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Bears Ears National Monument:  
An Integration of Social and Environmental Justice

by

Helen Greene

A Thesis  
Submitted to the Honors College of  
The University of Southern Mississippi  
in Partial Fulfillment  
of Honors Requirements

May 2021



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## **ABSTRACT**

In 2015, the Bears Ears Inter-Tribal Coalition of the Hopi, Navajo, Uintah and Ouray Ute, Ute Mountain Ute, and Zuni Tribes submitted a proposal to President Barack Obama for the creation of Bears Ears National Monument. In 2016, using the power given to the president in the Antiquities Act, President Obama issued a presidential proclamation establishing the monument. But in 2017, President Donald Trump issued a proclamation that significantly reduced the acreage of the monument. Bears Ears is located in the southeast corner of Utah, and is a remote and geographically unique area of land that holds historical, cultural, and religious significance for many Native American tribes. This paper explores the creation and modification of the monument, the controversy over the president's authority to create, reduce, and revoke national monuments, and the international applications of the Bears Ears story. The argument of this paper is that the original borders of Bears Ears National Monument should be restored because the authority to alter a national monument rests with Congress, not the president, and because Bears Ears is the beginning of an era of integrating land conservation with social and environmental justice.

***Keywords: Bears Ears, national monument, Antiquities Act, Native American, presidential power, land conservation***

## **DEDICATION**

To my parents, my first teachers.

## **ACKNOWLEDGMENTS**

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## **LIST OF ABBREVIATIONS**

BENM	Bears Ears National Monument
BLM	Bureau of Land Management
GCNP	Grand Canyon National Park
NFS	National Forest System
FLPMA	Federal Land Policy and Management Act
NPS	National Park Service
PLI	Public Lands Initiative
TK	Traditional Knowledge
UDB	Utah Diné Bikéyah
USFS	United States Forest Service

## CHAPTER I: INTRODUCTION

In the southeast corner of Utah, northwest of where the state joins the Four Corners, there is an area of over 1.9 million acres of land rich in history and natural wonders.<sup>1</sup> Located in San Juan County, Utah, the area known as Bears Ears is named for two 8,700 feet tall “rounded buttes that rise from the land like a bear about to raise its head over the horizon and look you in the eye.”<sup>2</sup> Bears Ears and the land surrounding it have been home to at least thirty Native American tribes throughout history. Today Bears Ears is shared between those who still live on or adjacent to the land, and those who live elsewhere but return to Bears Ears to reconnect with their history. Beginning in the mid-nineteenth century, that history was darkened as the tribes were gradually forced off the land, as in the Long Walk of 1864. Additionally, the relationships with the towns that were settled around Bears Ears began amiably, but the settlers’ attitude towards the tribes embittered over time.<sup>3</sup> Much of the meaningful engagement between the tribes and the Bears Ears land was lost, but they retained hope for restoring their relationship with the land and protecting it from potential threats.

For Native Americans and other indigenous people around the world, “land is ... a sacred space with which they need to interact if they are to maintain their identity and

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<sup>1</sup> “Monument History,” Bears Ears Education Center, accessed April 13, 2021, <https://bearssearsmonument.org/monument-history/>.

<sup>2</sup> Joe Fox, Lauren Tierney, Seth Blanchard, and Gabriel Florit, “What Remains of Bears Ears,” *Washington Post*, April 2, 2019, <https://www.washingtonpost.com/graphics/2019/national/bears-ears/>; Charles Wilkinson, “At Bears Ears We Can Hear the Voices of Our Ancestors in Every Canyon and on Every Mesa Top: The Creation of the First Native American Monument,” *Arizona State Law Journal* 50, no. 1 (Spring 2018): 318, <https://heinonline.org/HOL/Page?handle=hein.journals/arzjl50&id=325&collection=journals>; Robin Wall Kimmerer, “Renewing Relationship Between Land and Culture,” *Bears Ears Inter-Tribal Coalition*, December 10, 2016, <https://bearssearscoalition.org/traditional-knowledge-and-bears-ears/>.

<sup>3</sup> Wilkinson, “At Bears Ears We Can Hear,” 321.

values.” Industrialization often has little to no “regard for the degradation of nature and culture,” and along with land conservation, often forces indigenous people to leave the land for which they are best positioned to care. Many efforts have been made to atone for the treatment of Native Americans at the hands of the federal government, but the repercussions of the displacement of tribes as a result of industrialization and conservation efforts are still present. Environmental protection and human rights are inextricably linked, and the history of land conservation and the disenfranchisement of Native Americans in the United States is a prime example of the difficulty of simultaneously achieving environmental goals and human rights goals.<sup>4</sup>

However, the recent establishment of Bears Ears National Monument (BENM) provides tangible hope for Native American tribes. In 2016 President Barack Obama declared Bears Ears a national monument that would be managed in part by a Bears Ears Commission made up of elected officers from the Hopi, Navajo, Uintah and Ouray Ute, Ute Mountain Ute, and Zuni Tribes.<sup>5</sup> Though the historical, cultural, and ecological significance of the land in southeast Utah stretches far beyond what the Obama administration officially designated as a national monument, the creation of BENM marked a historic moment of cooperation between the federal government and Native American tribal governments.

However, in 2017 President Donald Trump issued a proclamation that changed the boundaries of BENM, removing some 85 percent of the land from the monument. As

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<sup>4</sup> Pope Francis, “Laudato Si’,” The Holy See, May, 24, 2015, para. 146, [http://www.vatican.va/content/francesco/en/encyclicals/documents/papa-francesco\\_20150524\\_enciclica-laudato-si.html](http://www.vatican.va/content/francesco/en/encyclicals/documents/papa-francesco_20150524_enciclica-laudato-si.html).

<sup>5</sup> Proclamation No. 9558, 82 Fed. Reg. 1139 (Dec. 28, 2016).

a result of this action, his administration undermined the progress made between the federal and tribal governments and missed a valuable opportunity to honor the efforts made on both sides to further good relations. There are conflicting opinions over whether the preservation of the history and natural landscapes of Bears Ears or the economic value of the natural resources is more valuable to the American public and the economy of Utah. This disagreement has resulted in contentious debate about how the land should be used. Those who believe the former is of greater importance advocate for the restoration of the original boundaries of BENM, and those who believe the latter is of greater importance stand with the revisions made by the Trump administration. The debate revolves in part around a president's authority to create, revise, and revoke national monuments using the Antiquities Act of 1906. The Act prohibits the removal or damage of objects located within federally protected areas and affords the president power to create national monuments on federally owned land in order to protect objects and sites that have historic or scientific interest and value.<sup>6</sup> The Act does not explicitly afford the president power to revise or revoke national monuments, which is why the revisions made to BENM have sparked considerable debate.

This thesis will use interdisciplinary approaches from geography, history, politics and law, as well as a mixture of primary and secondary sources, to explore the evolution of BENM from possibility to reality. There are three main source types referenced throughout the thesis, the first of which is legal documents such as proposals, reports, unenacted bills, statutes, executive orders, and presidential proclamations. The second is

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<sup>6</sup> Antiquities Act, 54 U.S.C. § 320301 (2014).

scholarly research articles in a variety of disciplines, and the third is updated website content and online news articles.

