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**PANHE AT THE CROSSROADS: TOWARD AN
INDIGENIZED ENVIRONMENTAL JUSTICE DISCOURSE**

by

DINA GILIO-WHITAKER

BACHELOR OF ARTS IN NATIVE AMERICAN STUDIES

THESIS

Submitted in Partial Fulfillment of the
Requirements for the Degree of

MASTER OF ARTS IN AMERICAN STUDIES

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Panhe at the Crossroads: Toward an Indigenized Environmental Justice Discourse

by

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ABSTRACT

Through a case study of the protection of a Native American sacred site from the development of a road through it in southern California, this study argues that environmental justice (EJ) for Native peoples encompasses far more than the protection of marginalized people from disproportionate rates of detrimental health effects of industry. Mainstream environmental justice discourse is troubled when it centers indigenous peoples' histories, differentiated political status, and epistemologies in EJ analytical frameworks.

Viewing EJ through the lens of settler colonialism allows for an analysis that broadens the scope of what environmental justice means for indigenous peoples by examining the meaning they attach to place through their spiritual/ancestral relationship to it. The relentless desecration and loss of sacred sites highlights the inadequacy of the institutional tools of law to protect them in the context of a capitalist system that commodifies land and resources, and necessitates coalition building among diverse interests to accomplish common goals. The connection between people and land through the concept of radical relationality represents a decolonial framework that can transcend hierarchical power relationships in the interest of protecting dwindling natural landscapes for Native and non-Native people alike.

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Panhe at the Crossroads: Toward an Indigenized Environmental Justice Theory

Dina Gilio-Whitaker

“[T]here 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.”¹

–Commissioner Mary Schallenberger, California Coastal Commission, *Reporter’s Transcript of Proceedings*, Feb. 6, 2008.

Introduction

History shows that social justice movements grow organically out of the collective need for change when a marginalized group of people moves to challenge the institutions of power that they perceive to be acting against their best interests, at best, and oppressing them at worst. While we as academics like to think that we are making a difference when we study and theorize phenomena we call “social justice” issues (maybe we are and maybe we aren’t), the actual work itself is already well established by the activists on the ground who engage in acts of resistance and attempt to change the status quo. Often, by the time the academics come along, social justice activism is well on the way toward creating that change. Such is the case in the realm of environmental justice work. Born more in the streets of poor inner city neighborhoods and rural communities of color than in college classrooms and thesis papers, this movement of marginalized people has pushed back against powerful polluting industries using the tools of law, media, and coalition building to fight for cleaner environments, giving birth to what we in

¹ Quoted in a letter from The City Project/United Coalition to Protect Panhe letter to Thomas Street at the National Oceanic and Atmospheric Administration (NOAA) and Carlos Gutierrez, United States Secretary of Commerce, May 28, 2008

academia today call “environmental justice.” The actual work and perhaps even the term itself existed long before academia began to frame it as an academic discipline.

For indigenous people in the United States, a similar dynamic is at work. In the epoch of the growing hyper-capitalism that has fueled the US nation building project that began in the 19th century, native lands were gobbled up by the forces of colonialism, leaving only a very small fraction of lands still under Native American control. The massive losses included access to places that often were the very heart and soul of the people who had inhabited those places since time immemorial. Regaining access to those sacred places is the focus of much of today’s Native American social justice work. Within the offices of governments, non-profits and tribes, the term “environmental justice” is often applied to the work of sacred site protection. In the academic discipline we call environmental justice discourse, it is not.² A survey of the environmental justice literature reveals a conspicuous lack of scholarship relative to Native American sacred site protection. This paper is an effort to bridge that gap. It argues that environmental justice (EJ) discourse can – and should – expand its conceptual parameters to include what Native activists and scholars already think of as a vital environmental justice issue. It will demonstrate that taken together, various legal and organizational tools that are available for the protection of sacred sites, while sometimes effective and often entirely inadequate, all together constitutes sacred site protection as an environmental justice issue as seen by Native activists and scholars.

Native American sacred site protection currently relies on a disparate cache of legal remedies that traverses a complex landscape of law and jurisdictions, depending on the legal

² The topic of sacred site protection is an emerging field of academic inquiry in Native American studies, and increasingly Native studies scholars are making the connection. Beth Rose Middleton (whose work will be discussed further) is one such scholar who is explicit about the term “environmental justice” relative to her work on Native land trusts as a tool to protect sacred sites.

status of a Native American group (i.e., whether it is a federally recognized tribe, state recognized tribe, or non-recognized tribe).³ In cases where few legal remedies exist, Native people have become creative and implemented new strategies based on alternative routes to protection that may not result in land ownership, but still recognize their connection to place and ensure their ability to access it, for purposes ranging from ceremonial use to resource extraction (such as plant gathering for basket or medicine making). While sacred site protection is inevitably an aspect of EJ for Native people, mainstream EJ discourse has yet to frame it as such, and one of the tasks of this paper is to help create an opening for it. The goal is to widen the scope of how EJ is conceptualized to include the needs of indigenous peoples whose histories, connections to land and place, and legal relationships to the state are different than other ethnic minorities. To accommodate these differences in the interest of “indigenizing” EJ discourse, we must begin with a different set of assumptions and questions, such as those that seek new understandings of environmental racism. How does racism manifest in Native communities that are different from other communities of color? How do indigenous Americans (including Native Hawaiians) relationship to the nation-state change the terms of debate in environmental justice studies? Ultimately this process asks what happens when we put indigenous peoples at the center of environmental justice studies?⁴

Centering Native Americans in a critical analysis of EJ discourse slightly shifts the focus of the frameworks that undergird conventional EJ discourse away from the gaze of a strictly

³ In this paper, I will interchangeably apply the terms “Native Americans,” “Native people” and “indigenous peoples” while the overall arguments can be applied to Native Hawaiians, with the understanding that Native Hawaiian struggles against the domination of the US nation-state have many different expressions.

⁴ This echoes the ideas of Native studies scholars in the wider discipline of American studies, such as Shari Huhndorf in her latest book, *Mapping the Americas: The Transnational Politics of Contemporary Native Culture* who asks “what happens when you put Native American studies at the center?”

Marxist analysis, but seen primarily through the indigenous lens of decolonization theory. Such a discursive shift allows us to interrogate the role of settler colonialism as the primary destabilizing force to Native American lives through the loss of lands and resources. However, a Marxist analysis does allow for the interrogation of private property as a construction of the capitalist state in service to the dominant social class in the name of development and “appropriate” land use. The construction of land as property impacts sacred site struggles in numerous negative ways, but also has created avenues for diverse coalitions with multiple, often divergent investments who come together to work for common goals, i.e. the protection of natural resources, and is one of the primary phenomena this study examines. Finally, centering Native Americans in this analysis means infusing it with indigenous methodologies that challenge master narratives and dominant paradigms. Normalized western paradigms are decentered and troubled when they are placed within the historical context of settler colonialism and the counter-narratives that indigenous worldviews present. It also raises questions about identity and agency.

The case study that informs this analysis brings all these ideas to light. While its example reveals the multitude of problems that tribes face in their efforts to protect or maintain access to their sacred places, it also illustrates some ways tribes form strategic alliances – often with partners that under other circumstances they might oppose – for the shared goal of resource (broadly defined) protection. It tells the story of a fight to protect a Native American sacred site in southern California, Panhe, from the building of a six lane toll road through it, which would not only have further desecrated a burial ground (which has already been desecrated by development) and disrupted a tribe’s ability to practice their religion, but would also have severely impacted a number of endangered species in one of the last remaining pristine and free-flowing watersheds in Southern California. It also would likely have negatively impacted a world

famous stretch of surf breaks collectively known as “Trestles” (named for the wooden railroad trestles at one of the spots) and one of the most popular state parks in California. The vehement fight against the toll road to most people in the community was the fight to save Trestles; for some it was primarily about saving the wetlands, and for fewer still it was about saving Panhe. In a brilliantly orchestrated political battle, the campaign to “Save Trestles” pit pro-development forces against private citizens, environmental activists and Native Americans, resulted in four lawsuits, and was ultimately rejected by more than one overseeing public agency. Few understood the degree to which Panhe as a protected cultural resource was responsible for the toll road not being built.

In this study, the story of the toll road controversy focuses on how activists across a diverse spectrum of interests came together to stop the building of the road. But more specifically it highlights the work of the United Coalition to Protect Panhe (UPCC), a grassroots alliance of Juaneño/Acjachemen people whose goal is the protection of Acjachemen sacred sites. As the title suggests, Panhe’s location is metaphorical for the crossroads I see Native American sacred site protection encountering as the term “environmental justice” continues to be asserted in these struggles. Most of the information about the controversy was gathered from a collection of documents created and submitted by UPCC as evidence for arguments against the toll road to the United States Department of Commerce and the National Oceanic and Atmospheric Administration, various newspaper articles and websites, and to a lesser extent, personal interviews. Altogether, the evidence paints a picture few people acknowledged (or even understood) about Panhe’s role in stopping the toll road. Note: this document is written with the express intent of limiting specifics that reveal too much identifying information about Panhe’s exact location, in the interest of protecting the needs of the Ajachemen Nation.

Toll Roads, TCA, and Development in Orange County

Drive south on highway 5 through Orange County in Southern California and the last city you encounter is San Clemente. With a population of 65,000 San Clemente feels more like a town than a city, but Orange County is so developed now that individual cities lose their distinctions as they all seem to blend into one seamless, undifferentiated mass of housing tracts, shopping malls and industrial parks. San Clemente is a laid back beach town (relatively speaking), famous for its proximity to Trestles, and is the capital of the surf industry in California, if not the world. At the southern end of San Clemente development stops abruptly and opens up into wide vistas of rolling hills and mountains in the east, and the Pacific Ocean a mile or so to the west. You have just crossed the county border line into San Diego County. The freeway takes the form of a bridge just after the Cristianitos Road exit, and is just long enough to traverse San Mateo Creek and its rich riparian vegetation. This is the entry point of San Onofre State Beach (SOSB), a 3,000 acre area characterized by ocean front and canyon lands; it is California's fifth most visited state park.⁵ If you were to get off at Cristianitos Road and head east, in a mile or so you would come to San Mateo Campground, which is one of three main areas of the park, in addition to San Onofre Bluffs (a five mile stretch of camping areas located on the bluffs above the ocean on the south end of the park) and San Onofre Surf Beach. San Onofre State Beach is actually located on land owned by the US military, within the boundaries of Camp Pendleton Marine Base. The park was created in 1971 by Presidential decree during the Nixon administration (Nixon owned a house on the bluffs above Trestles, the famed Western

⁵ Some figures vary. According to the San Onofre Foundation's website, it is the fifth most visited park. Other documents list it as the sixth most visited park.

White House), and a 50 year lease was signed with the Department of the Navy.⁶ With the lease the US retroceded jurisdiction over that portion of Camp Pendleton to the state.⁷ Also within the boundaries of SOSB is San Onofre Nuclear Generating Station (SONGS). San Mateo Campground was established by SONGS as a mitigation measure for the land it used to build the nuclear plant.

