

NOT YET AMERICA'S BEST IDEA: LAW, INEQUALITY, AND GRAND CANYON NATIONAL PARK

SARAH KRAKOFF*

Absolutely American, absolutely democratic, they reflect us at our best rather than our worst. . . . The national park idea, the best idea we ever had.

—Wallace Stegner¹

[P]arks are not 'America's best idea' The 'best idea' language has the potential to alienate more people than it attracts; . . . If asked to choose between the Grand Canyon or a landmark decision on Civil Rights that guarantees me equal protection under the law, Brown v. Board of Education wins with me hands down every time.

—Alan Spears²

INTRODUCTION	560
I. GCNP AND TRIBES: CREATING A PARK OUT OF INDIAN COUNTRY	563
A. <i>The Myth of the "Blank Space" on the Map</i>	567
1. Southern Paiute Nation	570
a. <i>Kaibab Paiute</i>	574
b. <i>Shivwits Paiute</i>	576
c. <i>Moapa and Las Vegas Paiute</i>	578

* Moses Lasky Professor, University of Colorado Law School. This paper would not be possible without my *Law of the Colorado River* students and alumni, classes of 2017 and 2019. Both times, I could not believe my luck at having such amazing, compassionate, funny, creative, and kind people with whom to share the Canyon. I am also grateful to Emilie Kurth and Leah Vasarhelyi for their excellent research assistance. Justin Pidot, Robert T. Anderson, Gerald Torres, and other participants in the Getches-Wilkinson Center's 2019 Martz Winter Symposium provided a rich context for thinking about the past and future of our public lands.

1. WALLACE STEGNER, *The Best Idea We Ever Had*, in MARKING THE SPARROW'S FALL: THE MAKING OF THE AMERICAN WEST 135, 137 (1999).

2. Alan Spears, *No, National Parks Are Not America's 'Best Idea'*, HIGH COUNTRY NEWS (Apr. 26, 2016), <https://www.hcn.org/no-national-parks-are-not-americas-best-idea> [<https://perma.cc/5N48-67LD>].

d. <i>San Juan Southern Paiute</i>	580
e. <i>Summary of Southern Paiute Displacement and Dispossession</i>	581
2. Hualapai, Havasupai, and Yavapai Peoples	582
a. <i>Failed Consolidation at the Colorado River Indian Tribes Reservation</i>	583
b. <i>Hualapai Indian Tribe</i>	584
c. <i>Havasupai Indian Tribe</i>	595
d. <i>Yavapai-Apache Nation</i>	599
3. Hopi, Zuni, and Navajo Lands	604
a. <i>The Hopi Tribe</i>	605
b. <i>The Navajo Nation</i>	607
c. <i>The Zuni Tribe</i>	610
B. <i>From "Blank Space" to the (Non-Indian) Public's Space</i>	613
II. GCNP, THE BIG BUILD-UP, AND WHITE SPACES	614
A. <i>The (White) New Deal and the Valley of the Sun</i>	618
1. Dams, Coal, and the Forgotten People	620
2. The Navajo-Hopi Land Dispute and the Bennett Freeze	625
3. Segregation in the Valley of the Sun	632
B. <i>Connecting the Dots</i>	636
III. TIME'S UP FOR THE GCNP?	637
CONCLUSION: THE NEXT ONE HUNDRED YEARS AND BEYOND	645

INTRODUCTION

It is 2019, the anniversary of Grand Canyon National Park's designation, and 150 years since John Wesley Powell's 1869 exploration of the Colorado River from Green River, Wyoming, to the Grand Wash Cliffs.³ At Lee's Ferry, Arizona, a point more than halfway through Powell's trip, fifteen law students from the University of Colorado, three alumni, and two law professors mill about on the shoreline, excited and nervous. We check life preservers, pack and repack waterproof day-bags, take a group photo, and set off to raft the Colorado River through Grand Canyon National Park (GCNP) for two weeks. Four miles downriver, we see Navajo Bridges high above us

3. See JOHN WESLEY POWELL, EXPLORATION OF THE COLORADO RIVER AND ITS CANYONS (Penguin Classics ed., 2003) (1875).

spanning the Canyon. I point to the slender suspension bridges and say, "That's it! That's the last we will see of modern infrastructure for two weeks. Say goodbye to civilization!"

I say it, but I only half believe it. A two-week Grand Canyon river trip is as detached from modern techno-industrial life as you can get in the United States, outside of Alaska. For fourteen days, we will live outside and off-line, reconnecting our bodies and minds with nature's rhythms as we travel through geologic time. Yet, as my students and I have studied and will encounter throughout the trip, even the nation's most cherished and protected public lands are not spaces apart from the workings of law, politics, and power.⁴

The Grand Canyon, along with every square inch within the federal government's 640-million-acre portfolio of public lands, is a human artifact as much as it is nature's domain. The put-in and take-out for today's Grand Canyon river trip are dictated by the location of two enormous dams and reservoirs that store water and generate power for seven western states.⁵ The GCNP as a whole is ringed by industrial landscapes (uranium mines, coal-fired power plants, and coal strip mines) that make possible the West's metropolises of Phoenix, Tucson, Las Vegas, and Los Angeles. The Havasupai, Hualapai, Hopi, and eight other American Indian Tribes⁶ were vio-

4. This Essay's theoretical lens is informed by critical ethnic studies, environmental justice studies, and critical geography, all of which incorporate analyses of "the ways race and class are imbricated in the production and uses of" landscapes. Bob Bolin, Sara Grineski & Timothy Collins, *The Geography of Despair: Environmental Racism and the Making of South Phoenix, Arizona, USA*, 12 HUMAN ECOLOGY REV. 156 (2005). From different perspectives, these literatures critique naturalized understandings of "environment" and "nature" and ask instead how bodies became distributed across landscapes and imbued with certain characteristics. They also ask how places get assigned hierarchies of value and made available to certain populations and unavailable to others. For exemplars from different disciplinary perspectives, see CAROLYN FINNEY, *BLACK FACES, WHITE SPACES* (2014); *RACIAL ECOLOGIES* (Leilani Nishimi & Kim D. Hester Williams, eds., 2018); DAVID PELLOW, *WHAT IS CRITICAL ENVIRONMENTAL JUSTICE?* (2018).

5. The put-in is just below Glen Canyon Dam, which generates hydropower and stores up to 24 million acre-feet of water in Lake Powell. The take-out is Pearce Ferry, which is located where the rushing waters of the Colorado River start to back up again into the slack of Lake Mead, the even-larger reservoir created by Hoover Dam. Lake Mead (maximum storage capacity of just over 26 million acre-feet) and Lake Powell are the two largest reservoirs in the United States.

6. The terms "American Indian Tribe," "Native nation" and "indigenous peoples" are used interchangeably in this Essay. "Native nation" is the preferred contemporary term for indigenous political sovereigns, but "American Indian

lently displaced from their aboriginal lands in order to create “public” land that became the basis for the National Park, even as their resources were recruited to build up the West’s cities and suburbs. Within the Park, racial and gender hierarchies play out in ways that belie the notion that wild places are ever truly separate from human frames, even when we establish them with the goal of being so.

This Essay uses the occasion of the GCNP’s one hundredth anniversary to examine how social, political, and economic forces constructed the Park. It argues that law facilitated the violent displacement of indigenous peoples to construct “empty” public lands, which then became sites that perpetuated broader structures of economic and social inequality. In Part I, the Essay examines law’s role in displacing Native peoples and creating public lands out of what was once all Indian country. Contrary to views that public land and conservation laws primarily act as hedges against privatization and corruption, the Essay shows how these laws dispossessed and confined the Grand Canyon’s Native peoples, resulting in economic disruption and cultural trauma as well as the nonconsensual redistribution of aboriginal lands to the non-Indian public.⁷ At the same time, Tribes and their allies were occasionally able to seize the framework of Indian law to retain some of their territory, which later became the basis for reasserting their rights and interests in the GCNP.

Part II examines law’s allocation of resources inside and outside the GCNP after the Park’s establishment. Laws and policies that created vast agricultural landscapes and gleaming cities in the desert excluded Black, Latinx, and Native people

Tribe” is firmly ensconced in legal documents and vocabulary.

7. Some scholars have argued that conservation-era public land law embodies a coherent normative theory that reflects public-oriented values. See Jedediah Britton-Purdy, *Whose Lands? Which Public? The Shape of Public-Lands Law and Trump’s National Monument Proclamations*, 45 *ECOLOGY L.Q.* 921, 927, 939 (2019) (arguing that public land law embodies a “structured normative pluralism” that integrates “competing public-lands goals in definite patterns . . .,” and that “anti-corruption” is a consistent value throughout that structure). See Michael C. Blumm & Kara Tebeau, *Antimonopoly in American Public Land Law*, 28 *GEO. ENVTL. L. REV.* 155, 213 (2016) (arguing that “[a]ntimonopoly principles have thoroughly infused federal public land law”). These arguments are thoughtful, normative efforts to put public land law in its best light, whereas this Essay historicizes the field and excavates its dark side. In other words, I agree that modern public land law *is best seen as* embodying principles of anti-corruption—but I also argue that it has not always or consistently done so.

from their vision. The burgeoning wilderness-preservation movement likewise largely failed to address racial and ethnic subordination. As a result, cities and suburbs as well as their supposed counterpoints—wild and protected places—each served to entrench race-based inequalities. In Part III, the Essay considers the GCNP's failure to protect female employees. Pervasive sexual harassment went unchecked for decades, resulting in the disbanding of the GCNP's River District—the unit of park rangers who patrolled the river corridor—and the resignation of two GCNP Superintendents, yet very little redress for female employees or accountability for their harassers. This sorry record reflects that gender hierarchies follow us even into places conceived of as wild, remote, and free.

In the Conclusion, the Essay will look to the GCNP's future. The next one hundred years can be different. With climate change and aridification putting increasing stress on the GCNP's natural and human resources, there is both impetus and opportunity for a reintegration of the GCNP, and public lands in general, into a broader landscape committed to decarbonization as well as racial, gender, and economic justice. If that comes to pass, then "America's best idea" may indeed be its national parks—not because they set places apart from law and politics but because they create spaces within which to forge better visions of what America might be.

I. GCNP AND TRIBES: CREATING A PARK OUT OF INDIAN COUNTRY

Night five of our river trip in the Grand Canyon. We are camped at Cardenas Creek, on river left. This part of the Canyon is wide and open before it closes up at the inner gorge, a narrow sluice created by 1.9-billion-year-old schists and granites. Several of us hike up above the campsite, past the remnants of an ancient Puebloan structure known as Hilltop Ruins. From the high point of our hike, we can see the broad, flat landscape known as Unkar Delta, where the river makes a big S-turn. The Delta was the site of extensive settlement by Cohonina and Puebloan peoples from 750 to 1200 CE, whose dwellings were excavated by the Park Service in 1967–68.⁸

8. See DOUGLAS W. SCHWARTZ ET AL., *ARCHAEOLOGY OF THE GRAND CANYON*

When members of the Kaibab Paiute Tribe accompanied Park Service employees on a river trip to the Delta, they were quick to find additional sites and identify their historic uses. According to one river-runner who served as a boatman for that trip, the Kaibab Paiute knew where to look without being told.⁹

Today, there are eleven federally recognized American Indian tribes with connections to the GCNP: the Havasupai Tribe, Hopi Tribe, Hualapai Tribe, Kaibab Paiute, Las Vegas Paiute, Moapa Band of Paiute, Navajo Nation, San Juan Southern Paiute, Shivwits Paiute, Yavapai-Apache, and Zuni. None, however, has direct management authority or regulatory power within the Park boundaries.¹⁰ In the introduction to Powell's narrative of his river trip, Wallace Stegner described the Grand Canyon and its plateau lands as a "blank space on the map one to two hundred miles wide and three to five miles long."¹¹ Yet, as Powell himself knew well, indigenous peoples lived, farmed, traded, and hunted throughout the Grand Canyon and its surroundings. The Unkar Delta and sites like it serve as reminders that the GCNP stands on the site of a broad-based eviction.

In Powell's journals, he drew a vivid portrait of the extent to which many different Native peoples inhabited the Colorado River drainage, from its headwaters in the Rockies to its lazier reaches below the Canyon in Arizona: "The desert valley of the Colorado . . . is the home of many Indian tribes."¹² These included Pima, Maricopa, Papago (today Tohono O'odham), Mo-

SERIES: UNKAR DELTA (School for Advanced Research Press, 1st ed. 1980); *see also* Notice of Inventory Completion: U.S. Department of the Interior, National Park Service, Grand Canyon National Park, Grand Canyon, AZ, 78 Fed. Reg. 21,400, 21,401 (Apr. 10, 2013), <https://www.federalregister.gov/d/2013-08377/p-10> [<https://perma.cc/3QLP-NAUE>] ("The Unkar Delta site is a complex of 52 agricultural and habitation areas spread across 300 acres. . . . [T]he site was occupied between A.D. 750 and 1200. Three culturally distinct groups of people are represented[:] . . . the Virgin and Kayenta branches of the ancestral Puebloan peoples and the Cohonina people.").

9. Interview with Lew Steiger, River Guide (May 14, 2019) (notes on file with author).

10. *See* U.S. DEP'T OF THE INTERIOR, NAT'L PARK SERV., GRAND CANYON NATIONAL PARK BACKCOUNTRY MANAGEMENT PLAN / DRAFT ENVIRONMENTAL IMPACT STATEMENT B-3, 495 (2015).

11. Wallace Stegner, *Introduction* to JOHN WESLEY POWELL, *THE EXPLORATION OF THE COLORADO RIVER AND ITS CANYONS*, at ix (Penguin Classics ed., 2003) (1875).

12. POWELL, *supra* note 3, at 24.

jave, Chemehuevi, and Yuma peoples.¹³ And on the north side, near the Virgin River and its surrounding mountains, “a confederacy of tribes speaking the Ute language and belonging to the Shoshonian family have their homes.”¹⁴ Powell also traveled through Zuni, Hopi, and Navajo lands on the western side of the Canyon in the Little Colorado and San Juan River basins. In Navajo country, Powell observed the many intact remnants of ancient Puebloan populations:

Wherever there is water, near by an ancient ruin may be found . . . The ancient people lived in villages, or pueblos, but during the growing season they scattered about by the springs and streams to cultivate the soil by irrigation, and wherever there was a little farm or garden patch, there was a summer house of stone.¹⁵

Even on the river trip itself—the tour through the “blank space”—Powell described buildings, artifacts, and other remnants of villages and agricultural communities, marveling at these peoples’ ability to eke out a living in the recalcitrant landscape: “They were, doubtless, an agricultural race, but there are no lands here of any considerable extent that they could have cultivated.”¹⁶ Powell and his men soon learned that his use of the past tense was, for them, happily premature. As he and his gaunt crew neared the end of their journey, surviving on re-sifted flour and coffee grounds, they spotted a garden ready for harvest:

Since we left the [Little Colorado River] we have seen no evidence that the tribe of Indians inhabiting the plateaus on either side ever come down to the river; but . . . today we discover an Indian garden Along the valley the Indians have planted corn, using for irrigation the water which bursts out in springs at the foot of the cliff.¹⁷

The corn was not ready for roasting, but there were “some

13. *Id.* at 27.

14. *Id.*

15. *Id.* at 53.

16. *Id.* at 259 (describing a site near Bright Angel River); *see also* 260, 264–67 (describing other villages and artifacts).

17. *Id.* at 274.

nice green squashes,” which Powell and his men pilfered “hurriedly . . . not willing to be caught in the robbery, yet excusing ourselves by pleading our great want.”¹⁸ Powell’s theft, along with its rationalization—“we needed it more”—are an apt metaphor for the larger story of dispossession.

Starting at the time of Powell’s explorations in the late 1860s and continuing through the next several decades, U.S. policies increasingly defined this broad indigenous landscape as non-Indian. Before, during, and after Powell’s explorations, law helped to create the empty spaces for western cartographers to map and non-Indian settlers to occupy. American Indian law did the work of confining indigenous peoples within knowable and demarcated boundaries. Public land law, in both its disposition and conservation modes, opened the newly non-Indian domain to privatization and conserved the balance for multiple-use management and, eventually, for the aesthetic, ecological, and recreational benefit of “the public.”

This history explains why many tribal members do not view the one hundredth anniversary of the GCNP as cause for celebration. Sarana Riggs, a Diné (Navajo) tribal member who works to protect the Grand Canyon both within the GCNP boundaries and outside of them, has written:

For the 11 tribes that call the canyon home, the park’s milestone is muddied with mistreatment. The creation of Grand Canyon National Park pushed the original inhabitants off their ancestral lands and excluded them from stewardship, management, and economic opportunities in the park. But the centennial opens the door to redefine relationships, have tough conversations, and bring new ideas to the table.¹⁹

Ms. Riggs and representatives from the other Tribes have been meeting in a series of gatherings leading up to the centennial to discuss their shared and distinct pasts, and to arrive at a set of objectives for reintegrating the Tribes into GCNP management.²⁰ The participants are optimistic, but there is a

18. *Id.* at 274–75.

19. Sarana Riggs, *We’re Still Here*, GRAND CANYON TR. ADVOC., Fall/Winter 2018, <https://www.grandcanyontrust.org/advocatemag/fall-winter-2018/native-voices-grand-canyon> [<https://perma.cc/A98S-ZWDW>].

20. *See id.*; *see also* Sarana Riggs, *Commemorating Our Indigenous Presence*,

lot of history to overcome. Carletta Tilousi, a tribal council member for the Havasupai, put it bluntly: “It’s been a really long, bitter relationship with the park.”²¹

A. *The Myth of the “Blank Space” on the Map*

The story behind that “long, bitter relationship” is in large part a legal one. For purposes of explaining how American Indian law did its work, it is helpful to have some broader context. From the early days of the republic, the nascent federal government dealt with American Indian nations through a combination of foreign affairs laws, military strategies, and domestic policies. On one hand, these laws and policies persistently guaranteed to tribes their distinct identities and separate homelands. On the other, they just as consistently undermined those very promises.²² Legal principles forged in treaties and affirmed by the U.S. Supreme Court recognized that Indian tribes were “domestic dependent nations” that had direct legal relationships with the United States.²³ In the 1830s, the Supreme Court interpreted those treaties and their backdrop of tribal sovereignty to mean that the individual states had no authority within Indian country.²⁴

Yet within a decade of that decision, U.S. policies ratified states’ hunger for Indian resources by removing tribes from any lands deemed valuable to non-Indians.²⁵ This era, known

GRAND CANYON TR. BLOG (Feb. 20, 2019), <https://www.grandcanyontrust.org/blog/commemorating-our-indigenous-presence> [<https://perma.cc/4R3L-8KKY>].

21. Laurel Morales, *Grand Canyon National Park, Turning 100, Works With Tribes to Tell Their Stories*, FRONTERAS DESK (Jan. 1, 2019), <https://news.azpm.org/p/news-articles/2019/1/1/143134-grand-canyon-national-park-turning-100-works-with-tribes-to-tell-their-stories/> [<https://perma.cc/T2CM-A8YT>].

22. A vast body of literature documents the conflicted nature of U.S. laws and policies with regard to American Indian nations. *See, e.g.*, CHARLES F. WILKINSON, *AMERICAN INDIANS, TIME, AND THE LAW: NATIVE SOCIETIES IN A MODERN CONSTITUTIONAL DEMOCRACY* (1987); ROBERT A. WILLIAMS, JR., *THE AMERICAN INDIAN IN WESTERN LEGAL THOUGHT* (1990); ROBERT A. WILLIAMS JR., *LIKE A LOADED WEAPON: THE REHNQUIST COURT, INDIAN RIGHTS, AND THE LEGAL HISTORY OF RACISM IN AMERICA* (2005). For important recent work about the significance of Tribes to the nation’s founding, see Greg Ablavsky, *Beyond the Indian Commerce Clause*, 124 YALE L.J. 1012 (2015); Maggie Blackhawk, *Federal Indian Law as Paradigm Within Public Law*, 132 HARV. L. REV. 1787 (2019).

23. *See Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 10–13 (1832).

24. *See Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 595 (1832).

25. *See, e.g.*, Indian Removal Act, 4 Stat. 411–412 (May 28, 1830); TIM ALAN GARRISON, *THE LEGAL IDEOLOGY OF REMOVAL: THE SOUTHERN JUDICIARY AND THE SOVEREIGNTY OF NATIVE AMERICAN NATIONS* (2002); Joseph C. Burke, *The*

as “the removal period” in Indian law and policy, overlapped with and eventually gave way to policies more prevalent in the western United States. Those policies consisted of consolidating tribes onto smaller homelands within their larger aboriginal land base (“reservation” policies) and then carving those lands into homestead-sized allotments for individual tribal members in order to declare the remaining lands “surplus” and open to non-Indians (known as “allotment and assimilation” policies).²⁶

In the Colorado River and Grand Canyon regions, reservation and allotment policies took root in the following context. After the Mexican-American War ended with the Treaty of Guadalupe-Hidalgo of 1848, the vast territory that now comprises Arizona, Utah, Nevada, California, and parts of New Mexico and Colorado became part of the United States. Initially, this transfer of jurisdiction made little difference to the many Native peoples of the region. But before long, different non-Indian groups descended onto the Colorado Plateau—and into the Grand Canyon—from all sides. Mormons,²⁷ sent down from Salt Lake City by Brigham Young to settle Zion, invaded Paiute, Ute, Navajo, and Hopi country. Miners and homesteaders came into the Four Corners area, clashing with earlier Mexican settlers as well as Ute and Navajo people. And settlers, miners, ranchers, and railroads came to the south rim of the Grand Canyon as well as the lower Colorado, crowding out the Havasupai, Hualapai, and Yavapai.

For the Native peoples of the greater Grand Canyon region, the reservation and allotment periods coincided with two phases of public land law, both of which depended on eliminating indigenous rights to land. The first phase was disposition, during which the United States disposed of its newly acquired

Cherokee Cases: A Study in Law, Politics and Morality, 21 STAN. L. REV. 500 (1969).

26. See Judith V. Royster, *The Legacy of Allotment*, 27 ARIZ. ST. L.J. 1 (1995); WILKINSON, *supra*, note 22, at 101–02; D.S. OTIS, *THE DAWES ACT AND THE ALLOTMENT OF INDIAN LANDS* (Francis P. Prucha ed., 1973).

27. A recent revelation by the Church of Jesus Christ of Latter Day Saints indicated that the name “Mormon” should no longer be used but rather that the full name or a short-hand “Latter Day Saints” is the preferred terminology. The term “Mormon” has been in use since the founding of the Church, and the historical documents use that term consistently. This Essay therefore uses the term “Mormon” interchangeably with “Latter Day Saints.” *Style Guide – The Name of the Church*, THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS, <https://newsroom.churchofjesuschrist.org/style-guide> (last visited Nov. 24, 2019) [<https://perma.cc/9U26-AZGR>].

public-domain lands to railroads, miners, and homesteaders. The second phase was conservation, which set aside swathes of retained public lands for multiple uses, eventually including scenic, aesthetic, and recreational uses. The following sections trace the histories of the eleven Tribes that today have consultation rights in the GCNP, showing how these phases of law and policy helped transform an all-indigenous landscape into a “blank space” on the map.²⁸ For some, like the Havasupai, the connections between their dispossession and the establishment of the GCNP are obvious and direct. Each step toward conservation eroded the Havasupai's land base and use rights. For others, like the Yavapai and Zuni, the connections are more attenuated. Federal policies abetted the violent disruption of their ways of life, facilitated the transfer of their homelands to non-Indians, and then confined them to small reservations that severed and erased their connections to the Grand Canyon. The following maps, which were created for this Essay,²⁹ tell the visual story of dispossession. They are followed by the written version—necessarily in summary fashion given the complexity and depth of the subject matter—for all eleven Tribes.

28. This Essay's treatment of each tribe's history and cultural/religious traditions is necessarily truncated. A full treatment of each tribe's legal history is beyond the Essay's scope and would take many thousands of pages. With regard to the tribes' cultural and religious traditions, the author does not and cannot purport to be an authority but has drawn from tribal sources or other reputable and trusted academic sources. Further, the Essay spends more time on the legal histories of GCNP tribes whose stories are less well-known (Southern Paiute, Hualapai, Havasupai, and Yavapai-Apache) and relatively less on the Hopi Tribe and Navajo Nation.

29. Sources for the Traditional Territories of Grand Canyon Tribes include: *Peoples of the Mesa Verde Region*, CROW CANYON ARCHAEOLOGICAL CTR., https://www.crowcanyon.org/EducationProducts/peoples_mesa_verde/images/map_sacred_mountains.asp (last visited Sept. 20, 2019) [<https://perma.cc/EH27-EWDH>]; ABOUT THE HUALAPAI NATION (Hualapai Dep't of Cultural Res., 2d ed., 2010), <http://hualapai-nsn.gov/wp-content/uploads/2011/05/AboutHualapaiBooklet.pdf> (last visited Sept. 28, 2019) [<https://perma.cc/M6YN-6SXG>]; *The Yavapai-Apache in the Verde Valley*, YAVAPAI-APACHE NATION, <https://yavapai-apache.org/history/> (last visited Sept. 19, 2019) [<https://perma.cc/K7CZ-7LCT>]; T.J. FERGUSON & E. RICHARD HART, A ZUNI ATLAS 3 (1985); STEPHEN HIRST, I AM THE GRAND CANYON: THE STORY OF THE HAVASUPAI PEOPLE 38–39 (3d ed. 2006); *Southern Paiute Traditional Lands*, KAIBAB PAIUTE TRIBE, <https://www.kaibabpaiute-nsn.gov/spc/SPCp2.html> (last visited Sept. 19, 2019) [<https://perma.cc/M3RZ-ECJP>]; *About Hopi*, HOPI EDUC. ENDOWMENT FUND, <https://www.hopieducationfund.org/about-hopi> (last visited Sept. 19, 2019) [<https://perma.cc/2A7D-E7HL>].