The process of creating and subsequently revising BENM illustrates the tension between Native Americans' historic claims to the land and the authority of the U.S. President to regulate national monuments. It also reveals conflict between state, federal, and tribal governments, and it has highlighted the conflicting historic, cultural, economic, and ecological uses of Utah's land. But Bears Ears contains lessons for the rest of the world as well as for the United States. The homelands of indigenous communities around the world face the same threats as Bears Ears, and while much of the debate about Bears Ears is specific to the U.S., the process of creating BENM and the many factors taken into account can inform other groups searching for protection for their homelands. Additionally, in the face of climate change, land conservation plays a crucial role in strengthening climate resilience and repairing damage that has already been done to the environment and ecological systems. As Sarah Krakoff notes, we live "[i]n a time of heightened assault on the Earth's resources," and should be striving to preserve what remains of the undeveloped areas of our world. The argument of this paper is that the original borders of the monument should be restored because the authority to alter a national monument rests with Congress, not the president, and because the creation of BENM is the beginning of an era of integrating land conservation with social and environmental justice.<sup>7</sup>

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<sup>7</sup> Sarah Krakoff, "Public Lands, Conservation, and the Possibility of Justice," *Harvard Civil Rights-Civil Liberties Law Review* 53, no. 1 (Winter 2018): 218 – 256. [quotation from 218].  
<https://search.ebscohost.com/login.aspx?direct=true&db=aph&AN=131636877&site=ehost-live>.

## CHAPTER II: JOURNEY TO MONUMENT STATUS

### *Bears Ears In Context*

America's national parks, national forests, national monuments, state parks, and other conserved and protected parcels of land have long been a source of pride for the country. Americans' awareness of and concern for the environment and unique North American landscapes, as well as Americans' desire to preserve the knowledge of their history on the land, have grown steadily over time. But the Americans of 1776 are not the only people whose history has unfolded on this continent, and the idea of preserving pristine and untouched areas of the continental landscape is often ignorant of history. Many of the landscapes Americans have sought to protect were inhabited long before we discovered them, and in forcing an idealized view of nature as untouched by humans upon those landscapes, we cleared the land of those who called it home. Most conservation battles have been fought between two opponents: those whose livelihood depends on the land and who view it for its economic value, and those who view the land through the lens of environmental protection and oppose development and resource extraction. What has historically been missing from these debates is the inclusion of Native American voices.<sup>8</sup>

In her article "Public Lands, Conservation, and the Possibility of Justice," Sarah Krakoff explains that in early conservation history, the notion that Native Americans

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<sup>8</sup> Krakoff, "Public Lands, Conservation, and the Possibility of Justice," 215-216.

were a “vanishing people” was in danger of becoming a self-fulfilling prophecy. Archaeology and anthropology were becoming increasingly prominent academic fields, and the history of Native peoples in North America provided a new subset to these fields. This gave American researchers the opportunity to branch away from studying other ancient and distant cultures. There was a wide consensus that Native American culture would not survive the rapid industrialization and modernization of the country, and therefore non-Native researchers felt compelled “to learn and understand all there is to know about the material culture of peoples who would soon vanish from the face of the continent.” The preservation of American antiquity, of Native American historical sites, came “often at the expense of Native American access to the lands that contained them.” This notion that Native American culture was approaching its extinction provided a justification to both the federal government and conservationists for the removal of Native peoples from their ancestral land. The actions of the U.S. government could be explained as a natural next step within its conception of the trajectory of history. In actuality, conservation proved just as detrimental to the lives of Indigenous peoples as did industrialization.<sup>9</sup>

Three major examples of land conservation unfolding in this way are the creation of Mesa Verde National Park, Yellowstone National Park, and Grand Canyon National Park. Mesa Verde, which was created in 1906 shortly after the passage of the Antiquities Act, is located in southwest Utah, and was created in order to protect Indigenous sites and ruins, most notably the many cliff dwellings. However, many of the cliff dwellings were

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<sup>9</sup> Krakoff, “Public Lands, Conservation, and the Possibility of Justice,” 215-239. [quotations from 220, 221, and 215 respectively].



located inside the Ute tribe's reservation boundaries. When the Ute tribal leaders refused to hand over the land for the park, the government forced them to accept a trade. But due to oversight, the land given to the tribe turned out to already be part of their reservation, and so the tribes lost land without compensation. Similarly, when Yellowstone National Park was created in 1872, no consideration was given to the presence of the Native Americans in the area, as the primary purpose of its establishment was to preserve the landscape. As the park transformed into a symbol of positive American identity after the ending of the Civil War, the tribes were systematically consolidated and moved off the land. The park was eventually militarized for over thirty years. According to Krakoff, "[t]he making of Yellowstone National Park was, among other things, the unmaking of Indian country." Several decades later in 1919, the creation of Grand Canyon National Park (GCNP) effected a similar outcome for the Havasupai tribe, among others. Though work has been done to restore their access to the land, the initial creation of the GCNP saw the gradual removal of the Havasupai and a severe restriction of their access to the area's resources. Just as the archeological and anthropological thought of the time regarded Native Americans as a disappearing people and sought to preserve the ruins of their culture more fervently than their living culture, those charged with the management of GCNP saw the Havasupai as disappearing, and believed that "hastening this inevitable departure would allow the Park Service to carry on with its mandate of managing the park for the benefit and enjoyment of the people, defined implicitly as non-Indian people." Though the history of land conservation in the U.S. is marred by its repercussion for Native Americans, Bears Ears National Monument, because it was created

specifically to address the concerns of the local tribes, has the capacity to set the future of land conservation on a positive course.<sup>10</sup>

### *The History of Bears Ears*

The Hopi, Navajo, Uintah and Ouray Ute, Ute Mountain Ute, and Zuni Tribes all claim ancient ancestral ties to the Bears Ears land. Whether their Tribes have always inhabited the land or arrived at various points in their history, their creation stories all include mention of Bears Ears. Throughout history they “variously inhabited, crossed, hunted, gathered, prayed, and built civilizations on these lands” until they were forced to leave in the mid-nineteenth century. In 1864, some 8,000 or more Navajos were led on the Long Walk from their homes to imprisonment in New Mexico, where they remained at the Bosque Redondo internment camp until a treaty was signed in 1868 that sent them to a new reservation. When the towns around Bears Ears were first settled, they were not immediately hostile to the Tribes. But hostilities grew over time as the consequences of Manifest Destiny and the federal government’s paternalistic attitude towards Native Americans persisted in the form of both psychological and physical abuse.<sup>11</sup>

The story of BENM is unprecedented because it is the first national monument to be proposed by a coalition of Native American Tribes who live on and around the monument lands. The Bears Ears Inter-Tribal Coalition is composed of representatives from the Zuni, Hopi, Navajo, Ute Mountain Ute, and Uintah and Ouray Ute tribal

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<sup>10</sup> Krakoff, “Public Lands, Conservation, and the Possibility of Justice,” 224-237. [quotations from 234 and 237 respectively].

