15-15754-cv

United States Court of Appeals

for the

Ninth Circuit

HAVASUPAI TRIBE,

Plaintiff-Appellant,

GRAND CANYON TRUST; CENTER FOR BIOLOGICAL DIVERSITY; SIERRA CLUB,

Plaintiffs,

- v. -

HEATHER C. PROVENCIO, Forest Supervisor, Kaibab National Forest; UNITED STATES FOREST SERVICE, an agency in the U.S. Department of Agriculture,

Defendants-Appellees,

ENERGY FUELS RESOURCES (USA), INC.; ENERGY FUELS ARIZONA STRIP LLC,

Intervenor-Defendants-Appellees,

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

PLAINTIFF-APPELLANT HAVASUPAI TRIBE'S PETITION FOR REHEARING *EN BANC*

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I. STATEMENT OF COUNSEL

Plaintiff-Appellant Havasupai Tribe ("Tribe" or "Havasupai"), hereby respectfully requests that this Court rehear, *en banc*, the Tribe's claims that the Forest Service flouted its legal obligations under Section 106 of the National Historic Preservation Act ("NHPA"), 54 U.S.C. § 306108. In the Tribe's counsel's judgment this proceeding involves a question of exceptional importance meriting an *en banc* rehearing. The central question at issue is the nature and extent of a federal agency's obligations under Section 106 to consult with an Indian tribe when an undertaking, whose recommencement requires approval by the agency, is likely to adversely affect a site with clear religious and cultural significance to the tribe. This question is of exceptional importance to all Indian tribes, because inadequate or untimely consultation can result—as here—in sacred sites being irreparably harmed or destroyed. This question is also of exceptional importance because ambiguities in the applicable regulations regarding the type of consultation that is required and the timing of that consultation create uncertainty for both federal agencies and Indian tribes, which hinders the protection of sacred sites and frustrates the achievement of NHPA's important purposes.

In the Tribe's counsel's judgment an *en banc* rehearing is also warranted in this case because the Court's ruling is in conflict with a prior ruling of this Court in *Pit River Tribe v. U.S. Forest Serv.*, 469 F.3d 768 (9th Cir. 2006). In that case, the

Court ruled that an agency was required to complete its NHPA consultation prior to the agency's renewal of a lease. In this case, the Court found that the agency complied with NHPA notwithstanding the fact that the agency *commenced* its purported NHPA consultation on *the same day* that it allowed destructive activities to resume at the Canyon Mine. Consideration of this ruling by the full Court is necessary to secure and maintain uniformity of this Court's decisions in this critically important area.

II. BRIEF BACKGROUND

Red Butte, a thousand-foot-tall topographical feature in the center of the Coconino Plateau in northern Arizona, is a site with tremendous religious and cultural significance to the Havasupai. *See* Opinion, ECF No. 72-1 ("Slip Op.") at 6. In 1988, the Forest Service approved a plan by which the predecessor of Appellees Energy Fuels Resources (USA), Inc. and Energy Fuels Arizona Strip LLC (collectively, "EFR") proposed to dig a 1,400-foot-deep uranium mine, to be known as the "Canyon Mine," just north of Red Butte, in a meadow known as *Mit taav Tiivjuudva* to the Havasupai, which is also sacred to the Tribe. *Id.* at 7. At that time, Red Butte was not eligible for inclusion on the National Register, and thus the Forest Service was not required to conduct a consultation with the Tribe under Section 106 of the NHPA regarding the potential adverse effects that the mine would have on the site. *Id.* at 7. The Tribe challenged the approval of the Canyon

Mine in federal court on religious freedom and other grounds, but that challenge was unsuccessful. *Id.* The mine operator subsequently sank the mine shaft 50 feet, but then placed the mine on "standby" status in 1992 due to a fall in the price of uranium. *Id.* at 8. The mine remained inactive for the next twenty years. *Id.*

In 1992, the NHPA was amended to include protection for sites of cultural significance to Indian tribes, and in 2010 the Forest Service completed a study that found that a large area around Red Butte, including the meadow in which the Canyon Mine was situated, qualified as a "traditional cultural property" ("TCP"), eligible for listing on the National Register, due to its religious significance to Havasupai and other tribes. *Id*. at 18; Tribe's Opening Brief, ECF Doc. 20-1 ("Tribe's Br.") at 5–6.