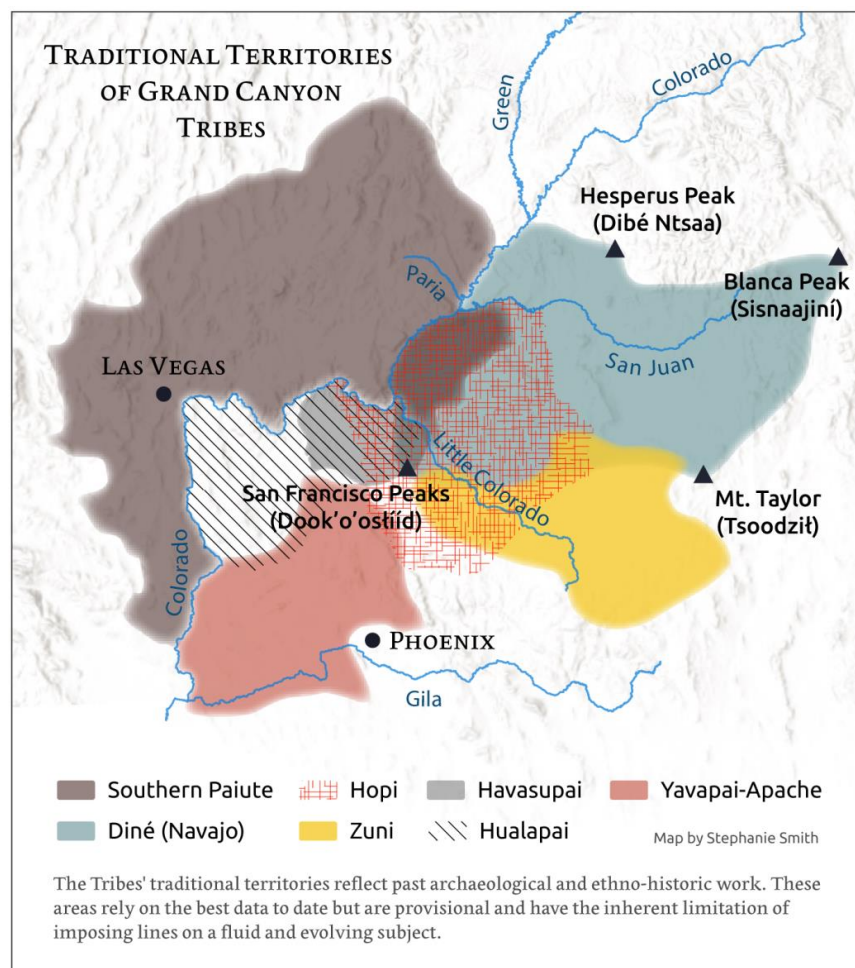


FIGURE 1. Traditional Territories of Grand Canyon Tribes.

1. Southern Paiute Nation

On the northern side of the Colorado River, Southern Paiute peoples (today separated into the five federally recognized Tribes that have consultation relationships with the GCNP)³⁰ occupied a vast region—*Puaxant Tuvip* in their own language—that included the Grand Canyon and much of the Colorado Plateau.³¹ The *Puaxant Tuvip* extended to the bottom of

30. Kaibab Paiute, Las Vegas Paiute, Moapa Band of Paiute, San Juan Southern Paiute, and Shivwits Paiute.

31. Richard W. Stoffle, David B. Halmo & Diane E. Austin, *Cultural*

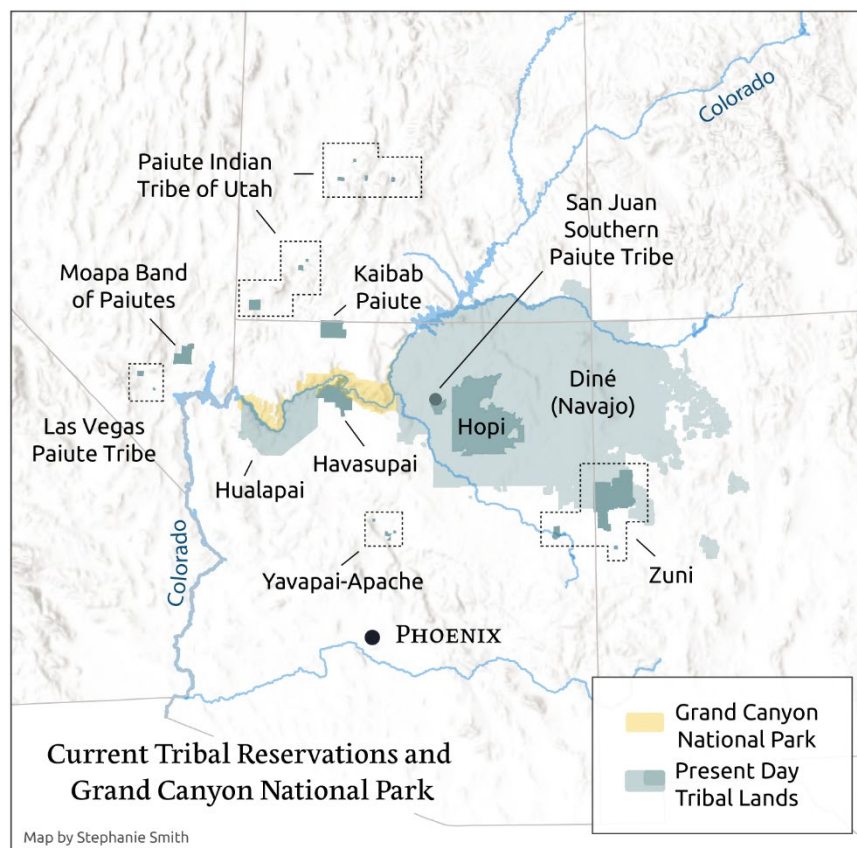


FIGURE 2. Current Tribal Reservations and Grand Canyon National Park.

the Grand Canyon on its southern border and included Monument Valley to the east; the Escalante Desert, Pavant Range, and Pevier River to the north; and Death Valley to the west.³² Historically, each of the three Southern Paiute bands—the Shivwits-Santa Clara, Kaibab, and San Juan—had its own district that included a riparian oasis (for farming and residence) and an upland area (for hunting, plant-gathering, and seasonal

Landscapes and Traditional Cultural Properties: A Southern Paiute View of the Grand Canyon and Colorado River, 21 AM. INDIAN Q. 229, 238 (1997).

32. *Id.* at 240; *see also* Southern Paiute Nation v. United States, 14 Indian Claims Comm'n 618, 619 (1965) (describing Southern Paiute Nation as being bounded by the Colorado River to the south, Death Valley to the west, and extending "northward into Beaver County of Utah and eastward to the region of the Escalante River in Utah").

housing).³³ But for all Southern Paiute, the Grand Canyon, which they called *Piapaxa 'uipi'* (Big River Canyon), was the cultural, material, and spiritual focus of the landscape.³⁴ Paiute people describe the systems of creeks and tributaries leading to the Colorado River in the Grand Canyon as “the veins of the world.”³⁵

Before Euro-American contact, Southern Paiutes moved throughout their vast aboriginal territory in patterns based on their knowledge of plants and other food sources.³⁶ Martha Knack, author of a comprehensive ethnohistory of the Southern Paiutes, noted that upon contact, Euro-Americans mistakenly described the Southern Paiutes as wanderers, when in fact they were deliberately moving across their landscape based on “extensive knowledge of the growth preferences of specific plants and solid familiarity with the seasonal blooming and ripening of each species.”³⁷ Further, because Southern Paiute territory included “many different altitude zones in close proximity,” each group’s seasonal needs were “usually filled in a customary harvest circuit.”³⁸ These circuits comprised the territory of each group’s usufructuary rights, which could be modified in response to the needs of other Paiute groups during times of scarcity.³⁹

When explorers and settlers made their way into *Puaxant Tuvip* country in increasing numbers in the 1860s, Southern Paiutes’ traditional patterns were severely disrupted. They used their specialized knowledge to maintain social cohesion and survive.⁴⁰ But survival required dramatic adaptations. Many Southern Paiute people took refuge in the Grand Canyon

33. Stoffle, et al., *supra* note 31, at 241; *see also* 2 DIANE AUSTIN, ET AL., *Yanawant: Paiute Places and Landscapes in the Arizona Strip*, THE ARIZONA STRIP LANDSCAPES AND PLACE NAME STUDY, at v (Dec. 12, 2005) (referring to research by Isabel Kelly in the 1930s delineating sixteen Southern Paiute districts, five of which are located in the region known as the “Arizona strip,” but noting that more recent efforts have revised those boundaries).

34. *See* Stoffle, et al., *supra* note 31, at 241.

35. *See id.*

36. *See* AUSTIN, ET AL., *supra* note 33, at 2–3.

37. *Id.* at 3 (quoting MARTHA KNACK, *BOUNDARIES BETWEEN: THE SOUTHERN PAIUTES, 1775–1995*, at 14 (2001)).

38. *Id.* at 4 (quoting KNACK, *supra* note 37, at 14).

39. *Id.* at 4 (citing KNACK, *supra* note 37, at 14–15).

40. AUSTIN, ET AL., *supra* note 33, at 4. For a study of the conflicts between Mormons, non-Mormon miners, and Southern Paiutes during the 1860s–90s, *see generally* W. PAUL REEVE, *MAKING SPACE ON THE WESTERN FRONTIER: MORMONS, MINERS AND SOUTHERN PAIUTES* (2006).

and its tributary side canyons.⁴¹ They altered their seasonal migration patterns and remained in the canyons for extended periods to avoid outside contact. During this time, they interacted extensively with their neighbors to the south—the Hualapai—who were under similar stress.⁴² Shared cultural traditions include the Salt Song Trail, through which Hualapai and Southern Paiute people pass to the afterlife. The Trail traverses through both groups' traditional territories on each side of the Colorado River.⁴³ The Southern Paiute also shared the Ghost Dance with the Hualapai, a movement that swept through Indian country in the 1880s in response to rapid non-Indian encroachment on sacred lands.⁴⁴ On occasion, the Southern Paiutes also made common cause with Navajos and Utes in the southeast Utah/northern Arizona region.⁴⁵ Their alliance was fluid and contextual, with antagonistic periods throughout, but they shared common interests in resisting invasion by Mormons and other white settlers.⁴⁶

By 1864, Mormons had established four ranching and farming communities in Southern Paiute country at Short Creek, Pipe Springs, Moccasin, and Kanab.⁴⁷ Southern Paiutes were getting squeezed out of their traditional territories and isolated from the sparse water sources in the region.⁴⁸ Miners, who were generally not aligned with the Mormons but eager to prospect on public domain lands, petitioned the federal government to formalize the Southern Paiutes' eviction.⁴⁹ The Indian agents for Utah readily agreed, enticed by the potential

41. HELEN C. FAIRLEY, *CHANGING RIVER: TIME, CULTURE, AND THE TRANSFORMATION OF LANDSCAPE IN THE GRAND CANYON* 71 (2003).

42. *Id.*

43. See Richard W. Stoffle & Maria Nieves Zedeno, *Historical Memory and Ethnographic Perspectives on the Southern Paiute Homeland*, 23(2) J. OF CAL. AND GREAT BASIN ANTHROPOLOGY 229, 240–41 (2001).

44. Richard W. Stoffle, Lawrence Loendorf, Diane E. Austin, David B. Halmo & Angelita Bullets, *Ghost Dancing the Grand Canyon: Southern Paiute Rock Art, Ceremony and Cultural Landscapes*, 41(1) CURRENT ANTHROPOLOGY 11, 12–13 (2000).

45. See ROBERT S. MCPHERSON, *NORTHERN NAVAJO FRONTIER 1870S-1900: EXPANSION THROUGH ADVERSITY* 11–14 (2001).

46. See *id.* at 15.

47. *Id.* at 6.

48. See Richard W. Stoffle & Michael J. Evans, *Resource Competition and Population Change: A Kaibab Paiute Ethnohistorical Case*, 23(2) ETHNOHISTORY 173, 179–80 (1976).

49. REEVE, *supra* note 40, at 49 (“Miners first appealed for government intervention against the Paiutes in August 1864.”).

for mineral wealth in southwest Utah.⁵⁰ They convinced the U.S. Commissioner of Indian Affairs that this was a good plan and, in 1865, managed to persuade six Paiute leaders to abandon all of their homelands in exchange for relocation to the Uintah reservation and promises of goods and annuities.⁵¹

The Treaty of Pinto Creek, as it was called, was never ratified. The Southern Paiutes therefore never had to test whether their three thousand members were adequately represented by six men whom they had not selected.⁵² Nonetheless, this was only the first of several times they would have to say no to removal to the Uintah reservation. Further, Mormons, miners, and other settlers kept moving in despite the failure to evict the Southern Paiutes by treaty.

The ensuing decades would formalize these encroachments, shrinking the Southern Paiutes' land base to small and scattered reservations on marginal lands.⁵³ As described below, after centuries of the Southern Paiutes' pervasive occupation of their homelands, within a few decades non-Indian invasion led to their being dispossessed of *Puaxant Tuvip*.

a. Kaibab Paiute

Today the Kaibab Band of Paiute Indians' 120,000-acre reservation is ninety miles from the north rim of the Grand Canyon in the isolated portion of northern Arizona known as the "Arizona strip."⁵⁴ The Kaibab's aboriginal territory, which included Kanab Creek Canyon and the Kaibab Plateau, is now almost entirely subsumed within GCNP. The Kaibab Paiute traditionally engaged in riverine and oasis farming, which they managed to sustain for centuries after the Spanish first came to their territory in the 1520s.⁵⁵ Kanab Creek Canyon was also an important north-south access from the mountains of southern Utah to the Colorado River, allowing trade between Paiute

50. *Id.* at 50.

51. *Id.* at 52.

52. *Id.* at 53.

53. *See id.* at 82 (listing the dispersed reservations for each band and describing them as "small," with lands that were "marginal at best").

54. *See Kaibab Band of Paiute Indians*, INTER TRIBAL COUNCIL OF ARIZ. https://itcaonline.com/?page_id=1166 (last visited Sept. 1, 2019) [<https://perma.cc/G8TT-6WC3>].

55. *See Stoffle & Evans, supra* note 48, at 179; *see also Stoffle, et al., supra* note 31, at 242.

communities and with other tribes.⁵⁶

The Kaibab Paiute's longstanding agricultural and subsistence patterns were severely disrupted by the arrival of Mormon settlers in the early 1860s.⁵⁷ Competition for water and resources was acute, and within ten years of the first Mormon contact, the Kaibab Paiute lost 82 percent of their population.⁵⁸ With support from the Navajo, the Kaibab were initially able to push the Mormons out of Long Valley (the northern reach of their territory), but the success was short-lived. By 1871, the Mormons returned, and the area was also under siege by miners seeking gold at the mouth of Kanab Creek in the Grand Canyon.⁵⁹ The Kaibab nonetheless stayed on their traditional lands, retreating further into the side canyons. They had no treaty with the United States and therefore received no allocations or rations until after 1900. Jacob Hamblin, a Mormon explorer with fairly good relationships with the region's tribes, asked John Wesley Powell to provide support to the Kaibab Paiute.⁶⁰ By then, Powell was Director of the United States Geological Survey and the Bureau of Ethnology. Powell responded that the Kaibab had to go to an existing reservation for assistance, ultimately recommending the Uintah Reservation. This approach was consistent with the government's broader policies of shrinking tribes' land bases, consolidating them where possible, and freeing the remaining lands for non-Indian settlement.⁶¹ The Kaibab Paiute refused to leave, however, and by 1913, a small reservation was established in the area near Pipe Springs.⁶²

56. See Stoffle, et al., *supra* note 31, at 243.

57. Stoffle & Evans, *supra* note 48, at 179.

58. *Id.* at 181–82; see also KATHLEEN L. MCKOY, AN ADMINISTRATIVE HISTORY OF PIPE SPRINGS NATIONAL MONUMENT, PART 1, n.69 (2000) (“The impacts on native flora and fauna that accompanied Mormon settlement along Kanab Creek and other nearby locations, such as Short Creek, Pipe Spring, and Moccasin Spring, were disastrous, resulting in the loss to the Kaibab Paiute of their traditional means of subsistence. This in turn led to a rapid decline in population.”).

59. See Stoffle & Evans, *supra* note 48, at 185.

60. *Id.* at 187.

61. *Id.*; see also REEVE, *supra* note 40, at 50, 60.

62. See Stoffle & Evans, *supra* note 48, at 190–91; Exec. Order No. 1786 (June 11, 1913) (temporarily withdrawing certain described lands in Arizona from settlement, location, sale, or entry, pending classification and legislation for their disposal). Stoffle and Evans describe the reservation as having been established in 1909, but there is no executive order referring to lands withdrawn for that purpose in 1909.

The Kaibab Paiute Reservation, which is twelve miles by eighteen miles, is a fraction of the Kaibab's aboriginal territory and excludes Kanab Creek and other tributaries of the Colorado River that are part of the Kaibab's sacred landscape. The Kaibab's current reservation boundaries encompass Pipe Springs National Monument, which has been a recurrent source of friction for the Tribe. The Monument was designated to recognize the persistence of Mormon settlers.⁶³ For years, the National Park Service argued against the Kaibab Paiutes' access to the water from Pipe Springs, prioritizing instead the aesthetic and recreational interests of tourists and NPS employees.⁶⁴ Today, the Kaibab Paiute's tribal headquarters are across the street from the NPS office, emblematic of the contentious yet necessarily close relationship between the Tribe and the federal agency.⁶⁵

b. Shivwits Paiute

To the west of the Kaibab Paiute, the Shivwits/Santa Clara band's traditional territory comprised the entire Shivwits Plateau. The Plateau includes the Santa Clara river in southern Utah, the Grand Wash cliffs area (the geological end of the Grand Canyon), and the base of the Virgin Mountains.⁶⁶ In the 1860s, Mormon aggression toward the Shivwits caused some tribal members to retreat to the south across the Colorado River, where they became refugees among the Hualapai.⁶⁷ The Mormon settlers took over Shivwits farms along the Muddy River, imposing further pressures on the population.⁶⁸ The Shivwits joined forces with the other Paiute bands but ultimately were defeated by the U.S. military in 1868.⁶⁹ Shortly after, the Mormons conducted a mass conversion of Shivwits and Santa Clara Paiutes to Mormonism in St. George, Utah.⁷⁰

63. ROBERT H. KELLER & MICHAEL F. TUREK, *AMERICAN INDIANS AND NATIONAL PARKS* 71–72 (1998) (describing the history of Pipe Springs National Monument and the Kaibab Paiutes' relationship with the National Park Service).

64. *See id.* at 81–83.

65. *Id.* at 65.

66. Isabel T. Kelly, *Southern Paiute Bands*, 36 *AM. ANTHROPOLOGIST* 548, 552 (1934).

67. Stoffle & Evans, *supra* note 48, at 183 (describing the Shivwits retreat to the "Pine Spring band of Walapais").

68. *See id.*

69. *Id.*

70. Stoffle, et al., *supra* note 44, at 15.

Even after their military defeat and conversion, pressure mounted to remove all traces of the Shivwits from southern Utah. Miners and their political allies lobbied the federal government to, in the words of historian W. Paul Reeve, “blot them from the map of their homeland[s].”⁷¹ In 1873, G.W. Ingalls, the Indian agent for the Paiutes, and John Wesley Powell proposed moving the Shivwits and Santa Clara to the newly established Moapa Indian Reservation.⁷² Commissioner of Indian Affairs Edward P. Smith proposed a different plan: consolidate all Southern Paiute with the Utes on the Uintah Reservation.⁷³ Powell and Ingalls were dispatched to convince the Paiutes to move to the Uintah Reservation, where they would live side by side with their historic rivals. Paiute leaders firmly rejected the plan, informing Powell and Ingalls that “the idea of going to Uintah ‘had been repelled by all the people.’”⁷⁴ Powell and Ingalls convinced the Commissioner to abandon the plan, and no provision was made for the Shivwits during the next two decades.

In the late 1880s, the Shivwits Paiute participated in the Ghost Dance ceremonies that swept through Indian country during this period of intense and violent dislocation.⁷⁵ As noted above, the Shivwits shared the tradition with their neighbors, the Hualapai, as part of the emerging pan-Indian resistance to tribal land loss and assimilation.⁷⁶ The Ghost Dance failed to yield a savior, and the Shivwits were no match for the ceaseless flow of Mormons, miners, and other settlers. The Shivwits began to receive federal funds and other assistance, and Shivwits and Kaibab Paiute children were sent to school in St. George, Utah.⁷⁷ Congress finally authorized the purchase of a small patch of land for the Shivwits and other Southern Paiute bands along the Santa Clara River, near St. George, in 1891.⁷⁸

71. REEVE, *supra* note 40, at 60 (2006).

72. *See id.* at 60.

73. *Id.*

74. *Id.*

75. *See* Stoffle, et al., *supra* note 44, at 15.

76. *See* Gregory Smoak, *The Mormons and the Ghost Dance of 1890*, 16 S.D. HIST. SOC'Y 269, 274 (1987) (“While each tribe incorporated its own traditions into the religion, the Ghost Dance was nevertheless truly a pan-Indian movement.”). On Pan-Indian resistance generally, see STEPHEN CORNELL, *THE RETURN OF THE NATIVE: AMERICAN INDIAN POLITICAL RESURGENCE* (1988).

77. Stoffle & Evans, *supra* note 48, at 189.

78. Act of Mar. 3, 1891, ch. 543, 2 Stat. 989, 1005 (codified as amended at 25 U.S.C. § 766 (omitted 1984) (2018)), <https://www.loc.gov/law/help/statutes-at->

The area was designated as a reservation in 1916⁷⁹ and enlarged in 1937.⁸⁰

Less than two decades later, Congress embarked on a policy of terminating tribes' federal relationships with the United States. At the urging of Utah Senator Arthur Watkins, the Paiute tribes in Utah were some of the first on the list.⁸¹ In 1954, Congress passed legislation terminating the Shivwits Band's federal status and eliminating federal supervision over their trust and restricted property.⁸² The Shivwits, along with Utah's other Paiute bands, joined the struggle to reverse the termination policy, which culminated in 1980 legislation restoring their federal status. The newly reconstituted tribe, designated the Paiute Indian Tribe of Utah (PITU), includes the Shivwits, Kanosh, Koosharem, Indian Peaks, and Cedar City Bands of Paiute.⁸³ The collective PITU Reservation is composed of ten separate parcels of land located in four southwestern Utah counties.⁸⁴

c. Moapa and Las Vegas Paiute

The Moapa and Las Vegas Paiute bands traditionally occupied the western- and southern-most end of Southern Paiute territory. The Moapa Paiute's aboriginal lands included

large/51st-congress/session-2/c51s2ch543.pdf [https://perma.cc/8WHW-8M7K].

79. Exec. Order No. 2364 (Apr. 21, 1916) (describing certain lands in Washington County, Utah, reserved for the Shebit or Shivwitz tribe and other Indians).

80. See Shivwits Band of the Paiute Indian Tribe of Utah Water Rights Settlement Act of 2000, Pub. L. No. 106-263, 114 Stat. 737 (2000) (citing to the 1937 expansion of the Shivwits reservation); see also *The Shivwits Band of Paiute Indians of Utah*, WASH. CTY. HIST. SOC'Y, <https://wchsutah.org/people/shivwits-band.php> (last visited June 22, 2019) [https://perma.cc/G78K-2TQQ].

81. See Arthur V. Watkins, *Termination of Federal Supervision: The Removal of Restrictions over Indian Property and Person*, 311 ANNALS OF THE AM. ACAD. OF POL. AND SOC. SCI. 47, 53–55 (1957).

82. See Paiute Indians of Utah Termination Act, Pub. L. No. 762, 68 Stat. 1099 (1954) (codified as amended at 25 U.S.C. §§ 721–60 (2018)); see also *Southern Paiute Nation v. United States*, 14 Indian Claims Comm'n 618, 638 (1965) (citing to the Paiute Termination Act, terminating Federal supervision over their trust and restricted property).

83. See 25 U.S.C. §§ 761–68 (2018) (omitted 1980). See Pub. L. No. 96-227, 94 Stat. 317 (1980) (originally codified in 25 U.S.C. § 461, later transferred to 25 U.S.C. § 5101).

84. See *Paiute Indian Tribes of Utah: Reservation Information*, <https://www.utahpaiutes.org/reservation/> (last visited July 9, 2019) [https://perma.cc/YG4J-LR5W].

a vast area of low-desert mountain country that extended to the Virgin Mountains in the east, the Sheep Range and the Las Vegas Valley in the west, and the Colorado River in the south.⁸⁵ The Moapa were the first Paiute band to be removed to a reservation. On March 12, 1873, President Grant issued an executive order that created the Moapa Reservation along the Muddy River in Nevada.⁸⁶ In 1874, a second executive order significantly expanded the reservation to the relatively large size of two million acres.⁸⁷ This apparent generosity had the usual assimilative purpose. Ingalls believed that the reservation would motivate the Paiutes to abandon “their savage, wandering life, and give their attention to agricultural and mechanical pursuits, and adopting a civilized mode of living”⁸⁸ As documented by historian W. Paul Reeve, Ingalls saw an additional benefit of removing the Southern Paiutes to the Muddy Valley: the “rapid development of the Arizona and Nevada silver mines.”⁸⁹

Agent Ingalls, it soon turned out, had asked too much of his fellow non-Indians. They wanted even more access to mineral lands, and they were not much pleased by forgoing the area’s rare arable lands either. After a year of intense lobbying, Nevada mining and farming interests convinced Congress to reduce the Moapa Reservation from two million acres to a mere one thousand acres.⁹⁰ On July 31, 1903, through executive order, President Roosevelt restored a small amount of land to the Moapa Indian Reservation.⁹¹

The Las Vegas Paiute band’s traditional territory borders that of the Moapa band, where the Colorado begins flowing south instead of west.⁹² The Las Vegas Paiute’s western boundary was Death Valley. Similar to the other Paiute bands, the Las Vegas Paiute first encountered sustained non-Indian contact in the first half of the nineteenth century, which then

85. See Kelly, *supra* note 66, at 555.

86. Exec. Order, President Grant (Mar. 12, 1873).

87. Exec. Order, President Grant (Feb. 12, 1874).

88. REEVE, *supra* note 40, at 54.

89. *Id.*

90. *Id.* at 57; see Act of Mar. 3, 1891, ch. 543, 2 Stat. 989, 1005 (codified as amended at 25 U.S.C. § 766 (omitted 1984) (2018)), <https://www.loc.gov/law/help/statutes-at-large/51st-congress/session-2/c51s2ch543.pdf> [<https://perma.cc/8WHW-8M7K>].