<sup>11</sup> *Proposal*, The Bears Ears Inter-Tribal Coalition, 12.

governments. Alfred Lomahquahu of the Hopi Tribe describes the cultural value of the land as,

“part of our footprints, a path that tells a story... Those who lived before us have never left. Their voices are part of the rhythm or heartbeat of the universe and will echo through eternity.”

The land is an important connection to history and an important source of education for the future, which is true not only for the current and future generations of the Tribes, but for “all people, young and old, from this continent and every other, Native and non-Native.”<sup>12</sup>

Bears Ears faces many threats, primarily from irresponsible visitors and potential development. Looting, grave robbing, off-road vehicle use, and acts of vandalism have plagued the historic and sacred sites of Bears Ears for many years. The destruction of these sites not only prevents an accurate studying and piecing together of history, but also “infringes on the cultural and spiritual health of Native peoples, as well as the passage of knowledge to the next generation.” There are various deposits of natural resources within Bears Ears, such as oil, gas, potash, tar sands, and uranium, the extraction of which would cause irreversible damage to the landscape. In the words of the Inter-Tribal Coalition, “Bears Ears ... is too valuable to drill for temporary economic gain,” and the land should be protected instead of being sacrificed “for the extraction of the low-quality energy and mineral resources found here which exist in abundance elsewhere.”<sup>13</sup> The Tribes acknowledge that there are existing mineral rights within BENM that should be

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<sup>12</sup> *Proposal*, The Bears Ears Inter-Tribal Coalition, 10.

<sup>13</sup> “Threats,” Bears Ears Inter-Tribal Coalition, accessed April 13, 2021, <https://bearscoalition.org/threats/>.

honored upon the creation of a monument, but stress that no further mining should be allowed.<sup>14</sup>

### *Environmental Protection and Traditional Knowledge*

In addition to the historical and cultural motivations for the protection of Bears Ears, there is also a strong argument for protection based on environmental and ecological conservation value, in the context of both preservation and resilience to climate change. The landscape of “vast, mountain-mesa-and-canyon country offers carved, rugged, soaring beauty,” in which encountering “an arch, natural bridge, unexpected side-canyon, bighorn sheep, black bear, or eagle or hawk on the wing” is almost guaranteed.<sup>15</sup>

A study conducted by Conservation Science Partners, published in 2017, concluded that BENM “presents a significant opportunity to conserve key elements of ecological function within this region and across the western U.S.” Their conclusion is based not just on the ecology within the BENM boundaries, but on the importance of BENM in the connectivity of all western land, particularly the other protected areas. The study states that “maintenance of connectivity processes is one of the most important aspects of biodiversity and landscape-level conservation,” and that BENM has “exceptionally high values for ecological intactness and connectivity.”<sup>16</sup> One example of

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<sup>14</sup> *Proposal*, The Bears Ears Inter-Tribal Coalition, 35.

<sup>15</sup> *Proposal*, The Bears Ears Inter-Tribal Coalition, 7-8.

<sup>16</sup> Brett G. Dickson, Meredith McClure, and Christine M. Albano, *A Landscape-level assessment of conservation values and potential threats in the Bears Ears National Monument*. Conservation Science

this connectivity value is that BENM would “provide a sturdy buffer zone” to the east and west of Canyonlands National Park.<sup>17</sup> Other aspects included in the study are biodiversity, resilience to climate change, remoteness and night sky darkness, and threats posed by resource extraction. Because of its remoteness BENM has remarkably little light pollution, meaning that it “is one of the darkest night skies of any equivalently size area in the western U.S.” Regarding resource extraction, the study notes the negative “long-lasting legacies” of mining on the landscape, wildlife, and human populations, and warns that “special management attention” will be necessary to avoid any future detriment. The study ultimately proves that the designation of Bears Ears as a national monument “support[s] fundamental ecological processes,” while also “substantially enhance[ing] the existing network of protected areas in the face of climate change.” While placing the Bears Ears land under federal protection is the first step, it must be followed by knowledgeable management, which is arguably best achieved by a combination of federal resources and the knowledge of those who have lived on the land the longest.<sup>18</sup>

The value of Native American Traditional Knowledge (TK) in land management, environmental sustainability, and climate change resilience is becoming more widely accepted, as are the advantages of combining it with modern science. Both bodies of knowledge are complemented when implemented side by side. Modern science is adept at handling laws and theories, conducting controlled experiments, and making

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Partners, 2017. Accessed April 13, 2021, 2-4. [quotations from 2 and 4 respectively]. [https://www.csp-inc.org/wp-content/uploads/2017/03/CSP-BENM\\_Landscape\\_Assessment\\_032717.pdf](https://www.csp-inc.org/wp-content/uploads/2017/03/CSP-BENM_Landscape_Assessment_032717.pdf).

<sup>17</sup> *Proposal*, The Bears Ears Inter-Tribal Coalition, 7.

<sup>18</sup> Dickson, McClure, and Albano, *A Landscape-level assessment*, 3-6. [quotations from 5, 6, 6, and 6 respectively].

predictions, while TK “comprises an intimate and detailed cultural connection between humans and place, which accrues slowly and deeply over time.” TK should not be generalized as a “romanticized ‘at-one-with-nature’ ideology,” but rather be appreciated for its depth and variety which comes from its being “rooted in the particular histories and practices of different peoples.”<sup>19</sup> Robin Wall Kimmerer, the founding director of the Center for Native Peoples and the Environment at the SUNY College of Environmental Science and Forestry in Syracuse, New York, wrote an article titled “Traditional Knowledge and Bears Ears.” In the article she describes TK as,

“both philosophy and practice, embedded in the indigenous worldview which guides right relationships between humans and the living world through the principles of respect, reciprocity, relationship, and reverence.”

Kimmerer describes the creation of BENM as “a visionary act of biocultural conservation,” one that combines the resources of the federal government with the resources of tribes, resources such as Traditional Knowledge, in a manner that will begin to reshape conservation practice in the United States.<sup>20</sup>

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<sup>19</sup> Krakoff, “Public Lands, Conservation, and the Possibility of Justice,” 255 - 256. [quotations from 255, 255, 256, 256 respectively].

<sup>20</sup> Kimmerer, “Renewing Relationship Between Land and Culture.”

Figure 1. The Region to the Native Eye



<sup>21</sup> "The Region to the Native Eye," Bears Ears Inter-Tribal Coalition, accessed April 13, 2021, <https://bearsarscoalition.org/the-region-to-the-native-eye/>.

