

# *Grand Canyon Trust v. Williams:* Tribal Land Protection and the Battle for Red Butte

## INTRODUCTION

In the midst of a Northern Arizona plateau, a rust-colored hill rises steeply from a base of sandstone to a summit of volcanic rock.<sup>1</sup> The Havasupai Tribe (“the Tribe”) refers to this land as the “mountain of the clenched fist,” and it is one of their most sacred spaces.<sup>2</sup> More commonly known as Red Butte, this property has faced mining threats for decades.<sup>3</sup> Objections based on the site’s cultural and religious significance have been considered and outweighed, leading to mountainside protests and legal action.<sup>4</sup> In 2013, the Tribe filed suit challenging the approval of resumed operations at Canyon Mine, a uranium mining site just four miles from Red Butte.<sup>5</sup>

In *Grand Canyon Trust v. Williams*, the District Court for the District of Arizona denied the Tribe’s motion for summary judgment on all four claims.<sup>6</sup> Among other assertions, the Tribe alleged that the valid existing rights (VER) determination completed by the Forest Service was inadequate, but the court held that the plaintiffs lacked standing.<sup>7</sup> Using *Grand Canyon Trust* as an example, this In Brief will analyze the inability of current law to protect tribal property rights from mining projects. Moreover, it will show how the outcome of *Grand Canyon Trust* demonstrates how current mining law restricts the ability of Native American communities to claim lands in the interest of environmental and cultural preservation. Moving forward, tribes and environmental groups should continue exploring alternative legal sources of land protection.

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1. BRUCE GRUBBS, *HIKING NORTHERN ARIZONA: A GUIDE TO NORTHERN ARIZONA’S GREATEST HIKING (REGIONAL HIKING SERIES)* 36 (3d ed. 2008).

2. GREGORY MCNAMEE, *GRAND CANYON PLACE NAMES* 95 (2d ed. 2004).

3. Kenneth Brower, *Gamma Rays and the Grand Canyon*, *NAT’L GEOGRAPHIC* (May 20, 2013), <http://news.nationalgeographic.com/news/2013/13/130520-grand-canyon-uranium-mine-native-americans-roosevelt/>.

4. *Id.*

5. *Grand Canyon Trust v. Williams*, 98 F. Supp. 3d 1044, 1051 (D. Ariz. 2015).

6. *Id.* at 1073–74.

7. *Id.* at 1058–59.

## I. BACKGROUND: THE BATTLE OVER RED BUTTE IN NORTHERN ARIZONA

Mining on tribal lands has long been a subject of legal struggle, and this particular mining site is no exception.<sup>8</sup> The Tribe has lived on the banks of the Havasu Creek in the Grand Canyon “since time immemorial,” and their broader aboriginal area extends from the Colorado River to the Bill Williams Mountains.<sup>9</sup> Canyon Mine is a uranium mine located in the center of this area, six miles south of Grand Canyon National Park and four miles north of Red Butte.<sup>10</sup> Situated within Kaibab National Forest, Canyon Mine is also thirty-five miles southeast and upstream from the Havasupai Reservation.<sup>11</sup> The Tribe uses this land for many purposes, including gathering natural resources and performing religious practices such as burial ceremonies.<sup>12</sup> According to the Tribe, any uranium mining at Canyon Mine would “kill and destroy the resting place of the Life Spirit and Mother,” devastating their religious practice by disrupting their “Way.”<sup>13</sup> Attempts to fully operate Canyon Mine first became a focus of debate decades ago.<sup>14</sup>

In 1984 Energy Fuels Nuclear submitted a plan of operations for Canyon Mine.<sup>15</sup> Pursuant to the National Environmental Policy Act, the Forest Service prepared an Environmental Impact Statement, which also solicited input from tribes.<sup>16</sup> Two years after submission, the Forest Service approved a modified version of the company’s plan of operations.<sup>17</sup>

In 1990 the Tribe filed suit challenging the Forest Service’s approval of Canyon Mine.<sup>18</sup> They alleged the mining project’s approval violated their religious freedom and aboriginal right of access, and they requested a new Environmental Impact Statement to replace the deficient statement used to approve the project.<sup>19</sup> The court overlooked the religious and cultural significance of the Canyon Mine location because the Tribe could not disclose

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8. Litigation over the Canyon Mine first began in 1990. *Havasupai Tribe v. United States*, 752 F. Supp. 1471 (D. Ariz. 1990).

