribes of this continent were deprived of their ancestral ranges by force and . . . even when the Indians ceded millions of acres by treaty in return for blankets, food, and trinkets, it was not a sale but the conquerors’ will that deprived them of their land.” *Tee-Hit-Ton v United States*, 384 U.S. 272, 289-90 (1955).


There are (3) substantive and (4) procedural irregularities in the process of seeking approval for the proposed toll road.

As discussed above, four State agencies formally oppose the toll road on substantive and procedural grounds: the California Coastal Commission, the California Native American Heritage Commission, SHPO, and the California Parks and Recreation Commission. The SHPO testified that the impacts on Panhe cannot be mitigated. The federal Advisory Council on Historic Preservation has condemned the failure to properly assess the effects of the toll road on Native American tribes and historic properties and to engage in consultation as required under section 106. The United States Army has highlighted the misleading statements in the TCA appeal. Acjachemen Tribal Resolutions have been passed supporting the protection of Panhe and full sovereign participation by the Acjachemen in any and all land and water use decisions likely to impact Panhe. The legality of TCA’s approval of the Project is being challenged in pending litigation, including two lawsuits filed by the California Attorney General on behalf of the Native American Heritage Commission for violation of laws protecting Native American resources, and on environmental grounds. The Department of Commerce did not provide a full and fair hearing in this matter. See Exhibit 71, Susannah Rosenblatt and Mike Anton, *Federal officials struggle to maintain order at toll road hearing: Raucous crowd of thousands of supporters and opponents and packs a hot, stuffy hall at the Del Mar Fairgrounds for Monday’s Hearing*, L.A. Times, Sept. 23, 2008; Ex. 81, Letter from Robert García, Executive Director and Counsel, The City Project, re: Objections to September 22, 2008, Hearing, to Carlos Gutierrez, United States Secretary of Commerce and Thomas Street, Attorney Advisor, NOAA Office of General Council for Ocean Services, Oct. 1, 2008.

5. There is a pattern of discrimination against the Acjachemen people, as demonstrated above.
6. Decision makers know of the impact against the Acjachemen people. This is demonstrated by the public comments sent by UCPP and The City Project to TCA and the record before the Coastal Commission on February 6, 2008, and this Department on September 22, 2008. Ex. 2, 3.

D. Native American Religious Freedoms


Under the RFRA and RLUIPA framework, the Acjachemen people exercise their religion at the sacred site of Panhe. This is demonstrated by the extensive and unrefuted evidence in the record, including but not limited to the decision of Commissioner Shallenberger, and testimony by the Acjachemen people, The City Project, the Coastal Commission staff, and the SHPO. See, e.g., Exs. 5, 12, 15, 41, 43-49, 51, 67, 68, 69, 70.

Ms. Cruz-Wright, Vice-Chairman of the Juaneno Band of Mission Indians, described the spiritual meaning of Panhe to the Acjachemen people at the September 22 hearing.

Panhe is regarded as a sacred site by the Acjachemen People. It has a cultural and religious significance to my people; this is where I come to refocus, to renew my inner spirit, to lay my problems down. This is where I come to speak with the ancient ones for guidance in the decisions I make. This is where I come to feel the wind and the comfort of my ancestors. This is where I come to honor them; this is where I call home, the home of my Indian heart, my Indian knowledge, my Indian passion, my Indian fire.

Ex. 69.

A six lane toll road “sitting right on top of the site” (Ex. 47 at 396) of Panhe and in the San Onofre State Beach and Park would substantially burden the exercise of religion by the Acjachemen people. Indeed, the SHPO testified that the burden is “simply not mitigatable. . . . Those things are simply not able to be mitigated.” Ex. 47 at 396. “The NAHC agrees with the determination of the Coastal Commission that the proposed mitigation will not reduce adverse impacts to below a level of insignificance. The NAHC believes that the impacts to the Juaneno people who use the site of Panhe for ceremony are completely unmitigated.” Ex. 52. According to the Coastal Commission staff, “The mitigation proposed for the Acjachemen, and for Panhe, is not reasonable. Avoidance measures were not included, nor was an adequate case made for why avoidance is not possible. Furthermore, these impacts will go unmitigated.” Ex. 41. According to the federal Advisory Council on Historic Preservation, “We believe that the preferred alternative for the proposed toll road will have significant adverse effects on the traditional cultural values associated with Panhe and that these effects will be difficult to resolve.” Ex. 74.
Cf. Navajo Nation v. United States Forest Service, No. 06-15371 at 10041-42 (9th Cir. en banc filed Aug. 8, 2008) ("plants, springs, natural resources, shrines with religious significance, or religious ceremonies . . . would be physically affected . . . plants would be destroyed or stunted; . . . springs polluted; . . . places of worship made inaccessible” in “public park land” that is “by definition, land that belongs to everyone”).