## *The Process of Creating Bears Ears National Monument*

The beginnings of BENM originate with Utah Diné Bikéyah (UDB), a nonprofit that began the process of creating what would eventually become the “Proposal to President Barack Obama for the Creation of Bears Ears National Monument.” In order to determine what the exact boundaries of a future protected area of land might be, UDB began researching, “developing cultural maps, conducting interviews with elders and other tribal members, bringing in academic experts, and gathering other information.” But the UDB felt that ultimately, if a formal proposal was sent to the President, it should be presented directly by the tribes. On July 16, 2015, the Bears Ears Inter-Tribal Coalition was formed at a meeting on the Ute Mountain Ute Reservation.<sup>22</sup> It was at that meeting that the decision to write a formal proposal and send it to President Obama by October 15<sup>th</sup>, 2015, was made. After that first meeting, the Tribes met for “all-day meetings on every other Saturday in August and September 2015,” and as scheduled, The Bears Ears Inter-Tribal Coalition of the Hopi, Navajo, Uintah and Ouray Ute, and Zuni governments submitted a proposal on October 15<sup>th</sup>, 2015 to President Obama for the creation of BENM.<sup>23</sup> The proposal, which Krakoff deems “a blueprint for a different way to conceive of human/land relations,” is a thorough 66 page document that details the Tribes’ history on the land and outlines a plan of “Collaborative Management” for the

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<sup>22</sup> Wilkinson, “At Bears Ears We Can Hear,” 324.

<sup>23</sup> *Proposal*, The Bears Ears Inter-Tribal Coalition, 1-3.



monument between the tribes and federal agencies.<sup>24</sup> The proposed land for the monument is “an area of 1.9 million acres of ancestral land on the Colorado Plateau.”<sup>25</sup>

The proposal goes into detail about the various aspects of the Bears Ears lands that warrant its protection, some of which stem from its status as one of the most, if not the most, “ecologically intact region in the Lower 48 states,” rendering it relatively untouched compared to other national parks and monuments because of the lack of motorized vehicle access. The proposed BENM boundaries encompass lands that are under the jurisdiction of the Bureau of Land Management (BLM), the National Park Service (NPS), and the United States Forest Service (USFS), including areas such as the Glen Canyon National Recreation Area, Canyonlands National Park, Natural Bridges National Monument, and the Manti-La Sal National Forest, which are all areas that lie within or directly adjacent to the monument’s borders. Between the mountains, mesas, canyons, forests, rivers, and wildlife, BENM would bring together and protect a significant amount of “bracingly wild” land.<sup>26</sup>

After addressing the components of the landscape, the Proposal addresses what it claims to be “the most profound aspect of Bears Ears,” which is the history of Native American presence in the area. For centuries Native people have left traces of their lives on and around Bears Ears in the form of “migration routes, ancient roads, great houses, villages, granaries, hogans, wikiups, sweat lodges, corrals, petroglyphs and pictographs, tipi rings, and shade houses.” There are over 100,000 cultural sites within the proposed boundaries, but it is not only Native people of the past who were a part of the landscape.

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<sup>24</sup> Krakoff, “Public Lands, Conservation, and the Possibility of Justice,” 239.

<sup>25</sup> *Proposal*, The Bears Ears Inter-Tribal Coalition, 1.

<sup>26</sup> *Proposal*, The Bears Ears Inter-Tribal Coalition, 6-9. [quotations from 6 and 9 respectively].

Native people today live on and travel to the Bears Ears area for the same reasons as their ancestors, to learn about their culture and their past, and because Bears Ears holds great religious significance for them. The 1.9 million acres of the proposed monument were selected because of their value for the,

“gathering of medicines and herbs, worshipping at sacred areas, holding ceremonies, protecting archaeological sites, gathering firewood, hunting, protecting wildlife habitat for deer, elk, and bighorn sheep, and maintaining natural beauty and solitude.”

A critical component of the proposal is the request that the monument “honor the worldviews of our ancestors, and Tribes today, and their relationships with this landscape.” This request is based on the unique nature of the relationship between Native people and the land, and how that relationship should be protected because of its importance to their culture, religion, and way of life, but also because of the potential of Traditional Knowledge to inform and strengthen research and land management.<sup>27</sup>

The Inter-Tribal Coalition describes a system of Collaborative Management, in which federal agencies and tribal governments will “collaborate jointly on all procedures, decisions, and other activities,” and if necessary, “proceed to appropriate mediation” and seek subsequent intervention of the Secretary of Interior or Secretary of Agriculture if there is an “impasse, undue delay, or other extraordinary circumstances.”<sup>28</sup> Within the proposal’s discussion of Collaborative Management, the idea for a “Bears Ears Traditional Knowledge Institute” is presented as a possible fruit of the combination of

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<sup>27</sup> *Proposal*, The Bears Ears Inter-Tribal Coalition, 4-20. [quotations from 10, 10, 20, and 4 respectively].

<sup>28</sup> *Proposal*, The Bears Ears Inter-Tribal Coalition, 22.

western science and TK.<sup>29</sup> Collaborative Management would combine both the values of western science and TK to achieve “broader and better results” for land management.<sup>30</sup>

On December 28<sup>th</sup>, 2016, President Barack Obama issued Proclamation 9558 which, through the power given to the president in the Antiquities Act, officially established the Bears Ears National Monument. The proclamation goes into considerable detail regarding the history of the Bears Ears region. It provides a brief history of the inhabitants of the region, descriptions of the cultural importance of the land, the archaeological and paleontological resources, and the diversity of the vegetation, topography, and wildlife. The detailed information of the region is presented in a factual yet inspiring manner, and “[t]he writing is powerful and often lyrical,” such as when it states,

“From earth to sky, the region is unsurpassed in wonders. The star-filled nights and natural quiet of the Bears Ears area transport visitors to an earlier eon. Against an absolutely black night sky, our galaxy and others more distant leap into view. As one of the most intact and least roaded areas in the contiguous United States, Bears Ears has that rare and arresting quality of deafening silence.”<sup>31</sup>