9. Complaint at 5, *Grand Canyon Trust v. Williams*, 98 F. Supp. 3d 1044 (D. Ariz. 2015) (No. 3–13–CV–08045).

10. *Grand Canyon Trust*, 98 F. Supp. 3d at 1048–49.

11. *Havasupai Tribe*, 752 F. Supp. at 1476.

12. *Id.* at 1482–83.

13. U.S. FOREST SERV., CANYON URANIUM MINE REVIEW: REVIEW OF THE CANYON MINE PLAN OF OPERATIONS AND ASSOCIATED APPROVAL DOCUMENTATION IN ANTICIPATION OF RESUMPTION OF OPERATIONS 14 (2012), [https://fs.usda.gov/Internet/FSE\\_DOCUMENTS/stelprdb5376042.pdf](https://fs.usda.gov/Internet/FSE_DOCUMENTS/stelprdb5376042.pdf); *Havasupai Tribe*, 752 F. Supp. at 1484.

14. Brower, *supra* note 3.

15. *Grand Canyon Trust*, 98 F. Supp. 3d at 1049.

16. *Id.* Under the National Environmental Policy Act, the environment considered in Environmental Impact Statements must include “not only such traditional environmental concerns as water and air quality, but also the historic cultural and natural aspects of our national heritage, in order to preserve an environment which supports diversity and variety of individual choice.” *Havasupai Tribe*, 752 F. Supp. at 1394 (characterizing 42 U.S.C. § 4331(b)(4) (2012)).

17. *Grand Canyon Trust*, 98 F. Supp. 3d at 1049.

18. *Havasupai Tribe*, 752 F. Supp. at 1475.

19. *Id.* at 1475–76.

intimate details of sacred rituals or specific locations of religious sites such as burial grounds without being sacrilegious.<sup>20</sup> Thus, the District Court for the District of Arizona granted summary judgment in favor of the Forest Service, and the Ninth Circuit affirmed in 1991.<sup>21</sup> Energy Fuels Nuclear soon began work on the mineshaft but ultimately halted construction in 1992 after uranium prices fell.<sup>22</sup>

In 2010 the Forest Service designated Red Butte and the surrounding area, including Canyon Mine, as a Traditional Cultural Property through the National Historic Preservation Act.<sup>23</sup> Because of this designation and its noted tribal significance, Red Butte became eligible to be included in the National Register of Historic Places.<sup>24</sup> As a Traditional Cultural Property, Red Butte is not guaranteed absolute protection from disturbance, but weight must be given to its historic value when making land use decisions.<sup>25</sup> Ultimately, if a public interest exists that outweighs the importance of historic protection, then a Traditional Cultural Property may be “sacrificed.”<sup>26</sup> In this case, Red Butte’s Traditional Cultural Property designation failed to protect it from the proposed renewal of mining operations at Canyon Mine.

When Energy Fuels Resources, a successor owner of the mine, notified the Forest Service of its intentions to resume operations in 2011, the Forest Service completed a VER Determination confirming the new owner had valid rights to the uranium mineral deposits.<sup>27</sup> The Forest Service also conducted a Mine Review, which examined the environmental and tribal impacts of mining operations, and ultimately determined operations could resume at Canyon Mine under the Plan of Operations approved in 1986.<sup>28</sup> The Arizona State Historic Preservation Office advised the Forest Service to undertake a full consultation under section 106 of the National Historic Preservation Act, but the Forest Service declined and instead undertook a reduced consultation process.<sup>29</sup>

The Tribe, along with multiple environmental groups, brought suit against the Forest Service and Energy Fuels Resources.<sup>30</sup> The complaint stated four

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20. *Id.* at 1500; U.S. FOREST SERV., *supra* note 13, at 20–21.

21. *Havasupai Tribe*, 752 F. Supp. at 1489–1505; *Havasupai Tribe v. Robertson*, 943 F.2d 32, 33–34 (9th Cir. 1991).

22. *Grand Canyon Trust*, 98 F. Supp. 3d at 1049.

23. *Id.*

24. *Id.* at 1049. Red Butte is now included in the National Register of Historic Places. *Id.* at 1066.

25. PATRICIA L. PARKER & THOMAS F. KING, NATIONAL REGISTER BULLETIN: GUIDELINES FOR EVALUATING AND DOCUMENTING TRADITIONAL CULTURAL PROPERTIES 4 (1998), <http://www.nps.gov/nr/publications/bulletins/pdfs/nrb38.pdf>.