The substantial burden on the right of the Acjachemen people to exercise their religion is not justified by “a compelling governmental interest.” There is no compelling governmental interest in running a toll road through a sacred Native American site in a state park. Indeed, the compelling governmental interest is protect the sacred site for the free exercise of religion by the Acjachemen people, and to protect the site and state park for all the people of California and the nation. Commissioner Larry Clark condemned the proposal of running a toll road through a public park for the benefit of the wealthy few who can afford to pay the toll: “I have many issues with this project. I think it is fatally flawed. I start with the basic premise, how is it that we can as a California Coastal Commission put a private road through a State Park? This is all in a State Park that . . . was created for all Californians.” Ex. 50, Statement of Commissioner Larry Clark, Reporter’s Transcript of Proceedings, Feb. 6, 2008, at 342.

The proposed toll road is not the least restrictive means of providing transportation. The Coastal Commission identified alternatives that “if adopted by the applicant, would permit the proposed activity to be conducted in a manner consistent with” enforceable policies and the law. Ex. 61. The Interstate 5 Freeway can be improved, car pools can be implemented, and transit including bus and rail service can improve transportation without devastating Panhe and San Onofre.

The toll road will also unduly burden the freedom of association at and access to Panhe and San Onofre State Beach by the Acjachemen people under the First Amendment and the California Constitution. See 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, 145-46, 192-93 (2005), which is fully incorporated by reference here.

E. Transportation Justice

The toll road would disproportionately impact the working poor with limited or no access to a car, people of color, and low income communities. 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 people disproportionately cannot afford to pay tolls for commuter or recreational travel.

Commissioner Larry Clark condemned the proposal of running a private road through a public park for the benefit of the wealth few who can afford to pay the toll:

I have many issues with this project. I think it is fatally flawed. I start with the basic premise, how is it that we can as a California Coastal Commission put a private road through a State Park?
Who do you think is going to use this private road? is it going to be the safety workers? is it going to be our firemen? is it going to be our policemen? is it going to be our nurses is it going to be our gardeners? is it going to be the people that service our homes? or is it going to be the privileged and wealthy?

Are we, before us here, looking at a plan that will fundamentally bring a privileged section of this southern California population another alternative?

It is fundamentally flawed on a transportation basis. It is fundamentally flawed in the sense that there are reasonable alternatives that have not been fully explored from a transportation standpoint -- and we heard about that today.

... 

This is all in a State Park that ... was created for all Californians.

Ex. 50, Statement of Commissioner Larry Clark, Reporter’s Transcript of Proceedings, Feb. 6, 2008, at 342-43.

The evidence supports Commissioner Clark. Stella Osbourne testified that many people cannot afford to pay the toll on the proposed road.

I would just like to point out that a lot of people are saying that this toll road is going to help with the congestion, but I can’t always pay the toll road to go down to Riverside, and when I come up the 91, or go down the 91, or 55, apparently a lot of thousands of people can’t pay it either, so it will be the same thing with this other one.


More than 88% of campers in San Onofre’s San Mateo campground reside in California, and 93% of these California campers reside in the 8 counties with the greatest green space needs – in combined terms of the fewest acres of green space per thousand residents, and highest levels of child obesity, children, poverty, and people of color. San Onofre is in one of those counties.

The map and analyses appear on page above and Exhibit 26.