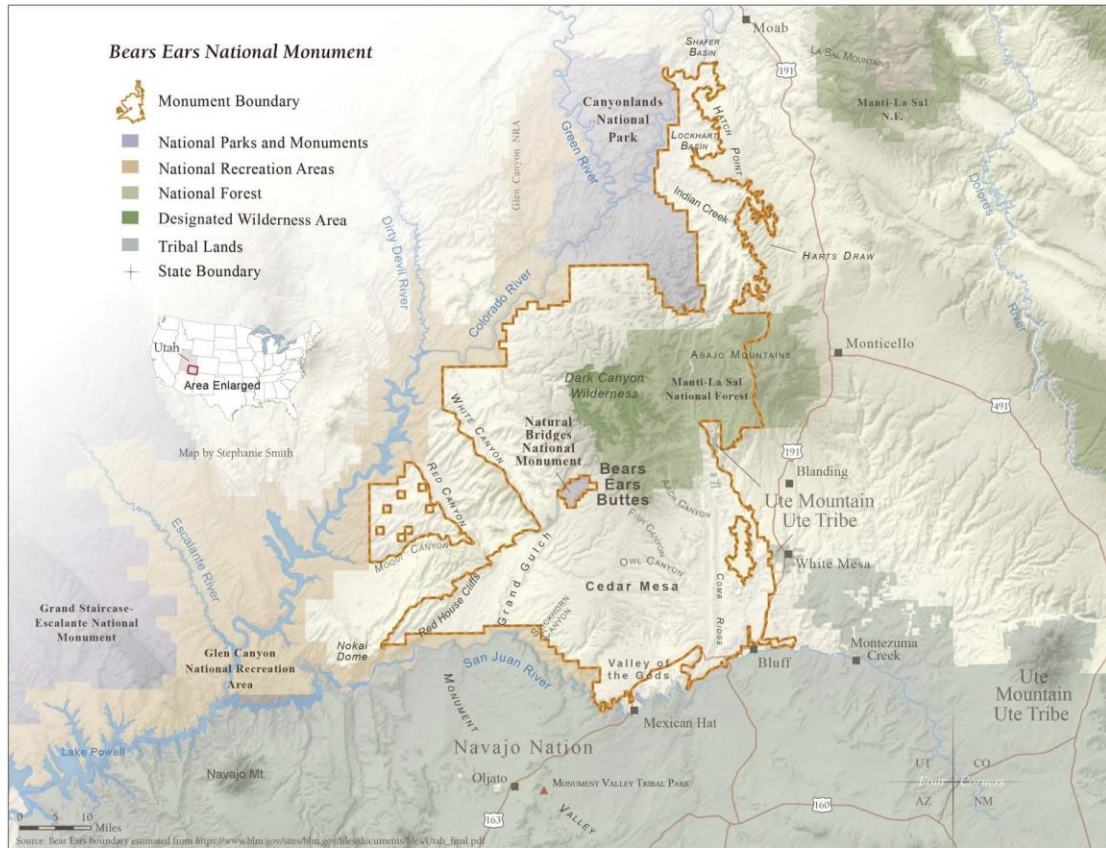
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<sup>29</sup> Wilkinson, “At Bears Ears We Can Hear,” 332; *Proposal*, The Bears Ears Inter-Tribal Coalition, 31.

<sup>30</sup> Wilkinson, “At Bears Ears We Can Hear,” 332.

<sup>31</sup> Proclamation No. 9558, 82 Fed. Reg. 1139 (Dec. 28, 2016).

Figure 2. Bears Ears National Monument



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After establishing the monument, the proclamation states that management of BENM will be shared by the Secretary of Agriculture and the Secretary of the Interior through the Department of Agriculture’s USFS and the Department of the Interior’s BLM.<sup>33</sup> Specifically, the land that falls within the boundaries of the National Forest System (NFS) will be under the management of the USFS, and the remainder will be managed by the BLM. The proclamation also states that the secretaries are responsible

<sup>32</sup> “About the Monument,” Bears Ears Inter-Tribal Coalition, accessed April 13, 2021, <https://bearsarscoalition.org/about-the-monument/>.

<sup>33</sup> Proclamation No. 9558, 82 Fed. Reg. 1139 (Dec. 28, 2016); Proclamation No. 9681, 82 Fed. Reg. 58081 (Dec. 4, 2017).

for the creation of “an advisory committee” to ensure appropriate management of BENM, which is to be composed of “interested stakeholders, including State and local governments, tribes, recreational users, local business owners, and private landowners.”

The proclamation then calls for the establishment of an additional Bears Ears Commission “in recognition of the importance of tribal participation to the care and management of the objects identified above,” which will be a body of elected officers from the Hopi Nation, Navajo Nation, Ute Mountain Ute Tribe, Ute Indian Tribe of the Uintah Ouray, and Zuni Tribe.<sup>34</sup> With the creation of this Commission, Bears Ears became the first national monument established with the “request and input” of Native American tribal governments. Though the Inter-Tribal Coalition originally advocated for the protection of 1.9 million acres of land “bounded to the west and south by the Colorado and San Juan rivers,” the proclamation ultimately protects a total of 1.35 million acres of land.<sup>35</sup> However, at this size BENM still became the second largest monument in the contiguous United States.<sup>36</sup> The proposal culminates in the argument that,

“[p]rotection of the Bears Ears area will preserve its cultural, prehistoric, and historic legacy and maintain its diverse array of natural and scientific resources, ensuring that the prehistoric, historic, and scientific values of this area remain for the benefit of all Americans.”<sup>37</sup>

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<sup>34</sup> Proclamation No. 9558, 82 Fed. Reg. 1139 (Dec. 28, 2016).

<sup>35</sup> Fox, Tierney, Blanchard, and Florit, “What Remains of Bears Ears.”

<sup>36</sup> Wilkinson, “At Bears Ears We Can Hear,” 318.

<sup>37</sup> Proclamation No. 9558, 82 Fed. Reg. 1139 (Dec. 28, 2016).

Just like previous conservation efforts, the creation of BENM was intended to protect the natural landscape and historic sites in the area. But it was also intended to preserve the land for current and future generations of Native Americans. Because the Bears Ears Inter-Tribal Coalition sought to avoid the conservation pattern of creating “islands of nature separate from islands of people,” the monument was established in a way intended to “reflect human connections to the land.” Krakoff notes that whether or not BENM withstands the test of time, the fact that it progressed as far as it did is “a step toward making reparations for the dark side of conservation history.” BENM has ushered in a new era of preservation by proving that protecting land and natural resources does not have to exclude human interaction with the landscape. It is a testament to how an intimate knowledge of the land, a knowledge that can only come from years of habitation, can afford a more thorough and thoughtful stewardship.<sup>38</sup>

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<sup>38</sup> Krakoff, “Public Lands, Conservation, and the Possibility of Justice,” 216-217. [quotations from 216 and 217 respectively].

## CHAPTER III: A NEW ADMINISTRATION

### *Opposition to the Monument*

The non-Native people of Utah who perceived BENM as a federal land grab were among the most dedicated opponents to the Obama proclamation, “[b]ut the Utah Delegation’s opposition and anger ran the deepest of all.”<sup>39</sup> On February 3, 2017, Governor Gary Herbert of Utah signed H.C.R. 11, the “Concurrent Resolution Urging the President to Rescind the National Monument Designation.” The resolution is comprised of several pages of arguments as to why the monument should be rescinded, beginning with the claims that all of Utah’s congressional delegates, the San Juan County Commission, every city council in San Juan County, and every member of the Utah State Legislature were in opposition to the monument. One argument is BENM “sets a dangerous precedent of allowing special interest groups to unduly influence the monument designation process and silence local voices.” Another argument is that western states are disparately impacted by the designation of national monuments because they have a far greater amount of federal land within their borders compared to other regions. The resolution also points out that the designation of a national monument is detrimental to students and to the public school system, as “considerable funding for the Utah public education system comes from the responsible development of [Utah’s] abundant natural resources and other economic uses of [Utah’s] public lands.” The

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<sup>39</sup> Wilkinson, “At Bears Ears We Can Hear,” 328.