26. *Id.*

27. *Grand Canyon Trust*, 98 F. Supp. 3d at 1050.

28. *Id.*

29. *Id.* at 1050–51.

30. *Id.* at 1048. Defendants also included Michael Williams, Supervisor of the Kaibab National Forest, and EFR Arizona Strip, LLC. *Id.*

claims.<sup>31</sup> The fourth claim alleged the VER Determination was deficient because it failed to consider all relevant cost factors and was therefore “arbitrary, capricious, and not in accordance with the law.”<sup>32</sup> While the court considered all four claims in depth, this In Brief will focus on the fourth claim.

The court’s decision in this case was heavily constrained by the Mining Law of 1872, which protected the owner’s right to the original claim despite its resale and period of inactivity.<sup>33</sup> The limited legal effect of the Withdrawal—a Department of Interior action that essentially prohibited establishment of new mining claims on federal lands—also guided this decision.<sup>34</sup> Part II explains these two policies.

## II. THE POWER OF THE MINING LAW

### A. *The Mining Law of 1872*

Following the California Gold Rush, the Mining Law of 1872 established that “all valuable mineral deposits in lands belonging to the United States . . . shall be free and open to exploration and purchase . . .”<sup>35</sup> The Mining Law protected economic interests: its “obvious intent was to reward and encourage the discovery of [valuable] minerals.”<sup>36</sup> Like many other mining plans approved under the Mining Law, Canyon Mine had no time limit; the owner’s rights were “never terminated and did not require affirmative renewal.”<sup>37</sup>

### B. *The Withdrawal*

In January 2012 the Department of the Interior withdrew approximately 633,547 acres of public lands and an additional 360,002 acres of National Forest from mineral location and entry under the Mining Law for up to twenty years (“the Withdrawal”).<sup>38</sup> By removing these numerous acres of federal land from open exploration, the Withdrawal essentially terminated the possibility of new mining claims on this land in the future.<sup>39</sup> However, this action did not

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31. *Id.* at 1051. The first claim alleged the Forest Service violated the National Environmental Policy Act by not conducting an Environmental Impact Statement as part of the VER Determination. The second claim alleged the Forest Service violated the National Historic Preservation Act by failing to complete a full review under section 106 of the National Historic Preservation Act. The third claim alleged the Forest Service violated the National Historic Preservation Act by conducting its review under 36 C.F.R. § 800.13(b)(3). *Id.*

32. *Id.*

33. *Id.* at 1054, 1059.

34. *Id.* Under Executive Order 10,355, President Truman delegated the authority to manage withdrawals to the Secretary of the Department of the Interior. Exec. Order No. 10,355, 17 Fed. Reg. 4831 (May 26, 1952).

35. 30 U.S.C. § 22 (2012).

36. *United States v. Coleman*, 390 U.S. 599, 602 (1968).

37. *Grand Canyon Trust*, 98 F. Supp. 3d at 1064.

38. *Id.* at 1049.

39. *Id.* at 1052–53.

diminish mining rights that already existed.<sup>40</sup> Because the Withdrawal occurred after the Canyon Mine claim process, it grandfathered in the resumed operations on that project.<sup>41</sup>

*Grand Canyon Trust* demonstrates the lack of legal tools available to tribes to protect land under current federal law. The broad, sweeping nature of the Mining Law leaves little room for environmental or cultural concerns that are not easily quantified in economic terms. Moreover, the Withdrawal did nothing to address preexisting mining claims like Canyon Mine in locations that have since demonstrated religious and cultural significance. Because the Tribe did not claim rights to exploit the uranium minerals in question, they could not protect Red Butte under current law.

### III. VER DETERMINATION IN *GRAND CANYON TRUST*

The Tribe argued that the VER Determination did not adequately consider all relevant cost factors.<sup>42</sup> Energy Fuels Resources responded that the Tribe lacked prudential standing to bring such a claim.<sup>43</sup> Under the Administrative Procedure Act (APA), this kind of claim may proceed only when the plaintiff asserts the government failed to take a required action.<sup>44</sup> The Supreme Court has further interpreted the APA to require that plaintiffs be within the “zone-of-interests” upon which the legislature conferred a right to sue under the relevant statute.<sup>45</sup>

Accordingly, in *Grand Canyon Trust*, the District Court for the District of Arizona required that the Tribe demonstrate that the interest seeking protection falls within the purview of the Mining Law.<sup>46</sup> Although the Supreme Court described this test as “not meant to be especially demanding,” in *Grand Canyon Trust* the Tribe’s claim failed because the district court determined that environmental and historical interests were not relevant to the VER Determination of uranium rights.<sup>47</sup> Specifically, the court found the Tribe lacked prudential standing because while “the purpose of a VER Determination . . . is to confirm that valid mineral rights have been acquired,” the Tribe did not claim mineral rights at Canyon Mine nor assert an economic interest in such rights.<sup>48</sup> As a result, the court decided the Tribe’s

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40. *Id.* at 1053.