The Southern California Association of Governments (SCAG) has called for public transportation to improve access for all to state, national, and local parks throughout Southern California as part of the 2008 Regional Transportation Plan (RTP). SCAG notes that “Not all neighborhoods and people have equal access” to parks. “Research has found a complete lack of public transportation services into National Parks, but this also appears true for State Parks. There is almost no access to national parks and very limited access to state parks by transit across all income groups ...” SCAG RTP Environmental Justice Report 11-14 (proposed final
May 8, 2008). “[A] multi-agency effort must be undertaken in order to further address and remedy the issue of inequity of park access.” Id. at 14. The following map and analyses show the unequal distribution of parks and low income neighborhoods in the six counties of Los Angeles, Ventura, San Bernardino, Riverside, Imperial, and San Diego. The toll road would harm affordable access to a state park by people in the counties with the greatest green access needs, as discussed above, contrary to the SCAG recommendation to increase park access.

Ex. 59. Map and analyses from the SCAG RTP Environmental Justice Report 11-14 (May 8, 2008), with San Diego County data from GreenInfo Network and The City Project.

There is a history and pattern of discrimination in the provision of transportation services to the working poor low income people of color in California. For example, see Darensburg v. Metropolitan Transportation Commission, No. C-05-01597 EDL (N.D. Ca. Aug. 21, 2008) (discriminatory impacts caused by transportation inequities under 11135 and its regulations).

The Los Angeles County Metropolitan Transportation Authority settled a civil rights law suit in 1996 by agreeing to improve the bus system county wide, keep fares affordable, and limiting overcrowding. MTA signed the consent decree in the suit filed under Title VI of the Civil Rights Act of 1964 and its regulations alleging that MTA operated separate and unequal bus and rail systems that discriminated against low income communities of color. See Robert García and

**V. Conclusion**

For the reasons stated and under the authorities cited above, we respectfully urge you to uphold the California Coastal Commission’s decision, reject the override request for the toll road, and protect California’s coastal and cultural resources and the rights of the Acjachemen people, working class people, and low income people of color.

Sincerely,

Rebecca Robles
Coordinator
United Coalition to Protect Panhe

Robert García
Executive Director and Counsel
The City Project
Exhibit List

Exhibit A  Letter to the California Coastal Commission *Re: Save Panhe and Save San Onofre Stop the Proposed Toll Road: Opposition to Coastal Consistency Certification (CCC-018-07)* from over 40 organizations and tribal nations throughout California and the nation, Feb. 5, 2008.

Exhibit B  Public Comments to the California Coastal Commission *Re: Save Panhe and Save San Onofre Stop the Proposed Toll Road: Opposition to Coastal Consistency Certification (CCC-018-07)* from The City Project and United Coalition to Protect Panhe, Jan. 21, 2008, including Exhibits 1-20 below.

Exhibit C  Public Comments to the California Coastal Commission *Re: Save Panhe and Save San Onofre Stop the Proposed Toll Road: Opposition to Coastal Consistency Certification (CCC-018-07)* from The City Project and United Coalition to Protect Panhe, Feb. 6, 2008, including Exhibits 21-33 below.


Exhibit 2  Letter from Tribal Chair David Belardes to John Romani, Greenwood & Associates, Oct. 8, 1996.


Exhibit 4  Betty Rivers, *The Pendleton Coast District: An Ethnographic and Historic Background* (undated typescript on file with The City Project).


Exhibit 9  Letter from the Native American Heritage Commission on the South Orange County Transportation Infrastructure Improvement Project (SOCTIIP) Final Environmental Impact Statement/Subsequent Environmental Impact Report (EIS/SEIR) to the Transportation Corridor Agencies Board of Directors, (undated).

Exhibit 10 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 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.


Exhibit 15 Seven letters from Acjachemen tribal members and others re: proposed 241 Foothill South toll road.


Exhibit 17 Letter 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, from Center for Law in the
Public Interest; Letter 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, from Center for Law in the Public Interest.


Exhibit 21 Letter from Patricia Martz, Ph.D., President, California Cultural Resource Preservation Alliance, Inc., to Patrick Krueer, Chair, California Coastal Commission, Jan. 17, 2008.