San Mateo Creek flows north to south, emptying out into the ocean at Trestles as the coastline curves northwest to southeast, with 160 acres located between highway 5 and the ocean designated as Trestles Natural Wetland Preserve. The creek's headwaters in the Santa Ana and Santa Margarita Mountains due north of Trestles is one of the last remaining pristine wilderness areas in Southern California and consists of mixed chaparral scrub, manzanita, and numerous varieties of trees and sagebrush. The middle reach of the creek lies within Rancho Mission Viejo and Camp Pendleton, which share a border.⁸ Rancho Mission Viejo (RMV) is a 23,000 acre cattle ranch which has been owned by the O'Neill/Avery/Moiso families since 1882. The original ranch encompassed some 200,000 acres, but throughout the twentieth century large parcels were sold off and resulted in the planned communities of Mission Viejo, Rancho Santa Margarita, Coto de Caza, and other towns that constitute the undifferentiated mass of development that sprung up in Orange County in the last fifty years.

⁶ San Onofre Foundation, www.sanofoundation.org (accessed August 9, 2011).

⁷ Native American Heritage Commission v. Foothill Eastern Transportation Corridor Agency, *Complaint for Injunctive Relief*, Superior Court of California, County of San Diego, North County Branch, March 22, 2006, 3. <http://www.sacredsitesca.com/images/lawsuit%20Panhe.pdf>. [Accessed Aug. 24, 2011]

⁸ San Mateo Creek Conservancy, *San Mateo Creek: An Overview*, <http://sanmateocc.org/files/SanMateoCreekOverview.pdf> (accessed August 9, 2011).

Somewhat counter-intuitively, RMV's owners pride themselves on their commitment to open space, even establishing a 1,200 acre land conservancy in 1990. Yet, belying RMV's rhetorical commitment to open space is a development plan to rival all others. According to the RMV's website, the current "Ranch Plan" is a "comprehensive, science-based, open space preservation/management and land use plan for the remaining 23,000 acres of Rancho Mission Viejo,"⁹ originally approved by the County of Orange in November of 2004. While the plan calls for the preservation of 17,000 acres (75% of the ranch) for permanent open space and habitat protection, and ranching operations, the remaining 25% (6,000 acres) is slated for development, in keeping with the plan's vision to "balance inevitable growth in Orange County with permanent ranch land preservation." Included in the plan are 14,000 homes and the infrastructure to support them: schools, churches, business parks, restaurants, shopping centers, civic facilities, child care centers, a regional sports park, equestrian center, and an estate enclave. In other words, the plan creates yet another brand new city in southern Orange County, potentially approaching the size of current San Clemente, and follows the predictable pattern of past development when the ranch was sold off parcel by parcel.

The problem with the plan? There is not a sufficient road infrastructure to support the tens of thousands of new residents and businesses – it is virtually landlocked with no major roads connecting the area with highway 5 or any other major arterial route that could support the new community. Traffic in Orange County (OC) is already a huge problem. The county experienced explosive growth between 1950 and 1987, expanding from 200,000 to 2 million residents in a 37

⁹ Rancho Mission Viejo, *The Ranch Plan Facts & FAQ's*, <http://www.ranchomissionviejo.com/ranchplan/faqs.php> (accessed August 9, 2011).

year span.¹⁰ According to the Orange County Transportation Authority (OCTA), OC projects a 24% growth in population between 2000 and 2030 (swelling from approximately 2.9 million residents in 2000 to 3.6 million in 2030). The trend predicts the majority of growth to occur in central and south OC. A public opinion poll conducted in 2004 revealed that 90% of OC residents believed that traffic congestion was the biggest issue facing them; OCTA's transportation analysis model calculates that daily vehicle miles traveled will increase by 39% by 2030, and freeway speeds during peak morning hours will drop by 30%. The analysis summarizes it by saying that the average 30 minute trip today will take 40 minutes 20 years from now.¹¹

In the 1970's the County of Orange drew plans for expanding the road infrastructure, calling it the *Master Plan of Arterial Highways* (MPAH). Because adequate state and federal funds were unavailable, two public joint powers agencies¹² were formed (the Foothill/Eastern Transportation Corridor Agency and the San Joaquin Hills Transportation Corridor Agency, both collectively known as TCA) between the County of Orange and 12 cities in the county to build roads. The roads would be funded by private and institutional bonds and would later be paid back by revenue generated through future tolls collected from drivers and development fees,

¹⁰ Quoting Kling, Poster, and Olin, 1991:2, *Orange County History: Suburbia and Today*, <http://www.ocf.berkeley.edu/~kennyk/oc/recent.html> (accessed August 10, 2011).

¹¹ Orange County Transportation Authority, *New Directions: Charting the Course for Orange County's Future Transportation System (Orange County Transportation Authority 2006 Long Range Transportation Plan)*, July 24, 2006. <http://www.octa.net/uploadedfiles/Files/pdf/lrtp06.pdf> (accessed August 10, 2011).

¹² A joint powers authority is an alliance of two or more public agencies to provide more effective government services, a power established by the California legislature in the mid 1970's. In the case of TCA, while it is privately funded, it is still considered a public agency.

after which point the roads would become freeways.¹³ Although they are privately funded, the toll roads are owned by the state of California once completed.¹⁴ While it sounded like a good idea, and may have provided the only alternative to easing up traffic congestion, in reality the toll roads have failed to deliver their expected outcomes. The tolls can be quite expensive – depending on the road, they are as high as \$5 for a 2 axle vehicle during peak hours, and higher for vehicles with more axles. A recent article in the Los Angeles Times reported that between 2007 and 2010 the Foothill and Eastern toll road trips declined 17%, and overall usage of those roads was 30% less than originally projected. For the San Joaquin Hills TCA, the projections were unfulfilled by 56%.¹⁵ According to another Los Angeles Times article in May 2011, TCA has been negotiating with bondholders for lower payments for 13 years in an effort to restructure \$430 million of its \$2.1 billion debt, meaning that users of the toll roads will be paying tolls for six years beyond the original plan.¹⁶

The 241 toll road is a project of the Foothill/Eastern TCA and was part of the MPAH which was to be built in phases. Running parallel to the 5 freeway a few miles to the east, it is accessed to the 5 by the 133 toll road at its northern-most end. Extending for approximately 14 miles north to south, it ends abruptly at Oso Parkway, some 10 miles or so north of Cristianitos Road in San Clemente, as the crow flies. According to the master plan, it was designed to connect to the 5 on the south end of San Clemente at Cristianitos Road, although there were

¹³ *About TCA – Background and History*, https://www.thetollroads.com/home/about_history.htm (accessed August 10, 2011).

¹⁴ *Ibid.*

¹⁵ Nicole Santa Cruz, “Recession slows use of Orange County’s toll roads,” *Los Angeles Times*, February 1, 2011.

¹⁶ Nicole Santa Cruz, “Tolls on Orange County road[s] may be extended another 6 years,” *Los Angeles Times*, May 6, 2011.

several potential alignments identified as possibilities. Known variously as the “preferred alignment,” “South Orange County Transportation Infrastructure Improvement Project (SOCTIIP),” the “241 Foothill South toll road,” and the “241 extension,” its 16.9 mile span would traverse directly through Rancho Mission Viejo, providing the transportation infrastructure needed for a new city. Ostensibly, it would also provide a viable alternate route to escape some of the congestion of highway 5 in south Orange County for those able and willing to pay the toll, although even that would come to be questioned given the road’s out of the way location and the public’s general under-use of the toll roads.

Panhe

According to most California Indian historians including Edward Castillo, at the time the Spanish ventured into what is now California and began establishing the 21 coastal missions of the Catholic Church in the 18th century, there were at least 300,000 indigenous inhabitants.¹⁷ 1769 marks the year the Franciscan administrative priest Junipero Serra traveled with Spanish military authorities under Gaspar de Portola, reaching San Diego¹⁸ and present day Orange County. The indigenous tribes they encountered came to be associated with the missions that sprung up among them; the people of the south OC region knew themselves as “Acjachemen,” while the missionaries called them “Juaneño,” after the mission San Juan Capistrano (SJC). Today they are politically organized as the Juaneño Band of Mission Indians/Acjachemen Nation. Most of the ethnographic history about the Acjachemen derives from the work of Fray Geronimo Boscana, a priest who served at the SJC mission from 1814-1826, and from the early

¹⁷ Edward Castillo, *A Short Overview of California Indian History*, California Native American Heritage Commission, <http://www.nahc.ca.gov/califindian.html> (accessed August 12, 2011).

¹⁸ Ibid.

20th century works of Kroeber, Harrington, Dubois, Sparkmen, and Strong,¹⁹ as well as from oral histories passed down through generations of Juaneño/Acjachemen people. The Acjachemen were known to exist in large groups in village sites, two of which are identified in the records as existing within the San Mateo Creek area near the mouth of San Mateo Canyon, and the largest and most significant of them is “Panhe,” translated from the Acjachemen language as the place “at the water.”²⁰ Today’s Acjachemen affirm their ancestral knowledge that prior to colonization Panhe referred to the entire valley that now constitutes parts of Camp Pendleton and San Onofre State Beach. Panhe was also known to provide the mission with much of the labor that built the mission in 1776,²¹ and many of today’s Juaneño trace their ancestry directly to Panhe from mission records.

Panhe is thought to be at least 9,000 years old, making it one of just a few remaining sites of such antiquity in the state. In 1981 Panhe received an official Determination of Eligibility for the National Register of Historic Places (NRHP)ⁱ by the National Park Service, and in the same year it was recorded with the State Historic Preservation Office, at which point it became organized as the San Mateo Archeological District (SMAD). The SMAD is comprised of four

¹⁹ Betty Rivers, *The Pendleton Coast District: Ethnographic and Historical Background*, Exhibit 4, The City Project/United Coalition to Protect Panhe letter to Thomas Street at the National Oceanic and Atmospheric Administration (NOAA) and Carlos Gutierrez, United States Secretary of Commerce, May 28, 2008.

²⁰ Stephen O’Neill, *Their Mark Upon the Land: Native American Place Names in Orange County*, (unpublished graduate paper, California State University at Long Beach, 1996).

²¹ While the scope of this project does not allow for (or necessarily need) a detailed historical analysis of the history of the mission system and its treatment of Indians, it does bear mentioning that there is a wide body of academic work that confirms the reality of the conditions of forced labor and servitude that the mission priests subjected the indigenous populations to, in addition to the ravages of foreign diseases that dramatically reduced their numbers throughout the 18th and 19th centuries.

archeological sites known as CA-ORA-22, CA-SDI-4282, CA-SDI-4535, and CA-SDI-8435, encompassing an area of approximately 480,000 square meters.²²

The eligibility documentation by archeologists details the archeological evidence found at the sites which demonstrate its historical importance, including tools, home sites, midden (the remains of the domestic waste of day to day living), fire hearths, and burials. No archeological excavations are recorded until 1949 and 1980, and it is estimated that although there has been significant disturbance to some areas of the district due to road building, approximately 322,000 square meters of the area “retains some contextual integrity.”²³ In 1989 the California Native American Heritage Commission (CNAHC) added Panhe to its Sacred Lands inventory as a result of extensive documentation by Juaneño elders.²⁴ Human remains had been found within the boundaries of San Onofre State Beach, once in 1969 during construction of the nuclear plant, and then again years later, during a construction project by the military at Camp Pendleton, when 12 sets of remains were found.²⁵ Overall, it should be understood that the site today referred to as Panhe is situated within San Onofre State Beach (governed by the California Department of Parks and Recreation), the San Mateo Creek watershed, and Camp Pendleton Marine Base (owned by the Department of the Navy), thus existing within a complex tangle of legal relationships, all in addition to Panhe’s cultural significance to the Acjachemen/Juaneño people, who are a state, but not federally recognized tribe.