91. Exec. Order, Moapa Reservation Nevada, Theodore Roosevelt (July 31, 1903).

92. Kelly, *supra* note 66, at 555.

increased in the second half.⁹³ In 1911, a private rancher, Helen Stewart, gave ten acres in downtown Las Vegas to the Las Vegas Paiute.⁹⁴ This land grant established the Las Vegas Paiute Colony. Together, the Indian Reorganization Act of 1934 and the Las Vegas Paiute Tribal Constitution of 1970 led to the official recognition of the Las Vegas Paiute.⁹⁵ In 1983, Congress allotted four thousand additional acres to the Las Vegas Paiute at the Snow Mountain Reservation, which is eighteen miles northwest of the original settlement in downtown Las Vegas.⁹⁶

d. San Juan Southern Paiute

The San Juan Paiute are the easternmost band of Southern Paiute.⁹⁷ Traditionally, San Juan Paiutes lived in villages throughout the region south of the San Juan River and east of the Little Colorado River.⁹⁸ Spanish explorers recorded contact with the San Juan Paiute in 1776,⁹⁹ but from then until the 1850s, there was little mention of the band. In the 1850s and '60s, as non-Indian settlers entered the region, U.S. military journals described conflicts between the San Juan Paiute and Navajo due to overlapping territory.¹⁰⁰ The federal government's first official acknowledgment of the San Juan Paiute came in the form of a report by government ethnologists (including John Wesley Powell) in 1873,¹⁰¹ which described the band's small population and scattered villages. In a 1903 census, the federal government counted roughly 120 San Juan Paiute members.¹⁰² In response to pressure to settle the tribe's boundaries, the United States government recognized a *de facto* Paiute reservation between the San Juan River and the

93. ROBERT C. EULER, SOUTHERN PAIUTE ETHNOHISTORY (Jesse D. Jennings & Dona G. McLaren eds., 1966).

94. *History*, LAS VEGAS PAIUTE TRIBE, <https://lvpaiutetribe.com/history.html> (last visited June 22, 2019) [<https://perma.cc/XSF8-LTPS>].

95. *Id.*

96. *Id.*

97. *See* Kelly, *supra* note 66, at 550.

98. *Id.*

99. Allen C. Turner & Robert C. Euler, *A Brief History of the San Juan Paiute Indians of Northern Arizona*, 5 J. OF CAL. AND GREAT BASIN ANTHROPOLOGY 199, 199–202 (1983).

100. *Id.* at 201.

101. *Id.* at 202–03.

102. *Id.* at 203.

Utah-Arizona border in 1907.¹⁰³ In 1933, however, the federal government expanded the Navajo reservation's boundaries to include that land, and the Southern Paiute's separate borders dissolved.¹⁰⁴ Although they continued to live in small villages throughout the northwestern portion of the Navajo Nation, from Navajo Mountain to Tuba City, the San Juan Paiutes did not achieve federal recognition until 1989.¹⁰⁵ In 2000, the Navajo Nation signed a treaty with the Southern Paiute to address their members' economic and social needs.¹⁰⁶

e. Summary of Southern Paiute Displacement and Dispossession

In less than three decades, between 1853 and 1880, the Southern Paiutes lost almost all of *Puaxant Tuvip* despite never having agreed to cede their homelands.¹⁰⁷ The United States never entered into a treaty with the Southern Paiutes or otherwise formally acquired their lands.¹⁰⁸ Instead, the Southern Paiutes suffered unrestrained invasions by waves of non-Indian settlers, often abetted by the U.S. military. The federal government ratified the Southern Paiute's dispossession by designating only a handful of small reservations.¹⁰⁹ The work of separating Southern Paiutes from their homeland was accomplished by allowing settlers to take land and resources without legal warrant, sanctioning those takings by supporting assimilationist actions (like the conversions and school at St. George, Utah), and designating postage-stamp sized reservations. The Southern Paiute nonetheless persisted, some receding into the side canyons off of the north rim of the Grand Canyon, others aligning with neighboring Tribes, and still others claiming the small reservations that were eventually

103. *About the Tribe*, SAN JUAN SOUTHERN PAIUTE TRIBE (June 22, 2019), <https://www.sanjuanpaiute-nsn.gov/about> [<https://perma.cc/C53R-XSNJ>].

104. *Id.*; see also An Act of June 14, 1934, Pub. L. No. 352; Turner & Euler, *supra* note 99, at 199–207.

105. Notice of Final Determination that the San Juan Southern Paiute Tribe Exists as an Indian Tribe, 54 Fed. Reg. 240 (Dec. 15, 1989); *About the Tribe*, *supra* note 103.

106. *About the Tribe*, *supra* note 103.

107. See Southern Paiute Nation v. United States, 14 Ind. Cl. Comm. 618, 619–20 (1965) (describing Southern Paiutes' allegations before the Indian Claims Commission).

108. See *id.*

109. See *supra* notes 66–96 and accompanying text.

designated.

Most of today's GCNP river runners and hikers have no idea that the side canyons they explore, the springs they drink from, and the seemingly uninhabited landscape they treasure were not long ago part of a populated and sacred Paiute homeland. And further, most are unaware that Southern Paiute people live near the Grand Canyon still. Southern Paiute people visit sacred sites like the hanging canyon above Deer Creek falls, where non-Indian tourists stop and wonder who left ghostly handprints in the Tapeats sandstone and why. The Southern Paiute know. It was their ancestors. They left marks for reasons of their own that should make us pause to ask why we ever think we are the first to love a place.¹¹⁰

2. Hualapai, Havasupai, and Yavapai Peoples

Unlike the Southern Paiute tribes, whose longstanding habitation of the Grand Canyon is barely visible to most of today's visitors, many GCNP hikers and river runners have some minimal awareness of the Havasupai and Hualapai Tribes. Today, the Havasupai Tribe's reservation includes plateau lands as well as the narrow Cataract side canyon, sometimes known as Havasu Creek. The Tribe issues permits for campers to hike or mule-pack down to Havasu Creek's stunning aquamarine falls, and river runners walk up from the bottom to play in the Creek's gentle rapids and warm pools. The Hualapai Tribe, whose reservation spans three counties and one hundred river miles, operates one of the main take-outs for Grand Canyon river trips at Diamond Creek and runs helicopter tours through a special use permit.¹¹¹ The Hualapai

110. Just above river mile 137, Deer Creek Falls "leaps into the Colorado by a direct fall of more than 100 feet." POWELL, *supra* note 3, at 271. The Falls are formed by a hanging canyon that emerges from a stranded layer of Tapeats sandstone. The Tapeats forms beautiful and eerie ledges, and the area is sacred to the Kaibab Paiute. In a narrow section of the side canyon, just above the falls, there are several pictographs in the shape of handprints.

111. 14 C.F.R. § 93.319(f) (2019); *see also* 65 Fed. Reg. 17,707, 17,714–15 (April 4, 2000) (explaining that the Federal Aviation Administration's exemptions from Grand Canyon overflight restrictions for the Hualapai are grounded in the federal government's trust responsibility. The Hualapai Tribe relies on revenue from overflights for nearly all of its annual tribal budget.). "As detailed in the regulatory evaluation accompanying this rule, the Hualapai Tribe would be significantly adversely impacted from an economic perspective if the operations limitation were applied to operators servicing Grand Canyon West Airport in

also own the Grand Canyon Skywalk, visible just past river mile 265, a popular attraction for tourists from Las Vegas.

What very few visitors know, however, is that both Tribes, as well as the related Yavapai people—today consolidated with Apache bands as the Yavapai-Apache Nation—occupied virtually all of the south rim, its plateau lands, and its side canyons, including the area now dominated by GCNP concessionaires and amenities. All three tribes are Pai peoples sharing linguistic, territorial, and cultural origins. But each tribe also has distinct historic relationships to defined geographies south and east of the Colorado River, extending to the Mexican border. These relationships were severely disrupted in the latter half of the nineteenth century, just as they were for the Southern Paiutes.

For all three Tribes, American Indian law, public land law, and conservation law left a mixed legacy of devastation and revival. The Hualapai Tribe's early resistance to non-Indian encroachment on their lands enabled them to secure a fairly large reservation, which they subsequently defended through litigation that set important pro-tribal precedent in Indian law. The Havasupai Tribe, on the other hand, faced a nearly century-long struggle to restore any of their plateau lands to the tiny reservation set aside for them in 1882. The Yavapai's story is also distinct, involving a period of removal to the San Carlos reservation, which resulted in severe population and land loss. The Yavapai returned to the upper Verde Valley in 1900 and officially became the combined Yavapai-Apache Tribe in the 1930s.¹¹²

a. Failed Consolidation at the Colorado River Indian Tribes Reservation

Just as they had tried to consolidate the Southern Paiutes with Ute peoples on a single reservation, Indian agents devised a plan to solve all of the lower Colorado River Basin's Indian problems in one fell swoop. The Chemehuevi, Mojave, Havasupai, Hualapai, Yavapai, and Yuma peoples lived on various plateaus and bottomlands, extending from the River's confluence with the Little Colorado River to the Mexican border.

support of the Hualapai Tribe." *Id.* at 17,718.

112. See *History*, YAVAPAI-APACHE NATION, <https://yavapai-apache.org/history/> (last visited June 23, 2019) [<https://perma.cc/9Q6L-ZQLF>].

In 1865, Superintendent of Indian Affairs Charles D. Poston proposed to Congress that a single reservation should be designated for all of these tribes (“some ten thousand Indians”) on the lower Colorado near what is now Parker, Arizona.¹¹³ Congress passed legislation establishing the Colorado River Indian Tribes (CRIT) reservation in 1865,¹¹⁴ but Poston’s plans were never realized. After decades of trying to make CRIT the single reservation for all Colorado River peoples, fewer than one thousand members of just two tribes—the Mojave and Chemehuevi—were persuaded to remain there.¹¹⁵ Today, CRIT is a single federally recognized tribe with established senior water rights and a multiethnic tribal membership, which includes some Hopi and Navajo who were relocated to CRIT in the 1930s.¹¹⁶ The Pai peoples, however, were never persuaded to leave their aboriginal lands. Their stories of resistance and return are below.

b. Hualapai Indian Tribe

The Hualapai Indian Tribe’s story includes litigating a landmark case in the field of American Indian law.¹¹⁷ In *United States v. Santa Fe Pacific Railroad Co.*,¹¹⁸ the Hualapai Tribe established that tribes have aboriginal rights to their territory that predate any United States claims and that tribes can prove these territorial rights by showing historic use and occupancy.¹¹⁹ The case, decided in 1941, cleared the path for other tribes to argue that traditional use and occupancy are sufficient to establish precontact Indian title.¹²⁰ Before this legal

113. Charles D. Poston, *Arizona Superintendency: No. 53*, in REPORT OF THE COMMISSIONER OF INDIAN AFFAIRS FOR THE YEAR 1864, at 150–57 (1865); see also Sarah Krakoff, *Inextricably Political: Race, Membership, and Tribal Sovereignty*, 87 WASH. L. REV. 1041, 1092–93 (2012).

114. 13 Stat. 559 (1865).

115. See Krakoff, *supra* note 113, at 1094–95 (CRIT population was barely more than eight hundred people, mostly Mojave, between 1876–1917).

116. See Krakoff, *supra* note 113; see also Sarah Krakoff, *Settler Colonialism and Reclamation: Where American Indian Law and Natural Resources Law Meet*, 24 COLO. NAT. RESOURCES, ENERGY, & ENVTL. L. REV. 261 (2013).

117. *United States v. Santa Fe Pac. R. Co.*, 314 U.S. 339 (1941).

118. *Id.*

119. See *id.* at 345 (“Occupancy necessary to establish aboriginal possession is a question of fact to be determined as any other question of fact.”).

120. See CHRISTIAN MCMILLEN, MAKING INDIAN LAW: THE HUALAPAI LAND CASE AND THE BIRTH OF ETHNOHISTORY, at xv (2007) (describing the path-breaking nature of the Hualapai case and its influence on other cases,

victory, however, the Hualapai Tribe was subject to the same policies that vastly diminished all other Grand Canyon Tribes' territory. The story behind the litigation that culminated in the Hualapai's Supreme Court win includes the federal government's carelessness and disregard for tribal rights, as well as its solicitousness toward entities like the railroad companies that were putting land and resources to purportedly higher uses.¹²¹ The Hualapai were nonetheless able to use the legal framework of American Indian law to their advantage, eking out a win against a backdrop of loss.

The Hualapai, according to their origin story, were born as a distinct people in Madwida Canyon, a side canyon to the Grand Canyon that today is located on the western side of the Hualapai Reservation.¹²² Some theories of Hualapai origins hypothesize that they derived from Yuman speakers who spread out from the Colorado River Delta around 1 CE.¹²³ Others posit that the Hualapai derived from peoples who settled in the region between 850 and 1250 CE, and "still others suggest that they were formed in situ, an amalgamation of several cultures."¹²⁴ Despite the different theories, there is a consensus that by roughly 1300 CE, the Hualapai "had arrived and were firmly in place" on the northwestern corner of the Colorado Plateau, living, trading, and forming their own unique culture in the side canyons and uplands of the Colorado River.¹²⁵ Their trading partners included the Hopi and Navajo to the east, the Shivwits Paiutes to the north, and the Mojaves to the west.¹²⁶

This vast network of indigenous peoples, which spanned the Grand Canyon and Colorado Plateau regions, was altered

domestically and in other countries).

121. See MICHAEL F. ANDERSON, *POLISHING THE JEWEL: AN ADMINISTRATIVE HISTORY OF GRAND CANYON NATIONAL PARK* 2–3 (2000) (describing the generous U.S. grants to the Atlantic and Pacific Railroad, predecessor to the Santa Fe Pacific Railroad Co., which included forty-mile swathes of alternate sections of land on either side of the rights-of-way for the tracks).

122. See MCMILLEN, *supra* note 120 at 4; see also *id.* at xx (map with location of Madwida canyon on the Hualapai Reservation).

123. See MCMILLEN, *supra* note 120 at 3; see also ABOUT THE HUALAPAI NATION, *supra* note 29 ("The word 'Pai' means 'the people,' and according to traditional oral history, all Pai bands consider themselves to be one ethnic group.").

124. MCMILLEN, *supra* note 120, at 3–4; see also John Martin, *The Prehistory and Ethnohistory of Havasupai-Hualapai Relations*, 32 *ETHNOHISTORY* 135, 136 (1985) (reviewing different theories about Hualapai and Havasupai origins).

125. See MCMILLEN, *supra* note 120, at 3.

126. See *id.* at 4.

by the arrival of Spanish explorers in the 1500s.¹²⁷ The Spanish introduced new trade items and livestock, including horses and sheep. For many tribes in more accessible regions, the Spanish also attempted to impose legal and religious control. But for the Hualapai, whose homelands were deeper in Grand Canyon country, initial direct contact did not come until the late 1700s, when Fray Francisco Garcés explored the Colorado River region and documented interactions with the Hopi, Havasupai, and Hualapai.¹²⁸

Similar to their Paiute neighbors on the north rim of the Grand Canyon, the Hualapai did not face serious intrusions until even later. It was during the 1850s, after the 1848 Treaty of Guadalupe Hidalgo and the discovery of gold in California that same year, that Anglos started to explore Hualapai country in earnest.¹²⁹ According to historian Christian McMillen, the lure of gold sent hordes of miners into Hualapai country in the 1860s.¹³⁰ Some committed violent acts against the Hualapai, including the murder of Wauba Yuma, a tribal leader, in 1866.¹³¹ This sparked a multiyear campaign of Hualapai resistance against encroachment by non-Indian farmers, ranchers, and miners. Dubbed the “Hualapai Wars,” the conflict also affected relations among the Indian tribes of the region, creating tensions and enmities with the Mojave and Yavapai.¹³²

The United States responded by attempting to banish the Hualapai from their homelands. As discussed above, Congress had established the CRIT reservation in 1865 with the naive vision of relocating all of the region’s tribes to that hot and arid location on the lower Colorado River.¹³³ Seizing on the opportunity to make that vision real, in 1874 the Indian Department ordered the army to remove the Hualapai “from their homes against their will and sen[d] them south to bake in the desert.”¹³⁴ Some Hualapai resisted and fled into the Grand Can-

127. See ROBERT C. EULER, SOUTHERN PAIUTE ETHNOHISTORY (1966).

128. See MCMILLEN, *supra* note 120, at 4–5.

129. See *id.* at 5; see also ANDERSON, *supra* note 121, at 1 (describing influx of non-Indian miners, ranchers, and pioneers (including Mormons) that occurred between 1848 and 1882).

130. See MCMILLEN, *supra* note 120, at 6.

131. See *id.* at 6–7.

132. See *id.* at 7.

133. See *supra* notes 116–119 and accompanying text; see also *United States v. Santa Fe Pac. R. Co.*, 314 U.S. 248, 255–56 (1941).

134. MCMILLEN, *supra* note 120, at 7; see also *Santa Fe Pac. R. Co.*, 314 U.S. at 255. The Hualapai were placed at La Paz, a failed mining town that is now a

yon, hiding out in the side canyons they knew well. The ones who were forced to relocate “suffered heavy losses from disease, exposure, and malnutrition.”¹³⁵ After just one year, the Hualapai who had been relocated left CRIT for good and returned home.¹³⁶ The Supreme Court later characterized this episode as “a high-handed endeavor to wrest from these Indians lands which Congress had never declared forfeited.”¹³⁷

When the Hualapai arrived back home, they found their traditional lands overrun by non-Indian miners and ranchers.¹³⁸ The Anglo settlers had usurped nearly every spring and seep, and their herds were destroying groundcover and reducing wild game.¹³⁹ An even more formidable rival—the Atlantic and Pacific Railroad (later the Santa Fe Pacific Railroad)—had also moved in.¹⁴⁰ The Hualapai realized that they would need a federally protected reservation to fend off threats from these various non-Indian interlopers.¹⁴¹ The Hualapai leader Cherum, with the assistance of other tribal headmen and a non-Indian who had married a Hualapai woman, approached the federal government and proposed boundaries to include “important springs, as well as the core areas of most of the tribal lands.”¹⁴² On January 4, 1883, President Chester Arthur signed an executive order establishing the one-million-acre Hualapai reservation, with boundaries determined largely as recommended by the Hualapai.¹⁴³ The Hualapai, by their own account, traditionally occupied “approximately five million acres.”¹⁴⁴ But their advocacy for the 1883 boundaries nonetheless was a relative success, given that other tribes, including their neighbors and relatives the Havasupai, fared far worse in

ghost town, located in the interior of the CRIT Reservation. *See* ABOUT THE HUALAPAI NATION, *supra* note 29, at 18.

135. MCMILLEN, *supra* note 120, at 7.

136. *See id.* at 7 (“This was the Hualapai’s long walk.”). *See also* *Santa Fe Pac. R. Co.*, 314 U.S. at 255–56.

137. *Santa Fe Pac. R. Co.*, 314 U.S. at 256.

138. *See* MCMILLEN, *supra* note 120, at 7.

139. *See id.* at 7.

140. *See id.*

141. *Id.* at 8.

142. *Id.* at 9.

143. Exec. Order, Hualapai [Walapai] Reserve (Jan. 4, 1883), <https://dc.library.okstate.edu/digital/collection/kapplers/id/27751>; *see* ABOUT THE HUALAPAI NATION, *supra* note 29.

144. ABOUT THE HUALAPAI NATION, *supra* note 29, at 2; *see also*, MCMILLEN, *supra* note 120, at 170 (discussing how Hualapai claims settlement compensated them for the loss of over four million acres).

the arbitrary process of drawing lines on unsurveyed territory.¹⁴⁵

Yet the Hualapai's struggles to maintain their lands and waters were far from over. Mining, ranching, and the railroad wrought negative consequences on Hualapai life. Non-Indian ranching interfered with Hualapai hunting and farming, forcing Hualapai tribal members to migrate to the mining towns for livelihood. There, they lived in "cramped and poor" conditions alongside other laborers, leading to "exposure to unknown diseases [that] tore through the population."¹⁴⁶ The railroad contributed to Hualapai losses by bolstering the mining towns and then establishing a cattle shipping economy when the mines went bust.¹⁴⁷ By 1890, the Hualapai, like their Paiute neighbors across the Colorado River, were despondent. The Hualapai "were just barely scraping by, eking out a living in an unforgiving landscape."¹⁴⁸ They learned about the Ghost Dance from the Shivwits, and "they hoped it would rid their country of non-Indians."¹⁴⁹ It did not.

Instead, the non-Indians continued to come for the Hualapai and their land. Specifically, the Santa Fe Pacific Railroad Company sought legal title to roughly half of the Hualapai's 1883 reservation. Federal Indian policies, by under-protecting the Hualapai from non-Indian encroachment and forcing assimilation policies on them, charted the Santa Fe Pacific's path.¹⁵⁰ The Railroad's claim was based on an 1866 grant from the United States to Santa Fe Pacific's predecessor, the Atlantic and Pacific Railroad.¹⁵¹ The grant, which was memorialized by legislation, provided: "The United States shall extinguish as rapidly as may be consistent with public policy and the welfare of the Indians, and only by their voluntary cession, the Indian title to all lands falling under the operation of this act"¹⁵² The 1866 grant provided the right-of-way for the

145. The Hopi also fared poorly when President Arthur designated their reservation to exclude vast portions of Hopi traditional territory. *See infra* notes 269–270 and accompanying text.

146. MCMILLEN, *supra* note 120, at 11.

147. *See id.* at 11.

148. *Id.*

149. *Id.*

150. *See id.* at 50–58, 76–77, 82–85 (describing government policies that undermined Hualapai claims as well as specific instances of government collusion with the railroad companies).

151. *See United States v. Santa Fe Pac. R. Co.*, 314 U.S. 339, 343 (1941).

152. Act of July 27, 1866, 14 Stat. 292 (1866) (quoted in *Santa Fe Pac. R. Co.*,

railroad's construction as well as odd-numbered sections extending in a forty-mile belt on either side. The Hualapai's reservation, established in 1883, postdated the 1866 grant. But the Hualapai's argument was that the Act required federal authorities to "extinguish" the Hualapai's "Indian title" in order for the railroad's 1866 grant to be operative.¹⁵³

To prevail, the Hualapai had to establish they had a preexisting legal right (their original Indian title) to the territory encompassed within the 1883 reservation. If they did, then they also had to convince the courts that their title had not been extinguished by the federal government's actions before 1883. The Hualapai's claims came at a time of uncertainty in Indian law. The concept of Indian title had been articulated a century before in *Johnson v. M'Intosh*,¹⁵⁴ but in the intervening years, federal policies, combined with state and private action, had undermined the notion that tribes were distinct political entities with rights to hold land collectively.

Nonetheless, in important ways, the law was on the Hualapai's side. In *Johnson*, Chief Justice John Marshall devised the legal category of Indian title. The case arose from a dispute between two non-Indian landowners, one of whom purchased land directly from the Illinois and Piankeshaw Tribes and the other from the United States after the government had obtained the land from the Tribes.¹⁵⁵ The Court held that Indian tribes retained a right of use and occupancy to their aboriginal territory but that they could only convey legal title to the federal government.¹⁵⁶ On one hand, the decision sanctioned Euro-American colonization by embracing the notion that European nations had exclusive rights to obtain legal title from Indian tribes by virtue of European "discovery" of these new lands.¹⁵⁷ The discovery doctrine, as it is known, is steeped in racist ideology, embracing a hierarchical view of human devel-

314 U.S. at 344).

153. *Santa Fe Pac. R. Co.*, 314 U.S. at 344.

154. *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543 (1823).

155. *Id.* at 571–72. Key to the legal dispute was that the landowners were claiming the same piece of property. Contemporary scholarship has determined this was not true, and that the parties stipulated to the facts in order to get the issue of legal title before the Supreme Court. See Eric Kades, *History and Interpretation of the Great Case of Johnson v. M'Intosh*, 19 LAW & HIST. REV. 67–116 (2001); Eric Kades, *The Dark Side of Efficiency: Johnson v. M'Intosh and the Expropriation of American Indian Lands*, 148 U. PA. L. REV. 1065 (2000).

156. See *Johnson*, 21 U.S. at 574.

157. See *id.* at 572–74.

opment and cultures that rationalized assertions of raw power over entire continents.¹⁵⁸ On the other, the *Johnson* Court also recognized that Indian tribes had preexisting legal rights to hold land as governments and, importantly, that non-Indian settlers and real estate speculators could not dispossess tribes of lands directly. To do so, they would have to rely on the federal government first to extinguish Indian title, either by acquisition or “conquest.”¹⁵⁹ *Johnson*, like many decisions in the field of American Indian law, is difficult to read today because of the demeaning, inaccurate, and self-justificatory language about indigenous peoples.¹⁶⁰ Yet for the Hualapai, and for other Native nations who refused to capitulate to the relentless forces of colonization, *Johnson* established just enough law for them to marshal on their behalf in more auspicious times.

Chief Justice Marshall also crafted the second legal principle that tilted in the Hualapai’s favor. After *Johnson*, Marshall penned two more cases addressing tribal rights to complete his Indian law trilogy. In *Cherokee Nation v. Georgia* and *Worcester v. Georgia*, the Court held that Indian tribes were unique sovereigns (“domestic dependent nations”) with inherent powers that preceded and did not flow from the U.S. Constitution.¹⁶¹ Further, following *Johnson*’s reasoning, only the federal government could extinguish or diminish those rights.¹⁶² Finally, and importantly for the Hualapai, when the federal government did erode tribal rights, it had to do so in clear language that the tribes would have understood.¹⁶³ These foundational principles were embraced in other cases and reflected the tenor of Indian policy throughout most of the nineteenth century, which consolidated the power to deal with Indian tribes in the federal government.¹⁶⁴

Despite this conceptual framework, other realities undermined the Hualapai’s claims. In the decades between the Mar-

158. See ROBERT A. WILLIAMS, JR., *THE AMERICAN INDIAN IN WESTERN LEGAL THOUGHT: THE DISCOURSES OF CONQUEST* 13–14 (1990); D’ARCY McNICKLE, *THEY CAME HERE FIRST* (J.B. Lippincott Co, 1st ed. 1949).