In 2012, EFR's predecessor informed the Forest Service of its intention to resume mining operations at the Canyon Mine. *See* Slip Op. at 8. Shortly before, the Secretary of the Interior had withdrawn the area around the Canyon Mine from location and entry under the Mining Law, subject to "valid existing rights." *Id.* at 8. The Forest Service undertook a study to determine whether EFR had valid existing rights in the Canyon Mine (the "VER Determination"), and it was understood by the agency, the company and the tribes that the mining operation would not resume until the VER Determination was completed. *Id.* at 14.

On April 18, 2012, the Forest Service issued a "Mineral Report" finding that

EFR did have valid existing rights at the mine. *Id.* at 8. On June 25, 2012, the Forest Service issued a second document titled a "Mine Review," which reviewed the 1988 decision approving the Plan of Operations for the Canyon Mine, and found that no amendment or modification to the plan was required before mining operations resumed. *Id.* at 8–9. The Mine Review also assessed the Forest Service's obligations under the NHPA and determined that the agency was required to engage in an NHPA consultation with nearby Indian tribes, but under the abbreviated process of 36 C.F.R. § 800.13(b)(3) because the Forest Service had determined that the Red Butte TCP could be considered a "newly discovered historic property." *Id.* The Forest Service sent letters to the tribes purporting to initiate this consultation on June 25, 2012, and on the *same day* the Forest Service informed EFR that it could resume mining operations at Canyon Mine. *See* Tribe's Br. at 7.

The Tribe objected to the Forest Service's decision to apply the abbreviated consultation process under Section 800.13(b)(3), rather than the ordinary, full consultation process. Slip Op. at 9. The Tribe also objected to the Forest Service's decision to allow destructive activities to resume at Canyon Mine before the consultation had been completed and mitigation measures to protect Red Butte TCP had been put into place. *See* Tribe's Br. at 8. The Tribe and the Forest Service were unable to reach an agreement on these issues, and so the Tribe filed this

lawsuit under the APA challenging the Forest Service's conduct under the NHPA. *Id.* A group of environmental organizations joined the Tribe's lawsuit and challenged the Forest Service's decision under the National Environmental Policy Act ("NEPA"). *Id.* The District Court determined that the Forest Service had properly complied with NEPA and NHPA, and that decision was affirmed on December 12, 2017, by a three-judge Panel of this Court.[1] This Court subsequently granted the Tribe's motion to extend its time to file this Petition to February 9, 2018. ECF No. 76.

III. ARGUMENT

A. Standard for Rehearing *En Banc*

Under Rule 35 of the Federal Rules of Appellate Procedure, an "en banc rehearing . . . is not favored and ordinarily will not be ordered unless: (1) en banc consideration is necessary to secure or maintain uniformity of the court's decisions; or (2) the proceeding involves a question of exceptional importance." Fed. R. App. P. 35(a).

B. The Question Whether Federal Agencies Have Continuing Obligations to Consult With Indian Tribes Under the NHPA Is a Question of Exceptional Importance.

The primary question at issue in the Havasupai's appeal concerns the nature

[1] The Panel opinion is reported as *Havasupai Tribe v. Provencio*, 876 F.3d 1242 (9th Cir. 2017). The Slip Opinion, which is attached, will be cited in this Petition.

and extent of a federal agency's consultation obligations under the NHPA when an agency has the opportunity to review a project that may adversely affect a historic property, even though the project may already have begun to some extent. In 2012, when EFR expressed its intention to resume operations at Canyon Mine after twenty years of inactivity, the Forest Service was required to determine what obligations it had under the NHPA to consult with the Havasupai and other tribes about the potentially adverse effects of the mine on Red Butte TCP. The Forest Service determined that it was only required to undertake the expedited consultation process set forth in Section 800.13(b)(3), and that it did not even have to initiate that "expedited" process until the mining operation had resumed. The Tribe objected to this determination and argued that the Forest Service was required to conduct a full Section 106 consultation, and that such consultation should be completed before mining was allowed to resume. Slip Op. at 8–9; Tribe's Br. at 8. This appeal, thus, calls upon the Court to determine the nature of a federal agency's consultation obligations under NHPA for an ongoing undertaking, but at a juncture where agency action is necessitated for the undertaking to resume.