²² U.S. National Park Service, *Determination of Eligibility Notification, National Register of Historic Places*, Dec. 31, 1981. Note: Some sources claim SMAD as consisting of six or seven sites.

²³ Ibid.

²⁴ Dave Singleton (Program Analyst at CNAHC), email message to author, Aug. 24, 2011.

²⁵ California Coastal Commission, *W 8b Revised Staff Report and Recommendation on Consistency Certification*, file date March 26, 2007, 190-191.

The Controversy

That Orange County has a growing need for traffic mitigation is indisputable. However, in the context of an economic recession and equally dismal economic realities at the state level, achieving the goal of traffic relief by means of private TCA bond funds is the only option for the foreseeable future. The first 10 miles of the proposed 241 extension was relatively free of controversy, except for a section of the road that was to extend into the Donna O'Neill Land Conservancy, an ecologically sensitive 1,200 acre area within Rancho Mission Viejo and the San Mateo watershed. The bulk of the controversy emerged when the public became aware that the last 6 mile segment would cross the border into Camp Pendleton and the state park where it would finally connect to highway 5, dangerously close to Trestles. In this section, the proposed road would run parallel to San Mateo Creek for approximately 2 miles, adjacent to the campground and a scant 20 feet from Panhe.²⁶

Jerry Collamer, one of the most highly visible activists and Sierra Club members during the years of the controversy, spoke with me about the history of the toll road uproar. The public controversy surrounding the toll road can be characterized as having several stages, beginning with Rancho Mission Viejo's development plan during the 1990's. Collamer says that it was "a slow fire that built, starting around 2002, and the fire burned because of the Sierra Club."²⁷ Upon learning of the scope of the plan and its location in and near environmentally sensitive areas in the San Mateo watershed, alarmed activists (primarily associated with the Sierra Club and other

²⁶ On Feb. 6, 2008 the California Coastal Commission conducted a public hearing to hear testimony from all sectors of the community weighing in on the toll road, drawing some 3,500 people. Milford Wayne Donaldson, State Historic Preservation Officer, when discussing the impacts of the proposed road, testified that "...all we know is the impact from that freeway is sitting right on top of the site." Reporter's Transcript of Proceedings, Agenda Item No. 8b. Hearing on Consistency Certification No. 018-07 before the California Coastal Commission, Feb. 8, 2008.

²⁷ Jerry Collamer, personal interview, Aug. 25, 2011.

environmental groups who by 2000 were committed to fighting the Ranch development) intervened. Knowing full well that the ultra-conservative, pro-development powers-that-be that Orange County is so well known for would approve a plan to develop the land, the activists created their own development maps based on principles of smart growth in the interest of minimizing the environmental impact. According to Collamer, the final Ranch Plan approved by the county clearly reflected the designs of the activists' maps in tandem with the plans of the architects hired by RMV. Collamer said that after the Ranch Plan was approved, their next big fight would be about the road.

According to Collamer, initially the main concern of the Sierra Club was the environmental issues associated with the road's disturbance to San Mateo creek, which they saw as completely destroying the several mile stretch of creek that the road would traverse, despite TCA's denial of the claim. The creek bed would likely be completely torn up as the highway's 100 foot pillars would have to be anchored in bedrock, totally disrupting the creek's flow by diversion. More alarming was the effect such dramatic disruption would have downstream where the creek empties out into Trestles. It is well known that one of the primary determinants of wave quality is the topography of the ocean bottom. Excessive silt deposits washing downstream from road construction would undoubtedly degrade the near perfect wave quality that Trestles is famous for, an effect that would be totally unmitigatable once inflicted. Collamer, a surfer and former Madison Avenue advertising executive prior to becoming an environmental activist, said that the Sierra Club fruitlessly tried to come up with a slogan or idea that could easily sell the public on the need to fight the road, but appeals to save the environment were not working. It was not until one day while manning an information table at the Trestles parking lot where surfers park to walk to the beach that the idea came. In a conversation with a surfer about the

proposed toll road, Collamer flippantly said, “Enjoy your session. It’ll probably be your last one.” The surfer turned around and replied, “What did you just say?” Collamer repeated his comment, and confident that he had gained the surfer’s attention told him about how the road would likely destroy Trestles. Forty five minutes later the surfer was back with 200 other surfers who wanted to know more. It was then that he realized he had hit upon his cause celeb: it was Trestles that had to be saved. Within weeks, funds were donated to the Sierra Club to pay for bumper stickers, t-shirts and lawn signs that read “Save Trestles, Stop the Toll Road.” The campaign to save Trestles was on and it would prove to be the flashpoint that galvanized the public’s attention. Bumper stickers and lawn signs appeared everywhere in San Clemente and beyond (and can still be seen to this day). The news that Trestles was in danger spread like wildfire not just through California, but it went worldwide once it hit the surfing community.²⁸ The “Save Trestles” campaign became an international issue.

In April 2004, a bill opposing the construction of the road through San Onofre failed to pass the California legislature due to lobbying from the construction, labor and business sector.²⁹ Four lawsuits were filed against TCA. One of the suits was brought by the State Attorney General’s office on behalf of the California Native American Heritage Commission (CNAHC) in 2006, claiming that the road would violate Public Resources Code 5097.9. The statute states that:

“[n]o public agency...shall in any manner whatsoever interfere with the free expression or exercise of Native American religion as provided in the United States Constitution and the

²⁸ Surfing has become a multi-billion dollar international industry. The Association of Professional Surfers, which holds the world’s most prestigious high stakes surfing contests in international locations such as Brazil, France, South Africa, Tahiti, Portugal, and Australia, holds four of its contests in the US with Trestles being one of the premier locations.

²⁹ “Battle Over Foothill Toll Road Rages,” *Building Trades News*, http://www.buildingtradesnews.com/index.php?option=com_content&view=article&id=162:battle-over-foothill-south-toll-road-rages&catid=1&Itemid=77 [accessed Aug. 24, 2011].

California Constitution; nor shall any such agency...cause severe or irreparable damage to any Native American sanctified cemetery, place of worship, or religious or ceremonial site, or sacred shrine located on public property, except on a clear and convincing showing that the public interest and necessity so require.”³⁰

TCA’s permitting process necessitated the need for an Environmental Impact Statement and Supplemental Environmental Impact Report (EIS/SEIR) to ensure its compliance with federal laws,³¹ and was released in May 2004. The permitting process hinged on the need for TCA to be able to obtain certification by the California Coastal Commission, rendering the project as consistent with the Coastal Zone Management Act (CZMA, or Coastal Act) and the California Coastal Management Plan (CCMP). On February 6, 2008, by a vote of 8-2, the Coastal Commission denied the certification, arguing that it was inconsistent with the Coastal Act based on the road’s impact to, and policy violations of environmentally sensitive habitat areas (ESHA), wetlands, public access and recreation, surfing, public views, water quality, archeological resources, energy and vehicle miles traveled, and conflict resolution.

³⁰Native American Heritage Commission v. Foothill Eastern Transportation Corridor Agency, *Complaint for Injunctive Relief, Superior Court of California, County of San Diego, North County Branch*, March 22, 2006, 5. <http://www.sacredsitesca.com/images/lawsuit%20Panhe.pdf>. [Accessed Aug. 24, 2011]

³¹ TCA conducted its Environmental Impact Report as per the California Environmental Quality Act (CEQA) between 1989 and 1991, which led to the choice of the preferred alternative, also known as the “Green Alternative.” In 1999, a change in federal law intending to streamline processes between government agencies (called the “Collaborative”) including TCA, Caltrans, US Army Corps of Engineers, US Fish and Wildlife, California Fish and Game, EPA, US Department of Transportation, and the Federal Highway Administration, proved an obstacle to the project when all the federal agencies except the FHWA abandoned the so-called Green Alternative after the release of the EIS/SEIR, asserting the need for further environmental studies and reopening the debate for other build alternatives. Source: Thomas Margro, Chief Executive Officer Transportation Corridor Agencies, “Accelerating the Project Delivery Process: Eliminating Bureaucratic Red Tape and Making Every Dollar Count,” testimony before the House Committee on Transportation and Infrastructure Subcommittee on Highways and Transit United States Congress, Feb. 15, 2011, <http://republicans.transportation.house.gov/Media/file/TestimonyHighways/2011-02-15%20Margro.pdf> [accessed Aug. 24, 2011].

Besides the opposition of the Coastal Commission, other government agencies that opposed the project included the State Department of Parks and Recreation, CNAHC, SHPO, and the federal Advisory Council on Historic Preservation. All agreed with the Coastal Commission's determination that based on the draft EIS/SEIR, no reasonable mitigation was possible in all the listed areas of concern. In particular, regarding the archeological resources, the Commission's report stated that "the impacts to the Juaneño/Ajachemen people who currently use the ceremonial site are completely unmitigated."³² Also at issue in the report was the fact that Panhe (as well as Trestles) should have been evaluated as a Traditional Cultural Property (TCP) based on the advice of SHPO, which was not done,³³ and because it was not, there was inadequate information to make a determination for consistency. After the consistency certification was denied by the Coastal Commission, the only tool left available to TCA was to appeal to the US Commerce Department who had the power to override the denial. Eight months later, the Secretary of Commerce denied the override request based on the fact that the project was not necessary for interests of national security, and that fact that there were reasonable alternative routes available.³⁴ It was the final nail in the preferred alignment's coffin, and TCA would have to go back to the drawing board to explore the other options.

³² California Coastal Commission, *W 8b Second Addendum to Commission Packet for Energy, Ocean Resources, and Federal Consistency Division (update for the Staff Recommendation)*, 4.

³³ Ibid.

³⁴ U.S. Secretary of Commerce, *Decision and Findings, in the consistency appeal of the Foothill/Eastern Transportation Corridor Agency and the Board of Directors of the Foothill/Eastern Transportation Corridor Agency from an objection the California Coastal Commission*, Dec. 8, 2008.

Overview of the Decision

Throughout and preceding the years of the Save Trestles campaign, TCA's marketing strategy was to advertize the toll road as the only hope of providing traffic relief in OC, with nary a word about the Ranch Plan. The strategy was useful in downplaying the Ranch's development plan, which San Clemente residents knew would heavily impact the town's already crowded streets and beaches. Predictably, when it *was* mentioned in the press or in public meetings by its advocates, it was praised for how many jobs it would create and how it would positively affect business in the area. Relative to the toll road, the Ranch development became somewhat like the proverbial elephant in the living room – known by everyone but not talked about openly, least of all by TCA. By 2008 when the Coastal Commission denied the consistency certification, the national economic crisis was in full swing – the real estate bubble had burst, the sub-prime mortgage debacle had been exposed for the scam it was, and with California being particularly hard hit, the last thing south Orange County needed was an upscale new development for the wealthy, and everyone (well, almost everyone) knew it.

Given the astonishing victory for the Save Trestles campaign, which focused the public's attention primarily on the road's damaging effect to surfing, the degree to which Panhe affected the Commission's decision is not immediately clear. After the denial, when TCA filed an appeal with the US Secretary of Commerce, coalitions (including UCPP, Surfrider Foundation, San Onofre Foundation, Sierra Club, National Defense Council, and others) regrouped to fight the 241 extension continued their fight by petitioning the Secretary's office not to override the denial. UCPP formed a partnership with The City Project, a legal firm based in Los Angeles

dedicated to environmental justice causes.³⁵ Compiled by UPCC as a two inch thick book of supporting documents (many of them constructed by Juaneño tribal members) listed as legal exhibits, an examination of the documents is revealing for how Panhe figured in to the Coastal Commission's decision.