resolution then moves to a discussion of the economic impact of the monument, stating that San Juan County is the poorest county in Utah and “most economically depressed in the nation,” and that the monument “will forever remove the possibility of economic development and decimate the economy of the region.” The resolution concludes that the people of Utah, not the Federal government or special interest groups, are ultimately the best managers of their land, and therefore the Legislature and the Governor of Utah urge President Obama to rescind his designation of BENM.<sup>40</sup> The Utah delegation had also formulated the Public Lands Initiative (PLI), their plan for the use of the Bears Ears land, which they believed combined the interests of preservation and economic potential by offering protection of the land as well as extraction of natural resources. But the PLI “tilted sharply toward industrial development,” and thus it was not supported by parties that favored preservation. The PLI failed to pass just a few short months before President Obama declared Bears Ears a national monument.<sup>41</sup>

On April 26, 2017, in response to the pressures from the state of Utah, President Donald Trump issued Executive Order 13792, “Review of Designations under the Antiquities Act.” The order directs the Secretary of the Interior, who at the time was Secretary Ryan Zinke, to “conduct a review of all Presidential designations or expansions of designations under the Antiquities Act made since January 1, 1996.” The order further specifies that the designations to be reviewed are the ones that either exceed 100,000 acres or that the secretary believes were created without enough communication with the public. The order states that monument designations which fail to conform to the

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<sup>40</sup> H.C.R. 11, 2017 Gen. Sess., (Ut. 2017).

<sup>41</sup> Wilkinson, “At Bears Ears We Can Hear,” 327-328. [quotation from 327].



objectives of the Antiquities Act “create barriers to achieving energy independence, restrict public access to and use of Federal lands, burden State, tribal, and local governments, and otherwise curtail economic growth.” In other words, the review of monument designations is intended to determine if there is an appropriate balance between the protection of the lands and their effects on surrounding communities. The secretary is directed to submit an interim report within 45 days of the release of the order, and a final report within 120 days.<sup>42</sup> Secretary Ryan Zinke submitted his report on August 24<sup>th</sup>, 2017.<sup>43</sup>

The report details a brief history of the Antiquities Act, including the criticism that presidents in recent history have used the Act to designate monuments that are too large. Presidents have used the Act to designate monuments greater than 100,000 acres twenty-six times since 1996, and Secretary Zinke notes a shift in the focus of monument designations from “geological formations, archaeological ruins, and areas of historical interest,” to a broader interpretation of the Act’s definition of qualifying objects including “landscape areas, biodiversity, and viewsheds.” Secretary Zinke states in the “Results” section of the report that he has “concerns that modern uses of the Act do not clearly and consistently define the objects,” and that “there are other areas, not a part of a monument, which contain virtually identical objects.” Essentially, Secretary Zinke argues that the incorrect uses of the Act include designating borders that are too large, providing unclear or inconsistent descriptions of why the areas and objects within them need to be protected

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<sup>42</sup> Exec. Order No. 13792, 82 Fed. Reg. 20429 (Apr. 26, 2017).

<sup>43</sup> “Review of Designations Under the Antiquities Act (Executive Order 13792),” SciPol, last modified November 28, 2017, <http://sciencepolicy.duke.edu/content/review-designations-under-antiquities-act-executive-order-13792>.

over other areas, and protecting some areas over others when they contain the same or similar objects.<sup>44</sup>

Secretary Zinke then addresses specific concerns regarding land, economics, and management. One concern regarding the land is that some designations overlap pre-existing management regimes which his report claims may implement stricter management than a national monument, thus bringing into question why a monument designation is necessary. Another concern about land is the possibility that some monuments were designated primarily to prevent grazing, mining, and timber production. And finally, although a monument designation can only be made using federally owned land, the proximity of some monuments to landowner's private land can "limit access to their land and economic activity outside of their lands." Some landowners are concerned that when a monument designation surrounds their land the goal "is for the eventual acquisition of these lands by the Federal Government to be made part of the monument." Some economic concern is based on the seasonal jobs which the monuments bring. Though monuments bring increased tourism, and some areas have benefited from the increased revenue, other areas suffer from the "lost or forgone employment and revenue resulting from the limitations placed on land development," which is not fully offset by the tourism and seasonal jobs. Some concerns about management include the desire of the Inter-Tribal Coalition to be granted true co-management of the monument, the difficulty of managing "monuments that span up to a million acres or more," and the lack of funding associated with national monuments compared to some land-management

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<sup>44</sup> Ryan K. Zinke, Dept. of the Interior, Final Report Summarizing Findings of the Review of Designations Under the Antiquities Act (2017): 1-7. [quotations from 1 and 6 respectively].

authorities that are already established in the areas. Other concerns include those of local people and organizations who do not have the same funding and name recognition as larger national organizations and feel that their voices are not being heard. In regard to BENM, Zinke suggests in the report that President Trump should amend the Obama proclamation “to ensure compliance with the provisions and intent of the [Antiquities] Act,” and that he should revise the boundaries of BENM “to ensure the size ... is limited to the smallest area compatible with the protection of the objects identified.”<sup>45</sup>

On April 26, 2017, the Bears Ears Inter-Tribal Coalition sent a letter to Secretary Ryan Zinke responding to Executive Order 13792. In the letter the Coalition expresses that they are “deeply troubled” by the order, and that “any change to the monument would undermine the efforts of so many, and would disrespect our deep and enduring connections to this place.”<sup>46</sup> The letter also points out that the previous letters sent to Secretary Zinke by each of the Tribal Nations, the Coalition, and the Commission inviting him to meet with them were never answered, such as the letter sent on March 17, 2017 from the Bears Ears Commission to Secretary Ryan Zinke and Acting Secretary of Agriculture Michael Scuse. That letter informed the secretaries of the complete formation of the Bears Ears Commission established in the Obama proclamation and lists the names of the elected commissioners, which are Alfred Lomahquahu, Davis Filfred and James Adakai, Terry Knight, Shaun Chapoose, and Carleton Bowekaty. The letter’s purpose

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<sup>45</sup> Zinke, Final Report, 7-10. [quotations from 8, 8, 8, 9, and 10 respectively].