This question is of exceptional importance to all Indian tribes whose historic properties could be adversely affected by ongoing undertakings if inadequate measures to consult and mitigate harms are not in place. In this case, the area of Red Butte TCP, where the Canyon Mine is located, is an area with enormous

religious and cultural significance to the Tribe. Slip Op. at 6. As described in the Tribe's Opening Brief, the meadow where the mine is located is a sacred place that has been used, probably for centuries, for pilgrimages, ceremonies, gathering of medicinal plants, and prayers. Tribe's Br. at 3–4. Havasupai elders have also explained the significance of this area in the Tribe's religious beliefs, and the irreparable harm that the mine will cause. *Id.* When the Canyon Mine was originally approved, sites with religious and cultural importance to Indian tribes were not eligible for inclusion on the National Register, and thus the Forest Service was not required under the NHPA to consider the effects that the mine would have on this site and to implement measures to mitigate those harms. Slip Op. at 7. Thus, the only protections available to the Tribe for this sacred site arise under the agency's consultation obligations for ongoing undertakings.

The question of federal agency's ongoing consultation obligations is also of exceptional importance because ambiguities in the NHPA regulations create uncertainty as to federal agencies' obligations, which impairs the protection of historic properties. Ongoing projects are generally governed by Section 800.13(b) of the regulations, which sets forth the agency's obligations "[i]f historic properties are discovered or unanticipated effects on historic properties [are] found after the agency official has completed the section 106 process. . . ." 36 C.F.R. § 800.13(b). If the undertaking has not been approved or if construction has not commenced,

the agency is required to undertake a full Section 106 consultation. *See id.* § 800.13(b)(1). If the agency "has approved the undertaking and construction has commenced," however, the agency is required to undertake an expedited consultation process set forth in Section 800.13(b)(3).

The ambiguity in these regulations arises if a historic property is not newly "discovered" but was simply not required to be considered at the time of the initial approval, as occurred for the Canyon Mine. The Court's Opinion states that it was true that Red Butte's change in eligibility for the National Register was "not exactly a 'discovery,' [but] there is no other regulation requiring an agency to consider the impact on newly eligible sites after an undertaking is approved." Slip Op. at 18. The Opinion goes on to state that the Forest Service's decision to apply the expedited consultation process under Section 800.13(b)(3), thus, "may have given the Tribe more than it was entitled to demand." *Id.* The Panel's decision highlights the ambiguity in the regulations and the possibility that they could be interpreted to not impose *any* consultation obligations on the Forest Service for the Canyon Mine, which would be contrary to the purpose of the NHPA, which is to protect historic properties. In this case, the Forest Service and the Tribe agreed that *some* consultation was required, but they disagreed whether it should be a full consultation under Section 800.13(b)(1) or an expedited consultation under Section 800.13(b)(3). An *en banc* panel should resolve this uncertainty in the regulations

and provide guidance for agencies and tribes faced with similar circumstances in the future.

The Tribe's Opening Brief cited case law establishing that federal agencies have continuing consultation obligations throughout an undertaking that are triggered whenever an agency has the opportunity to implement measures to avoid or mitigate adverse effects on an historic property. Tribe's Br. at 9–10, 13, 16 (citing *Apache Survival Coal. v. United States*, 21 F.3d 895, 911 (9th Cir. 1994); *Vieux Carre Prop. Owners v. Brown*, 948 F.2d 1436, 1445 (5th Cir 1991); *Morris Cty. Tr. for Historic Pres. v. Pierce*, 714 F.2d 271, 280 (3d Cir. 1983); *WATCH (Waterbury Action to Conserve Our Heritage Inc.) v. Harris*, 603 F.2d 310, 326 (2d Cir. 1979)). Under those cases, the Forest Service's continuing NHPA obligations regarding Red Butte TCP were triggered when it determined that it had to conduct the VER Determination and the Mine Review. The Panel's decision acknowledged that agencies do have "continuing obligations" under 36 C.F.R. § 800.13(b), but the Panel severely narrowed the scope of those obligations by finding that the Forest Service's invocation of Section 800.13(b) in this case "may have given the Tribe more than it was entitled to demand." Slip Op. at 17–18. That ruling cannot be squared with the historic preservation goals of the NHPA. If the continuing obligations under NHPA are to have any meaning, they must apply in situations like the resumption of operations at Canyon Mine, where they may

provide the only opportunity to protect an historic property from destruction.