Exhibit 22 Letter from Bernard Bruce, Bruce’s Beach, January 28, 2008.


Exhibit 26 *San Onofre State Beach Campground Visitors: Child Obesity, Poverty, People of Color and Green Space by County* map produced by The City Project and GreenInfo Network, Jan. 2008.


Exhibit 30 Letter from Charlene Dwin Vaughn, AICP, Assistant Director, Advisory Council on Historic Preservation re: *Section 106 Consultation Regarding the Proposed South Orange County Transportation Infrastructure Improvement Project (SOCTIIP), Orange and San Diego Counties, California* to Gene Fong, Division Administrator, California Division, Federal Highway Administration, Feb. 5, 2008.
Exhibit 31  
Letter from Save the Peaks Coalition, Feb. 5, 2008.

Exhibit 32  
Letter from the Northern Chumash Tribal Council (undated).

Exhibit 33  

Exhibit 34  

Exhibit 35  

Exhibit 36  

Exhibit 37  

Exhibit 38  

Exhibit 39  

Exhibit 40  
Letter from Thomas H. Magness, Colonel, United States Army, District Commander, to Mr. Thomas Street, Staff Attorney, National Oceanic and Atmospheric Administration, April 7, 2008.

Exhibit 41  
Statement of Sarah Townsend, Coastal Staff Analyst, California Coastal Commission, Reporter’s Transcript of Proceedings, Agenda Item No. 8.b. Hearing on Consistency Certification No. 018-07 Before the California Coastal Commission, Feb. 6, 2008.

Exhibit 42  
Letter from Joe A. O’Campo, Tribal Chair, Juaneño Band of Mission Indians re: Save Panhe, Save San Onofre, Stop the Toll Road to Larry Myers, Executive Secretary, Native American Heritage Commission, May 23, 2008.

Exhibit 43  
Statement of Rebecca Robles, Co-Founder and Coordinator, United Coalition to Protect Panhe, Reporter’s Transcript of Proceedings, Agenda Item No. 8.b. Hearing on Consistency Certification No. 018-07 before the California Coastal Commission, Feb. 6, 2008.


Exhibit 50 Statement of Larry Clark, California Coastal Commissioner, Reporter’s Transcript of Proceedings, Agenda Item No. 8.b. Hearing on Consistency Certification No. 018-07 before the California Coastal Commission, Feb. 6, 2008.

Exhibit 51 Statement of Mary Shallenberger, California Coastal Commissioner, Reporter’s Transcript of Proceedings, Agenda Item No. 8.b. Hearing on Consistency Certification No. 018-07 before the California Coastal Commission, Feb. 6, 2008.

Exhibit 52 Letter from Larry Myers, Executive Secretary, Native American Heritage Commission re: Comments: Foothill Transportation Corridor South (FTC-S) Toll Road, to NOAA Office of General Council for Ocean Services, May 27, 2008.
Exhibit 53
Letter from John Garamendi, Lieutenant Governor, Don Perata, Senate President pro Tem, Darrell Steinberg, Chair, Senate Natural Resources Committee, and Christine Kehoe, California State Senator re: *Foothill/Eastern Transportation Corridor Agency Appeal for Secretary of Commerce Override of California Coastal Commission Objection to Consistency Certification for Foothill-South Toll Road* to Carlos M. Gutierrez, Secretary of Commerce, April 7, 2008.

Exhibit 54
Resolution 66-2005 adopted by the California State Park and Recreation Commission opposing a Proposed Toll Road Alignment and Request for Action to Protect San Onofre State Beach, Nov. 18, 2005.

Exhibit 55
Letter from California State Parks and Recreation Commission to the California Costal Commission, Jan. 25, 2008.

Exhibit 56
Letter from the Tribal Council of the Juaneño Band of Mission Indians re: The traditional village and burial ground of Panhe at San Clemente, California to Larry Myers, Executive Secretary, Native American Heritage Commission, May 19, 2008.