159. *Johnson*, 21 U.S. at 589.

160. See *id.*

161. See *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832); *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831).

162. See *Worcester*, 31 U.S. (6 Pet.) at 540, 544.

163. See *id.* at 549–57.

164. See *Winters v. United States*, 207 U.S. 564 (1908); *United States v. Winans*, 198 U.S. 371 (1905); Act of July 22, 1790, ch. 33, 1 Stat. 137 (current version at 25 U.S.C. § 177 (2000)).

shall trilogy and the Hualapai's attempts to fend off the Santa Fe Pacific, the federal government's policies toward tribes shifted to confining them on ever-smaller reservations and then dividing the reservations up into individual allotments that all would eventually become private land.¹⁶⁵ Anthropologists of the time provided convenient racialized justifications for reservation and allotment policies by categorizing indigenous peoples as occupying a lower rung of human development, destined either to be engulfed within more advanced civilizations or to disappear.¹⁶⁶ In the Southwest, these policies were in ascendance just as the Hualapai and other tribes were struggling to convince the federal government to protect their already-diminished lands.

Federal agents, including those assigned to defend the Hualapai's claims against the Santa Fe Pacific, embraced these policies as well as the racialized logic of the disappearing Indian. For instance, the Special Commissioner of Indian Affairs and the U.S. Attorney initially assigned to defend the Hualapai's claims colluded with Santa Fe Pacific.¹⁶⁷ Their justification was that "ceding half of the reservation to the railroad would be of no consequence to the Hualapai; they weren't there anyway."¹⁶⁸ The U.S. Senator from Arizona called the Hualapai a "dying race." U.S. Attorney John Gung'l agreed, reasoning that "because the Hualapais were disappearing so fast," there was no reason to defend their claims.¹⁶⁹

Throughout the early stages of their case, the Hualapai were therefore subject to the dual (and cruel) logic of Indian elimination. First, federal policies forced the Hualapai to "disappear" by attempting to relocate them to central Arizona. Then, after the Hualapai insisted on returning home, the government imposed assimilationist policies and permitted non-Indian miners, settlers, and ranchers to invade Hualapai

165. See ROBERT ANDERSON, BETHANY BERGER & SARAH KRAKOFF, *AMERICAN INDIAN LAW: CASES AND COMMENTARY* 80–126 (3d ed. 2015) (describing reservation and allotment policies); Judith V. Royster, *The Legacy of Allotment*, 27 ARIZ. ST. L.J. 1 (1995) (recounting the history and continuing effects of the allotment era).

166. See McMILLEN, *supra* note 120, at 64–67; see generally PATRICK WOLFE, *SETTLER COLONIALISM AND THE TRANSFORMATION OF ANTHROPOLOGY: THE POLITICS AND POETICS OF AN ETHNOGRAPH EVENT* (1998).

167. See McMILLEN, *supra* note 120, at 50–53, 72.

168. *Id.* at 72.

169. *Id.*

lands.¹⁷⁰ Federal officials who were supposed to defend the Hualapai's land claims relied on the combined effects of the government's forced displacements and dispossessions to argue that the Hualapai's "disappearance" warranted the loss of even more of their lands. In short, the federal government worked hard to make the Hualapai all but disappear and then argued that their disappearance constituted justification for taking the remainder of their lands and resources.

The Hualapai refused to disappear. Fred Mahone, a tribal member who served in World War I and came home to a wave of Indian rights activism, joined other Hualapai leaders to keep their land-claims case alive.¹⁷¹ Mahone and his peers documented what was known and obvious to them—that Hualapai people had always lived in their territory and had never agreed to cede their lands. Without the persistence of tribal members, the Hualapai's case would have gone the way of many others during this time period. The Santa Fe Pacific would have quietly worked out a deal with federal officials, and before long more than half of the Hualapai's 1883 reservation would have been lost.¹⁷²

Fortunately for the Hualapai, their self-advocacy persisted until there was a changing of the guard at the Department of the Interior. After years of representation by federal attorneys who betrayed the Hualapai's interests, their case fell into the hands of Felix Cohen and Nathan Margold. Cohen was a champion of tribal self-determination and author of the then-imminent Handbook of Federal Indian Law, and Margold was a similarly strong proponent of tribal rights.¹⁷³ John Collier, President Franklin Roosevelt's Secretary of the Interior, abandoned federal policies of allotment and assimilation and brought in Cohen, Margold, and others to implement the "Indian New Deal," a package of laws and policies to revive Indian self-governance.¹⁷⁴

170. See *id.* at 79–88.

171. See *id.* at xvi.

172. See, e.g., *Southern Paiute Nation v. United States*, 14 Ind. Cl. Comm. 618 (1965).

173. See MCMILLEN, *supra* note 120, at 125; see also *United States v. Santa Fe Pac. R. Co.*, 314 U.S. 339, 341 (1941) (noting petitioner's representation by Nathan Margold). Margold is better known for his work with the NAACP, helping to craft their anti-segregation litigation strategy.

174. See Kenneth R. Philip, *Termination: A Legacy of the Indian New Deal*, 14 WESTERN HISTORICAL QUARTERLY 2, 165–80 (1983); KENNETH R. PHILIP, JOHN COLLIER'S CRUSADE FOR INDIAN REFORM: 1920-1954 (1977).

Cohen and Margold relied on the Hualapai's testimony regarding their use and occupation of their lands and applied that to the legal framework of original Indian title. If the Hualapai had original Indian title to the lands within their executive order reservation, then the railroad's claims failed unless the federal government had otherwise extinguished the Hualapai's claims.¹⁷⁵ Justice Douglas wrote the opinion for a unanimous court: the Hualapai's use and occupancy of their lands established original Indian title, which was not extinguished by the 1866 grant to the railroad.¹⁷⁶ To arrive at that conclusion, the Court had to resolve several key questions in the field of federal Indian law.

First, does a tribe's claim of Indian title depend on prior federal recognition in a treaty, statute, or other formal government action?¹⁷⁷ No, the Court held: the tribe's rights of occupancy do not depend on prior federal recognition.¹⁷⁸ Second, did Congress abandon its general position recognizing tribes' rights to occupancy with regard to the territories acquired from Mexico after the Mexican-American War? Again, no. In 1851, Congress extended the Indian Trade and Intercourse Act to the newly acquired territories, thereby continuing "the unquestioned general policy of the Federal government to recognize such right of occupancy."¹⁷⁹ And finally, what kind of federal enactments will extinguish a tribe's right of occupancy? Here, the Court revived the interpretive approach first outlined in *Worcester v. Georgia*: "doubtful expressions . . . are to be resolved in favor of" the tribes.¹⁸⁰ Further, "an extinguishment cannot be lightly implied in view of the avowed solicitude of the Federal government for the welfare of [Indian tribes]."¹⁸¹

The Court therefore concluded that neither Congress's establishment of the Colorado River Indian Tribes Reservation in 1865 nor the federal government's 1874 attempted relocation

175. *Santa Fe Pac. R. Co.*, 314 U.S. at 343–44 (describing the Hualapai's claims in their petition). The Hualapai also asserted claims to some lands outside of the 1883 executive order reservation. The Court held that those had been extinguished by establishment of the reservation, although the Hualapai nonetheless obtained 6,000 acres in post-litigation settlement negotiations. See McMILLEN, *supra* note 120, at 169.

176. *Santa Fe Pac. R. Co.*, 314 U.S. at 359.

177. *Id.* at 347.

178. *Id.* (citing *Cramer v. United States*, 261 U.S. 219, 229 (1923)).

179. *Id.* at 348.

180. *Id.* at 354 (internal citation omitted).

181. *Id.*

of the Hualapai extinguished the tribe's right to their homelands. Congress's unilateral establishment of the CRIT reservation was merely "an offer to the Indians, including the Walapais [sic], which it was hoped would be accepted."¹⁸² And the Indian Department's forcible removal of the Hualapai could not be interpreted as the Hualapai's "plain intent" to accept the offer, given that the tribe "left [the Colorado River Indian Tribes reservation] the next year in a body."¹⁸³ The federal government acquiesced in the Hualapai's defiant return, allowing them "to remain in their old range."¹⁸⁴ The Court forcefully concluded of this whole episode: the Hualapai's "forcible removal in 1874 was not pursuant to any mandate of Congress. It was a high-handed endeavor which Congress had never declared forfeited. . . . Certainly a forced abandonment of their ancestral home was not a 'voluntary cession.'"¹⁸⁵

The Court ultimately determined that the Hualapai won and the railroad lost. The Santa Fe Pacific took their lands subject to the Hualapai's Indian title, which had never been extinguished. The Court nonetheless remanded the case for determinations concerning whether the Hualapai exclusively and continuously occupied all lands within the 1883 reservation boundaries.¹⁸⁶ But the hard work was over, and in the end, the Hualapai retained every acre contained within the 1883 Executive Order and gained an additional six thousand acres around Clay Springs, Arizona.¹⁸⁷

For reasons that are unclear, the Hualapai's stunning legal victory in 1941 is seldom recognized or discussed in the canonical Indian law textbooks.¹⁸⁸ But the case revived foundational principles at a time when Indian law was in a state of flux, and it laid the groundwork for many other tribes to argue that they had rights to their homelands. Perhaps most significantly, the case legitimized the very notion that indigenous histories are relevant to proving their land claims.¹⁸⁹ The Huala-

182. *Id.* at 353.

183. *Id.* at 354.

184. *Id.*

185. *Id.* at 355–56.

186. *Id.* at 359.

187. *See* MCMILLEN, *supra* note 120, at 169 (describing the result of the settlement negotiations that took place after the Supreme Court decision).

188. *See* GETCHES, ET AL., *CASES AND MATERIALS ON FEDERAL INDIAN LAW* (6th ed. 2011); GOLDBERG, ET AL., *AMERICAN INDIAN LAW: NATIVE NATIONS AND THE FEDERAL SYSTEM* (7th ed. 2015).

189. *See* MCMILLEN, *supra* note 120, at 169.

pai's relentless advocacy, combined with good luck with regard to the timing of their Supreme Court case, resulted in precedent that helps to erase the myth of the blank space on the map.

*c. Havasupai Indian Tribe*¹⁹⁰

For hundreds of years before Euro-American arrival, the Havasupai farmed in the canyons by the blue waters of Havasu Creek in the spring and summer and moved to the plateau lands of the Grand Canyon's south rim for winter foraging and hunting.¹⁹¹ When prospectors and ranchers, facilitated by the newly built railroad, started to trickle into the forbidding high desert surrounding Havasu Canyon, the first threats to the Havasupai's sustainable, year-round use of their Grand Canyon home arrived. As if coordinating with the railroad's inroads into Havasupai country, the federal government moved to confine the tribe to ever-smaller amounts of acreage. In 1882, at the behest of Arizona territorial governor John Fremont, President Chester Arthur signed an executive order that designated a diminutive 518-acre reservation for the Havasupai consisting of a slice of their summer home and excluding entirely their winter range on the plateau.¹⁹² As succinctly put by Stephen Hirst: "[A]t the stroke of a pen, the entire Havasupai winter range and age-old plateau homeland became public property."¹⁹³

Despite being confined, as a legal matter, to the small portion of their aboriginal lands designated as the Havasupai Reservation, most Havasupai continued to engage in the annual migration from their summer to winter homes.¹⁹⁴ But the federal land managers in charge of the Grand Canyon Forest Reserve, created in 1893 and surrounding the reservation, proved

190. Material for this section was previously published in: Sarah Krakoff, *Public Lands, Conservation, and the Possibility of Justice*, 53 HARV. C.R.-C.L. L. REV. 213, 234–39 (2018); Sarah Krakoff, *Public Lands and the Public Good: The Limitations of Zero-Sum Frames*, in BEYOND ZERO-SUM ENVIRONMENTALISM 152–57 (Sarah Krakoff, Jonathan Rosenbloom & Melissa Powers eds., 2019). It has been modified for inclusion in this article.

191. HIRST, *supra* note 29, at 6, 7–8, 21.

192. *Id.* at 59–64.

193. *Id.* at 65.

194. KARL JACOBY, CRIMES AGAINST NATURE: SQUATTERS, POACHERS, THIEVES, AND THE HIDDEN HISTORY OF AMERICAN CONSERVATION 173 (2001); KELLER & TUREK, *supra* note 63, at 157.

to be tough and intolerant rivals.¹⁹⁵ In 1898, the Grand Canyon Forest Reserve Supervisor wrote to the Commissioner of Indian Affairs to declare:

The Grand Canon [sic] of the Colorado River is becoming so renowned for its wonderful and extensive natural gorge scenery and for its open clean pine woods, that it should be preserved for the everlasting pleasure and instruction of our intelligent citizens Henceforth, I deem it just and necessary to keep the wild and unappreciable [sic] Indian from off the Reserve¹⁹⁶

In keeping with his conclusion, the Forest Supervisor implemented a ban on all Havasupai travel in the forest reserve, whether for hunting, gathering, or any other purpose.¹⁹⁷

At the behest of conservationists, President Roosevelt designated the Grand Canyon a game preserve in 1906, and then a national monument in 1908.¹⁹⁸ The Grand Canyon National Monument was managed by the Forest Service, which under Gifford Pinchot's urging had been created as part of the United States Department of Agriculture in 1905 and assumed authority over all of the forest reserves.¹⁹⁹ In 1916, Congress passed the National Park Service Organic Act, and the National Park Service (NPS) was created. Just three years later, the Grand Canyon was designated a national park on February 26, 1919.²⁰⁰

Each legal step forward in the history of Grand Canyon conservation was another blow to the Havasupai. At the time of President Roosevelt's designation of the Grand Canyon National Monument, there was talk of restoring land to the

195. See HIRST, *supra* note 29, at 73–76; JACOBY, *supra* note 194, at 165–66.

196. HIRST, *supra* note 29, at 75 (quoting Letter from W.P. Hermann, Grand Canyon Forest Reserve Supervisor, to Binger Hermann, General Land Commissioner, U.S. DOI (Nov. 8, 1898) (on file at National Archive and Havasupai Tribal Collection)).

197. See JACOBY, *supra* note 194, at 175–76.

198. See ANDERSON, *supra* note 121, at 7–8 (2000). Public lands withdrawn as game preserves had limited protections for hunting and wildlife; national monument status added another layer of management for preservation purposes.

199. *Id.* at 7.

200. See Grand Canyon National Park Establishment Act, Pub. L. No. 65-277, 40 Stat. 1175 (1919). With each new designation, the Grand Canyon area achieved heightened protections of its land and resources.

Havasupai.²⁰¹ Likewise, throughout the period from 1909 until after the establishment of the GCNP, the Havasupai and their occasional supporters in the Bureau of Indian Affairs' (BIA) Office of Indian Services lobbied for recognition of their land.²⁰² Their pleas fell on deaf ears.²⁰³

Throughout this period many Havasupai continued to undergo their annual migration, risking violent conflicts with white settlers as well as the wrath of the Forest Service. Despite the steady diminishment of access to their lands and the negative effects of mining and grazing on environmental quality, most Havasupai persisted in living and farming as they had historically done—until the park designation. As characterized by Hirst: “[T]he establishment of [the GCNP] marked the most damaging encroachment on their life yet dealt out by the federal government.”²⁰⁴ NPS rangers disrupted the Havasupai's use of their winter range by searching out and destroying their camps and chasing them away from pinyon gathering and other activities on the plateau. Throughout the ensuing decades, as the Havasupai attempted to regain their homelands, the NPS continued to be a staunch opponent. In 1940, an NPS Director inquired whether the Havasupai could be removed to the Hualapai Reservation, thereby enabling the Havasupai Reservation to be added to the GCNP.²⁰⁵ The recurring refrain was that the Havasupai would eventually disappear in any event and that hastening their inevitable departure would allow the NPS to carry on with its mandate of managing the park for the benefit and enjoyment of the people—defined implicitly as non-Indian people.²⁰⁶

Decades later, the legacies of displacement had not vanished. Tribes' forced separation from their lands created an artificially depopulated backdrop against which conservationists measured their own goals for public lands. This became evident toward the end of the Havasupai's long struggle to regain a

201. See HIRST, *supra* note 29, at 97–105.

202. *Id.*

203. See *id.* at 101.

204. *Id.* at 99; see also JACOBY, *supra* note 194, at 187.

205. HIRST, *supra* note 29, at 166.

206. *Id.* at 173 (discussing an NPS report from 1942). The NPS report, co-authored by Frederick Law Olmsted, rejected the Havasupai's proposal because “[t]he views down into Havasupai Canyon . . . will remain uniquely interesting and beautiful for centuries to come—perhaps long after the last of the Havasupais shall have passed away.” *Id.*

portion of their plateau lands, when conservation groups took varying positions on returning land to the Havasupai Tribe in the late 1960s and early 1970s. The Arizona Chapter of the Sierra Club initially opposed the return of any GCNP acreage on the grounds that no lands should be taken out of public ownership. When educated by the Havasupai about the historic and continuing injustice to the tribe, the local chapter changed its position to support the Havasupai's claims.²⁰⁷

Two powerful national groups, however, would not be persuaded. The national directorate of the Sierra Club— notwithstanding the position of the Arizona chapter, which was joined by the Club's National Committee on Native American Issues—opposed any return of public lands to the Havasupai.²⁰⁸ Friends of the Earth took the same stance.²⁰⁹ Their tactics included circulating unfounded rumors that the Havasupai intended to develop the land and the result would be an Indian-owned “Disneyland on the plateau.”²¹⁰ As Havasupai historian Stephen Hirst observed, these same groups had voiced no concerns in response to the NPS's mass tourism-oriented development and leases at the south rim of the Grand Canyon.²¹¹ The NPS's plans at one point included hiring an architectural firm that actually *had* helped to design Disneyland²¹² and (proving that sometimes satire is impossible) converting Indian Garden, home to Havasupai families until they were evicted by the NPS, into a “mock Havasupai camp” as a tourist attraction.²¹³ The Sierra Club and most other environmental groups raised no objections to these plans.²¹⁴ Their silence in the face of extravagant non-Indian development and fear of tribal control echoed the racialized sentiment of early conservationists that only the white race “could ‘make the land more fruitful.’”²¹⁵

With regard to the Havasupai's land claims, the Sierra Club and Friends of the Earth maintained their vocal opposi-

207. *Id.* at 222–23.

208. *Id.* at 226–27.

209. *Id.*

210. *Id.* at 214.

211. *Id.* at 214–15.

212. *Id.* at 215.

213. *Id.*

214. *Id.* (“Of all this, the Sierra Club and most other environmental groups said nothing.”).

215. See MILES A. POWELL, VANISHING AMERICA 39 (2016).

tion. In a last-ditch lobbying effort, the two groups circulated specious information that the Havasupai had signed a contract with the “Marriott Hotel Corporation for a giant resort complex and that Joe Sparks [the tribe’s lawyer] was representing Marriott.”²¹⁶ Nonetheless, they failed to block the tribe’s efforts. After several rounds of cliff-hanger moments in Congress, the legislation was finalized and signed into law in 1975.²¹⁷ The Havasupai Indian Tribe’s trust lands grew from the meager several hundred acres they had been consigned to since 1882 to 185,000, with additional use rights to 95,300 acres.²¹⁸ The Havasupai story reveals that conservation’s legacy of exclusion persisted well into the twentieth century; myths of empty places die hard.

d. Yavapai-Apache Nation

Today, the Yavapai-Apache Nation is a single, federally recognized tribe with two thousand acres of reservation trust lands spread across five communities.²¹⁹ In its literature, the Yavapai-Apache Nation embraces its mixed tribal heritage: “the several satellite communities . . . truly reflect the evolution from two historically distinct Tribes into the single nation of today.”²²⁰ In the same materials, however, the Yavapai-Apache acknowledge the colonizing forces that brought them to this “single nation” status:

The modern Yavapai-Apache Nation is the artificial amalgamation of . . . two distinct cultures, who occupied opposite sides of the Verde Valley for centuries prior to the Euro-American conquest of the Southwest. The Nation as we know it today is the result of legislation passed by the Congress in 1934 known as the Indian Reorganization Act, in

216. HIRST, *supra* note 29, at 230.

217. Grand Canyon National Park Enlargement Act, Pub. L. No. 93-620, 88 Stat. 2089 §§10(a), 10(e) (1975).

218. *Id.*

219. *Welcome to the Yavapai-Apache Nation*, YAVAPAI-APACHE NATION, <https://yavapai-apache.org> (last visited July 29, 2019) [<https://perma.cc/YTC3-TGD9>]; *The Yavapai-Apache in the Verde Valley*, YAVAPAI-APACHE NATION, <https://yavapai-apache.org/history/> (last visited July 23, 2019) [<https://perma.cc/9Q6L-ZQLF>].

220. *The Yavapai-Apache in the Verde Valley*, YAVAPAI-APACHE NATION, *supra* note 219.

an effort to establish a single tribe in the Upper Verde Valley. This was done as an expedient by the federal government²²¹

The Yavapai, like the Hualapai and Havasupai, are Yuman-speaking peoples. Their traditional territory included the Verde Valley, with borders extending west to the Colorado River and south to the Gila River. The Tonto Apache descended from Athapaskan speaking peoples and occupied lands extending from central Arizona to southern Texas.²²² When Europeans arrived, they mistakenly assumed that the Yavapai were an Apache band and referred to them as “Mohave-Apache.”²²³

Spanish explorers encountered the Yavapai in 1583 and scouted their territory for gold, copper, and other minerals.²²⁴ The Yavapai adopted a peaceful response strategy, avoiding conflict in favor of a wary welcome for the outsiders.²²⁵ The first phase of Spanish intrusion ended in 1605 with minimal impact on the Yavapai. The remainder of that century was relatively quiet, in part because of the Pueblo Revolt of 1680, which drove the Spanish temporarily out of Arizona and New Mexico.²²⁶ The second wave of Spanish intrusion began in 1690 and was characterized largely by missionary activity.²²⁷ According to historian Timothy Braatz, the primary effects of this phase were the introduction of European goods, animals, and diseases into Yavapai life: “Even Yavapai camps, removed as they were from major trade routes and mission communities, acquired horses, metal knives, and smallpox in the eighteenth century.”²²⁸ Despite these changes, the Yavapai’s traditional territories and fundamental ways of life remained relatively unaffected until after the Mexican-American War and the in-

221. *Id.*

222. *Id.*

223. *See id.*; *see also* TIMOTHY BRAATZ, SURVIVING CONQUEST: A HISTORY OF THE YAVAPAI PEOPLES 8, 12 (2003) (noting that historians made the same mistake: “[L]ike the nineteenth-century U.S. army officers they so admire, historians concerned with the conquest of central Arizona have regularly misidentified and mischaracterized the Yavapai peoples—usually labeling them Apaches—or they have omitted them altogether.”).

224. BRAATZ, *supra* note 223, at 53–54.

225. *Id.* at 58.

226. *Id.*

227. *Id.* While the book used the year “1960,” this appears to have been a typographical error.

228. *Id.* at 63.

corporation of their lands into the United States.²²⁹ Within the following decades, and in particular after the end of the Civil War, the pace of change accelerated dramatically for the Yavapai, as it did for all other Native peoples of the Grand Canyon region.

In the 1860s, miners and other settlers—encouraged by public land laws that opened the public domain to mineral extraction, homesteading, and ranching—began to invade Yavapai and Apache lands.²³⁰ The invading Americans labeled all of the indigenous inhabitants “Apaches” and “turned to killing them, even those who professed accommodation and friendship.”²³¹ An Arizona territorial official sanctioned the strategy: “A sickly sympathy for a few beastly savages should not stand in the way of the development of our rich gold fields, or the protection of our enterprising frontiersmen.”²³² With mining in full swing and increasing numbers of settlers moving into and across Arizona, the only perceived alternative to extermination was to consolidate all of the tribes onto as little territory as possible. As discussed above, Charles Poston, Superintendent of Indian Affairs, proposed to put all of the Colorado River peoples, including the Yavapai, on the 75,000-acre Colorado River Indian Tribes reservation.²³³ Like their Pai relatives, the Yavapai refused and instead “took to the hills for the summer gathering season.”²³⁴ Eventually a small number of Yavapai were persuaded to stay at the CRIT reservation. They tried to farm, but after three years of frustration and stalled efforts to construct an irrigation canal, they too left for good.²³⁵

Years of conflict with the U.S. military followed, with Yavapai bands adopting different strategies to survive. Some chose accommodation, others resisted and joined in raiding parties, and some vacillated between these approaches.²³⁶ In 1871–72, the Indian agents in Arizona ran out of patience with the Yavapai and Apache instability and declared a single solu-

229. *Id.* at 73.

230. *Id.* at 88–89.

231. *Id.* at 89.

232. *Id.* at 89 (quoting *Annual Report of the Commissioner of Indian Affairs* 299 (1864)).

233. See notes 113–114, *supra*, and accompanying text; see also BRAATZ, *supra* note 223, at 101.

234. BRAATZ, *supra* note 223, at 101.

235. See *id.* at 105–08.

236. See *id.* at 118–30.

tion: all Yavapai and Tonto Apache should remove to a reservation at Rio Verde.²³⁷ General George Crook did the dirty work of enforcing the orders, and his campaign became known as the “Yavapai Wars.”²³⁸ “Crook’s campaigns were one-sided, murderous onslaughts, carried out by well-armed and organized soldiers against scattered bands of malnourished and poorly armed families.”²³⁹ By April 1873, “to avoid further decimation,” the Yavapai and Tonto Apache surrendered to the U.S. military and agreed to stay at the Rio Verde reservation.²⁴⁰

For the short time the Yavapai and Apache were at the Camp Verde reservation, they managed to do what the Indian agents and paternalistic reformers wanted: they adopted a sedentary, agricultural way of life.²⁴¹ Indeed, they were so successful that they brought about the next phase of their dispossession. By 1875, the Yavapai and Apache residents at Rio Verde “were moving steadily toward agricultural self-sufficiency.”²⁴² This posed a threat to government contractors in Tucson, for whom “a self-sufficient reservation, honestly administered, represented a significant loss of business.”²⁴³ The contractors lobbied the Indian Office to relocate the Rio Verde population to the San Carlos reservation, which was hotter, drier, and less hospitable for farming.²⁴⁴ Eliminating the Rio Verde reservation would also open up arable land for non-Indian farmers and ranchers.²⁴⁵ In December 1874, the Indian Office issued orders to shut down the Rio Verde reservation.²⁴⁶ General Crook, who had waged the military campaign to confine the Yavapai at Camp Verde, was appalled by the move. He opposed the corrupt reasons for it, as the move undermined the promise he

237. *See id.* at 131 (noting that the Yavapai were also given the option of returning to CRIT and that the Apache could choose between White Mountain Apache and Rio Verde); *see also The Yavapai-Apache in the Verde Valley*, *supra* note 219; *see also* Order to Sec. of War to carry out recommendations of Sec. of Interior concerning resettlement of Apache Indians on designated reservation in New Mexico and Arizona, Exec. Order, Ulysses Grant (Nov. 9, 1871) (establishing the reservation at Camp Verde).