<sup>46</sup> Letter from Alfred Lomahquahu, Bears Ears Comm’n Interim Co-Chair, Carleton Bowekaty, Bears Ears Comm’n Interim Co-Chair, Shaun Chapoose, Ute Indian Tribe Buss. Comm Chairman, Harold Cuthair, Ute Mountain Ute Tribe Chairman, & Davis Filfred, Navajo Nation Council Del., to Hon. Ryan Zinke, Sec’y of the Interior. Coalition Sends Letter to Secretary Zinke Regarding Bears Ears “Review,” (Apr. 26, 2017), <http://bearssearscoalition.org/coalition-sends-letter-to-secretary-zinke-regarding-bears-ears-review/>

was to extend a formal invitation to the secretaries to visit Utah and discuss the management of BENM. It reiterates the purpose of the Commission as set forth in the Obama proclamation, which is “that management decisions . . . reflect tribal expertise and historical knowledge,” and it states a concern over reports of the Trump administration’s consideration of altering the boundaries of BENM.<sup>47</sup> The letter once again requests a meeting and invites Secretary Zinke to attend a Commission meeting the next month, an invitation which went unanswered.<sup>48</sup>

### *Modifying the Monument*

On December 4<sup>th</sup>, 2017, President Donald J. Trump issued Proclamation 9681 – “Modifying the Bears Ears National Monument.” The proclamation begins by summarizing the Obama proclamation, then gives a brief description of the restrictions of the Antiquities Act, particularly that it requires the protected area of a national monument to “be confined to the smallest area compatible with the proper care and management of the objects of historic or scientific interest.” The central claim made in Proclamation 9681 is that the area of 1.35 million acres protected by the Obama proclamation is “not confined to the smallest area compatible with the proper care and management” of the objects identified as having historic and scientific interest. Proclamation 9681 further

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<sup>47</sup> Letter from Alfred Lomahquahu, Bears Ears Comm’n Interim Co-Chair, & Carleton Bowekaty, Bears Ears Comm’n Interim Co-Chair, to Hon. Ryan Zinke, Sec’y of the Interior, & Hon. Michael Scuse, Acting Sec’y of the Dept. of Agric. Bears Ears Commissioners Selected, Focus on the Future of the National Monument, (Mar. 17, 2017), [http://bearscoalition.org/wp-content/uploads/2017/03/BearsEarsCommission\\_LettertoZinke\\_March17.pdf](http://bearscoalition.org/wp-content/uploads/2017/03/BearsEarsCommission_LettertoZinke_March17.pdf)

<sup>48</sup> Letter from Alfred Lomahquahu (Apr. 26, 2017).

claims that some of the objects identified in the Obama proclamation are not significant or unique to the Bears Ears area, and that not all of them are “under threat of damage or destruction.” Thus, they have no need of protection through the designation of a national monument because they are already protected “by existing law and governing land-use plans.”<sup>49</sup>

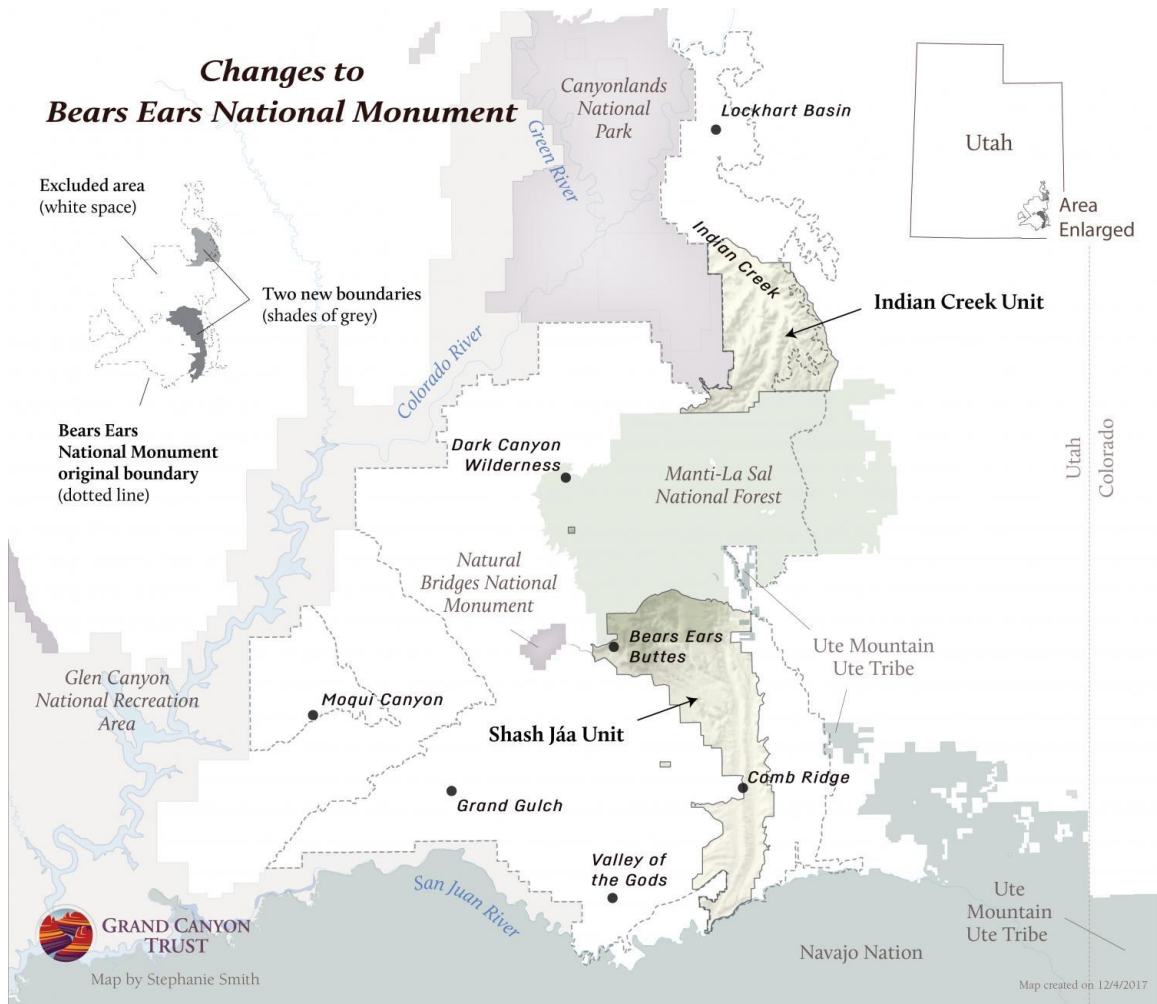
After claiming that the Obama proclamation is incompatible with the restrictions of the Antiquities Act, Proclamation 9681 proceeds to reduce the acreage of BENM from 1.35 million acres to 201, 876 acres. The revised monument boundaries are split into the two “smaller and more appropriate” tracts of Shash Jaa and Indian Creek. The famous Bears Ears buttes are located in Shash Jaa, and Indian Creek contains significant areas such as the Indian Creek Canyon, Canyonlands Research Center, and Newspaper Rock. The justification for the significant areas left out of the revised boundaries is that they “are adequately protected by existing law, designation, agency policy, or governing land-use plans.” The protected areas are to be officially known as the Indian Creek and Shash Jaa units.<sup>50</sup>

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<sup>49</sup> Proclamation No. 9681, 82 Fed. Reg. 58081 (Dec. 4, 2017).

<sup>50</sup> *Ibid.*

Figure 3. Changes to Bears Ears National Monument



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Though not explicitly stated in the Trump proclamation, one of the central reasons for the modifications of BENM was to gain access to potential resource deposits in the area.<sup>52</sup> According to the New York Times, the focus on resource potential was confirmed when they sued the Department of the Interior over “the agency’s failure to respond to an

<sup>51</sup> Stephanie Smith, “Changes to Bears Ears National Monument Map,” Grand Canyon Trust, last modified December 4, 2017, <https://www.grandcanyontrust.org/changes-bears-ears-national-monument-map>.