Much of the documentation focuses on the draft EIS/SEIR for what it had to say about impacts to the environment, but also highlights its deficiencies (both aspects which were primarily what the Coastal Commission based their decision on), in addition to two public hearings on the matter in which thousands of people attended – interestingly, hearings that were requested by TCA.³⁶ UCPP and The City Project argued that there was no legal basis for the Secretary of the Commerce to override the denial. They pointed out the other government agencies that were against the road project in the interest of protecting Panhe and San Onofre: the California Native American Heritage Commission, the California Department of Parks and Recreation, the federal Advisory Council on Historic Preservation, and the State Historic Preservation Office. Among their objections, each agency highlighted problems the road posed for Panhe. The CNAHC noted that among the deficiencies of TCA's draft EIS/SEIR was the fact that nowhere in the document was mention of Panhe's status as a sacred site listed on the CNAHC's Sacred Lands Inventory, nor that Panhe had not been evaluated as a Traditional

³⁵ The mission statement of The City Project says that: "The mission of The City Project is to achieve equal justice, democracy, and livability for all. We carry out our mission by influencing the investment of public resources to achieve results that are equitable, enhance human health and the environment, and promote economic vitality for all communities. Focusing on parks and recreation, playgrounds, schools, health, and transit, we help bring people together to define the kind of community where they want to live and raise children. 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."

³⁶ Jerry Collamer, personal interview, Aug. 25, 2011.

Cultural Property (necessary to be in compliance with SHPO), and that TCA failed to include descendants of Panhe in its Native American consultation.³⁷ The federal Advisory Council on Historic Preservation and SHPO both concurred that the impacts to Panhe could not be mitigated. And while the State Department of Parks and Recreation focused on the general unmitigatability of the road for the entire park, they did point out the fact that TCA offered to give \$100 million to the department for mitigation, something they saw as a “political gesture.”

³⁸ As for the Coastal Commission itself, most of the members seemed to understand the significance of Panhe and its need for protection. One commissioner in particular, Mary Shallenberger (whose quote appears at the beginning of this paper) even went so far as to argue that it only took one issue to be inconsistent with the Coastal Act to be reason enough for denial, and for her, the protection of Panhe alone was reason enough to vote no.³⁹

But UPCC and The City Project’s argument emphasized that *people* would be hurt by the road:

“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...any benefits [of the road] would be dwarfed by the road’s extensive damage to the environment, archeological, and cultural resources, and by discriminatory impacts to Native Americans...”⁴⁰

³⁷ Rebecca Robles, Coordinator United Coalition to Protect Panhe, Robert Garcia, Executive Director and Counsel The City Project, and Angela Mooney D’Arcy Policy Director The City Project, Letter to Carlos Gutierrez, United States Secretary of Commerce, and Thomas Street, NOAA Office of General Counsel for Ocean Services, May 28, 2008.

³⁸ California Department of Parks and Recreation Commission letter to the California Coastal Commission, Jan. 25, 2008.

³⁹ Statement of Mary Shallenberger, Reporter’s Transcript of Proceedings, Feb. 6, 2008, at 401, 402-403.

⁴⁰ The City Project and United Coalition to Protect Panhe letter to US Secretary of Commerce and NOAA, pg. 2.

Referring numerous times to the egregious history of the treatment of California Indians by the US and California governments,⁴¹ they pointed out that because “the Acjachemen people will lose an ancient village, and current religious, sacred, ceremonial, and burial site...[n]o one else will,”⁴² it would constitute TCA’s violation of both Title VI of the Civil Rights Act of 1964 and the California Government Code section 11135, which prohibit discrimination based on race.

The City Project went further to argue that if the road were built, TCA would also be in violation of California environmental justice law, defined 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”⁴³ and that it would also violate the Coastal Commission’s own rules for a coastal plan that ensured equal public access to beaches for people of all races, cultures, and income.⁴⁴ Finally, The City Project argued that TCA would also violate the Religious Freedom Restoration Act (RFRA), the Religious Land Use and Institutionalized Persons Act of 2000, and the First Amendment because the road “would unduly burden the exercise of religion by the Acjachemen people at the sacred site of Panhe...”⁴⁵ In other words, there is enough documentation to conclude that Panhe as a Native American sacred

⁴¹ The City Project referred more than once to the Supreme Court decision in *Tee-hit-ton v. United States (1955)* in which the court opined that “[e]very schoolboy knows that 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.” As well, they referred to *Thompson v. U.S. (1959)*, where the Court stated “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 scattered throughout the state, and their tribal or band origin generally lost.” They also cited a plethora of research that affirmed the discriminatory treatment of California Indians at the hands of governments.

⁴² *Ibid.*, pg. 20.

⁴³ California Government Code §65040.12.

⁴⁴ The City Project and United Coalition to Protect Panhe letter to US Secretary of Commerce and NOAA, pg. 22.

⁴⁵ *Ibid.*, pg. 24.

site held more sway in the Coastal Commission's decision to deny consistency certification than most people in the end realized.

Environmental Justice Frameworks, Scale, and Sovereignty

While The City Project's arguments against TCA were solidly based in law, it also relied on testimony from Acjachemen people themselves. The collection of documents presented to the US Secretary of Commerce and the NOAA includes dozens of letters and comments from Native people, from the Acjachemen and other tribal nations, local and non-local alike, as well as transcripts of testimonies given by Native Americans and tribal leaders at public hearings held by the NAHC and the Coastal Commission. Over and over, they urgently argued the need for Panhe to be protected, and emphasized the massive loss of indigenous lands as a result of vast differences in worldviews between those of their ancestors and those of European settlers, who they saw as having

“long [ago] forgotten how to live in appropriate relationship with the natural environments of their own ancestors...[t]hey came without respect, without the knowledge of the necessity of living in reciprocity and generosity, without the humility to value all aspects of creation as having equal importance, all because of their perceived superiority and authority over nature and the native peoples.”⁴⁶

Consistently they reflected a sense of alarm and grief at the regularity of the disturbance of burials and other sacred places in southern California,⁴⁷ and the complete lack of respect that

⁴⁶ Chumash Maritime Association letter to Patrick Kruer, Chairman of the California Coastal Commission, 3 Feb., 2008.

⁴⁷ According to the California Cultural Resources Preservation Alliance (an alliance of American Indians, scientific communities, and preservation advocates who work together for the preservation of archeological sites and other cultural resources), “archeologists estimate that at least 90 percent of the known archeological sites that once existed in the county have been destroyed by development.” California Cultural Resources Preservation Alliance brochure.

their ancestors are continually treated with in the name of progress. Another letter from a Native American organization lamented the differences this way:

“And...here we are, once again, as native people, in another struggle to protect land that is deemed by us to be sacred. We inherited this obligation from our ancestors. It may [be] 2008, but those obligations hold a sanctity that we honor. There are numerous communities who are here representing their interest, from surfers protecting their sport, to homeowners fearful of encroaching populations and dwindling real estate prices. Yet, we argue, none of them could possibly understand our dilemma as the original people of this land. Our loss has been significant and yet we continue to fight for the dwindling remnants of land ou[r] family has known for countless generations. This is a fact and not a solicitation of sympathy!”⁴⁸

The arguments Acjachemen and other Native people made for the protection of their lands reflected a much different perspective than the others mentioned in the above quote – the surfers protecting their sport and homeowners concerned about real estate prices. Even the environmentalists whose interests were the protection of endangered species and natural resources, and the agencies who were primarily interested in protecting the state park for the use of the public were doing so based on certain conceptions of the land that may have been similar in certain regards (like how the land and the life that depends on it should be treated, and how it should be used by people), but were fundamentally different from the concerns of the Native people. Their arguments reflected a sense of a relationship to place that may have *included* ideas about protecting life and natural resources, and how they used the land, but were ultimately transcended by the meaning the land held for them based on their historical continuity as a people and their spiritual connection to it. That meaning was infused with a sense not only of sanctity, but responsibility for what had been bestowed upon them by their ancestors in a relationship of trust that describes the proper way to live on and care for the land. But it also points to the loss of power to exercise that responsibility.

⁴⁸ Ti’at Society/Traditional Council of Pimu, letter to Patrick Kruer, Chairman of the California Coastal Commission, Feb. 4, 2008.

When environmental justice discourse is applied to non-Native American communities, it automatically invokes racism as the culprit when people of color experience higher incidence of noxious facility siting in their communities (usually in urban settings), or in other contexts where a marginalized community has been disproportionately affected by the processes of industry or modernization. As scholars have pointed out, proving racism is easier said than done. Cutter, Holm, and Clark point out that when geographic scale is taken into account, research data can produce inconsistent results when trying to demonstrate racism based on quantitative analyses.⁴⁹ Pulido complicates the argument by interrogating how racism is defined; without understanding the historical processes that create the communities who are disproportionately affected by toxic industries, she argues, we cannot “move to a more meaningful and nuanced understanding of what environmental racism is, how it is produced, and how an anti-racist and left movement can develop.”⁵⁰ Underlying Pulido’s inquiry is the question of whether “‘race’ or ‘class’ is responsible for discriminatory pollution.”ⁱⁱⁱ Likewise, David Harvey in his theoretically dense analysis of EJ argues that a dialectical approach to EJ would help us to understand and move beyond the “militant particularisms” that can prevent a unitary response to environmental racism from the left.⁵¹ Indeed, Harvey makes a compelling argument for transformative behavior that can rise out of the contradiction of oppositions.⁵²

⁴⁹ Susan L. Cutter, Danika Holm, and Lloyd Clark, “The Role of Geographic Scale in Monitoring Environmental Justice,” *Risk Analysis*, Vol. 16, no. 4, 1996.

⁵⁰ Laura Pulido, “A Critical Review of the Methodology of Environmental Racism Research,” *Antipode*, 28:2: 142-159.

⁵¹ Pulido, *A Critical Review*, 144.

⁵² David Harvey, *Justice, Nature, and the Geography of Difference*, (Oxford: Blackwell Publishing, 1996): 54.

Arguably, these authors' ideas are rooted in certain fundamental assumptions: first, they are based on a paradigm of social justice which assumes the authority of the nation-state under which the victims of social injustice are presumably subjected with their consent (evidenced, for example, by their belief in the social contract, or their loyalty to the state) even if as ethnic minorities they are "others." Harvey does account for the heterogeneity of situated knowledges, however within certain parameters:

"It is the social construction of situatedness (places) at different scales which matters and in that social construction the agency of personal political choice and commitment, of loyalties, brooks large, however embedded individuals may be in macro-processes of capital accumulation on the world stage."⁵³

Harvey seems to acknowledge not just geographic scale, but the scale of identity politics as well, locating it within a Marxist framework, which leads to a second point. Racism at its most basic level is the denial of the benefits of national citizenship (particularly equality), either covertly or overtly. Equality in a democracy means that all people, regardless of ethnicity or race, have equal opportunity to enjoy the potential advantages available to them; a comfortable life based on financial security, fair wages, a clean environment, education, etc. It can be argued that these are the material benefits of a capitalist democracy, which reflects a Marxist framework to which Harvey refers (as well as inferring a distributive model of justice). As such, the "different scales" that Harvey refers to are thus *political scales within the framework of the nation-state*.