238. BRAATZ, *supra* note 223, at 131; *see also The Yavapai-Apache in the Verde Valley*, *supra* note 219.

239. BRAATZ, *supra* note 223, at 137.

240. *Id.* at 139.

241. *See id.* at 170.

242. *Id.*

243. *Id.* at 139.

244. *See id.* at 170–71.

245. *See id.* at 170.

246. *See id.*

had made to the Tribe for agreeing to surrender.²⁴⁷ Nonetheless, as a military officer, Crook followed orders and organized the forced removal.

The Yavapai and Tonto Apache “March of Tears” took place during the winter of 1874–75. Yavapai and Apache children, elders, and all ages in between “walked, climbed, crawled, and waded through snow, mud, and streams.”²⁴⁸ Roughly 1,476 started the journey, and only 1,361 arrived at San Carlos. Along the way some died of malnutrition, exposure, or injuries, and some fled.²⁴⁹ For all, it was a brutal and inhumane journey that ended at a place 180 miles from their homes, which they would have to share with several thousand other Apache.²⁵⁰

The Yavapai were in exile at San Carlos for twenty-five years. As they did at Rio Verde, they adapted in order to survive. Some enlisted in the U.S. Army as scouts. Others took to ranching, a more viable livelihood than farming in the arid San Carlos reservation, and still others managed to engage in dryland agriculture despite the challenges.²⁵¹ Throughout, they repeatedly requested to return to the valleys, canyons, and mountains of their homelands in western Arizona.²⁵² A steady trickle of Yavapais left San Carlos throughout their time there, with or without permission. Finally, in 1899, the acting Indian agent for San Carlos lifted all restrictions and let the Yavapai return home.²⁵³ By 1903, roughly two hundred Yavapais were living on the former Rio Verde lands, and another three hundred occupied various locations along the Verde River valley.²⁵⁴ In 1903, President Roosevelt established an Executive Order Reservation at Fort McDowell, where another two hundred or so Yavapai resided.²⁵⁵ In 1934, during the Indian New Deal, the Yavapai and Tonto Apache who lived in the Verde Valley were officially commingled as a single federally recognized Tribe, the Yavapai-Apache Nation.²⁵⁶ The Yavapai-Apache

247. *See id.* at 171.

248. *Id.* at 174.

249. *Id.* at 176.

250. *Id.* at 177.

251. *See id.* at 179–92.

252. *See id.* at 193.

253. *Id.* at 212; *see also The Yavapai-Apache in the Verde Valley*, *supra* note 219.

254. *See* BRAATZ, *supra* note 223, at 212.

255. *See id.* at 220.

256. *See* CONSTITUTION AND BY-LAWS OF THE YAVAPAI-APACHE INDIAN

eventually convinced the federal government to restore a small proportion of their lands to federal trust status in the 1970s.²⁵⁷ In the interim, the Indian Claims Commission acknowledged the illegal taking of the vast majority of the Yavapai-Apache's traditional territory.²⁵⁸

The Yavapai's tenacious hold on their distinct culture, identity, and sense of place allowed them to persist as a distinct people through the years of violence and dislocation.²⁵⁹ During the current era of self-determination, the Yavapai-Apache Nation has taken advantage of economic development opportunities, including gaming, to restore their self-governance and fund tribal social services and education programs.²⁶⁰

The Yavapai-Apache Nation is one of the eleven Tribes with interests and rights in the Grand Canyon. Their presence, however, might be even more invisible to most non-Indians than that of the Southern Paiute. Despite the Yavapai's endurance and ability to adapt, they remain physically estranged from the Grand Canyon—with one ironic exception. Yavapai-Apache Nation tribal members, just like the rest of the public, can book a room at the "Yavapai Lodge" on the south rim, in the heart of the commercialized section of Grand Canyon Village.²⁶¹

3. Hopi, Zuni, and Navajo Lands

The Hopi Tribe, Navajo Nation, and Zuni Tribe, like the Pai and Paiute peoples, have historic and continuing ties to the Grand Canyon and surrounding plateau lands, as well as to each other. Indeed, the ethnographies of all of the Grand Canyon tribes refer to the social and cultural interactions, trade

COMMUNITY ARIZONA, OFFICE OF INDIAN AFFAIRS (Feb. 12, 1937).

257. See An Act to Authorize the Acquisition of a Village Site for the Payson Band of Yavapai-Apache Indians and for Other Purposes, Pub. Law. No. 92-470, 48 Stat. 984 (Oct. 6, 1972); Arizona: Establishment of Village Site for the Yavapai-Apache Indians, 39 Fed. Reg. 20,376 (June 10, 1974).

258. See *Yavapai-Apache Indian Community v. United States*, 15 Ind. Cl. Comm. 68 (Mar. 3, 1965).

259. See BRAATZ, *supra* note 223, at 230–31.

260. See *Welcome to the Yavapai-Apache Nation*, *supra* note 219 (describing establishment of Cliff Castle Casino and listing the services the Nation is able to provide with revenue from the gaming facility).

261. See *Visit Grand Canyon/Yavapai Lodge*, <https://www.visitgrandcanyon.com/yavapai-lodge> (last visited July 29, 2019) [<https://perma.cc/HCC7-44TQ>].

networks, and intermarriages between and among the peoples that preceded Euro-American arrival. Their identities and territories were fluid until the process of colonization subjected them to bureaucratized rules for mapping and membership. The three tribes (Hopi, Navajo, and Zuni), whose aboriginal territory and current reservations lie to the east of the GCNP, do not fall into a single linguistic or ancestral group in the way that the Pai and Paiute peoples do. But due to their geographic proximity and shared histories, this Section will include an overview of these three tribes together to fill in the last blank space—the area to the east of Marble Canyon, extending north to Lee's Ferry, south to below the Little Colorado River, and east to New Mexico.

a. The Hopi Tribe

Nearly every group that rafts the Grand Canyon stops at the confluence of the Colorado and Little Colorado Rivers. If the weather has been dry, the first view of the confluence is a stunning aquamarine plume blending into the mainstem of the river. The mesmerizing color results from limestone and travertine layers dissolving into the seeps and springs that merge to form the Little Colorado's flow.

In 2019, my students and I arrived just after the rains. Like Powell and his men, we came upon “a very small river . . . exceedingly muddy and saline.”²⁶² We pulled the boats over anyway, as did Powell, and wandered up the Little Colorado River Gorge to talk about its significance to the Hopi Tribe.

Unbeknownst to Powell and most present-day boaters, the most sacred site in Hopi cosmology, the Hopi *Sipaponi*, lies just upstream from the confluence. The *Sipaponi* is a salt dome with a mineral spring on top that, according to Hopi tradition, is where humans came to this world from the previous one.²⁶³ It lies along the Salt Trail, which descends from the plateau on the north side of the Little Colorado River Gorge and eventually reaches the Hopi salt mines downstream from the confluence. The entire area is part of the Hopi's sacred landscape, although it now lies miles from the Tribe's reservation.

The Hopi Tribe's reservation, like that of the Hualapai and

262. POWELL, *supra* note 3, at 241.

263. See Justin B. Richland, *Dignity as (Self-)Determination: Hopi Sovereignty in the Face of US Dispossession*, 41 L. & SOC. INQUIRY 917, 923 (2016).

Havasupai, was established by Executive Order in 1882.²⁶⁴ Hopi tribal leaders had no say in the reservation boundaries. Instead the Hopi reservation—a square drawn according to longitude and latitude lines—reflected the federal government’s desire to impose assimilationist policies on the Hopi. Specifically, federal Indian agent J.H. Fleming wanted clear authority to force Hopi families to send their children to distant boarding schools.²⁶⁵ Further, the Executive Order stated that the reservation was set aside for the use and occupancy of the Hopi “and other such Indians as the Secretary of the Interior may see fit to settle on.”²⁶⁶ The square carved out of the Hopi’s larger map had the effect of dispossessing them in situ.²⁶⁷ The reservation excluded the Salt Trail, the Little Colorado River Gorge, and other Hopi sacred sites such as the San Francisco Peaks.²⁶⁸ Similar to the Havasupai, the Hopi were dislocated without being forcibly removed.

Further, the twin legacies of the Executive Order’s careless mapping and ambiguous language manifested decades later in disruptive, wrenching disputes between the Hopi Tribe and the Navajo Nation, which ultimately resulted in revisions to the 1882 boundaries.²⁶⁹ The Navajo-Hopi land dispute is discussed below in Section II.A.1. Here, it will suffice to note that one of the Hopi Tribe’s objectives was to assure access to the Salt Trail and other sacred sites that the federal government had arbitrarily placed on the non-Hopi side of the map in 1882.²⁷⁰

The Hopis’ fierce attachment to the Little Colorado River Gorge, the Salt Trail, and the Grand Canyon has not diminished. Their pilgrimages continue, as does their advocacy for protecting the entirety of their aboriginal territory.²⁷¹ Ed

264. Exec. Order of Dec. 16, 1882.

265. See Richland, *supra* note 263, at 926–27; JOHN REDHOUSE, GEOPOLITICS OF THE NAVAJO-HOPI LAND DISPUTE 5 (1985).

266. See Exec. Order, *supra* note 264.

267. See Richland, *supra* note 263, at 926.

268. See *id.* at 922–24 (describing the Hopi sacred landscape as extending from the Hopi mesas to the San Francisco Peaks).

269. See *infra* Section II.A.1.

270. See EMILY BENEDEK, THE WIND WON’T KNOW ME: A HISTORY OF THE NAVAJO-HOPI LAND DISPUTE 296 (1992); *Masayesva v. Zah*, 65 F.3d 1445, 1453–55 (9th Cir. 1995) (discussing Hopi’s claims to access religious sites encompassed within the 1934 Navajo reservation boundaries).

271. See Richland, *supra* note 263, at 931–34 (describing litigation and advocacy to protect the San Francisco peaks); *Navajo Nation v. Forest Service*, 479 F.3d 1024 (9th Cir. 2007) (rejecting tribes’ efforts to protect the San Francisco peaks from artificial snow-making with reclaimed water).

Kabotie, a Hopi tribal member involved in Native gatherings surrounding the GCNP's one hundredth anniversary, described his hopes for the celebration:

People come to the canyon to appreciate its beauty while being totally ignorant of the suffering that's taken place The affiliated tribes of the Grand Canyon have all been severely assaulted over the last 125 years So I think what I am most excited about is our voice. That is what brings healing and understanding, not only to victimized individuals and communities, but also to the greater culture and the world.²⁷²

Mr. Kabotie, along with members of the other tribes, hopes that reckoning with the violent past will create the space for re-incorporating tribal voices, knowledge, and presence into the GCNP today.

b. The Navajo Nation

The Navajo, or Diné in their own language, historically occupied the territory marked by their four sacred mountains: Blanca Peak (*Sis Naajiní*) in the East, Mount Taylor (*Tsoodzil*) in the South, the San Francisco Peaks (*Dook'o'ooshíí*) in the West, and Hesperus Peak (*Dibé Nitsaa*) in the North. According to the Diné origin story, the space bounded by the four sacred mountains is where they emerged into this world (the fourth world) and first came into contact with other peoples.²⁷³ Contemporary archaeologists corroborate this aspect of Diné identity; from the earliest days of their documented presence in North America they merged with Apache, Puebloan, and Ute peoples and adopted aspects of their customs and art forms.²⁷⁴ Indeed, historian Peter Iverson asserts that incorporation and change inhere in what it means to be Navajo.²⁷⁵ The constant

272. Riggs, *supra* note 19.

273. PETER IVERSON, DINÉ: A HISTORY OF THE NAVAJOS 12 (2002); RAYMOND FRIDAY LOCKE: THE BOOK OF THE NAVAJO 129–36 (1976) (describing how some of the Navajo clans emerge from the blending of Zuni, Apache, Pueblo, and Ute people into Navajo culture).

274. See IVERSON *supra* note 273, at 13–21.

275. See *id.* at 6 (“The Navajos’ vibrant culture has never stood still. Through time it has demonstrated that it is through contact with others that a community truly enjoys vitality. All along the way, the Diné have incorporated new elements,

for Navajo identity, both historically and today, is place.²⁷⁶ The Diné creation stories and oral histories revolve around specific features of the landscape throughout Navajoland (*Dinétah*), and Diné religious and cultural ceremonies are rooted in relationships with these sacred places.²⁷⁷

The Grand Canyon is part of this sacred Diné landscape, and today the Navajo Nation abuts the GCNP all along the eastern edge of Marble Canyon. But like the other Grand Canyon tribes, the Navajo Nation lost access to its traditional territories within the GCNP as well as other sacred landscapes across the Colorado Plateau through the process of colonization. Spanish arrival into the Rio Grande Valley in the late 1500s and early 1600s changed Navajo culture through the introduction of livestock, silver, and other agricultural and material goods, but it did not substantially disrupt Navajo territory.²⁷⁸ The Spanish influence was not benign, however, and included violent conflict, enslavement, and pressures on Navajo lands from Pueblo peoples fleeing Spanish persecution.²⁷⁹ Nonetheless, the Navajo managed to emerge from the period of Spanish occupation with a consolidated sense of identity and relatively little loss of territory.²⁸⁰ By 1848, when the United States acquired the lands encompassing *Dinétah* in the Treaty of Guadalupe-Hidalgo, the Navajo had become a “people who mattered” in the region.²⁸¹

Being a “people who mattered” was not necessarily a benefit under U.S. colonial rule. The Arizona and New Mexico territorial governments bristled at the Navajo’s growing population and occasional aggression toward their Indian and non-Indian neighbors.²⁸² Up until the early 1860s, the relationship between the Navajo, the U.S. military, and the territorial governments fluctuated between violence and attempts at treaties. But by 1863, the policy shifted toward efforts to evict the Navajo from *Dinétah* in order to “civilize” them and free the territory

new peoples, and new ways of doing things.”).

276. See *id.* at 5, 7–8.

277. See *id.*

278. See *id.* at 24, 32, 35.

279. See EDWARD H. SPICER, CYCLES OF CONQUEST: THE IMPACT OF SPAIN, MEXICO, AND THE UNITED STATES ON THE INDIANS OF THE SOUTHWEST, 1533–1960, at 212 (1962).

280. IVERSON, *supra* note 273, at 33.

281. *Id.*

282. See *id.* at 37–46.

for non-Indian settlement.²⁸³ The United States embarked on a violent military campaign to uproot Navajo people from their homes and farmlands and relocate them to an area known as Bosque Redondo at Fort Sumner in New Mexico.²⁸⁴ Kit Carson led the brutal campaign, which included guerilla tactics such as burning cornfields and orchards, filling in water sources, and killing the elderly who were too weak to move.²⁸⁵ The forced removal took place over several years and included more than fifty-three episodes of herding Navajo tribal members from their homelands to the Bosque. Several thousand Navajo managed to evade capture by fleeing to remote corners of *Dinétaḥ* such as Bears Ears, Navajo Mountain, and Black Mesa.²⁸⁶ The majority, however, were rounded up and confined to the sparse land along the Rio Grande, which they experienced as a prison.²⁸⁷ This multiyear period became known as the Navajo's "Long Walk" and was akin to the forced removals of the Yavapai-Apache, the Hualapai, and many tribes throughout the country that were forced out of their homelands and onto heavily policed reservations. The federal government's goals for all of these tribes were the same: to free up land for non-Indian settlement and force a process of assimilation.²⁸⁸

The Navajo never submitted to their removal. They emerged from their desperate time at the Bosque determined to return home. Led by Headman Manuelito, they negotiated the Treaty of 1868, which designated a portion of *Dinétaḥ* as the Navajo reservation and secured their rights to self-government.²⁸⁹ Over the ensuing decades, through a series of Executive Orders, the Navajo reservation was expanded until it reached its current size of roughly seventeen million acres in 1934.²⁹⁰ As discussed in Part II below, this hardly marked the end of their estrangement from the Grand Canyon. The same

283. See *id.* at 80.

284. See *id.* at 51–57.

285. See *id.*

286. See *id.* at 57; see also *Bears Ears Buttes*, BEARS EARS INTER-TRIBAL COALITION, <https://bearscoalition.org/portfolio-items/bears-ears-buttes/> (last visited Sept. 20, 2019) [<https://perma.cc/H6GM-4AVD>] (describing how many Navajo fled to the Bears Ears region during Carson's campaign).

287. See IVERSON, *supra* note 273, at 64–65.

288. See ANDERSON, BERGER & KRAKOFF, *supra* note 165, at 80–87 (describing purposes and means of the reservation period).

289. See Treaty with the Navajo, June 1, 1868, 15 Stat. 667.

290. See PETER IVERSON, *THE NAVAJO NATION* 14–15 (Univ. of N.M. Press 1983) (1981).

policies that saved the Grand Canyon from development plunged thousands of people on the western side of the Navajo Nation into a purgatory of underdevelopment and locked the Navajo Nation into a coal-dependent economy for decades. Throughout that time, the GCNP and the Navajo Nation were worlds apart, even though they shared a border.

c. The Zuni Tribe

The Zuni, according to their origin story, emerged from the “womb of the earth”—a place near Ribbon Falls, deep within the heart of the Grand Canyon.²⁹¹ The Havasupai and Hualapai peoples emerged with them, and the Hopi came from the underworld at the same time but in a different location.²⁹² After their emergence, the Zuni began to search for the “Middle Place” (*Halona Idiwan’a*) where they would find stability and indefinite sustenance.²⁹³ During this journey, they stopped at four springs where they planted corn and built shrines.²⁹⁴ The Zuni found the Middle Place at the headwaters of the Zuni River, where they remain today. The Grand Canyon, the places visited on the way to find the Middle Place, and the headwaters of the Zuni River are all linked as part of the Zuni’s sacred landscape.²⁹⁵ Everything the Zuni observed along their journey is integrated into Zuni prayers, stories, and religious ceremonies.²⁹⁶

The Zuni’s traditional lands ranged from the Grand Canyon in the west to the Rio Grande in the east, the headwaters of the Little Colorado River in the south, and Mt. Taylor in the north. The Zuni also traveled across Utah, Colorado, Arizona, and New Mexico for different purposes, such as hunting and trade.²⁹⁷ Most Zuni resided in large and stable settlements along the Zuni River in 1846 when the United States military came to the Southwest.²⁹⁸ Today, the Zuni’s territory consists of a small reservation—about 450,000 acres—in New Mexico

291. HELEN C. FAIRLEY, CHANGING RIVER: TIME, CULTURE, AND THE TRANSFORMATION OF LANDSCAPE IN THE GRAND CANYON 71–72 (2003).

292. *Id.* at 72.

293. *Id.*

294. *Id.*

295. *Id.*

296. *Id.* at 73.

297. T.J. FERGUSON & E. RICHARD HART, A ZUNI ATLAS 3 (1985).

298. *Id.*

and additional dispersed landholdings in Catron County, New Mexico, and Apache County, Arizona.²⁹⁹ The Zuni's story of their illegal dispossession, under color of U.S. law, is recounted in detail in the Zuni's successful takings cases before the Indian Claims Commission and is told in broad outlines here.³⁰⁰

Spanish explorers first encountered the Zuni in 1539.³⁰¹ Similar to the other Grand Canyon tribes, the Zuni retained their traditional territory throughout the first three centuries of European contact despite Spanish efforts to conquer and convert the Zuni and other Pueblo peoples.³⁰² The Zuni joined in the Pueblo Revolt of 1680, which evicted the Spanish and temporarily sidelined European invasion.³⁰³ The Spanish returned, but the most serious disruption to Zuni lands and culture came after the Mexican-American War in 1848.³⁰⁴ The U.S. military, dispatched to settle the newly acquired U.S. territories, instigated conflict throughout the region by engaging in battles with the Navajo and Apache, who fled to Zuni country as a result. In the 1860s, the federal government built large forts on Zuni land, which they used as bases of operation to fight the other tribes.³⁰⁵ To settle matters with the Navajo after their return from Bosque Redondo, the United States expanded the Navajo reservation into Zuni territory in 1871.³⁰⁶ The Zuni reservation itself was established by executive order in 1877 and enlarged in 1883, but Zuni people continued to use their broader territory in the ensuing decades.

Non-Indian settlement, which the United States actively promoted through its public land laws, caused the next wave of Zuni dispossession.³⁰⁷ The Indian Claims Commission found

299. *Id.*; see also *Pueblo of Zuni Is Located*, PUEBLO OF ZUNI, <http://www.ashivi.org> (last visited Sept. 26, 2019) [<https://perma.cc/4H62-J27Z>].

300. See generally *Appendix B, Findings of the United States Claims Commission, Docket No. 161-79L, Taking Dates*, in *ZUNI AND THE COURTS: A STRUGGLE FOR SOVEREIGN LAND RIGHTS* 283–307 (E. Richard Hart, ed. 1995).

301. FERGUSON & HART, *supra* note 297, at 59.

302. *Id.* at 89.

303. For more on the Pueblo revolt and the Zuni's role, see DAVID ROBERTS, *THE PUEBLO REVOLT* 56 (2004).

304. See *Appendix A, Findings of the United States Claims Commission, Docket No. 161-79L, Aboriginal Area*, in *ZUNI AND THE COURTS: A STRUGGLE FOR SOVEREIGN LAND RIGHTS* 241, 263 (E. Richard Hart, ed. 1995) (finding that the Zunis “continued to have exclusive use and occupation of the claim area during the Mexican Period”).

305. FERGUSON & HART, *supra* note 297, at 87.

306. *Id.* at 87.

307. *Id.* at 87, 89; see also *Appendix B, Findings of the United States Claims*

that “the United States, under mining, homestead, and desert entry laws, encouraged numerous settlements in the Arizona portion” of the Zuni’s traditional territory.³⁰⁸ Mormons arrived from the west, miners from the south, and ranchers scattered across the territory, taking advantage of the government-sponsored giveaways.³⁰⁹ Most ominously, the railroad arrived in Zuni territory in 1882.³¹⁰ The United States granted alternate sections to the Atchison, Topeka, and Santa Fe Railroad throughout Zuni lands.³¹¹ In addition to these direct transfers, rail access led to increased non-Indian exploration of Zuni lands, including for resource extraction in particular.³¹² Timber was clear-cut from the Zuni mountains with no compensation, and copper mines were located under the General Mining Law “in derogation of the Zuni rights to the lands.”³¹³

Between 1900 and 1934, the Zuni’s territory grew ever-smaller as non-Native settlers continued to move in.³¹⁴ As the Claims Commission determined, “The United States administered Zuni lands as public lands, allowing homesteads to be taken by third parties.”³¹⁵ In 1934, the Zuni were officially confined to the territory of their reservation, which was fenced in order to prevent grazing outside of the reservation boundary.³¹⁶ After 1934, Zuni ranchers were allowed to use what were known as the Zuni North and South Purchase areas until 1939.³¹⁷ In 1939, the Navajo moved into the Zuni North and the government opened the area to non-Zuni settlement.³¹⁸

Commission, Docket No. 161-79L, Taking Dates, supra note 300, at 298.

308. *See also Appendix B, Findings of the United States Claims Commission, Docket No. 161-79L, Taking Dates, supra note 300, at 298.*

309. FERGUSON & HART, *supra* note 297, at 87, 89.

310. *Id.* at 87; T.J. Ferguson & Barbara J. Mills, *Settlement and Growth of Zuni Pueblo: An Architectural History*, 52 KIVA 4, 245 (1987).

311. *See Appendix B, Findings of the United States Claims Commission, Docket No. 161-79L, Taking Dates, supra note 300, at 299.*

312. FERGUSON & HART, *supra* note 297, at 87.

313. *Appendix B, Findings of the United States Claims Commission, Docket No. 161-79L, Taking Dates, supra note 300, at 299.*

314. FERGUSON & HART, *supra* note 297, at 89–90; *Appendix B, Findings of the United States Claims Commission, Docket No. 161-79L, Taking Dates, supra note 300, at 301–03.*

315. *Appendix B, Findings of the United States Claims Commission, Docket No. 161-79L, Taking Dates, supra note 300, at 303.*

316. FERGUSON & HART, *supra* note 297, at 89–90; *Appendix B, Findings of the United States Claims Commission, Docket No. 161-79L, Taking Dates, supra note 300, at 303.*

317. FERGUSON & HART, *supra* note 297, at 90.

318. *Id.*

From that time forward, Zuni were officially confined to the 1883 boundaries, which proved insufficient to meet the needs of the Zuni herds and people.³¹⁹

In 1970, the Zuni began the long and multistage process of litigating about their illegal dispossession.³²⁰ First they had to lobby Congress to pass special legislation to allow their land claims cases to go forward.³²¹ Then they had to assemble the archaeological, ethno-historical, and geographic evidence to prove their land claims. The Zuni prevailed on all aspects of their claims, but like most tribes in the lands claim process, their sole remedy was money damages. The Zuni did manage to regain some small but crucial portions of their traditional lands through legislation, and they won access to one of their most sacred areas—*Kolhu/wala:wa* (Zuni Heaven)—through litigation against a private landowner.³²² Today, they join with the other eleven tribes trying to reassert their voices in the GCNP, the place of their origins.