Another ambiguity in the regulations is whether the agency must conclude its consultation before destructive activities are allowed to resume at an ongoing undertaking. The Panel's decision did not find any NHPA violation in this case despite the uncontested fact that the Forest Service did not even *begin* the consultation with the Tribes until the same day that it informed EFR that it could resume mining activity, which was *ten months after* the Forest Service had first learned that EFR intended to resume operations. *See* Tribe's Br. at 7. The Tribe has consistently contended that the NHPA consultation was required to be completed prior to the resumption of destructive activity at the mine, regardless of whether the agency was applying a full consultation or the expedited process under Section 800.13(b)(3). *Id.* at 12–19. Likewise, the Advisory Council on Historic Preservation ("ACHP"), which promulgated the NHPA regulations, advised the Forest Service that its consultation should be completed prior to the resumption of "destructive activities." *Id.* at 15.[2] This uncertainty about whether the consultation must be completed prior to the resumption of destructive activities at an ongoing undertaking further warrants *en banc* review.

[2] In this portion of its letter, the ACHP was clearly advising the Forest Service as to the requirements of its regulations. ER-143–44. Later, the letter offers what could be considered "tactical advice" as well. ER-144. The Panel erroneously chose to agree with the district court that the entire letter could be disregarded as "tactical advice." Slip Op. at 19 n.4.

Lastly, the importance of the issues in this appeal is evident from the executive orders and presidential memorandums directing federal agencies to engage in "meaningful consultation and collaboration with tribal officials in the development of Federal policies that have tribal implications." Memorandum on Tribal Consultation, 74 Fed. Reg. 57881, 57881 (Nov. 5, 2009); Consultation and Coordination with Indian Tribal Governments, Exec. Order No. 13,175, 65 Fed. Reg. 67249, 67249 (Nov. 6, 2000) (same); *see also* Indian Sacred Sites, Exec. Order No. 13,007, 61 Fed. Reg. 26771, 26771 (May 24, 1996) (directing the Forest Service to accommodate access to and ceremonial use of Indian sacred sites by Indian religious practitioners and avoid adversely affecting the physical integrity of such sacred sites).

These executive actions further highlight the importance of the consultation process between federal agencies and Indian tribes, particularly with respect to the protection of sacred sites such as Red Butte. In this case, the Tribe and the Forest Service were unable to agree on the most fundamental questions as to the nature of consultation that was required under the NHPA, which prevented this consultation from being completed and mitigation measures being put into place. *See* Slip Op. at 19–20. A decision from an *en banc* panel emphasizing the need for good faith, substantive consultations in such situations would facilitate more productive consultations between federal agencies and tribes going forward.

C. The Panel's Decision is in Conflict with this Court's Prior Ruling in *Pit River Tribe*

In *Pit River Tribe*, this Court ruled that the Forest Service and the Bureau of Land Management violated the NHPA by failing to conduct a Section 106 consultation before renewing leases that allowed an energy company to drill for and extract geothermal resources in an area of religious significance to Indian tribes, even though the leases had been previously approved and there had been no change in the character of the project. 469 F.3d at 775–77, 787. In reaching this result, the Court specifically determined that the agency had failed to comply with the timing requirements of the NHPA, stating that the agency "violated NHPA by failing to *complete* the necessary review *before* extending the leases." *Id.* at 787 (emphasis added). The Court further found that a later consultation that had been conducted under Section 106 "[could] not cure the earlier violation." *Id.*

The *Pit River Tribe* decision is consistent with the express timing requirements in Section 106, which state that "[t]he agency official *must complete* the section 106 [consultation] process '*prior to* the . . . issuance of any license.'" 36 C.F.R. § 800.1(c) (emphasis added) (quoting 54 U.S.C. § 306108). It is also consistent with a common-sense reading of NHPA that agencies must complete their consultation with Indian tribes before allowing the commencement of activities that could potentially destroy a historic property. If the consultation requirements of the NHPA are to have any meaning, they must be completed and

mitigation measures must be implemented before the destruction of historic sites has already happened.

In this case, the Forest Service determined in its "Mine Review" dated June 25, 2012, that it was required to engage in an NHPA consultation with the Tribe (albeit, erroneously, as has been explained above, a highly truncated form of consultation, actually designed to deal with "emergencies"). Slip Op. at 8–9. As stated in the Court's Opinion, the Mine Review noted

> . . . that Red Butte had become eligible for inclusion on the National Register, and opined that the site "could be considered a newly 'discovered' historic property." Applying the regulation applicable to such discoveries, 36 C.F.R. § 800.13(b)(3), the Forest Service immediately contacted the Tribe to "enter into government-to-government consultation" to "develop 'actions' to resolve or minimize the adverse effects" on Red Butte.

Slip Op. at 9.