41. *Id.*

42. *Id.* at 1051.

43. *Id.* at 1055.

44. 5 U.S.C. § 706(1) (2012); *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 64 (2004) (“[A] claim under § 706(1) [of the APA] can proceed only when a plaintiff asserts that an agency failed to take a *discrete* agency action that it is *required* to take.”).

45. *Lexmark Int’l, Inc. v. Static Control Components*, 134 S.Ct. 1377, 1388 (2014).

46. 98 F. Supp. 3d at 1058 (quoting *Ass’n of Data Processing Serv. Orgs.*, 397 U.S. at 153).

47. *Clarke v. Securities Indus. Ass’n*, 479 U.S. 388, 399–400 (1987); *Grand Canyon Trust*, 98 F. Supp. 3d at 1058–59.

48. *Id.*

environmental and historical interests were not sufficiently related to the purposes of the Mining Law and thus not protected under the statute.<sup>49</sup>

#### IV. ANALYSIS: POTENTIAL RECOURSE FOR TRIBAL PROPERTY RIGHTS

The nature of the Mining Law and the Withdrawal determined the outcome of this case. The Mining Law only “regulates mineral interests and provides procedures by which mining claims may be discovered and protected.”<sup>50</sup> Accordingly, any environmental or tribal concerns that arise or gain public awareness with regards to a mining claim staked decades ago are incapable of recognition if the land in question contains valid mineral claims under the Mining Law. This decision exemplifies tribal communities’ powerlessness to protect culturally and historically valuable land from mining development. Current law still reflects antiquated gold-rush-era policy that prioritizes mineral development above all else. Subsequent policy changes, such as the preservation of historic properties and recognition of important Native sites, do little to alter preexisting mining claims. The inflexible nature of the Mining Law does not protect the current interests and priorities of our present society.

Still, there may be opportunity for recourse from the grip of the Mining Law. The ideal solution would be a congressional amendment to include cultural and environmental concerns within the cost considerations of the Mining Law. Unfortunately, such an action would likely fail given the political desirability of reserving any profitable resource such as uranium for mining. Mining projects often require significant investment and can take years, even decades to become profitable.

However, perhaps future guidance documents from government agencies could provide some avenue of compromise and workability within the Mining Law.<sup>51</sup> The long period of dormancy during which established mining claims such as Canyon Mine often lay untouched could be cause for reexamining such unrelenting protection of mining claims. In *Grand Canyon Trust*, Canyon Mine was dormant for nearly ten years, during which time the Forest Service recognized the location as a Traditional Cultural Property given its significance to multiple tribal communities.<sup>52</sup> Furthermore, the original plan for Canyon Mine was approved twenty-five years prior to the resumed operations at issue in *Grand Canyon Trust*.<sup>53</sup> The Department of Interior may attempt to issue guidance broadening the cost factors included within the VER Determination, recognizing that while we still maintain a national interest in the development

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49. *Id.*

50. *Id.*

51. For the sake of brevity, this In Brief does not address potential takings claims that may be implicated by the proposed solutions.

52. *Grand Canyon Trust*, 98 F. Supp. 3d at 1049.

53. *Id.*

and extraction of minerals, the cost evaluation of such extraction must include a full cultural and environmental assessment. Still, such executive action amending pre-existing mining claims would likely face takings challenges. In the meantime, operations on projects like Canyon Mine will be allowed to proceed based on decades-old impact assessments which fail to consider cultural and environmental harms that are now recognized and valued.

#### CONCLUSION

The decision in *Grand Canyon Trust* was not a surprise, nor was it legally incorrect. The APA did not protect Red Butte because the prudential standing requirement for VER Determination excluded consideration of costs outside the scope of the Mining Law. The National Historic Preservation Act did not protect Red Butte because designation as a Traditional Cultural Property offered limited protection. This case demonstrates the continuing need for additional legal tools for Native American communities seeking to protect culturally and historically valuable lands from mining development.

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