B. From “Blank Space” to the (Non-Indian) Public’s Space

With American Indians erased from their own maps, the story of creating Grand Canyon National Park appears seamless. The conventional environmental-progress story proceeds in the following way. First, President Benjamin Harrison set aside the Grand Canyon Forest Reserve in 1893.³²³ Next, President Theodore Roosevelt designated portions of Grand Canyon as a game preserve in 1906. After the passage of the Antiquities Act, Roosevelt created the 800,000-acre Grand Canyon National Monument in 1908.³²⁴ As Americans began to visit these places in greater numbers, demand for their preservation grew. John Muir and other proponents of the aesthetic and recrea-

319. *Id.*

320. See E. Richard Hart, *The Continuing Saga of Indian Land Claims, Zuni Claims: An Expert Witness’ Reflections*, 24 AM. INDIAN CULTURE & RESEARCH J. 163 (2000).

321. See E. Richard Hart, *Introduction*, *supra* note 300, at xv–xx.

322. See *id.* at xv; see also Hank Meshorer, *The Sacred Trail to Zuni Heaven: A Study in the Law of Prescriptive Easements*, *supra* note 300, at 208–19 (describing the Zuni Heaven litigation); Stephen G. Boyden, *The Zuni Claims Cases*, *supra* note 300, at 223–25 (describing 1978 legislation restoring the Zuni Salt Lake and 1984 Act restoring Zuni lands in Arizona).

323. See Proclamation No. 45 (Feb. 23, 1893).

324. See Proclamation No. 694 (Nov. 28, 1906); Proclamation No. 794 (Jan. 11, 1908).

tional values of wild places led a movement that culminated (after Muir's death) in the establishment of the National Park Service in 1916.³²⁵ Three years later, Congress designated the GCNP.³²⁶ This is the story of how Americans evolved to embrace "the best idea we ever had."³²⁷

The Southern Paiute, Hualapai, Havasupai, Yavapai, Hopi, Zuni, and Navajo stories, told in summary fashion above, are contained in the invisible ellipses. But if we import them, then we also bring in the more complicated role that law, power, and politics played in establishing the terrain for America's "best idea." Those stories include how the federal government subsidized and abetted the railroad companies, and how the railroad shaped Americans' relationship with public lands. They also include how non-Indian miners, ranchers, and Mormon pioneers dispossessed Indians of their lands with the federal government's blessing or tacit indifference. If we put the Native nation dispossession timeline right next to the Grand Canyon National Park timeline, we see that the story is one of take-and-give. Law abetted the dispossession of Indian lands at the same time that law established public lands with increasing levels of protection.

Starting with the Hualapai Tribe's success in 1941, the Grand Canyon story also includes how tribes and other non-majority groups, together with their allies, were sometimes able to influence law and reinsert themselves into the "public." The contest over the meaning of the Grand Canyon, and whether it represents our best ideas or not, continued throughout the twentieth century.

II. GCNP, THE BIG BUILD-UP, AND WHITE SPACES

Day nine on the River is a hiking day. Our dories stop past mile 135, just before the narrowest point in the canyon, where the granite walls squeeze the water tight and create the River's deepest pool. We climb up a drainage to a narrow ledge. For a stretch of about ten feet, there are only inches between our boots and the sheer canyon wall dropping off to the left. Every-

325. See National Park Service Organic Act, 16 U.S.C. § 1 (1916); see also ANDERSON ET AL., *supra* note 165, at 9.

326. Grand Canyon National Park Establishment Act, ch. 44 § 1, 40 Stat. 1175 (1919) (codified at 16 U.S.C. § 221 (2018)).

327. STEGNER, *supra* note 1, at 137.

one crosses without a hitch, some in nervous silence and others chatting obliviously. We ascend to the saddle and then down the hot, dusty trail as it winds into Deer Creek Canyon. We arrive just above the "Patio," an area of Tapeats ledges that form clear pools and pour-offs above the dramatic site of Deer Creek falls. The students peel off their shoes and run into the cool water laughing and joking. There are few better surprises than perfect swimming holes in canyon country.

After eating lunch and playing in the pools, most of us hike up Deer Creek to Dutton Springs, a stream of water that shoots out of the canyon walls. The whole area is part of the Kaibab Paiute's sacred landscape. It does not take much imagination to understand why. Pure water pours out of rock walls. Lush plants and cottonwood trees grow in the perennial riparian areas. Signs of wildlife are everywhere—bobcat prints and occasional scattered bones. I love seeing my students take it all in, but I feel a contradictory mix of emotions. I want everyone to see and experience this magic, but I want to protect it from the world at the same time. Then another set of jumbled thoughts enters in: who and what is being protected, and from whom, in this land that once belonged to the Kaibab Paiute but now is mostly frequented by privileged white Americans?

We hike back down to the Patio. I straggle on purpose, savoring the moments when it is quiet. At the River's edge, another group is getting back on their boats. I hear a familiar voice: "Sarah! How could you abandon us?!" A wide smile and big hug await me from R., one of the guides from two years ago, when we went with a different outfitter. I explain that it was not my choice, that his employer gave away the dates that worked best for me and my students. I tell him I miss him and his fellow guides, and I mean it. I love our trip this year, but it is different. All of our guides are older white men. Two years ago, we had a much more diverse crew, including R., who is African American. Two other guides that year were women: one Asian American graduate student and one white woman who was making a lifetime career of it.

My inarticulate thoughts from earlier come back to me. The people who visit and work in the GCNP and other national parks are disproportionately white.³²⁸ Black, Latinx, and other

328. See *Visitation Numbers*, NAT'L PARK SERV., <https://www.nps.gov/aboutus/visitation-numbers.htm> (last visited Aug. 10, 2019) [<https://perma.cc/44BZ-NW53>]; see also Jack Goldsmith, *Designing for Diversity*, 68 NAT'L PARKS 20

nonwhite groups participate in outdoor recreation activities and visit public lands at lower rates than white Americans.³²⁹ As a consequence, there are very few nonwhite outdoor recreation professionals, including Grand Canyon river guides. R. is one of the exceptions. But it should not be this way, for reasons that go to the heart of the best—and admittedly most idealized—justifications for having national parks. From Frederick Law Olmsted to Joseph Sax, proponents of national parks have argued that they are essential public goods because they provide spaces for contemplative recreation.³³⁰ Parks, by setting aside swathes of undeveloped land, allow people from all walks of life to have encounters with nonhuman nature.³³¹ Sax argued that these encounters are symptomatic and generative of a high-functioning democracy. Good governments should provide for these kinds of experiences for all, and the experiences generate contemplative virtues that reinforce civic participation.³³² If significant proportions of the public do not come, the Parks are failing at their mission and depriving those segments of the public of their benefits.³³³

(May/June 1994) (only 1.5 percent of visitors to the GCNP arriving by car and only 2 percent arriving by bus are African American, whereas African Americans make up 12 percent of the U.S. population). A vast literature has documented the under-representation of minorities in various outdoor recreation activities. See, e.g., Daniel H. Krymkowski, et al., *Race, Ethnicity, and Visitation to National Parks in the United States: Tests of the Marginality, Discrimination, and Subcultural Hypotheses with National-Level Survey Data*, 7 J. OF OUTDOOR RECREATION AND TOURISM 35, 37 (2014) (“It is thus well documented that members of racial and ethnic minority groups participate in outdoor recreation activities such as visitation to national parks at lower rates than whites”); Myron Floyd, *Race, Ethnicity and Use of the National Park System*, NAT’L PARK SERV. SOC. SCI. RESEARCH REV., Spring/Summer 1999, at 1.

329. See Myron Floyd, *Getting Beyond Marginality and Ethnicity: The Challenge for Race and Ethnic Studies in Leisure Research*, 30 J. OF LEISURE RESEARCH 3 (1998) (surveying the literature).

330. See FREDERICK LAW OLMSTED: WRITINGS ON LANDSCAPE, CULTURE, AND SOCIETY (Charles Beveridge ed. 2015); JOSEPH L. SAX, MOUNTAINS WITHOUT HANDRAILS: REFLECTIONS ON THE NATIONAL PARKS (1980).

331. See generally OLMSTED, *supra* note 330; SAX, *supra* note 330; see also Sarah Krakoff, *Mountains Without Handrails, Wilderness Without Cellphones*, 27 HARV. ENVTL. L. REV. 417 (2003) (reviewing these justifications). Importantly, Olmsted did not think that these spaces had to be wild or depopulated to be terrain for contemplation. Rather he believed that they could and should be designed for that purpose regardless of their degree of separation from human influence. See generally OLMSTED, *supra* note 330.

332. See generally SAX, *supra* note 330.

333. See John Schelhas, *Race, Ethnicity, and Natural Resources in the United States: A Review*, 42 NAT. RESOURCES J. 723, 751 (2002).

Tourism and leisure scholars developed three theoretical explanations for why people of color visit national parks in disproportionately low numbers: the marginality hypothesis, the ethnicity or subcultural hypothesis, and the ethnic boundary maintenance (or perceived discrimination) hypothesis.³³⁴ Myron Floyd, a leading scholar within the discipline, summarizes the first two positions as follows. The marginality hypothesis “holds that black participation patterns result from limited socioeconomic resources, which in turn are a function of historical patterns of discrimination.”³³⁵ The ethnicity/subculture hypothesis “explains differences in participation as reflecting divergent norms, value systems, and social organization between majority and minority populations.”³³⁶ The third thesis, ethnic boundary maintenance, explains differential visitation and participation rates as a result of the perception by nonwhite visitors that they will not be safe or welcome.³³⁷ The ethnic boundary thesis has particular traction in remote and rural areas, where most of the Nation’s iconic public lands are located.³³⁸

All of the theories hold explanatory force, but they also fall short on their own and as testable hypotheses.³³⁹ Certainly socioeconomic inequality stemming from historic discrimination, varying cultural experiences, and current discrimination all contribute to disparate visitation by nonwhites. But to fully grasp why places like the GCNP are still “white spaces,” all of these theories need to be put in historical and political-economic context.³⁴⁰ The questions, in other words, should go

334. Floyd, *supra* note 329, at 4–5.

335. *Id.* at 5.

336. Floyd, *supra* note 329, at 5.

337. Schelhas, *supra*, note 333, at 751. Consistent with this hypothesis, Professor Regina Austin describes certain leisure sites, including national parks, as “white-identified spaces,” which convey the message to African Americans and other nonwhites that they have no place there. Regina Austin, “Not Just for the Fun of It!”: Governmental Restraints on Black Leisure, Social Inequality, and the Privatization of Public Space, 71 S. CAL. L. REV. 667, 695 (1998); *see also* FINNEY, *supra* note 4 (exploring the “white space” phenomenon in various public lands and parks).

338. *See* Kim A. O’Connell, *On the Front Lines*, 75 NAT’L PARKS, May/June 2001, at 36, 39 (describing “deeply rooted fear among people of color that a visit to our nation’s remote areas might make them vulnerable to racial hostility”).

339. *See* Floyd, *supra* note 329; *see also* Jennifer Byrne & Jennifer Wolch, *Nature, Race, and Parks: Past Research and Future Directions for Geographic Research*, 33 PROGRESS IN HUM. GEOGRAPHY 743 (2009).

340. *See generally* Byrne & Wolch, *supra* note 339.

deeper than an examination of current visitation trends and include how environmental privileges and harms became embedded in unequal and racialized landscapes. Why and how did discrimination against African Americans, Latinx, and other nonwhite groups entwine with the making of Grand Canyon National Park? Further, how do those entwined stories of racial formation and park-making relate to visitation to the GCNP today?³⁴¹ The following sections provide that context and describe how laws participated in the segregation of spaces throughout the Southwest. These laws, as implemented, allocated natural resources (for outdoor recreation as well as urban development) to predominately white populations, while segregating and impoverishing nonwhite populations.

A. The (White) New Deal and the Valley of the Sun

Phoenix, Arizona, is the largest city near the GCNP. Its population is over 1.5 million, and another 3 million live in the “Valley of the Sun,” the greater Phoenix metropolitan area. Phoenix’s journey from small agricultural town to major city began during the New Deal and accelerated after World War II, when Phoenix boosters took full advantage of the federal government’s policies of funding large infrastructure projects and backing consumer spending.³⁴² Charles Wilkinson calls this period the “Big Buildup.” It entailed extracting natural resources—coal, oil and gas, and water—from the Colorado Plateau and sending them to electrify and hydrate the cities of Los Angeles, Las Vegas, Tucson, and Phoenix.³⁴³ More specifically, coal from Navajo and Hopi lands underwrote the growth of these big cities, and the damming of the Colorado provided the water and much of the electricity.

One consequence of the Big Buildup was to impoverish and deplete vast portions of Navajo and Hopi lands.³⁴⁴ Another was

341. See *id.* at 750–51 (describing need for a similar historicized framework for interrogating race and park use in the context of geography).

342. See ANDREW NEEDHAM, *POWER LINES* 56 (2014).

343. See CHARLES WILKINSON, *FIRE ON THE PLATEAU: CONFLICT AND ENDURANCE IN THE AMERICAN SOUTHWEST* 182–85 (1999).

344. See Sarah Krakoff, *Sustainability and Justice*, in *RETHINKING SUSTAINABILITY TO MEET THE CLIMATE CHANGE CHALLENGE* 217–25 (Jessica Owley, et al., eds., 2015) (showing connections between the Big Buildup, the rise of the environmental movement, and the impoverishment of vast swathes of Hopi and Navajo lands).

to spur the nascent environmental movement to some of its most famous victories. David Brower and the Sierra Club fought off dams in the Grand Canyon and catalyzed the national effort to pass major environmental laws, including the National Environmental Policy Act.³⁴⁵ These two phenomena—impoverishment of Native lands and protection of the Grand Canyon—were connected. The rise of the modern environmentalism coincided with, and was at best negligent toward, outsourcing extractive industries and their pollution to Indian country.³⁴⁶

The cities that extracted natural capital from Native communities established unequal playing fields for other minority groups. During the booster years, Phoenix segregated its neighborhoods and schools while engaging in a marketing and real estate development strategy that catered to white anxiety about urban danger and decay.³⁴⁷ Part of that strategy was to advertise the West's environmental amenities, including romanticized depictions of Native peoples that elided their violent displacement. Arizona Highways, the glossy lifestyle magazine of the Southwest, touted clean air, open spaces, outdoor recreation, and the surrounding beauty of the Colorado Plateau, "where our scattered Indian tribes live complacently, completely undisturbed by the frenzied civilization about them."³⁴⁸

The combined result of the Big Buildup, residential and educational segregation, and the impoverishment of tribal lands was the following geo-cultural map: booming southwestern cities marked by racial and class inequalities; the GCNP, catering largely to white travelers; and impoverished Native lands scarred by mining and lacking basic infrastructure and modern amenities.

345. See *id.* at 217–18 (describing the fight against the proposed dam in Marble Canyon); see also Byron E. Pearson, *Salvation for the Grand Canyon: Congress, the Sierra Club, and the Dam Controversy of 1966-68*, 36:2 J. SOUTHWEST 159 (1994) (detailed history of the political and legal maneuvering that killed the dam proposals).

346. See Krakoff, *supra* note 344, at 217–25.

347. NEEDHAM, *supra* note 342, at 55–64, 83–88 (describing the marketing and financing strategies that entrenched pre-existing intentional segregation in Phoenix).

348. *Id.* at 55 (quoting *Roads Through the Indian Country*, ARIZONA HIGHWAYS 12 (June 1953)).

1. Dams, Coal, and the Forgotten People³⁴⁹

The Glen Canyon and Hoover Dams mark the beginning and end of today's Grand Canyon river trips. They also conveniently bookend, though in reverse order, the era of massive federal investment in the West's infrastructure. At first, dams were New Deal projects intended to revive the national economy.³⁵⁰ The Hoover Dam, completed in 1936, was the ultimate symbol of New Deal aspirations. It was a feat of technological marvel that lassoed a wild river, compounded its waters for agricultural and other human uses, and literally turned the lights on in Los Angeles.³⁵¹ In the postwar years, western politicians and the Bureau of Reclamation continued to promote dams as solutions to the West's water and energy needs. The Glen Canyon Dam was the last of the big reclamation projects, opening its intakes just as new federal environmental laws would all but ensure the end of the dam-building era. Glen Canyon Dam was finished in 1966, and the National Environmental Policy Act, requiring environmental review of all major federal actions, was passed in 1970.³⁵² In between the Grand Canyon's two dams lies the story of how the West's development spurred the modern environmental movement, and how both are implicated in the underdevelopment and impoverishment of vast swathes of the Navajo and Hopi reservations.

Today, approximately 60,000 Navajo tribal members lack electricity and 40 percent of Navajo and Hopi homes do not have running water. Yet in Phoenix, people turn on the tap and drink Colorado River water, which flows to them uphill from Lake Havasu through the Central Arizona Project (CAP). The CAP gets electricity from the Navajo Generating Station (NGS), a 2,250-megawatt power plant within the boundaries of the Navajo Nation. Coal for the NGS is mined from a giant strip coal mine on Black Mesa, a high desert plateau that straddles the Hopi and Navajo reservations. Without the NGS and the coal that feeds it, there would have been two more gi-

349. Portions of this section were adapted from Krakoff, *supra* note 344, at 217–25.

350. See DAVID P. BILLINGTON & DONALD C. JACKSON, *BIG DAMS OF THE NEW DEAL ERA: A CONFLUENCE OF ENGINEERING AND POLITICS* 7–8 (2006).

351. NEEDHAM, *supra* note 342, at 23.

352. Pub. L. 91-90, 83 Stat. 852 (1970) (codified at 42 U.S.C. §§ 4321 et seq. (2018)).

ant dams and reservoirs in the Grand Canyon in between Lakes Powell and Mead, flooding all of Marble Canyon as well as the Lower Granite Gorge. The rise of the environmental movement that defeated those dams, the buildup of Phoenix, and the desecration of Navajo and Hopi lands were interdependent aspects of distributing water, power, preservation, and extraction in the Southwest.

The story behind this state of affairs begins in the early 1940s, when Arizona began aspiring to be more than an underpopulated flyover state. Between 1940 and 1960, the population of Phoenix grew from 65,000 to 440,000.³⁵³ To ensure the city's continued success, Arizona had to secure its share of Colorado River water.

The Colorado River Compact of 1922 divided the River's basin into upper (Colorado, New Mexico, Utah, and Wyoming) and lower (California, Arizona, and Nevada) halves and imposed delivery obligations on the upper basin states but left unclear the allocation to states within each basin.³⁵⁴ In 1963, the Supreme Court decided *Arizona v. California*,³⁵⁵ which clarified Arizona's rights and obligations and affirmed the water rights of several American Indian tribes on the main stem of the Colorado. This cleared the way for the passage of the Colorado River Basin Project Act in 1968,³⁵⁶ which authorized the construction and energy supply for CAP. But preceding that solution was a brawl over damming the Grand Canyon.

While the Compact states wrangled over water rights throughout the 1930s–1950s, the Bureau of Reclamation set about mapping the River for optimal storage sites. Big dams, in vogue since the 1930s, could store vast amounts of the Colorado's precious acre-feet to meet compact requirements and also produce hydroelectric power. Unfortunately for the Bureau, national environmental groups were coming to power and prominence at the same time as the Bureau's engineers were zeroing in on dam sites within the boundaries of Dinosaur National Monument, an obscure and striking landscape straddling western Colorado and eastern Utah. David Brower, Executive Director of the Sierra Club, and Howard Zahniser of the Wilder-

353. See NEEDHAM, *supra* note 342, at 55.

354. See Colorado River Compact, art. III (codified at Colo. Rev. Stat. § 37-61-101 (2012)).

355. 373 U.S. 546 (1963).

356. 43 U.S.C. § 1501 et seq. (2018).

ness Society led a nationwide effort to oppose flooding Dinosaur. With Brower's urging, Wallace Stegner edited *This is Dinosaur: Echo Park Country and Its Magic Rivers*, a volume of essays and photographs pleading the case against dams at Echo Park and Split Mountain.³⁵⁷ Public outcry and charismatic leadership succeeded in saving the Monument's remote canyons. Congress passed the Colorado River Storage Project Act in 1956, which eliminated Dinosaur from the list of proposed dam sites and included language prohibiting dams or reservoirs from being constructed within national parks or monuments.³⁵⁸

The environmental movement saved Dinosaur, but in a decision that Brower and others grew to regret and condemn, the 1956 legislation included authorization for the Glen Canyon Dam.³⁵⁹ The Dam flooded Glen Canyon, which lies in the heart of northern Arizona and southern Utah's red rock canyon country. Lake Powell drowned Glen Canyon behind the Dam's massive height. Today, the Glen Canyon Institute is devoted to releasing the water from Lake Powell and liberating the canyon's depths and passageways. Brower published his support for their mission in 1997, elaborating on his long-held view that sacrificing Glen Canyon had been a grave mistake.³⁶⁰ In the late 1950s, it made eminent political and public relations sense for the Sierra Club and their allies to draw the line at allowing dams in designated monuments and parks. Legally protected status provided a clear boundary for the public, as well as the federal bureaucrats. Brower's regret, however, highlights the inevitably arbitrary quality of trying to save nature, one big, beautiful place at a time. Not all big, beautiful places are within monuments or parks, and even worse, unless the goal is structural change to the economy such that water and hydropower are not in demand, saving one place simply kicks the can down the road—or the dam down (or up) the river. Save Dinosaur, sacrifice Glen Canyon; meanwhile, the effort to flood and populate the desert continued, and the power and water had to

357. See WALLACE STEGNER, *THIS IS DINOSAUR: THE ECHO PARK COUNTRY AND ITS MAGIC RIVERS* (1956).

358. Act of April 11, 1956, ch. 203, 70 Stat. 105 (1956) (codified as amended at 43 U.S.C. §620 et seq. (2009)).

359. See *id.*

360. David Brower, *Let the River Run Through It*, *SIERRA MAGAZINE*, Mar./Apr. 1997.

come from somewhere.³⁶¹

Indeed, as soon as the last diversion tunnel at Glen Canyon Dam closed in 1963 and water began to fill Lake Powell, Floyd Dominy, the Bureau of Reclamation's Commissioner, announced a plan to dam the Grand Canyon. The proposed site in Marble Canyon lay outside of the boundaries of Grand Canyon National Park at the time, and was therefore not foreclosed by the Colorado River Storage Project Act's language prohibiting dams in Parks or Monuments. Brower and the Sierra Club had learned their lesson and were ready; they were not going to sacrifice Marble Canyon. The Club, in a campaign led by Brower, and river runner Martin Litton, took out a series of full-page ads in the *New York Times*, the most famous of which asked: "Should We Also Flood the Sistine Chapel So Tourists Can Get Nearer the Ceiling?"³⁶² The campaign was wildly successful, all the more so after the Sierra Club lost their federal tax-exempt status for engaging in excessive lobbying. The Club's membership numbers soared, and eventually Dominy's hopes to dam Marble Canyon were defeated. The Sierra Club and its allies won.³⁶³ Yet the search for power and water continued. This time, the compromise resulted in construction of the Navajo Generating Station, which would supply the energy to pump water from Lake Havasu through the CAP.

While the national spotlight was focused on the battle between Brower and Dominy, plans were already being made to extract coal from Black Mesa, a sacred and traditional landscape in the heart of Hopi and Navajo country. Most national environmental groups in the 1950s and 1960s, even if they sought to align with tribes on environmental issues, stopped their advocacy at Indian country's borders.³⁶⁴ Further—

361. See WILKINSON, *supra* note 343, at 182–85.

362. See Sierra Club, *David Brower (1912–2000): Grand Canyon Battle Ads*, <http://content.sierraclub.org/brower/grand-canyon-ads> (last visited Nov. 10, 2013) [<https://perma.cc/637H-VT3U>].

363. See generally Pearson, *supra* note 345.

364. Fortuitously for the Sierra Club, the Navajo Tribe joined the opposition to the Marble Canyon dam. See generally Byron E. Pearson, "We Have Already Forgotten How to Hope": *The Hualapai, the Navajo, and the Fight for the Central Arizona Project*, 31 W. HIST. Q. 297 (2000). Navajo concerns included infringement of their trust lands on the western edge of their reservation and usurpation of their water rights without adequate acknowledgment or compensation. See *id.* But once the dams were successfully defeated, the Sierra Club pulled stakes from Indian country and for many years did not revisit the twin harms of underdevelopment and environmental devastation that ensued. The point,

amazingly from today's vantage point—Brower and the Sierra Club expressed their support for coal as an alternative to damming the Colorado during the Dinosaur fight. Coal, Brower wrote, was a “much longer-lived source of energy than the short-lived reservoirs of the silty Colorado.”³⁶⁵ When the source of energy for the build-up shifted from scenic public lands to tribal lands, Brower and the Club not only failed to object, they approved: in 1966 Brower testified before Congress that the Club would “support as many coal plants as is necessary to make the CAP viable.”³⁶⁶

The story of saving Marble Canyon is seldom told in conjunction with the convoluted and complicated one of how our nation's treatment of the Navajo and Hopi people—at times careless and at others outright corrupt—led to a long and costly conflict between the tribes, the relocation of thousands of Navajo people, blunt and inhumane federal policies for tribal land development, and a legacy of economic hardship. Yet the two are tightly linked as a matter of economic, environmental, and socio-legal history. Accessing the huge coal deposits on Black Mesa—which were required to fuel the Navajo Generating Station—required settling land disputes between the Navajo Nation and the Hopi Tribe. Without clear title in one tribe or the other, the coal companies could not enter into leases to mine the resource. As Emily Benedek describes in her thorough account of the Navajo-Hopi land dispute, the federal government created the basis for the boundary confusion with its careless and callow mapping.³⁶⁷ Then, encouraged by mining and development interests, the government facilitated a series of solutions that ran roughshod over the lives of thousands of Navajo people.³⁶⁸

however, is not to blame the Sierra Club or other environmental groups for hewing to their missions. Rather, it is to highlight that in a context where growth and development constitute the underlying and seemingly inevitable logic, environmental protection can unwittingly become a game of NIMBY (not in my backyard) on a very large scale.

365. STEGNER, *supra* note 1, at 8.

366. NEEDHAM, *supra* note 342, at 210 (quoting David Brower Testimony, Lower Colorado River Basin Project: Hearings before the Subcommittee on Irrigation and Reclamation (1966)).