In order for a conception of environmental justice to be relevant to a group of people, it must fit within ideational boundaries that are meaningful for them. Indigenous people fighting for political autonomy from the hegemony of the nation-state are fighting the forces of

⁵³ Harvey, *Justice, Nature, and the Geography of Difference*, 363.

colonialism while they are fighting the forces of capitalism – all aimed at the control of resources – with colonialism as the container for capitalism. Framed as settler colonialism, which Wolfe argued is far more than an historical event, but a genocidal structure designed to eliminate the Native via multiple technologies aimed at political and physical erasure; the purpose of control is the settler’s interest in accumulating access to territory.⁵⁴ Native peoples are thus in the position of fighting not only to protect their lands, but also for their continued existence as autonomous political entities. EJ for indigenous peoples, therefore, must be capable of conceiving of *political scale* beyond the homogenizing nation-state.⁵⁵ It must conform to a model that can frame their issues in terms of their indigenous colonial condition, and can affirm decolonization – a discourse of liberation – as a potential framework within which environmental justice can be made available to them. Environmental justice for Native peoples is a necessary element of the project of decolonization. It must also recognize that racism is imbricated with colonialism in a logic of white supremacy, as Andrea Smith argues. In this view, the logic of genocide is one of three pillars of white supremacy:

“[Indigenous peoples] must *always* be disappearing in order to enable non-indigenous peoples’ rightful claim to land. Through this logic of genocide, non-Native peoples then become the rightful inheritors of all that was indigenous – land, resources, indigenous spirituality and culture.”⁵⁶

Indigenizing EJ by centering Native issues means it should conform to principles outlined in indigenous decolonization theories, adhering to a critical and indigenous methodology,

⁵⁴ Patrick Wolfe, “Settler Colonialism and the Elimination of the Native,” *Journal of Genocide Research*, December 2006, 387-409.

⁵⁵ Similarly, David Schlosberg argues that justice is a concept with multiple meanings, and that in the realm of environmental justice the recognition of cultural difference are integral to the demands for justice that should not be limited to a system of equitable distribution.

⁵⁶ Andrea Smith, “Indigeneity/Settler Colonialism/White Supremacy,” unpublished essay, 2010.

defined as “research by and for Indigenous peoples, using techniques and methods drawn from the traditions, and knowledges of those people.”⁵⁷ While indigenous peoples’ lived experiences vary from place to place, there are common realities they all share in the experience of colonization which make it possible to generalize an indigenous methodology while recognizing specific, localized conditions. Linda Tuhiwai Smith, quoting Franke Wilmer, notes that “the indigenous voice speaks critically to the narrative (some would say the myth) of the nation-state – the hierarchical, incorporative, coercive state that exists, in part, to facilitate the process of creating economic surplus on an international scale.”⁵⁸ Creating economic surplus is possible from not only the exploitation of indigenous lands, but from the commodification of them also – that is, as Smith argues, the construction of land as property. It is the construction of land as property that necessitates the constant migration of people, which relies on the “displacement and disappearance of indigenous peoples who emerge from the land.”⁵⁹ Arguably, there are few places in the US where the commodification of land and consequent massive in-migration and erasure of the indigenous population is so pronounced as it is in southern California.

McCaslin and Breton’s argument about what a decolonized American justice system would look like raises the powerful and important idea that decolonization applies not only to the colonized, but to the colonizer as well.⁶⁰ They note that in colonial systems, “positive” law relies

⁵⁷Norman K. Denzin and Yvonna S. Lincoln, “Preface,” *Handbook on Critical and Indigenous Methodologies*, ed. Norman K Denzin, Yvonna S. Lincoln, and Linda Tuhiwai Smith (Los Angeles: Sage Publications, 2008): x.

⁵⁸ Linda Tuhiwai Smith, *Decolonizing Methodologies: Research and Indigenous Peoples*, (London: Zed Books, 1999): 111.

⁵⁹ Smith, “White Supremacy,” 23.

⁶⁰ Wanda McCaslin and Denise C. Breton, “Justice as Healing: Going Outside the Colonizers’ Cage,” *Handbook on Critical and Indigenous Methodologies*, ed. Norman K Denzin, Yvonna S. Lincoln, and Linda Tuhiwai Smith (Los Angeles: Sage Publications, 2008). 511-529.

upon rule by force, whereas in indigenous communities “law is not about coercion but about learning how to move ‘in a good way’ with the order of things. It is not imposed but organic.”⁶¹ In essence, justice for indigenous peoples is about restoring balance in relationships that are out of balance. Western legal theory emphasizes what we can call a distributive concept of law as “fair and equitable” and “laws hold insofar as those in economic and political power say they do.”⁶² But indigenous peoples rarely experience Western law as either fair or equitable, and for them (and arguably all people) law is an enforcer of oppression. For this reason, the authors argue three points:

1) that decolonization is good for both the colonizer and the colonized because it can restore right relationship to all involved; “What is destructive and catastrophic to the well-being of one cannot be good for the other. To dehumanize others can only dehumanize the dehumanizer.”⁶³

2) Rule by force cannot somehow become benevolent or even benign. It punishes the colonized for who they are.

3) Colonization has steered the colonizer away from his own ancestral wisdom. Decolonizing the colonizer is necessary so that he can once again learn how to respect himself and others.

⁶¹ Ibid., 512.

⁶² Ibid.

⁶³ Ibid., 513.

A restorative model of justice is one element of the kind of paradigm shift needed between the dominant culture and Native communities; it is more in line with indigenous worldviews and resonates with critical race theory when applied to indigenous communities.⁶⁴ Differentiating a mainstream EJ discourse from an indigenized EJ discourse must proceed from two primary assumptions:

1) that indigenous peoples face political circumstances that differ markedly from other ethnic minorities; i.e. their pre-nation-state connections to ancestral homelands and traditional cultures which they are constantly fighting to protect mean a different relationship to nation-states, as they are political relationships characterized by struggles for political autonomy, often (though not always) based on treaty relationships to states.

2) Indigenous epistemologies reflect a different relationship to land, a relationship that does not separate people or culture from the land, nor creates anthropocentric hierarchies within nature; simply stated, non-human life forms have agency in a way that they do not in dominant Western cultures. Likewise, the religious significance of a place is the spiritual glue that binds them there.

These perceptual differences manifest problematically in legal ways, for example, in the protection of sacred sites. It is difficult enough to obtain protection based on the human elements of sanctity such as a site being a burial ground, much less for the significance a site may have for its other religious meaning, such as its function as a ceremonial site, or as a place that provides important materials in the practice of culture (such as plants for baskets or clay for pottery), or its place in the cosmology of a people.

⁶⁴ For example, Brayboy's adaptation of critical race theory for indigenous peoples takes as its primary assumption that colonization is endemic to society, rooting it in relationships of domination and subjugation.

In the case of Panhe, legal protection was available by virtue of its location on publicly owned lands that had been designated as an “archeological resource” deserving of protection, a framework that recognizes Panhe’s relevance to the Acjachemen people (framed as a “cultural resource”). Panhe’s eligibility status for the National Register of Historic Places and its listing on the CNAHC Sacred Lands Inventory were critical as a protective mechanism, just as an evaluation of it as a Traditional Cultural Property⁶⁵ likely would have been. However, protective frameworks of Panhe based on the construction of its national historical significance also rather problematically frames Panhe in terms of its significance to *all* American people, Acjachemen and non-Acjachemen alike. These kinds of claims amount to a dialectic whereby settler society appropriates Native culture for itself, based on *our* collective history, *our* heritage as a nation, not exclusively Acjachemen history or heritage. Because Acjachemen history and heritage is *ours*, it is worthy of protecting. Acjachemen subjectivity is once again effectively submerged into a homogenizing American discourse aimed at erasure of the Native. Ironically, Panhe was protectable *because* of its absorption into what eventually became publicly owned or leased lands, subject to laws designed for the homogenized masses of American citizens, not necessarily or primarily because of its inherent meaning for Acjachemen people.

Political Differentiation

The story of Panhe demonstrates how the Acjachemen nation as constitutionally pre-existing sovereign people – even though they are not federally recognized – asserted their political identity as Native people to protect their ancestral lands in response to the threat of the inevitable environmental destruction that would be committed there (constituting further

⁶⁵ A Traditional Cultural Property is an official designation as defined by National Register Bulletin 38, under the National Park Service within the Department of the Interior.

religious desecration and limited access to a religious site) had the toll road been built. Their ancient historical ties to the land was the indisputable vehicle available for them to argue for the protection of the land, while other protective mechanisms were based on protecting the environment itself, divorced from any aspect of connection between humans and the land (aside from how their recreational use of it would be affected).⁶⁶ By and large, this is not a political or ideological avenue that is available to other ethnic minorities in their struggles for environmental justice. Laura Pulido's work on environmentalism and subaltern communities in her book *Environmentalism and Economic Justice: Two Chicano Struggles in the Southwest* highlights this fact. The stories of the United Farm Workers unionizing to protect marginalized workers and of the Ganados del Valle in New Mexico, while involving issues of identity, culture, and power relationships, nonetheless situate their struggles for justice squarely in the realm of distributive justice, in decidedly economic terms. In a different but similar vein, Julie Sze's *Noxious New York* is a classic example of marginalized communities of color who engage their political battles for EJ within the parameters of their status as national citizens. What is *not* at issue in either example is any claim to land linked to struggles for the protection of sacred sites based on historical continuity, political identity or spiritual significance; rather, freedom from environmental victimization based on their subaltern state as national citizens is the focus of their struggles.

Environmental justice is inescapably bound up in identity politics, and the political differentiation of Native people is acutely so. In the settler colonial state, one of the usurpations of power materializes as the state becomes the arbiter of identity for indigenous peoples. In the

⁶⁶ The City Project – an environmental justice law firm – did, however, raise the idea that the toll road was an issue of transportation justice because building a private road through a public park would disproportionately affect low income people also, by limiting access to affordable recreation and their inability to afford the toll.

US, without the official designation of federal recognition, an Indian group or tribe may be Indian by self-definition, amounting to no more than an ethnic classification, or even by state recognition (as is the case with the Acjachemen/Juaneño), but it does not necessarily attach to the rights associated with political recognition granted through the legal fictions of federal Indian law. Federally recognized tribes, even those without land bases, in theory have the ability to acquire land and have it placed in trust status with the Bureau of Indian Affairs, making it reservation land (as difficult as this process can be). As Indian trust land, it then becomes subject to the jurisdiction of federal Indian law and a certain level of “sovereignty.” *If* the Juaneño were federally recognized, and *if* the Juaneño were to be able to overcome the nearly impossible odds that would result in their acquiring Panhe, and *if* they could achieve the monumental task of having Panhe placed into trust status, by virtue of their state-sanctioned sovereignty, they may theoretically have had the power to stop the road and protect their sacred site via the mechanisms accorded to them through federal Indian law. The Juaneño, like many other tribes and individual Indians in the US, inhabit an identity grey zone politically – not necessarily non-Indian in the eyes of the state of California and the US, but not necessarily Indian in the eyes of the nation-state.⁶⁷ As a tribe, they are not subject to the laws that would support what the US likes to call “limited sovereignty,” but as individual Indians, Juaneños are entitled to some of the benefits guaranteed under some legal definitions of “Indian.”⁶⁸ So to conceptually transcend the limits that the nation-state imposes on Native people through legal definitions of “Indian” or “tribe,” EJ

⁶⁷ In 1979, the Juaneños filed an application with the BIA for federal recognition. After a grueling 32 year process, they were denied for a final time in March of this year on grounds that they did not meet 4 out of the 7 necessary standards set forth by the US government.