Exhibit 57
Letter from Rebecca Robles, Co-Founder and Coordinator, United Coalition to Protect Panhe re: *Save Panhe, Save San Onofre, Stop the Toll Road* to Larry Myers, Executive Secretary, Native American Heritage Commission, May 15, 2008.

Exhibit 58

Exhibit 59
Map and analyses from the SCAG RTP Environmental Justice Report 11-14 (proposed final May 8, 2008), with San Diego County data from GreenInfo Network and The City Project.

Exhibit 60
Rules Governing the Court of Indian Offenses, Department of the Interior, Office of Indian Affairs, March 30, 1883.

Exhibit 61
Letter from Mark Delaplane, Manager, Energy, Ocean Resources, and Federal Consistency Division, California Coastal Commission re: *CC-018-07 Consistency Certification*, Transportation Corridor Agencies (TCA), Foothill Transportation Corridor – South (FTC-S), northern San Diego and southern Orange County, to Thomas E. Margo, Chief Executive Officer, Transportation Corridor Agencies, Feb. 13, 2008.
Exhibit 62  Letter from Joe A. O’Campo, Tribal Chair, Juaneño Band of Mission Indians re: Save Panhe and Save San Onofre State Beach – Stop the Proposed Toll Road: Reject Override Request – Consistency Certification for the Foothill-South Toll Road [FR Doc. E8-5247] to Carlos Gutierrez, United States Secretary of Commerce, May 17, 2008.

Exhibit 63  Dana Parsons, A Native American Applauds the Tollway Decision: With all the talk of surfers and environmentalists, it seemed a concern for sacred sites was overlooked. But one observer sees the outcome as a convergence of interests. L.A. Times, Feb. 9, 2008.


Exhibit 65  David Reyes, O.C. tollway could spoil burial site: The sacred burial site, mentioned in mission logs from the 1770s, abuts the planned extension of the 241 toll road. L.A. Times, Aug. 20, 2007.

Exhibit 66  Alliance letter from Rebecca Robles, Co-Founder and Coordinator, United Coalition to Protect Panhe, Robert García, Executive Director and Counsel, The City Project, and Angela Mooney-D’Arcy, Policy Director, The City Project, re: Save Panhe and Save San Onofre State Beach – Stop the Proposed Toll Road: Reject Override Request – Consistency Certification for the Foothill-South Toll Road [FR Doc. E8-5247], to Carlos Gutierrez, United States Secretary of Commerce, May 28, 2008.


Exhibit 69  Public Testimony by Sally Cruz Wright, Acjachemen Nation, Vice-Chairman of the Juaneno Band of Mission Indians, identified by the Office of Federal Acknowledgement, as petitioner 84B.


Exhibit 75  Assurances- Non-construction Programs, certified by Walter D. Kreutzen, Chief Executive Officer, Foothill/Eastern Transportation Corridor Agency, June 11, 2002.

Exhibit 76  “SLTP Funding Summary” spreadsheet dated July 29, 2008, provided by TCA to the City Project.

Exhibit 77  TCA application for $1.1 billion in federal loans from the FHWA under the Transportation Infrastructure Finance and Innovation Act (“TIFIA”), 23 U.S.C. 601-609, June 8, 2008.

Exhibit 78  Letter from Walter D. Kreutzen, Chief Executive Officer, TCA, to Honorable Mary Peters, Administrator, FHWA, July 1, 2002.

Exhibit 79  $120,000,000 Federal Line of Credit Agreement, Dated as of July 1, 1999, between Foothill/East Transportation Corridor Agency and the United States Department of Transportation, Federal Highway Administration, signed by Walter D. Kreutzen, Chief Operating Officer, TCA, and Kenneth Wykle, Administrator, Federal Highway Administration.
Exhibit 80
Letter from United Coalition to Protect Panhe and The City Project re: Save Panhe and Save San Onofre State Beach – Stop the Proposed Toll Road: Reject Override Request – Consistency Certification for the Foothill-South Toll Road [FR Doc. E8-5247], to Carlos Gutierrez, United States Secretary of Commerce and Thomas Street, Attorney-Advisor, NOAA Office of General Counsel for Ocean Services, Aug. 6, 2008.

Exhibit 81

Exhibit 82