367. See generally BENEDEK, *supra* note 270; REDHOUSE, *supra* note 265.

368. See generally BENEDEK, *supra* note 270; REDHOUSE, *supra* note 265.

2. The Navajo-Hopi Land Dispute and the Bennett Freeze

Even a truncated explanation of why millions of snowbirds, gamblers, real estate developers, dreamers, actors, plastic surgeons, and other denizens of Phoenix, Las Vegas, and Los Angeles can flip a switch and turn on their air conditioning and water must begin no later than 1868. As described above, in that year the Navajo Nation signed its Treaty with the United States, guaranteeing that Navajo people could return to at least part of their aboriginal homeland.³⁶⁹ The 1868 Treaty boundaries soon proved to be too limited, and the Navajo Reservation was expanded several times until it reached its current size.³⁷⁰

Meanwhile, Hopi people were opposing the federal government's policies in other ways. The federal government's assimilation program included forcing Indian children to attend Christian-sponsored boarding schools far from their homes and families.³⁷¹ Many Hopi people resisted these efforts and ran off or hid their children to evade their government pursuers. As of the early 1880s, the Hopi lacked a treaty or other formal acknowledgement of their lands, largely because their aboriginal title remained unchallenged. They occupied their villages on the rocky cliffs jutting out from Black Mesa and farmed in the spring-fed valleys below, as they had for centuries, without need for the federal government's blessing or approval.

This proved to be a problem for Indian Agent J.H. Fleming, who wanted to prosecute two non-Indian allies of the Hopi for assisting with the Hopi's efforts to keep their children at home. To have federal criminal jurisdiction, the lands had to be recognized as federal lands set aside for tribes.³⁷² Agent Fleming

369. See notes and accompanying text, *supra* notes 286–89 (discussing the Navajo's confinement at Bosque Redondo, negotiation of the Treaty, and return to their homelands).

370. See IVERSON, *supra* note 290, at 14–15 (describing executive order and legislative expansions).

371. See VINE DELORIA, JR. & CLIFFORD M. LYTLE, *AMERICAN INDIANS*, *AMERICAN JUSTICE* 11–12 (1983); Alison Dussias, *Ghost Dance and Holy Ghost: The Echoes of Nineteenth Century Christianization Policy in Twentieth Century Native American Free Exercise Cases*, 49 *STAN. L. REV.* 773 (1997); David Wallace Adams, *Schooling the Hopi: Federal Indian Policy Writ Small 1887-1917*, in *AMERICAN VISTAS, 1877 TO THE PRESENT* (7th ed. 1995).

372. See REDHOUSE, *supra* note 265, at 5 (page cites correspond to those from the downloaded version of the monograph).

therefore wrote with urgency to the Bureau of Indian Affairs and ultimately persuaded President Chester Arthur to create an executive order reservation for the Hopi in 1882, with boundaries corresponding to survey lines on the rectangular grid rather than any realistic assessment of where Hopi and Navajo people actually lived.³⁷³ Acknowledging the porous nature of the 1882 boundaries, the executive order stated that the lands were to be set aside “for the use and occupancy of Moqui (Hopi) and other such Indians as the Secretary of Interior may see fit to settle thereon.”³⁷⁴ During this same period, Navajo people were migrating from conflicts on the New Mexico side of their territory to lands within and west of the 1882 Executive Order Reservation. By 1918, the Navajo Reservation had been expanded to its current size, so that it surrounded the Hopi Reservation on all sides. In 1934, Congress passed a statute affirming the executive orders expanding the Navajo reservation, as well as generically acknowledging the presence and possible claims of other tribes.³⁷⁵

The poorly drawn boundary between Navajo and Hopi lands might have eventually provoked the need for formal legal settlement even without the demand for fossil fuel development. Disputes about the boundaries between the Navajo and the Hopi are rooted in their distinct patterns of cultural and economic relationships to the land. The 1882 boundaries, their slavishness to the grid-like survey, and the ambiguous language of both the 1882 Executive Order and 1934 Act exacerbated these tensions. The two tribes, in other words, certainly had their own very real differences about rights to territory as a result of the federal government’s carelessness, even apart from the demand for certainty about who owned the subsurface resources. But that story will never be told. The trigger for the Navajo-Hopi land dispute was the need to resolve the question of which tribe owned the mineral rights to Black Mesa.³⁷⁶ Reports and surveys in the first two decades of the twentieth century indicated rich fossil fuel deposits in the area, and while some of the hopes were for oil, it was coal that met and exceeded its early promise. In the 1970s, the Arizona Bureau of Mines estimated that Black Mesa contained over twenty-one billion

373. *See id.*

374. Exec. Order, Chester Arthur (Dec. 16, 1882).

375. Act of June 4, 1934, ch. 521, 48 Stat. 960.

376. *See* BENEDEK, *supra* note 270, at 133–34.

tons of coal.³⁷⁷

In the 1930s and '40s, when the question of mineral rights on Black Mesa arose, American Indian tribes were just emerging from the devastating period of allotment and assimilation. Today's self-determination policies were far off, and while early versions of self-governance were being implemented under the 1934 Indian Reorganization Act (IRA), the federal government's top-down, bureaucratic approach to tribal affairs remained pervasive. The Navajo and Hopi tribal councils of that era were established in large part to have a centralized authority in place to approve mineral leases. Traditional governing structures were omitted from the tribal council framework, instigating for both tribes a decades-long process of tumult and reform in order to reclaim their governments. The fragility of these early IRA governments meant that, for better or often for worse, lawyers for the tribes played enormous roles in determining the tribes' options. Charles Wilkinson has illuminated the tangled and conflicted role that the Hopi Tribe's lawyer, John Boyden, played in the Black Mesa story.³⁷⁸ Boyden's papers revealed that he was simultaneously representing the Hopi Tribe and Peabody Coal, the company with its sites on the Black Mesa leases. Such joint representation violated core ethical and professional legal standards, yet it was not revealed to the Hopi people until long after Boyden's representation was over.

On the Navajo side, their lawyer Norman Littell played a complicated role, at times asserting the Navajo Nation's interest strongly and at others prioritizing his own at his client's expense.³⁷⁹ To settle the boundary dispute between the tribes, the lawyers concluded, based on a 1946 Solicitor's Opinion, that legislation authorizing the tribes to sue each other was required.³⁸⁰ Congress passed such legislation in 1958, and the tribes' lawyers filed the case of *Healing v. Jones*, asking the federal court to determine the tribes' rights to the disputed areas, including the subsurface rights, of the 1882 Executive Order Reservation. In 1962, the *Healing* decision resolved that a portion of the Executive Order Reservation described as "Dis-

377. See REDHOUSE, *supra* note 265, at 4.

378. See WILKINSON, *supra* note 343, at 299–304.

379. See REDHOUSE, *supra* note 265; BENEDEK, *supra* note 270, at 134–38, 140–41.

380. See BENEDEK, *supra* note 270, at 136–37.

tract Six” belonged exclusively to the Hopi Tribe.³⁸¹ The remainder of the 1882 Reservation was declared to be a “joint use” area of the Navajo and Hopi tribes, with the surface and mineral estate shared by the tribes and consent from both required for leasing.³⁸² The court further determined that it lacked jurisdiction to partition the Joint Use Area and that the matter had to be resolved by Congress.³⁸³

The tribes and their lawyers shifted their sights to Congress, which in 1974 passed the Navajo-Hopi Indian Land Settlement Act authorizing partition of the Joint Use Area.³⁸⁴ In the surrounding years, the dispute bounced between the federal district court, Congress, and federal mediators. In addition to the tribes, powerful parties involved in the dispute—or hovering closely on the sidelines—included the Department of the Interior, the coal companies, and the proponents of development in Arizona and California, all with increasingly strong interests in getting access to the vast coal resources on Black Mesa. The Joint Use Area was ultimately divided pursuant to the Settlement Act, requiring the relocation of nearly ten thousand Navajo and several hundred Hopi who were on the wrong side of the divide. The Navajo relocatees faced grim circumstances, having been torn from their livelihoods and the landscapes they knew intimately. They were moved to distant places, some on the Navajo Reservation but some in the neighboring border towns of Winslow or Flagstaff, where anti-Indian sentiment can be strong. The relocation houses were often cheaply built, with structural problems that soon rendered them uncomfortable or even uninhabitable.³⁸⁵ Deprived of their traditional sheepherding, many relocatees were unable to find employment and quickly descended into poverty and despair.³⁸⁶

Most disturbing for the relocatees, however, was the brute reality of being ripped from everything they knew and understood about how to live in the right way. The following scene witnessed by lawyers for the Navajo Nation in Winslow, Arizona, in 1994 was not unusual. An elderly Navajo man lived

381. See *Healing v. Jones*, 210 F. Supp. 125, 158 (D. Ariz. 1962).

382. *Id.* at 132.

383. *Id.* at 192.

384. Pub. Law No. 93-531, 88 Stat. 1712 (Dec. 22, 1974) (omitted at 25 U.S.C. §§640d et seq. (2018)).

385. See William F. Rawson, *110-Year-Old Navajo-Hopi Land Dispute Haunts Tribal Relations*, L.A. TIMES, Oct. 17, 1993.

386. See *id.*

alone in his relocation spec house, which had several bedrooms, a living room, and a kitchen. The house was entirely empty, except for one portion of the linoleum floor in the living room. All of the man's belongings were piled there. He slept on a sheepskin near the woodstove, just as he had in his hogan on what was now Hopi partitioned land.³⁸⁷ Refusing to accept this fate, several hundred Navajo families, most from the Big Mountain area, declined to move. Their resistance drew the attention and support of national and international human rights groups, and additional litigation, mediation, legislation, and settlement discussions focused on the resisters and whether terms could be reached to allow for their continued residence on the Hopi side of the now divided lands.³⁸⁸ After decades of wrenching and emotional conflict, long-term leases, accompanied by mutual assurances from both tribes about religious and cultural access, proved to be a partial solution, although the legal wrangling continues even today.

At the height of the post-*Healing v. Jones* lobbying and litigation, Robert Bennett, then the Commissioner of Indian Affairs, imposed a freeze on all development, construction, and improvements on 1.5 million acres on the western edge of the Navajo Reservation that borders Marble Canyon. The Bennett Freeze, as it became known, at first seems puzzling because it affected vast stretches of land outside of the 1882 Executive Order Hopi Reservation boundaries. The explanation may appear to lie in the fact that, in the course of what had become a hydra-headed monster of litigation and claims, the Hopi Tribe argued that parts of the 1934 Navajo Reservation were Hopi lands.³⁸⁹ Yet the Hopi's claims predominately lay to the east or south of the Bennett Freeze area. Much of the vast acreage where Navajo people had long resided was not seriously in dispute or subject to partition. The Freeze seemed instead to be a harsh and overbroad measure to pressure the Navajo Nation to accede to the partition of the Joint Use Area, and subsequently to keep the pressure on with respect to negotiating terms for the resisters and other fallout from the partition.

The Bennett Freeze prevented Navajo people from making

387. Interview with John Carlson (Oct. 16, 2013) (notes on file with author).

388. See generally BENEDEK, *supra* note 270.

389. See *Masayesva v. Zah*, 65 F.3d 1445 (9th Cir. 1995) (describing history of the litigation including Bennett Freeze); see also BENEDEK, *supra* note 270, at 296.

any improvements to their homes, including infrastructure for electricity or water as well as normal household repairs. Sheds collapsed and could not be rebuilt. Outhouse roofs could not be patched. Horse corrals could not be repaired. And the Navajo Nation could not make any progress with respect to developing an electrical grid or modernizing access to water for thousands of tribal members. Today, families in the Bennett Freeze area, sometimes aptly referred to as our country's Forgotten People, still lack these basic amenities. Only 10 percent have running water, and 3 percent have electricity.³⁹⁰

The Freeze went into effect in 1966, and, despite its bare relevance to the legal issues and its overbroad territorial reach, it was not lifted until 2009, when President Obama signed legislation repealing it.³⁹¹ It is hard to convey adequately the inhumanity and harshness of this policy. If any such unilateral decision, consigning tens of thousands of people to substandard housing for decades, were imposed on any other community in the United States, there would be widespread and righteous cries protesting the totalitarian injustice. The Freeze, in effect, employed a strategy of underdevelopment for the Navajo people on the western edge of their Reservation to facilitate massive development for the distant metropolises of Los Angeles, Phoenix, and Las Vegas.

As noted above, the Navajo-Hopi Settlement Act, which partitioned some of the disputed lands and declared others to be joint use areas, was passed in 1974. The final partitions went into effect pursuant to federal district court orders in 1977.³⁹² During this period, the mines at Black Mesa opened, and a secure supply of coal started flowing. The first unit at Navajo Generating Station (NGS) opened in 1974, with units two and three to follow in 1975 and 1976.³⁹³

The coal mines on Black Mesa are impressive sites to behold. The sparse pinyon-juniper landscape yields abruptly to the strip mine's vast, black scar. Beneath the mine, water from

390. See Rawson, *supra* note 385.

391. See Pub. Law No. 111-18, 123 Stat. 1611 May 8, 2009 (repealing 25 U.S.C. §640d-9(f)).

392. See *History of a Dispute*, L.A. TIMES, Jan. 5, 1997, available at <https://www.latimes.com/archives/la-xpm-1997-01-05-me-15555-story.html> [<https://perma.cc/E3DD-7YC3>] (timeline of events in the Navajo-Hopi Land Dispute).

393. See Salt River Project, *Navajo Generating Station*, <http://www.srpnet.com/about/stations/navajo.aspx> (last visited Sept. 23, 2019) [<https://perma.cc/5EB2-LEVQ>].

a pristine aquifer that the Navajo and Hopi people include in their creation stories and rely on to feed their springs was pumped to slurry coal from the mines. Studies by the Natural Resources Defense Council have indicated that the mines have caused material damage to the aquifer,³⁹⁴ and residents of Black Mesa report that their wells are drying up and their land is subsiding.³⁹⁵ Alongside the human and environmental harms inflicted by the tortuous land dispute is another long-term cost to the Navajo Nation and Hopi Tribe. Revenues from coal mining have been the largest portion of tribal revenues. Reliance on this single extractive industry, coupled with the underdevelopment caused by the Bennett Freeze and other policies, have made the tribes vulnerable to the same boom and bust cycles that plague mining and oil and gas towns throughout the West.

This is the seldom-told backstory to the Big Buildup and the Big Preservation moments. Phoenix, California, and Nevada got their power and their water. The Sierra Club saved Dinosaur National Monument and the Grand Canyon. It all sounds like the win-win happy ending that, before widespread awareness of the biosphere's limits, the environmental movement aimed for. But the development was not free; the negative environmental and social impacts were merely pushed out of sight, although not for the Navajo and Hopi people.

Today, those impacts include a new economic transition: the shift away from coal. The Navajo Generating Station is slated to close.³⁹⁶ CAP no longer needs coal-fired generation to pump water uphill to Phoenix. The Salt River Project, CAP's owner, can buy cheaper electricity from natural gas plants and renewable sources. The closure of NGS and the coal mines will decrease Navajo and Hopi tribal revenues and result in unemployment for tribal members, whose income and benefits support entire communities. Nonetheless, as discussed in Part IV

394. See TIM GRABIEL, *DRAWDOWN: AN UPDATE ON GROUNDWATER MINING ON BLACK MESA*, NRDC ISSUE PAPER (Mar. 2006), <http://www.nrdc.org/water/conservation/draw/draw.pdf> [<https://perma.cc/58H2-3Y9Y>].

395. Interviews with Nicole Horseherder and Marshall Johnson (Mar. 25, 2012) (notes on file with author).

396. See Ryan Randazzo, *Last Coal Train Rolls to Arizona Power Plant as Closure Looms for Major Polluter*, ARIZ. REPUBLIC (Aug. 26, 2019), <https://www.azcentral.com/story/money/business/energy/2019/08/26/navajo-generating-station-receives-last-trainload-coal-mine-kayenta/2089822001/> [<https://perma.cc/FR2T-A7J4>].

below, there is also opportunity. The necessary shift toward a zero-carbon economy could provide a long-delayed reintegration of the GCNP with the broader socioeconomic and cultural landscape. Instead of a national park on one side and sacrifice zones on the other, the vision would be a seamless, protected, and sacred homeland where people play, worship, hike, and live.³⁹⁷

3. Segregation in the Valley of the Sun

As described above, Arizona's battle for water and power was a success, and it coincided with federal policies subsidizing the postwar consumer capitalism that led to the Southwest's population boom.³⁹⁸ Andrew Needham describes the marketing and development of Phoenix as a political project driven by two forces. First, "the ongoing legacy of New Deal policies that sought to fuel the national economy through debt-driven personal consumption."³⁹⁹ And second, local efforts to attract capital in two forms: high-tech, military-industrial manufacturers and "white middle-class Americans to whom the federal government guaranteed credit."⁴⁰⁰ African American, Latinx, and other nonwhite people were left out of this vision. During Phoenix's ascendance as a major city from 1940 to the 1960s, federal housing policies discriminated against Black homeowners and devalued Black and integrated neighborhoods. While Arizona was litigating over its water rights and lobbying for power to ship water across the desert to Phoenix, Black and Latinx residents of Phoenix were fighting school and housing segregation. As Needham describes, the result was a landscape of racial inequality that was fueled by "distant power plants on Indian lands."⁴⁰¹

Phoenix, unlike other southwestern cities, did not originate as a Spanish colonial settlement. Instead, Anglos established the city in the 1860s as an agricultural hub for the Salt

397. See Erin Ford, *Native Americans from Five Tribes Come Together to Discuss Grand Canyon's Indigenous History: Many Tribes, One Voice: "We Are Still Here,"* GRANDCANYONNEWS.COM (Sept. 17, 2019), <https://m.grandcanyonnews.com/news/2019/sep/17/native-americans-five-tribes-come-together-discuss/> [<https://perma.cc/53KJ-SRMH>].

398. See NEEDHAM, *supra* note 342, at 56.

399. *Id.*

400. *Id.*

401. *Id.* at 57.

River Valley.⁴⁰² The location the founders chose was no accident. It had been the site of an extensive Hohokam civilization until the fourteenth century, and the remnants of the Hohokam irrigation system remained.⁴⁰³ The Hohokam had abandoned the valley four centuries earlier for reasons that remain unknown. The newcomers used the Hohokam canals as the basis for their new irrigation works and optimistically named their city in the desert Phoenix, predicting it would rise again.⁴⁰⁴ From its earliest days, Phoenix had a significant Mexican and Mexican American population, as well as smaller numbers of African Americans, Chinese Americans, and American Indians.⁴⁰⁵ Residential segregation characterized the city from the start. The railroad marked the dividing line, as it so often does, and the south side of Phoenix was the under-resourced “wrong side of the tracks” where the nonwhite population lived.⁴⁰⁶

By the 1870s, Mexicans, Mexican Americans, and other nonwhite people were excluded from employment in most economic sectors and relegated to low-wage agricultural work. They were also barred from Phoenix’s circles of political power, which controlled the development and growth of the city. Phoenix’s racialized political structure entrenched the north-south dichotomy throughout the early twentieth century.⁴⁰⁷ Large industries and their attendant pollution were located south of the tracks, where the low-income and predominately minority populations lived. Unsurprisingly, housing for wealthier Anglo communities expanded on the north side.⁴⁰⁸

Segregation and discrimination in Phoenix fit within the larger fabric of Arizona’s legal, political, and cultural stance toward nonwhite populations. Arizona territorial laws recognized voting rights only for white men, and Mexican Americans were excluded from voting and participation in political life even though many were legally classified as white.⁴⁰⁹ Through-

402. See Bolin, et al., *supra* note 4, at 158.

403. See *id.*

404. See *id.*

405. See *id.*

406. See *id.* at 158–59.

407. See *id.* at 159.

408. *Id.* at 159.

409. See Kristina M. Campbell, *Rising Arizona: The Legacy of the Jim Crow Southwest on Immigration Law and Policy After 100 Years of Statehood* 24 BERKELEY LA RAZA L. J. 1, 6–7 (2014).

out the Arizona territory, many Mexican Americans were subject to the same forms of violent racial subordination as African Americans in the southern states. They were lynched, attacked by mobs, deprived of property without due process, excluded from juries, denied health care, and systematically paid less than non-Mexican whites.⁴¹⁰ Arizona's self-identification as a white space carried through to its quest for statehood. When the chair of the Senate committee on territories proposed that the Arizona and New Mexico territories should be admitted as a single new state, white Arizonans resisted on the grounds that they would be swallowed up in New Mexico's large and powerful Hispanic population.⁴¹¹

After Arizona became a state, its tradition of legally sanctioned racial discrimination continued. Territorial laws requiring segregated schools carried over into statehood, and a 1927 state law provided that in communities with twenty-five or more Black high school students, an election could be called to determine the necessity of a segregated school.⁴¹² Arizona also passed discriminatory voting laws. A statewide literacy test was adopted in 1912,⁴¹³ and Arizona law prohibited American Indian tribal members from voting until 1948, when the Arizona Supreme Court held that the Fourteenth and Fifteenth Amendments barred the exclusion of Indians from the franchise.⁴¹⁴

Phoenix mirrored this broader discriminatory landscape, and federal funding increased the city's patterns of racial inequality. In North Phoenix, federally subsidized water projects increased property values by supplying reliable water supplies.⁴¹⁵ Meanwhile, South Phoenix continued to deteriorate. By the 1920s, the segregated housing and development patterns were set. The degraded environmental and housing conditions in South Phoenix worsened, and the increasingly white and well-off neighborhoods, fueled by federally backed mortgage loans and infrastructure projects, pushed the boundaries

410. *See id.* at 7 (citing and quoting Salvador Acosta, *Crossing Borders, Erasing Boundaries: Interethnic Marriages in Tucson, 1854–1930*, Ch. 3, (2010) (PhD dissertation, University of Arizona)).

411. *See* Campbell, *supra* note 409, at 16.

412. *See id.* at 22.

413. *See id.* at 26.

414. *See* *Harrison et al. v. Laveen*, 196 P.2d 456 (Ariz. 1948).

415. *See* Bolin, et al., *supra* note 4, at 259–60.

of Phoenix further north.⁴¹⁶ The role of the Federal Housing Authority (FHA) in establishing racial segregation was more than just reflecting preexisting home values. The FHA instituted practices of “redlining,” which drew boundaries around Black and integrated neighborhoods and blocked federal insurance from being issued for mortgages in those areas.⁴¹⁷ In addition, nonwhite applicants for loans in newly built subdivisions were rejected.⁴¹⁸

Federal redlining was reinforced by the practices of the real estate industry. Realtors in Phoenix promised to maintain the racial integrity of their neighborhoods, stating openly that sales to nonwhites depressed real estate values.⁴¹⁹ The realtors apparently kept their promises; according to 1962 testimony before the U.S. Commission of Civil Rights in Phoenix, thirty-one thousand homes had been built by three developers and not a single one had been sold to an African American.⁴²⁰ The 1960 census confirmed what the eye could see: ninety percent of Phoenix’s African American population lived in neighborhoods in South Phoenix, and the other residents were Hispanic. The housing stock in these neighborhoods was older and more dilapidated than in the rest of the city, and infrastructure was poor to nonexistent. Visitors to Phoenix described the area as a “cross between a Mississippi Black Belt Negro ghetto and a Mexican border town.”⁴²¹

North of the tracks, the white neighborhoods flourished and marketed themselves as clean and wholesome escapes from the overpopulated metropolises of the coasts.⁴²² Phoenix’s white residents did not rely on FHA financing alone to ensure that their neighborhoods excluded nonwhites. African Americans who entered white areas of the city were harassed by resi-

416. *See id.*; *see also* NEEDHAM, *supra* note 342, at 66–83 (describing the essential role that federally-guaranteed loans and financing played in Phoenix’s growth in the post-World War II era).

417. *See* NEEDHAM, *supra* note 342, at 83–84. For an overview of the federal government’s role in instigating racially segregated housing, *see generally* RICHARD ROTHSTEIN, *THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA* (2017).

418. *See* NEEDHAM, *supra* note 342, at 84.

419. *See id.*

420. *See Hearings Before the United States Commission on Civil Rights* 47 (Feb. 3, 1962) (testimony of Lincoln J. Ragsdale), <https://www2.law.umaryland.edu/marshall/usccr/documents/f819p57a57.pdf> [<https://perma.cc/GBC2-PS5J>].

421. NEEDHAM, *supra* note 342, at 85.

422. *See id.* at 62–65, 85.

dents and the police, and the small number who managed to buy houses in North Phoenix faced petitions from white neighbors and defacement of their property.⁴²³

Consistent with segregated housing policies, Phoenix schools remained segregated by law until 1953 and only “voluntarily” ended the practice after a lower court decision declared Arizona’s segregation laws unconstitutional.⁴²⁴ Public accommodations and most employment situations were likewise not made available to nonwhites.⁴²⁵ As lifelong Phoenix resident and Municipal Court Judge Elizabeth Finn put it, Phoenix “at mid-century was for all practical purposes, a segregated place.”⁴²⁶

B. Connecting the Dots

By the 1960s, Phoenix was forced to confront its segregationist roots.⁴²⁷ But the effects linger still.⁴²⁸ The unequal flow of federal subsidies and private capital constructed racialized landscapes from Phoenix to the GCNP and throughout the surrounding Indian country terrain.⁴²⁹ White communities benefited from federally subsidized water, power, and protected public lands, while Native communities suffered from the expropriation of their resources and expulsion from those same public lands. Black, Latinx, and other nonwhite residents of

423. See *Hearings Before the United States Commission on Civil Rights*, *supra* note 420, at 47.

424. See Hon. Elizabeth Finn, *The Struggle for Civil Rights in Arizona*, AZ BAR (July 1988), <https://web.archive.org/web/20160304044044/http://www.myazbar.org/AZAttorney/Archives/July98/7-98a5.htm> [<https://perma.cc/S2WM-SN9V>]. See also *Phillips v. PUHS*, Superior Court of the County of Maricopa, Opinion and Order (Feb. 9, 1953), <https://superiorcourt.maricopa.gov/media/4358/opinionandorder-puhs.pdf> [<https://perma.cc/FUP2-Y58W>] (finding Arizona’s segregation laws unconstitutional).