⁶⁸ According to Eva Marie Garoutte’s research, “A 1978 congressional survey found no less than *thirty-three* separate definitions of Indians in use in different pieces of federal legislation.” *Real Indians: Identity and the Survival of Native America*, (Berkeley: University of California Press, 2003): 16.

frameworks must be able to situate tribal peoples' struggles to protect sacred places based on their relationality to land, not artificial constructions of identity.

An indigenized EJ discourse that provides an alternative framework for sacred site protection for Native peoples in the US (and potentially beyond), must be able to conceptually reach beyond the legal limitations placed on those who are still undergoing colonization. The Acjachemen/Juaneño people, despite the US' assessment that they do not meet the criteria deemed legitimate for political identification as Indians, nonetheless know who they are by virtue of their continuity with the land holding the bones of their ancestors. They do not simply cease to exist as a people with a collective identity rooted in an ancient past, distinct from settler society, nor does the lack of federal recognition negate or in any way diminish their assertions of sovereignty and sense of nationhood. But indigenous nationhood and "sovereignty" must be distinguished from other ethnic nationalisms, and untangled from the problematic issues it presents.

Native American "nationalism" is best described as the attachment to, and expression of, tribal subjectivity within the context of political and affective relationships—relationship to tribe and relationship to the US. With hundreds of tribes with distinct cultures still extant in the US, there are innumerable potential expressions of "nationalism." But Andersonian nationalism conceived as an imagined community characterized by contrived symbols of unity, or even a common language and shared history, does not account for the ways indigenous peoples are related through ancient systems of kinship with unbroken connections to place that can span tens of thousands of years. Even the pan-Indian movement of the 1960's that emerged among other expressions of ethnic nationalisms is not synonymous with nationalism. Vine Deloria, Jr. argued that the many social justice actions that surfaced out of Indian country at the time merely

“ethnicized” Indian conditions and rights. The growth of the urban Indian organizations perpetuated this trend of Indians as an ethnicity in tandem with the other ethnic movements of the time; within the broader context of the social justice movement the concept of “Indian” was more appropriate because “the public could deal with Indians; it was never quite certain about tribal affiliations.”⁶⁹

Conceiving of Native American collective identity during the civil rights years of high profile political activism was a sort of default way of depicting Native concerns that inevitably pointed to their status as sovereigns within the US, construed as “nations” within a nation. For Indians, it was more an expression of solidarity connecting disparate tribal communities than an imagined community of nationhood. Forced inclusion into the fabric of the US nation-state has resulted in generations of Indians who regard themselves as American citizens as well as citizens of their tribal nations (and the imposition of cookie cutter tribal constitutions modeled on the US form of government during the Indian Reorganization Act did much to perpetuate the notion of nationality), but many Native people have upheld their belief that they exist apart from the nation-state, and this usually gets articulated in terms of sovereignty. Sovereignty, however, is a problematic concept for Native peoples according to Taiaiake Alfred because it is rooted in a non-indigenous philosophical system of government. Sovereignty generates from coercive, hierarchical modes of maintaining power that necessitates the legitimization of the hegemony of the state, or in Alfred’s terms, the mythology of the state. From an indigenous perspective,

“State sovereignty depends on the fabrication of falsehoods that exclude the indigenous voice. Ignorance and racism are the founding principles of the colonial state, and concepts of indigenous sovereignty that don’t challenge these principles, in fact, serve to perpetuate them. To

⁶⁹ Vine Deloria, Jr. *The Nations Within: The Past and Future of American Indian Sovereignty*. 2nd ed. (Austin: University of Texas Press, 1998): 235.

claim that the state's legitimacy is based on the rule of law is hypocritical and anti-historic. There is no moral justification for state sovereignty."⁷⁰

The concept of Native sovereignty thus reinscribes the hegemony of the state and for this reason it is politically invested in encouraging tribes to “reframe and moderate their nationhood demands to accept the *fait accompli* of colonization to collaborate in the development of a ‘solution’ that does not challenge the fundamental imperial lie.”⁷¹ Alfred also points out that the colonizer's version of Native sovereignty amounts to nothing more than self-government and aboriginal rights:

“Observers of the political process from within and from outside Native societies have tended thus far to characterize the [nationalist] revitalization as a movement toward enhanced ‘self-government’ powers or an expanded concept of ‘aboriginal rights.’ But these are narrow views which assume that Native politics functions in an environment created by non-Natives.”⁷²

Political theorist (and colonial apologist) Michael Walzer confirms the inevitability of state domination over Native peoples in his essay *The New Tribalism*. Speaking of the tribes of Europe, he argues that the “‘internationalism’ of the left owes a great deal to Hapsburg and Romanov imperialism” which led to the separations that became the modern states of Western Europe; bringing those “predemocratic or antidemocratic” tribal people into the fold of the nation-state did not hold the possibility of justice for them. He writes that the same is true for aboriginal peoples; their rights are automatically eroded with time because the possibility no longer exists for the restoration of their prior independence:

⁷⁰ Taiaiake Alfred, *Peace, Power, Righteousness: An Indigenous Manifesto*, 2nd ed. (Oxford University Press, 2009): 82.

⁷¹ *Ibid.*, 84.

⁷² Scott Richard Lyons (quoting Alfred), *X-Marks: Native Signatures of Assent*, (University of Minnesota Press, 2010): 134.

“They stand somewhere between a captive nation and a national, ethnic, or religious minority. Something more than equal citizenship is due them, some degree of collective self-rule, but exactly what this might mean in practice will depend on the residual strength of their own institutions and on the character of their engagement in the common life of the larger society. They cannot claim any absolute protection against the pressures and attractions of the common life—as if they were an endangered species. Confronted with modernity, all the human tribes are endangered species. All of them, whether or not they possess sovereign power, have been significantly transformed. We can recognize what might be called a right to resist transformation, to build walls against modern culture, and we can give this right more or less scope depending on constitutional structures and local circumstances; we cannot guarantee the success of this resistance.”⁷³

For Walzer, justice for colonized indigenous people is therefore impossible, as is the ability to maintain autonomy within the context of modernity and the borders of the nation-state or to adapt new, more equitable forms of political relationships. Alfred, however, counters this idea by arguing for the return to indigenous systems of governance. Walzer’s view also fails to envision any possibilities for new conceptions of nation-state sovereignty that might be induced through the changing realities of global resistance to neoliberal market fundamentalism or even geophysical alterations due to climate change or other potentially cataclysmic geophysical change. We can look to the passage of the United Nations Declaration on the Rights of Indigenous Peoples for new possibilities of autonomy for indigenous peoples, but given that the very nature of the United Nations privileges the centrality of the nation-state as primary actor, as well as the exclusionary and biased nature of the Western juridical system which prefigures coloniality as its beginning point, the possibility for real justice and protection for indigenous peoples within this context remains to be seen.

Ojibwe/Dakota scholar Scott Lyons takes a more moderate approach between Alfred and Walzer’s ideas. While largely embracing many of Alfred’s ideas on sovereignty, however, he

⁷³ Michael Walzer, “The New Tribalism,” in *The Nationalism Reader*, ed. Omar Dahbour and Micheline R. Ishay. (New Jersey: Humanities Press, 1995): 326.

also challenges elements of them. For Lyons, Alfred's model of indigenous nationalism is unnecessarily rigid, does not take stock of the diversity of today's Native nations, and amounts to conceptual separatism ("the assertion of radical conceptual differences that are deemed incommensurable with other concepts and systems"),⁷⁴ running the risk of acing themselves out of political conversations altogether by highlighting their "differences to the point of incommensurability."⁷⁵ Lyons sees Alfred espousing a four part model of sovereignty which includes a return to traditional governance, making heritage languages the official languages of Indian nations, the necessity of tribal economic self-sufficiency, and the need for an expanded land base. While Lyons concurs that Native people in general widely agree on the last three, the first one (Alfred's favorite) he does not sense much support for.⁷⁶ Instead, Lyons advocates for a different concept of Native nationalism he calls "realist nationalism," the idea that like other ethnonationalisms, "low" cultures are turned into "high" cultures "while based on the historical fact and memory of an ethnies, but it recognizes that the nation-people that came into existence at the moment of treaty are more culturally diverse than the ancestors as we imagine them today."⁷⁷ Lyons admits to a somewhat skeptical enthusiasm about Native nationalism, and even about terms like "settlers," but he acknowledges three particular points: that the era of nationalism is far from over, that sovereignty is shifting its focus away from nation-states to a sinister, more globalized Empire, as evidenced by the concentration of economic power in a tiny percentage of

⁷⁴ Lyons, *X-Marks: Native Signatures of Assent*, 136.

⁷⁵ *Ibid.*

⁷⁶ *Ibid.*, 145.

⁷⁷ *Ibid.*, 140.

the world's population, and that even Native nationalism can perpetuate injustice when taken to extremes.⁷⁸

The point to be made in the discussion of Native nationalism and sovereignty, even in all their potentially inconsistent or contradictory iterations, is that Native peoples are nations in some sense of the word, whether they are federally recognized tribes or not. For the Acjachemen/Juaneño, even though they lack the state-sanctioned version of sovereignty available to federally recognized tribes, the protection of Panhe was nonetheless a necessary assertion of sovereignty in an act of responsibility inherited by them, handed down through innumerable generations of ancestors before them.

Epistemology and Sanctity

The very thing that distinguishes indigenous peoples from colonial settler societies is their unbroken connection to ancestral homelands. Their cultures and identities are linked to their original places in ways that define them, reflected through language, place names, and cosmology. In indigenous worldviews, there is no separation between people and land, between people and other life forms, or between people and their ancient ancestors whose bones are infused in the land they inhabit. All things in nature contain spirit (specific types of consciousness), thus the world is seen and experienced in spiritual terms. As many scholars have noted,⁷⁹ the indigenous world is a world of relationships built on reciprocity, respect, and responsibility, not just between humans but extending to the entire natural world. Indigenous

⁷⁸ Ibid., 162-164.

⁷⁹ See for example Greg Cajete, *Look to the Mountain: An Ecology of Indigenous Education*, Manulani Aluli Meyer, "Indigenous and Authentic: Hawaiian Epistemology and the Triangulation of Meaning" in *Handbook of Critical and Indigenous Methodologies*, and *How It Is* by Viola Cordova for in depth articulations of indigenous worldviews.

relationships with nature (often framed as living in harmony with the natural world), perceived by Westerners as an exotic, esoteric concept has been stereotyped and appropriated (or in capitalistic terms, consumed) in a multitude of ways from New Age gurus selling sacred ceremonies to transnational corporations pedaling products with Indian names or themes, but in reality is rooted in a philosophical paradigm very different from dominant Western paradigms.

At the risk of perpetuating an essentializing, homogenizing discourse, what has been called “indigenous epistemologies” by scholars, can be seen as something akin to shared epistemological articulations, or even as scales of worldviews that can be traced along a common heuristic trajectory among indigenous peoples. These scales or articulations, while exhibiting a vast array of particularities from culture to culture, nonetheless share enough common elements or themes which can be can be spoken of in broad strokes, much like the differences in Western cultures can be, for example speaking of the cultural differences (or similarities) between the United States and Canada, or between France, Italy or Germany.