The Panel's characterization of the Forest Service's actions as "immediately contact[ing] the Tribe" is belied by the record. The Forest Service waited *ten months* after it first learned that EFR intended to reopen the mine before it even invited the Tribe to consult, and it sent its "consultation initiation letters" to the Tribes on June 25, 2012, the *very same day* that it notified the Regional Forester that "operations at the Canyon Mine may continue." *See* Tribe's Br. at 7. As acknowledged in the Court's Opinion, this consultation process was also never completed, *see* Slip Op. at 9, and contrary to the implication of the Opinion, the Forest Service followed *none* of the procedures spelled out in the regulation it

claimed to be following, *see* Tribe's Br. at 20–28. Nonetheless, the Panel did not find that the Forest Service had violated its obligations under the NHPA.

The Panel decision allows an agency to wait ten months to *begin* its NHPA consultation, after it has already allowed destructive mining activities to resume. This ruling is in direct conflict with this Court's ruling in *Pit River Tribe*, which found that the NHPA required the Section 106 consultation to be *completed* prior to the renewal of a lease, and that a later consultation could not cure that earlier failure to consult.

In its Opening Brief, the Tribe specifically argued that under the *Pit River Tribe* decision, the Forest Service was required to complete its NHPA consultation prior to allowing the resumption of destructive activities at the mine. Tribe's Br. at 15. The Panel's Opinion did not specifically address *Pit River Tribe* in its discussion of the NHPA issue, but it did distinguish the case in its discussion of NEPA. The Court stated that in *Pit River Tribe*, the lease extension was required for the lessee to continue operating a power plant on the leased property, whereas in this case the "resumed operation of Canyon Mine did not require any additional government action." Slip Op. at 15.[3] Thus, the Court concluded that a new

[3] But this assertion directly conflicts with the Panel's acknowledgement that the VER Determination was a "practical requirement," and that "mine operations would not resume until the VER Determination was completed." Op. at 14 (quoting *Grand Canyon Trust v. Williams*, 98 F. Supp. 3d 1044, 1079 (D. Ariz. 2015)).

Environmental Impact Statement was not required under NEPA. *Id.*

The Court's grounds for distinguishing *Pit River Tribe* may have been relevant in the NEPA context, because the plan for the mining operation had not changed. In the NHPA context, however, the Forest Service affirmatively determined that an NHPA consultation *was* required. The relevant portion of the *Pit River Tribe* decision here, therefore, was the section requiring that the NHPA consultation be completed prior to the renewal of the leases. The Panel did not discuss that portion of the decision, nor did it provide any explanation why the timing requirements of NHPA, as set forth in *Pit River*, would not be applicable in this case.

It is true that the facts and circumstances in this case and the *Pit River Tribe* case are not identical, but those distinctions do not alter the fundamental principle that in order for NHPA consultations to be meaningful, they must be completed before activities that could irreparably harm or destroy an historic property are allowed to occur. Reconsideration by an *en banc* panel is necessary to establish consistency and uniformity in this Court's rulings on that issue.

IV. CONCLUSION

For all of the reasons discussed above, the Tribe respectfully requests a rehearing of the Panel decision *en banc*.

Respectfully submitted,

Dated: February 8, 2018

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STATEMENT OF RELATED CASES

Appellant Havasupai Tribe states that is unaware of any related cases before this Court, other than the consolidated appeal, Docket Number 15-15857.

CERTIFICATE OF SERVICE

I hereby certify that on February 8, 2018, I electronically filed Plaintiff-Appellant Havasupai Tribe's Petition for Rehearing *En Banc* with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. I further certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Richard W. Hughes
Attorney for Havasupai Tribe

Form 11. Certificate of Compliance Pursuant to 9th Circuit Rules 35-4 and 40-1 for Case Number 15-15754-cv

Note: This form must be signed by the attorney or unrepresented litigant *and attached to the back of each copy of the petition or answer.*

I certify that pursuant to Circuit Rule 35-4 or 40-1, the attached petition for panel rehearing/petition for rehearing en banc/answer to petition (check applicable option):

☐ Contains [ ] words (petitions and answers must not exceed 4,200 words), and is prepared in a format, type face, and type style that complies with Fed. R. App. P. 32(a)(4)-(6).

or

☒ Is in compliance with Fed. R. App. P. 32(a)(4)-(6) and does not exceed 15 pages.

Signature of Attorney or Unrepresented Litigant: s/ Richard W. Hughes

Date: 02/08/2018

("s/" plus typed name is acceptable for electronically-filed documents)