425. See Finn, *supra* note 424.

426. *Id.*

427. See *Hearings Before the United States Commission on Civil Rights*, *supra* note 420.

428. See Anita Snow, *Phoenix Video Stirs Up Ghosts of Southwest’s Segregated Past*, ASSOC. PRESS NEWS (Aug. 1, 2019), <https://www.apnews.com/9ff13a506a76434d9f6c093d3e03c450> [<https://perma.cc/XE4C-W4ET>]; Joseph Flaherty, *Long Division: 65 Years After Segregation, Phoenix Schools Are Separate and Unequal*, PHOENIX NEW TIMES, (Apr. 8, 2018), <https://www.phoenixnewtimes.com/news/segregation-phoenix-schools-separate-and-unequal-10295728> [<https://perma.cc/J4MD-9EQ6>] (discussing how segregation in Phoenix schools, while no longer legally mandated, is the effect of discriminatory housing policies).

429. See *supra* Section III.A.1.

Phoenix were shut out from the benefits flowing to the Valley of the Sun, and discrimination throughout Arizona created a less-than-welcome environment for nonwhites who might otherwise think about hitting the road to visit the GCNP or any other protected public lands.⁴³⁰ Laws—federal Indian laws, federal natural resources laws, federal and local housing laws, and state school, accommodation, and voting laws—contributed to this spatially and racially coded landscape by intertwining with and reinforcing unstated norms about privilege and power. Until these broad and geographically embedded inequalities are addressed, it will be hard for many communities to single out our national parks as America's best idea.

III. TIME'S UP FOR THE GCNP?

Night eleven of our trip. We camp just past river mile 176, at a site labeled Below Red Slide. After sleeping, eating, and peeing in close proximity for ten days, the group has an easy camaraderie. My students—eleven women and four men—are strong, smart, and independent. With law school behind them⁴³¹ and uncertain career paths ahead, they are also somewhat apprehensive about their futures. For now, we all share a very immediate focal point for our anxiety: tomorrow we will run Lava Falls, the most storied and dangerous rapid in the canyon. The mood is joyful but nervously giddy, and it is no surprise that my students are ready to blow off some steam.

I wander up Red Slide Canyon on my own and scramble up a pour-off, shredding my desiccated fingertips in the process. The rocks emit the sun's warmth even as daylight fades. It is quiet, and I use the time to think about what I might say to my students tomorrow, after Lava, at their graduation ceremony in the Grand Canyon. My students are not in the same contemplative mood. Beer, wine, and whiskey flow freely. After dinner,

430. The Green Book, a popular Jim Crow-era guide for African American travelers that listed nondiscriminatory accommodations, had only a small number in Arizona, all in Phoenix or Tucson. There were no hotels or other accommodations at the Grand Canyon. See Victor Green, *THE NEGRO MOTORIST GREEN-BOOK 5* (1940) (Arizona listings). See also LAURET SAVOY, *TRACE: MEMORY, HISTORY, RACE, AND THE AMERICAN LANDSCAPE* 15–16 (2015) (describing the author's encounter with racism at a GCNP concession near Point Imperial when she was seven years old and trying to buy postcards).

431. Most of them. Twelve had just graduated, and three were heading into their third year of law school.

some of the students gather in small groups down by the river's edge. A few of the river guides join them.

The guides are longtime river runners, all men in their late fifties or sixties. They row us expertly through every rapid, prepare all of our meals, and regale us with Grand Canyon lore. The trip leader in particular keeps an eye on everybody, making sure the students are hydrated, eating right, and keeping safe on the water. We have all grown very fond of these men who love the Canyon enough to make their living there, and we are grateful for their care.

Yet there is a dynamic among a small number of the guides, not far below the surface, that makes me wary. They talk nostalgically of the days when their clients thought of them as "gods." One veers near the thin line between light-hearted flirtation and creepy unprofessionalism with women less than half his age. I wonder, even if it is not fair to do so, how things would go on a night like this if I were not keeping a watchful eye.

My vague concerns have foundation outside of our trip. In the preceding years, the National Park Service and other public lands agencies were roiled by reports of rampant sexual harassment and discrimination.⁴³² Grand Canyon National Park and its River District (the GCNP rangers who patrol the river corridor) were particular flashpoints. In 2016, the Interior Department's Office of Inspector General found "systemic harassment among employees in the River District of the park."⁴³³ The findings were serious enough to warrant the extreme action of abolishing the River District altogether.⁴³⁴ The Inspector General's report found that "women were repeatedly propositioned for sex, harassed by male boatmen and supervisors and retaliated against after reporting incidents to management."⁴³⁵ The report also found that National Park Service administrators had been aware of the problem but

432. See Lindsey Gilpin, *National Park Service Survey Finds Widespread Harassment*, HIGH COUNTRY NEWS (Oct. 13, 2017), https://www.hcn.org/articles/a-legacy-of-harassment-national-park-service-reveals-sexual-harassment-survey-results/print_view [https://perma.cc/PB28-U9SB].

433. *Id.*

434. See Lindsey Gilpin, *Grand Canyon Abolishes River District in Response to Sexual Harassment Allegations*, HIGH COUNTRY NEWS (April 1, 2016), <https://www.hcn.org/articles/grand-canyon-abolishes-river-district-in-response-to-sexual-harassment-allegations> [https://perma.cc/2SFV-P3JG].

435. *Id.*

“failed to take action for years.”⁴³⁶

The background of harassment included the following. In 2012, a Grand Canyon National Park employee reported to her supervisor that a boatman in the Park's River District “continually pursued her with unwelcome advances and eventually, somewhere down in the canyon, attempted to force himself on her.”⁴³⁷ Another female employee who had recently resigned as a federal river ranger in GCNP learned of the complaint, which resonated with what she had gone through during her three years in the GCNP. She filed a report with the GCNP's chief ranger, “documenting egregious violations of National Park Service policy, sexual harassment by agency boatmen and supervisors, as well as other . . . violations.”⁴³⁸ That report led to an investigation by the Equal Employment Opportunity Commission (EEOC), which culminated in a report sent to GCNP Superintendent Dave Uberuaga toward the end of 2013.⁴³⁹

And then, nothing happened. The EEO report disappeared. The Inspector General Report stated that women who worked at GCNP provided “evidence of discrimination, retaliation, and a sexually hostile work environment” committed by a small number of boatmen and supervisors, all in the River District.⁴⁴⁰ Superintendent Uberuaga admitted that he did not forward the EEO report to Human Relations or other Grand Canyon managers, nor did he pursue disciplinary actions against any of the alleged perpetrators of harassment.⁴⁴¹ Instead, he sat on it. The employee who instigated the EEO process concluded: “It was a systemic failure at every level as you move up the chain of command.”⁴⁴²

That systemic failure was not isolated, nor was it of recent vintage. In 2016, a year before the #MeToo movement garnered national attention, a reporter for High Country News undertook a year-long investigation of discrimination and harass-

436. *Id.*

437. Lindsey Gilpin, *Grand Canyon Park's 15-Year Failure on Sexual Harassment*, HIGH COUNTRY NEWS (Jan. 28, 2016), <https://www.hcn.org/articles/grand-canyon-national-parks-15-year-failure-to-address-its-systemic-sexual-harassment-problems> [<https://perma.cc/4FTT-Z4M3>].

438. *Id.*

439. *Id.*

440. *Id.*

441. *Id.*

442. *Id.* (quoting Michelle Kearney, former GCNP and River District employee).

ment in the National Park Service.⁴⁴³ Her inquiry was triggered by the River District stories, but it unearthed a far more widespread pattern.⁴⁴⁴ Sixty current and former employees came forward, ranging in age from twenty-three to seventy and representing a variety of careers within the NPS.⁴⁴⁵ The reporter concluded that “[t]heir testimony reveals an agency that has failed to protect its workers from sexual misconduct.”⁴⁴⁶

The NPS’s pattern of learning about sexual harassment and then doing nothing was also not new. Over a decade earlier in 2000, an employee survey “found that over half of female rangers and three-quarters of female park police had experienced sexual harassment on the job.”⁴⁴⁷ A majority also described the NPS as “poor” at ensuring that complainants did not experience retaliation.⁴⁴⁸ The NPS responded by creating a task force that planned to expand harassment training, work with individual park service units to improve agency culture, and implement a hotline for victims.⁴⁴⁹ The task force was disbanded in 2002 without implementing a single proposal.⁴⁵⁰ Nonetheless, in 2016 “top administrators expressed shock when the news of harassment at the Grand Canyon broke.”⁴⁵¹

After recovering from their shock, Interior and Park Service officials again promised to undertake a survey, which they finalized in 2017. And again, the results showed National Park Service employees experienced high rates of sexual harassment and discrimination.⁴⁵² Almost 40 percent of NPS employees reported that they had experienced some form of harassment

443. See Lindsey Gilpin, *How the National Park Service Is Failing Women*, HIGH COUNTRY NEWS, (Dec. 12, 2016), <https://www.hcn.org/issues/48.21/how-the-park-service-is-failing-women> [<https://perma.cc/BEJ9-UR3P>] [hereinafter Gilpin, *How the National Park Service*]; see also Lindsey Gilpin, *It’s Too Soon for #MeToo Apathy*, HIGH COUNTRY NEWS (Mar. 16, 2018), <https://www.hcn.org/articles/opinion-gender-its-too-soon-for-metoo-apaty> [<https://perma.cc/3M43-ENMJ>].

444. See Gilpin, *How the National Park Service*, *supra* note 443 (describing harassment and discrimination by NPS supervisors and employees in GCNP, Canaveral National Seashore, Death Valley National Park, Little Bighorn National Monument, Yellowstone National Park, Yosemite National Park, and Chattahoochee River National Recreation Area).

445. See *id.*

446. *Id.*

447. *Id.*

448. *Id.*

449. *Id.*

450. *Id.*

451. *Id.*

452. Gilpin, *National Park Service Survey*, *supra* note 432.

over a twelve-month period, with 19 percent reporting gender-based harassment.⁴⁵³ Similar to the response to the 2000 survey, agency officials responded with dismay and calls for change. Acting National Park Service Director Mike Reynolds told employees: “The survey makes it clear that NPS has a significant problem with harassment; it has infiltrated our organization and needs to stop now.”⁴⁵⁴ Then-Secretary of the Interior Ryan Zinke reportedly said he would ask Congress to give park superintendents and other agency leaders broader authority to fire employees who were repeat offenders. “A culture of tolerance of harassment and discrimination is unacceptable for me, and for the president, and we will take action,” Zinke said, apparently without irony.⁴⁵⁵

The regulatory system that Zinke and Reynolds promised to reform has been in place for more than fifty years. Park Service employees are, in theory, protected by Title VII of the Civil Rights Act, which prohibits sex discrimination and sexual harassment in the workplace.⁴⁵⁶ Title VII was passed in 1964, and regulations implementing the statute are promulgated by the EEOC. Current regulations define sexual harassment as unwelcome sexual advances, requests for sexual favors, and other forms of verbal and/or physical harassment that is sexual in nature and that either impacts a person’s ability to perform their job or becomes a condition of their employment.⁴⁵⁷ Employers are responsible for sexual harassment between employees when the conduct is known or should have been known by the employer, unless the employer took immediate and appropriate corrective action.⁴⁵⁸ The law requires that employers take all necessary steps to prevent sexual harassment, such as affirmatively raising the subject, expressing strong condemnation, and training their employees on the process through which to file a complaint under Title VII.⁴⁵⁹

For NPS employees, the Title VII complaint process is governed by EEOC rules that apply to all federal agencies. The EEOC rules task the agencies themselves with the primary responsibility to ensure nondiscrimination as well as the initial

453. *Id.*

454. *Id.*

455. *Id.* (quoting Ryan Zinke, Secretary of the Interior).

456. *See* 42 U.S.C. §§ 2000(e) (2018).

457. 29 C.F.R. § 1604.11(a) (2016).

458. 29 C.F.R. § 1604.11(d) (2016).

459. 29 C.F.R. § 1604.11(f) (2016).

authority to investigate and resolve complaints.⁴⁶⁰ Federal agencies must appoint an EEO director who, among other obligations, identifies and eliminates discriminatory employment practices and policies and advises agency heads on matters related to equal employment opportunity.⁴⁶¹ The EEO director is required to report directly to the agency head.⁴⁶² The purpose of this is to keep the regular personnel function separate from the EEO's reporting mechanisms.⁴⁶³

To initiate a Title VII complaint, NPS employees have to start by contacting an EEO counselor within the NPS in order to try to resolve the matter informally.⁴⁶⁴ Complainants must initiate contact with the EEO counselor within forty-five days of the date of the alleged discrimination. The EEOC has the discretion to extend the deadline for another forty-five days if the complainant was unaware of the discrimination or had good cause for being unable to report it.⁴⁶⁵ EEO counselors are required to advise complainants of their rights under Title VII, describe the EEO process, and provide written notice of complainants' rights and responsibilities, including the right to request a hearing or immediate final decision after the agency's investigation.⁴⁶⁶

The EEO counselor is required to conduct counseling in accordance with EEOC management directives and must submit a written report within fifteen days to the agency office concerning the actions discussed and taken during counseling.⁴⁶⁷ Unless the complainant agrees to an extension of the counseling period or to alternative dispute resolution, the EEO counselor must conduct the final interview with the complainant within thirty days of the complainant's initial contact with the EEO counselor.⁴⁶⁸ The timeline for this process can be extended by the complainant to sixty or ninety days if the

460. 42 U.S.C. § 2000e-16(e) (2018); U.S. EQUAL EMP'T OPPORTUNITY COMM'N, EEO-MD-110, EQUAL EMPLOYMENT OPPORTUNITY MANAGEMENT DIRECTIVE FOR 29 C.F.R. 1614 (2015), <https://www.eeoc.gov/federal/directives/md110.cfm> [<https://perma.cc/Z5WK-9XLZ>].

461. 29 C.F.R. § 1614.102(c)(1)–(5) (2019).

462. 29 C.F.R. § 1614.102(b)(4).

463. EEO-MD-110, Chapter 1, *supra* note 460.

464. 29 C.F.R. § 1614.105(a).

465. 29 C.F.R. § 1614.105(a)(1)–(a)(2).

466. 29 C.F.R. §§ 1614.105(b), 1614.108(f).

467. 29 C.F.R. § 1614.105(c).

468. 29 C.F.R. § 1614.105(d).

parties agree to participate in alternative dispute resolution.⁴⁶⁹ If the dispute is not resolved, then the EEO counselor must inform the complainant, through a written notice, of their right to file a formal discrimination complaint within fifteen days from the receipt of the notice.⁴⁷⁰ The formal complaint must also be filed with the agency that allegedly discriminated, and that agency is the one that conducts the investigation.⁴⁷¹ After exhausting the agency's process, the complainant can appeal to the EEOC.⁴⁷² In addition, at various points throughout the internal agency or EEOC investigations, the complainant can exit the formal process and go to court.⁴⁷³ But every case, to be successful, must begin with the complainant's initial report to the agency.

The 2016 Inspector General's Report described how the NPS failed to follow many of the rules detailed above and therefore allowed a culture of harassment and discrimination to flourish. After the 2017 survey, the NPS issued a new "no tolerance" policy, promised to revamp training programs based on academic and social science expertise, and created a new reference manual for employees.⁴⁷⁴ Acting Director Reynolds also said that the agency had plans to increase resources for employees and hold trainings to help bystanders "facilitate difficult conversations."⁴⁷⁵

Years later, almost nothing has changed. At GCNP, the situation is arguably even worse. Christine Lehnertz, the first woman Superintendent at GCNP, took on the formidable task of implementing the proposed reforms and changing the culture of harassment, silencing, and retaliation. Hardly a year into her tenure, a few male employees filed complaints against Lehnertz, alleging that they were subject to sexual harassment.⁴⁷⁶ Lehnertz was put on administrative leave.⁴⁷⁷ Ulti-

469. 29 C.F.R. §§ 1614.105(e)–(f).

470. 29 C.F.R. § 1614.105(d).

471. 29 C.F.R. § 1614.106(a) (filing complaints); 29 C.F.R. § 1614.108(a)–(b) (performing investigations).

472. 29 C.F.R. § 1614.401–02.

473. *See generally* 29 C.F.R. § 1614.407.

474. NAT'L PARK SERV., DEPT OF THE INTERIOR, DIRECTOR'S ORDER # 16E, NATIONAL PARK SERVICE ANTI-HARASSMENT POLICY (Oct. 12, 2017), https://www.nps.gov/policy/DOrders/DO_16E_2017rev.htm; *see also* Gilpin, *National Park Service Survey*, *supra* note 432.

475. Gilpin, *National Park Service Survey*, *supra* note 432.

476. Annette McGivney, *Grand Canyon Superintendent Announces Resignation*, OUTSIDE (Mar. 14, 2019), <https://www.outsideonline.com/2391433/>

mately, she was cleared of all of the allegations.⁴⁷⁸ Nonetheless, Lehnertz resigned and has left the National Park Service to be the President and CEO of the Golden Gate National Parks Conservancy, an independent nonprofit.⁴⁷⁹

Further, to test the new “no tolerance” and employee support policies, I made a couple of phone calls. I searched online for the number of the Equal Employment Opportunity Counselor for the NPS Intermountain region (which covers the GCNP). The position was listed as “vacant.”⁴⁸⁰ Instead, I called the number for the person listed as the “EEO Specialist—Complaints Processing, Resolution and Adjudication Programs” in the Washington, D.C. support office.⁴⁸¹ Someone answered the phone but told me that the person I asked for—the EEO Specialist—no longer worked there. I explained that I was a researcher trying to contact someone in the Intermountain region office to find out how employees could initiate a sexual harassment complaint. The person who answered the phone said she had those names and numbers sitting on her desk, and then provided them to me. I called both of the numbers and reached voice-mail recordings for both. I left my name and phone number and requested a return phone call so that I could confirm that this was the proper route for someone wishing to initiate a sexual harassment or discrimination complaint.

Still hoping to talk to an EEO counselor at the NPS who could confirm that they were the appropriate starting point for initiating a sexual harassment complaint, I did an internet search for “EEO hotline” and “National Park Service.” That yielded a web page entitled “Employee Resources for a Supportive Work Environment” with an “EEO Hotline” number listed.⁴⁸² I dialed that number. The person who answered was

grand-canyon-superintendent-christine-lehnertz-oig-report [https://perma.cc/Y8M9-UYLB].

477. *Id.*

478. *Id.*

479. Kurt Repanshek, *Christine Lehnertz Picked to Lead the Golden Gate National Parks Conservancy*, NATIONAL PARKS TRAVELER (Apr. 17, 2019), <https://www.nationalparkstraveler.org/2019/04/christine-lehnertz-picked-lead-golden-gate-national-parks-conservancy> [https://perma.cc/VK7T-LB9K].

480. *EEO Counselors*, NAT'L PARK SERV., <https://www.doi.gov/pmb/eeo/national-park-service-eeo-counselors#Intermountain%20Region> (last visited July 31, 2019) [https://perma.cc/TBJ9-A9JP].

481. *See id.*

482. *Employee Resources for a Supportive Work Environment*, NAT'L PARK SERV., <https://www.nps.gov/aboutus/work-environment-resources.htm> (last visited

the same person (presumably a receptionist or other administrative assistant who fields calls at the D.C. office) who answered my first call to D.C. “Hi, I think I just spoke to you,” I said, and she confirmed that she was the same person. I asked if this was the EEO hotline number, and she said that the calls for the hotline number were referred to her. I asked her what would happen next if I were calling to initiate a complaint. She said she would either take a message or refer me to the EEO counselors in my region. I asked if those were the same names and numbers she had given me earlier, and she confirmed that as well. At time of publication, more than six months later, I still have not received any return phone calls from the Intermountain region counselors. Perhaps Interior’s “no tolerance” approach is so effective that they have obviated the need for NPS employees to initiate harassment or discrimination complaints?

CONCLUSION: THE NEXT ONE HUNDRED YEARS AND BEYOND

The question that ends the previous section is facetious. But my hope for change in the GCNP and across our public lands is not. In celebration of the GCNP’s anniversary, members of the eleven American Indians Tribes of the Grand Canyon have been making their voices heard. They have articulated three immediate goals for reversing their histories of exclusion and erasure. These are to add indigenous names to all park signs and maps; to work with the NPS to hire more Native guides, artists, and entrepreneurs; and to involve tribes at high levels of management and decision-making.⁴⁸³ The NPS has been receptive so far and already has plans underway to renovate the Desert View visitor center to create an Inter-Tribal Heritage Site.⁴⁸⁴ The site was conceived of and developed through consultations and ongoing meetings with the eleven Tribes.⁴⁸⁵ The GCNP has also announced plans to diver-

Aug. 31, 2019) [<https://perma.cc/W6BX-L5P3>].

483. See Melissa Sevigny, *Not Your Playground’: Indigenous Voices on Grand Canyon’s Centennial*, KNAU (Feb. 26, 2019), <https://www.knau.org/post/not-your-playground-indigenous-voices-grand-canyon-s-centennial> [<https://perma.cc/48SN-VVNE>].

484. See NAT’L PARKS SERV., DEPT. OF THE INTERIOR, FINDING OF NO SIGNIFICANT IMPACT DESERT VIEW INTER-TRIBAL CULTURAL HERITAGE SITE PLAN (2019) [<https://perma.cc/ZX6R-9SCM>].

485. See *id.* at 4–5.

sify its workforce and engage in outreach programs to encourage more nonwhite visitation. They hired a Latinx community and centennial outreach coordinator who acknowledges bluntly what the GCNP has to overcome: “I think we need to see more brown people represented in the National Park Service.”⁴⁸⁶

These steps toward bringing Native and other diverse voices into the management and governance of the GCNP are important. But they do not go far enough. To remedy the history of harassment and discrimination within the GCNP, the NPS should do more than issue ineffectual no tolerance edicts. It should adopt a top-to-bottom action plan to root out aspects of its culture that are sexist and dysfunctional.

To become part of a more just and equitable landscape, the NPS should support efforts to break down the barriers between preserved spaces and the spaces that surround them. This does not mean affording less environmental protection to the GCNP. Rather, it means thinking about how to provide more environmental protection, more clean spaces, air, and water to all communities equally while cherishing the public lands that now are part of our shared heritage. Rather than engage in environmental trade-offs—protect this but sacrifice that—the public lands agencies together with the environmental and economic justice movements should oppose unsustainable energy and industrial development throughout the Colorado Plateau while promoting green and culturally appropriate economic development. Here too there is reason for hope. The Navajo, Hopi, Hualapai, and Havasupai Tribes have teamed up with conservation groups and other constituents to protect the Grand Canyon from uranium mining and to promote just transitions for Native communities as coal-based jobs and revenue come to an end.⁴⁸⁷

486. Tyler Fingert, *Grand Canyon, National Park Service Works to Attract More Ethnically Diverse Visitors*, CRONKITE NEWS/ARIZONA PBS (Apr. 26, 2018), <https://cronkitenews.azpbs.org/2018/04/26/grand-canyon-draws-more-diverse-visitors/> [https://perma.cc/3T5A-JUV5].

487. See Grand Canyon Centennial Protection Act, H.R. 1373, 116th Cong. (2019) (proposed legislation protecting one million acres of public lands surrounding the GCNP from uranium mining); see also *What is the Grand Canyon Centennial Protection Act*, GRAND CANYON TR. (Feb. 26, 2019), <https://www.grandcanyontrust.org/blog/what-grand-canyon-centennial-protection-act> [https://perma.cc/UT24-FQBQ] (describing support from Havasupai, Hualapai, Hopi, Navajo, and other Grand Canyon tribes). On groups working together toward just transitions for the Navajo Nation and Hopi Tribes, see Tony Skrelunas, *A Path Forward for Navajo Communities*, JUST TRANSITION FUND (July 24, 2018),

If this “no trade-offs” approach sounds unrealistic, that is because we have never tried it. Instead, we have relied on growth to solve problems—both of environmental protection and economic progress. As the history of the GCNP demonstrates, economic growth—in a nation steeped in inequality—pushes the environmental harms out of sight, across the tracks, or over the reservation borders. The GCNP history also reminds us that historically, the economy has always grown for some and contracted for others. The settler economies in Arizona and Utah grew in direct proportion to the obliteration of Southern Paiute, Havasupai, Hualapai, and Navajo traditional economies. In this sense, economic growth as the joint solution to environmental and development problems has always been a myth.

Finally, climate change looms as a crisis that must be addressed within the next decade. Anyone who thinks it is unrealistic to link transitioning to a zero-carbon economy with concerns about equity and justice on our public lands should try to envision what could happen to their favorite national park if we fail to do so. Will the GCNP still be our “best idea” when it is a desiccated landscape devoid of endemic plants and animal species, where the privileged few still come to escape the misery, poverty, and chaos in wildly unequal urban areas?⁴⁸⁸ This is a likely scenario if public lands protection does not expand its mandate. If we continue to think about protecting the places we love without simultaneously redressing the inequities sewn into how we have protected those places in the past, we will see increasingly extreme versions of environmental inequality amidst overall environmental devastation.

Even here, there is reason for hope. The fifteen students who drifted down Marble Canyon, walked up the Little Colorado River, played in Deer Creek, and ran Lava Falls with me also care and know about all of these issues. And now they have law degrees, but more importantly they have commitment, passion, and imagination. They do not want to live in a world where their environmental privilege comes at someone else's

<http://www.justtransitionfund.org/blog/a-path-forward-for-navajo-communities>
[<https://perma.cc/JQ8J-C7KL>].

488. A recent report by the Intergovernmental Panel on Climate Change sketches precisely such scenarios. See INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, *GLOBAL WARMING OF 1.5°C: SUMMARY FOR POLICYMAKERS* 5–10 (Valérie Masson-Delmotte et al. eds., 2018).

expense. They want to redefine the “public” in our public lands so that it includes indigenous peoples, all classes, races, and genders, and even other species, and future generations. They want the Grand Canyon National Park to become America’s best idea, for everyone and forever. Finally, they are not alone. They reflect a broader shift toward reclaiming the equity and justice strains within environmentalism and updating them for today’s global challenges. Places like our national parks may yet become our best idea—as proving grounds and metaphor for creating just, equitable, beautiful, and wild spaces—within and outside of lines on a map.