Identifying these Western paradigms, Native American scholar and theologian George Tinker drawing on the work of Vine Deloria, observes that the difference in these paradigms is grounded in different orientations to time and space. Centuries ago Europeans adopted a perceptual orientation based on temporality; time as the primary organizing intellectual principle to which a spatial orientation is secondary, creates a linear and unidimensional world in which human existence is perceived in terms of motion through space cast as the past, present, and future. According to Tinker,

“In Euro-American (and European) philosophical and theological history it is more common to see intellectual reflection on the meaning of time; it is far less common to see intellectual reflections on space. Hence, progress, history, development, evolution, and process

become key notions that invade all academic discourse in the West, from science and economics to philosophy and theology.”⁸⁰

Deloria points out that in Newtonian mechanics reality was reflected by the visible world, and what was visible was measurable; but their error was reifying it as absolute reality:

“When Newtonian physics established *a priori* that space, time, matter, energy, and causality were inherent in the structure of the universe, and when Newtonian formulas proved immensely successful in exploring the solar system, Western thinkers forgot that these concepts were definitions generated in Newton’s mind, and they came to believe that they were accurate descriptions of ultimate physical processes.”⁸¹

An orientation that favors time over space in which the world is perceived in linear terms of “progress” based on forward motion (evolution) naturally results in systems of hierarchy; hierarchies of knowledge and life forms, for example, make it possible for a paradigm of domination to become a guiding principle in a society (Smith points out that Deloria in *God is Red* made the connection between religion and imperialism). The sacred, as well, is conceived of in terms of history, places are sacred because of the events associated with them contained within time; for instance, for Christians, Jews, and Muslims, Deloria argues, particular sites in the Holy Land are sacred primarily because of their historical significance more than a sense of rootedness in them as is true in Native American cultures.⁸²

For Native Americans (and arguably all indigenous peoples) a spatial orientation connects people with place and all the elements of that place, spanning time. These connections are reflected by and infused in all aspects of Native life, including identity, culture, and ceremonial cycles, as people recognize themselves as having been placed there by spiritual

⁸⁰ George Tinker, “An American Indian Theological Response to Ecojustice,” *Defending Mother Earth: Native American Perspectives on Environmental Justice*, ed. Jace Weaver. (New York: Orbis Books, 1996): 163.

⁸¹ Vine Deloria, Jr., *The Metaphysics of Modern Existence*, (New York: Harper & Row, 1979): 35.

⁸² Vine Deloria, Jr. *God is Red: A Native View of Religion*, 3rd ed. (Golden: Fulcrum Publishing): 66.

forces to which they are responsible. But this responsibility is a two way street, and the elements of those places are seen to be responsible to the people as well; this reciprocal relationship forms a sense of kinship with the land itself.⁸³ The affective bonds of people to place reflects an egalitarianism that does not distinguish hierarchies of importance, and as Tinker observes, “humans lose their status of ‘primacy’ and ‘dominion’...American Indians are driven by their culture and spirituality to recognize the personhood of all ‘things’ in creation.”⁸⁴ In other words, for indigenous people land and all its elements have agency by virtue of their very life in a way that they do not in Western cultures.

Andrea Smith’s idea of radical relationality affirms the agency of non-human life; however, this idea also points to a paradox in the temporal/spatial epistemology. She contends that:

“...the previously described framework of recognition that is also presupposed by Native scholars and activists depends on a temporal framework of prior occupancy rather than on a spatial framework of radical relationality to land. This temporal framework of prior occupancy is then easily co-opted by state discourses that enable Native peoples to address land encroachment by articulating their claims in terms of land ownership. Essentially, it is not ‘your’ land, it is ‘our’ land because we were here first. In doing so, land must then become a commodity that can be owned and controlled by one group of people. If we understand Native identity as spatially rather than temporally based, then claims to land would be based not on prior occupancy, but based on radical relationality to land.”⁸⁵

In essence, Smith argues that understanding how the logics of white supremacy undergird Native claims to land and sovereignty is necessary to realize that it is forces of capitalism embedded in imperialism that guide state-centered frameworks for sovereignty (through the processes of land commodification) when they rely on those frameworks. Native people unwittingly reinscribe the

⁸³ Tinker, “An American Indian Theological Response to Ecojustice,” 163.

⁸⁴ *Ibid.*, 165.

⁸⁵ Smith, *White Supremacy*, 22.

power that has been used against them by adopting those frameworks. Re-centering an indigenous politics on the relationality to land opens the possibility to “transform the world so that it is governed through principles of participatory democracy rather than through nation-states.”⁸⁶ Doing so “articulate[s] indigeneity within the context of global liberation [and] their understanding of indigeneity becomes expansive and inclusive. Their politics is not based on claims for special status to be recognized by the state, it is based on a commitment to liberation for all peoples that depends on the dismantling of the state.”⁸⁷ Such an understanding of indigeneity thus becomes a praxis “focused on building relationships between peoples and all creation,” and it is through the “practice of ceremony and of living in right relationships to the land” that de-essentializes ideas that Native people have a “natural” connection to land and other people do not.⁸⁸

An indigenized environmental justice framework, therefore, must not only be able to account for indigenous cosmological paradigms, it must also recognize the ways that Native peoples have been co-opted by the settler-state in their identities and claims to land. This does not mean that articulations of nationalism are not appropriate or do not matter if nationalism and sovereignty are the terms used to describe Native American historical continuity with place, and distinct political existence and formations. But it does mean that Native peoples must be cognizant of how they frame the terms of their debates, being careful not to limit themselves to state-centered definitions of sovereignty, identity, and conceptions of land rooted in ownership. For the Acjachemen/Juaneño, ironically, it was the very fact that they could not claim ownership

⁸⁶ Ibid., 23.

⁸⁷ Ibid., 24.

⁸⁸ Ibid.

of Panhe that they relied on a discourse of radical relationality to the land to articulate its need for protection. Their living relationship to the land is affirmed not only through the existence of burials and other elements that constitute it as an “archeological resource,” but through their practice of ceremony and the very act of protecting – which places them in right relationship with the land – thus fulfilling their ancestral mandate to exercise responsibility for it.

Coalitions and Native American EJ on the Ground

When I first began the project to study how Panhe was framed in the public debate to stop the toll road, I knew that the fact that coalitions were formed among diverse interests was necessary to fight what was a formidable foe. After all, it is not often that the forces of development are averted in southern California, least of all by Native people. TCA is backed not only by extreme wealth, but by political power as well, by virtue of its organization as a joint-powers agency and the weight of 12 cities behind it. Initially, I was under the impression that it was only because of the coalitions forged by the United Coalition to Protect Panhe, together with the Sierra Club, the Surfrider Foundation, the California Cultural Resources Preservation Alliance, and many other environmental and social justice organizations, that Panhe was able to be saved from further desecration and destruction. However, as I studied the documentation I came to believe that Panhe’s status as a documented sacred site, and its “archeological” importance held more power to dissuade the Coastal Commission from certifying the toll road than most people to this day realize. Even though that documentation depended squarely on the authority of a ruling power to give legitimacy to the claims of the Acjachemen Nation, its importance in this case cannot be discounted (occasionally the powers-that-be do the right thing, albeit for the wrong reasons or in the wrong context). The comments of Commissioner Mary Schallenberger (when in her testimony she claimed that Panhe’s status and the need to protect

Native American rights is enough reason to deny certification, as well as the quote at the beginning of this paper) are telling for how a Native American religious paradigm was able to seep into the consciousness of a powerful government official and effect a positive outcome.⁸⁹

The ethics of environmental justice have also seeped into governmental institutions as they have gained legitimacy in recent years, for example, with the creation of EJ agencies and laws in the state of California and the federal government. The Executive Order on Environmental Justice 12898, signed by President Clinton in 1994, was designed to address inequalities in low income communities and communities of color, framed in terms of “fair treatment.” Fair treatment is defined as a group of people who “should [not] bear a disproportionate share of the negative environmental consequences resulting from industrial, governmental and commercial operations or policies” with regard to activities that involve environment and/or health.⁹⁰ This Executive Order established the Interagency Working Group to coordinate and “develop environmental justice strategies to help federal agencies address disproportionately high and adverse human health or environmental effects of their programs on minority and low-income populations.”⁹¹

Yet despite existing legal EJ frameworks, as well as laws to protect their religious freedoms, Native peoples continue to fight for the protection of sacred sites within an inadequate and often unjust system. The indigenous idea that recognizes agency in sacred places helps shift

⁸⁹ Commissioner Schallenberger had worked for many years for the President Pro-Tem of the State Senate, and in that position had worked on bills to protect Native American sacred sites, thus had a good base of knowledge of Native American worldviews that constitute sanctity.

⁹⁰ Environmental Protection Agency. “Environmental Justice, Basic Information, Background.” <http://www.epa.gov/environmentaljustice/basics/ejbackground.html> [accessed 26 September, 2011].

⁹¹ Ibid.

the balance of power that currently favors Eurocentric configurations of justice in a way that denies indigenous spiritual realities and the rights of the Earth. American courts routinely deny the protection of lands based on Native claims to sacred sites, the precedent having been set in the Supreme Court case *Lyng vs. Northwest Indian Cemetery Protective Association (1988)*. In *Lyng* the Court ruled that building a road through a site of traditional spiritual significance and ceremonial practice of three tribes in Northern California did not constitute a violation of their freedom of religion. The court argued that “the First Amendment bars only outright prohibitions, indirect coercion, and penalties on the free exercise of religion.”⁹² As Getches, Wilkinson, and Williams claim, any other actions even if detrimental to an entire religion do not constitute a violation, and effectively strips Native people “of any constitutional protection against perhaps the most serious threat to their age-old religious practices, and indeed to their entire way of life.”⁹³ *Lyng* set a dangerous precedent that continues to haunt Native American battles to protect sacred sites.

The high profile case to protect the San Francisco Peaks perfectly illustrates how the legal system failed to recognize the significance of Native American spiritual beliefs as an argument against what for them constitutes desecration of a sacred site on publicly owned lands at the hands of powerful developers. The San Francisco Peaks in Arizona is sacred to at least 13 tribes in the four corners region of the Southwest (amounting to hundreds of thousands of individual Indians) for the way it figures into their creation stories, and for the resources provided by the mountains. In the 1970’s the US Forest Service allowed the building of a ski

⁹²David H. Getches, Charles F. Wilkinson, and Robert A. Williams, Jr, *Cases and Material on Federal Indian Law, Fifth Edition*, (St. Paul: Thompson West, 2005): 747.

⁹³ *Ibid.*

resort, against the protests of the tribes who, based on their religious beliefs about the sanctity of the place, felt that the mountain should be protected from development. Then, in the early 2000's the resulting Snowbowl Ski Resort applied for a permit to expand the resort and add snowmaking equipment that would utilize reclaimed sewage water. The tribes responded with a massive campaign and lawsuit to oppose the permit (and also argued that the use of treated effluent would pose significant health risks to all people, particularly those who still use the mountain to gather plants for medicine and other traditional practices). When the lawsuit came before the Ninth Circuit Court of Appeals, a narrow interpretation of the American Indian Religious Freedom Act made the law unavailable to protect the land. The court claimed that

“the only effect of the proposed upgrades is on the Plaintiffs’ subjective, emotional religious experience. That is, the presence of recycled wastewater on the Peaks is offensive to the Plaintiffs’ religious sensibilities...the diminishment of spiritual fulfillment – serious though it may be – is not a ‘substantial burden’ on the free exercise of religion.”⁹⁴

Twice the Supreme Court declined to review the lower court’s decision and while the Obama administration has the power to intervene, it has “taken a back seat, effectively allowing local officials to take the lead in allowing the company to do as it wishes.”⁹⁵ The campaign to stop the development is still active despite its setbacks, but now focuses on technical legal maneuvers aimed at claims that the Forest Service was negligent in disseminating appropriate information to the public regarding the potential health threats, effectively eliminating an argument based on religious or spiritual meaning.

⁹⁴ Indigenous Action Media. “Save the Peaks Coalition News Release: Supreme Court Affirms Tribes Have No Religious Rights,” June 9, 2009. <http://www.indigenouaction.org/save-the-peaks-coalition-news-release-supreme-court-affirms-tribes-have-no-religious-rights/> [accessed 26 September 2011].

⁹⁵ Indian Country Today Media Network, “Native Say Forest Service Broke Rules, Obama Administration Asked to Investigate,” July 11, 2011. <http://indiancountrytodaymedianetwork.com/2011/07/natives-say-forest-service-broke-environmental-rules-obama-administration-asked-to-take-a-new-look/>. [accessed 26 September, 2011].

The Save the Peaks campaign, like the campaign to save Panhe, relied upon diverse coalitions of groups with similar objectives to accomplish their goals. In these campaigns, Native people find themselves aligned with groups who have often been their opponents, particularly the environmentalist community. Sometimes the need for coalition building between environmentalists and Native peoples is clear, as was the case in the Panhe struggle where the shared goal of the preservation of a particular place, even if for different reasons, facilitates a relatively easy alliance. But often in their nation-building projects for economic development, Native nations frequently square off against environmentalists who they view as yet another force within the colonizing state attempting to hamper their assertions of sovereignty,⁹⁶ especially when they rely on the legal tools of the colonial state to fight them. Sometimes environmentalists are all too willing to throw out the baby with the bathwater when they fail to consider their arguments in the light of the colonial relationship between the US and Native American tribes, but sometimes tribes engaged in capitalistic models of nation-building also hastily compromise their own traditional values of respecting the land and the environment for the sake of economic gain, in the name of sovereignty.⁹⁷ Andrea Smith illustrates this point:

“Environmental activist Klee Benally [famous for his leadership in the Save the Peaks campaign and himself Navajo] similarly calls into question who defines the ‘nation’ and ‘tradition’ in his critique of the Hopi and Navajo tribal councils. In 2009, the Hopi Tribal

⁹⁶ In my own activism I have come face to face with this dynamic. As a journalist covering a conflict between a landless tribe’s casino project in Northern California several years ago, I went head to head with a Sierra Club representative who opposed the project on a widely listened-to call in radio program on a “progressive” station as we debated the ideological nuances of protecting an endangered salamander on 300 acres versus the economic and cultural survival of the tribe in question. Most of the phone calls that came in were vehemently, some to the point of venomous, against the project and what they saw as environmental recklessness and economic opportunism on the part of the tribe.

⁹⁷ A case in point is the Dooda Desert Rock coal-fired power plant project proposed by the Navajo Nation. The 1,500 megawatt plant which would be located in the Four Corners region of the Navajo reservation, an area already highly contaminated by two other coal-fired power plants, is opposed by Navajo and non-Navajo environmental activists alike.

Council passed a ban on environmental groups, which was supported by Navajo Tribal Chair, Joe Shirley. According to Shirley: ‘Unlike ever before, environmental activists and organizations are among the greatest threat to tribal sovereignty, tribal self-determination, and our quest for independence.’ In response, Benally argued: ‘Does sovereignty really mean being dependent on non-renewable energy that destroys Mother Earth, pollutes drinking water and air and compromises our holy covenant with nature? Does it mean being dependent on casinos and outside corporate interests? Joe Shirley & the HTC have sent a message that only certain types of democracy are allowed within reservation boundaries. This action emboldens those who seek to destroy our Mother Earth for their own profit and pleases those who prefer totalitarianism.’⁹⁸

Smith’s brilliant scholarship considers this complex relationship between Native Americans and diverse, often divergent political interests in her book *Native Americans and the Christian Right: The Gendered Politics of Unlikely Alliances*. In the book, Smith argues that the political agendas of diverse groups are not always static and immutable, often changing with the changing trends of society. She examines the ways in which evangelical Christian and Native American communities have embraced political agendas in shared articulations that have transcended easy categorization into “conservative” or even “progressive,” but that favor positive social change which we can call progressive, for example through race reconciliation facilitated by Native Christian evangelicals, who also have co-opted biblical scripture to reinforce tribal sovereignty.

Smith contends that:

“Because the numbers of Native peoples in the United States is small, Native activists can seldom be under the illusion that they can achieve political victories by themselves. It is equally the case that no community can change the system of domination and exploitation on which the political and economic relationships of the world are based. Consequently, progressives do not have the luxury to dismiss entire sectors of society as potential coalition partners.”⁹⁹

⁹⁸ Smith, “White Supremacy,” 29.

⁹⁹ Andrea Smith, *Native Americans and the Christian Right: The Gendered Politics of the Christian Right* (Durham: Duke University Press, 2008): 273.

In her methodology, Smith is careful to point out that intellectual projects which anchor coalition politics must be able to distinguish between *including* Native Americans, and *centering* them. The liberal, multicultural approach of “inclusion that seeks to include a marginalized voice within a preestablished politics or discourse” is “particularly troubling for Native peoples and Native studies because the relatively small population of Native peoples always renders our inclusion less significant than that of groups with greater numbers.”¹⁰⁰ When Native people re-center themselves intellectually (by engaging, for example, in theoretical discourses they have tended to reject as irrelevant to them, such as Marxist or Foucauldian frameworks) they can avoid reacting to their marginalization, “which is the result of colonization and white supremacy.” As Smith adds:

“[W]e may fear that engaging in other discourses may continue our marginalization. But if we really want to challenge our marginalization we must build our own power by building stronger alliances with those who benefit from our work, both inside and outside the academy. When we become more directly tied to larger movements for social justice, we have a stronger base and greater political power through which to resist marginalization. When we build our own power, we can engage and negotiate with others from a position of strength rather than weakness. Thus, rather than fearing that engagement with the ideas emerging from non-Native communities will marginalize us, we can actually position Native peoples as intellectual and political leaders whose work benefits all peoples.”¹⁰¹

As Native peoples have re-centered themselves in their decolonizing political projects for social justice, coalition building continues to gather steam as one of the most effective strategies for protecting sacred sites. Worldwide, indigenous peoples are joining forces with each other and non-Native peoples, fighting not only to stop endless expropriation of their lands by

¹⁰⁰ Ibid., xiii.

¹⁰¹ Ibid., xv.

multinational forces driven by market fundamentalism, but to produce a paradigm shift that acknowledges their worldviews as a legitimate and necessary basis for understanding the world we all live in. Whether it's fighting the structural adjustment programs of the International Monetary Fund to develop indigenous lands with toxic industries in so-called developing nations, trying to prevent the dumping of nuclear waste within a sacred mountain, or simply to guarantee access to a ceremonial ground, all together these battles constitute what Native activists regularly refer to as "environmental justice." Organizations like the Indigenous Environmental Network, Honor the Earth, Cultural Conservancy, Sustainable Nations Development Project, National Environmental Coalition of Native Americans, Seventh Generation Fund, and innumerable others both within and beyond the US, focus their efforts in a web of ideas built on the intersection of the concepts of sacred, environment, and justice.

Beth Rose Middleton, whose work examines Native Americans' use of land trusts and private conservation as a means to protect access to sacred sites, challenges the conventional understanding of environmental justice. She acknowledges that even the land conservation movement in the US has contributed to Native land dispossession, and that the "cultural foundations of the notion of conservation and public benefit must be interrogated,"¹⁰² particularly since the concept of private conservation is hardly private because they are subject to public statutes, funding, and incentives. She further argues that:

"Environmental justice is analytically important to private conservation, yet it remains under-discussed and under-utilized in the conservation field. As Mary Christina Wood and Zachary Welcker note, 'by integrating humans into conserved landscapes, the tribal trust movement will draw attention to the role of land in the pursuit of social justice and human rights. This dimension has been much ignored by the conservation movement.' An environmental

¹⁰² Beth Rose Middleton, *Trust in the Land: New Directions in Tribal Conservation* (Tucson: University of Arizona Press, 2011): 3.

justice analysis is essential for expanding conservation tools that have heretofore been used for relatively narrow conservation purposes.”¹⁰³

Implicit in this thought is that an environmental justice analysis that does not account for the meaning indigenous peoples attach to land, i.e. their relationship to it, however, is incomplete and risks perpetuating the colonial frameworks that dispossessed them in the first place. It speaks to the importance of expanding the analytical framework of environmental justice for Native peoples in all realms of land protection and whatever protocols they may utilize in the short term, be they conservation and land trusts, environmental law, religious freedom protection, sacred lands inventories, archeological resource protection, and in the long term, whatever new forms we may in the future imagine for sacred site protection.

Conclusion

It is now almost five years since the Coastal Commission denied certification of the 241 toll road extension. The project has been lying mostly dormant, until recent rumblings in the media put out by TCA, pushing for the public to engage with elected officials to encourage the project to move ahead, complete with a website for that purpose. TCA has an office in San Clemente, complete with a mural size map of the build alternatives, and rooms with dioramas depicting the layout of the 241 as it was conceptualized running the 6 mile span through San Onofre State Beach/Panhe. In a conversation I had with the TCA representative there, I was told that the preferred alignment was “off the table,” no longer an option since the Coastal Commission and the Department of Commerce shut it down.¹⁰⁴ They are forced to consider the other possible alignments which were identified. However, given the resources and power of

¹⁰³ Ibid.

¹⁰⁴ Jim Green, interview by author, San Clemente, August 12, 2011.

TCA, the Acjachemen Nation and UCPP must remain vigilant in their efforts to make certain Panhe remains protected, taking nothing for granted.

Environmental justice for Native peoples encompasses a broad spectrum of concerns, from protecting sensitive environmental habitats and communities from the ravages of toxic industries, to the assurance that lands deemed holy by them are still available to them for ceremonial, spiritual and cultural practices. Centering Native peoples in EJ frameworks allows us to talk in terms of decolonization. Decolonization as a liberatory project is a two way street which can benefit all by restoring humanity to the colonizer and the colonized. When systems of power entrenched in colonialism and capitalism are untangled from the people who enact them we can transcend cycles of victimization and domination, and instead focus energy on restoring balance to relationships that are damaging to everyone. If all people can learn to see themselves within a framework of radical relationality to the land, we can destabilize our differences and instead come closer to affirming our similarities at this crucial time when we need to see ourselves as radically related to each other. The result is then something that much more closely resembles justice, as well as the protection of vital resources and endangered cultures on an ever-shrinking finite planet.

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Green line shows the preferred alignment as rejected by the Coastal Commission. Panhe is located roughly where the alignment intersects with highway 5 at the bottom of the page. The #7 interchange is RMV's proposed planned community.