<sup>52</sup> Britton-Purdy, “Whose Lands? Which Public?” 924.

open records request in August asking for internal records” which contained discussions about boundary modifications and access to natural resources. As a result of the lawsuit the New York Times obtained over 25,000 pages of emails from the Interior Department, from both the Obama and Trump administrations, regarding the Obama administration’s efforts to create national monuments, and the Trump administration’s reconsiderations of national monument designations and boundaries. Among the emails were discussions about the resource deposits in Bears Ears, dating from before the creation of the monument to its eventual modification. The modifications reduced the amount of trust lands included in the monument to roughly 22,000 acres, and the associate director of the Utah School and Institutional Trust Lands Administration, John Andrews, confirmed that the changes “reflected his group’s request to exclude trust lands from federal protection,” but “by a much larger amount than his organization had sought.” Therefore it is likely that the BENM boundary modifications were made with more in mind than just the Utah public school system. The Trump administration went to considerable effort to undo many of the environmental initiatives implemented under the Obama administration on the basis that they were detrimental to the energy industry, so it is reasonable to conclude that these same motivations were present in their discussions about reviewing and modifying national monuments.<sup>53</sup>

H.R. 4532 was introduced in the House of Representatives on December 4<sup>th</sup>, 2017 in the 115<sup>th</sup> Congress and is cited as the “Shash Jaa National Monument and Indian Creek National Monument Act.” The bill was introduced by John Curtis, the U.S.

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<sup>53</sup> Eric Lipton and Lisa Friedman, “Oil Was Central in Decision to Shrink Bears Ears Monument, Emails Show,” *New York Times*, March 2, 2018, <https://www.nytimes.com/2018/03/02/climate/bears-ears-national-monument.html>.

Representative of Utah’s 3<sup>rd</sup> congressional district, and it declares the Obama proclamation to be “null and void.” It states that the Shash Jaa and Indian Creek National Monuments will consist of approximately 142,337 acres and 86,447 acres, respectively, and be managed by the Shash Jaa Tribal Management Council and the Indian Creek Management Council.<sup>54</sup> Though ultimately H.R. 4532 was not passed, the modifications made to BENM in the Trump proclamation remained in effect.

### *Responses to the Reduction of the Monument*

Many people were pleased with the new boundaries, particularly “public lands activists and local resource users who have long criticized federal land management for usurping local control,” as well as the state of Utah, whose public school system stands to gain from the revenue brought in by the resource deposits in the area. More than half of Utah is federally controlled, so the government gave the state “trust lands,” which it has used to fund the public school system “by selling off mineral rights and allowing private companies to extract oil or gas.” President Obama included a significant portion of those lands, 110,000 acres, in BENM, preventing future resource extraction and thus cutting off potential revenue. This was one of the main sources of opposition to the monument from the state of Utah.<sup>55</sup>

Though the Trump administration had considerable support for his decision to alter the borders of BENM, many people fought his actions, claiming they were either

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<sup>54</sup> Shash Jaa National Monument and Indian Creek National Monument Act, H.R. 4532, 115<sup>th</sup> Cong. (2017).

<sup>55</sup> Lipton and Friedman, “Oil Was Central.”



unlawful or simply a step in the wrong direction. Legal action was taken by “[e]nvironmental groups, Native tribes, and the Patagonia corporation, among others,” who believed the modifications of Bears Ears to be illegal.<sup>56</sup> On January 9, 2018, Shaun Chapoose testified on behalf of the Bears Ears Inter-Tribal Coalition at the Legislative Hearing on H.R. 4532. Chapoose stated that the Inter-Tribal Coalition “adamantly opposes H.R. 4532” because it would “legislatively confirm the President’s unlawful action in violation of the Antiquities Act.”<sup>57</sup> Ruben Gallego, the U.S. Representative for Arizona’s 7th congressional district, introduced H.R. 4518, the “Bears Ears National Monument Expansion Act,” on December 1<sup>st</sup>, 2017 in anticipation of President Trump’s proclamation. Its primary purpose was to expand the boundaries of BENM from the 1.35 million acres designated in 2016 to the original 1.9 million acres that was proposed in 2015. The bill also urges meaningful and “prompt engagement” with the Bears Ears Commission regarding the management of BENM.<sup>58</sup> In 2019, after the shrinking of BENM, Gallego introduced H.R. 871, the “Bears Ears Expansion and Respect for Sovereignty Act,” on January 30<sup>th</sup>, 2019. The bill’s purpose was also to expand the boundaries to 1.9 million acres. Ultimately neither bill was passed.<sup>59</sup>

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<sup>56</sup> Britton-Purdy, “Whose Lands? Which Public?” 924.

<sup>57</sup> *Testimony of the Bears Ears Inter-Tribal Coalition: Legislative Hearing on H.R. 4532 Before the U.S. House of Representatives Comm. on Natural Resources, Subcomm. on Federal Lands*, 115<sup>th</sup> Cong. (2018) (statement of Shaun Chapoose, Bears Ears Commission): 1-7 [quotations from 7].

<sup>58</sup> Bears Ears National Monument Expansion Act, H.R. 4518, 115<sup>th</sup> Cong. (2017).

<sup>59</sup> Bears Ears Expansion And Respect for Sovereignty Act, H.R. 871, 116<sup>th</sup> Cong. (2019).

## CHAPTER IV: THE ANTIQUITIES ACT AND PRESIDENTIAL POWER

### *The Act*

When the Antiquities Act was signed into law in 1906 by President Theodore Roosevelt, the archaeological sites of the southwestern United States were being constantly plundered, and the Act was a response to concerns that the sites would continue to deteriorate at the hands of visitors who were either simply irresponsible or in search of a profit. The Act prohibits the removal or damage of objects located within federally protected areas, and affords the president the power to “declare by public proclamation historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest” located on federal land “to be national monuments,” and “reserve parcels of land as a part of the national monuments.”<sup>60</sup>

Though the Act has been used to protect many Native American historical sites, until BENM it had not directly “been used at the behest, or for the benefit, of tribes.”<sup>61</sup> The Act is “a succinct but powerful piece of legislation” that is restricted only by the stipulation that “the parcels shall be confined to the smallest area compatible with the proper care and management of the objects to be protected.”<sup>62</sup> This is one of two facets of the Act that is currently under close scrutiny. The other is that though the Act explicitly

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<sup>60</sup> Antiquities Act, 54 U.S.C. § 320301 (2014); Wilkinson, “At Bears Ears We Can Hear,” 322.

<sup>61</sup> Wilkinson, “At Bears Ears We Can Hear,” 323.

<sup>62</sup> Wilkinson, “At Bears Ears We Can Hear,” 332; Antiquities Act, 54 U.S.C. § 320301 (2014).

outlines the power to designate a monument, there is no mention of the president having the power to alter monuments once they have been created. There are two distinct opinions about what the absence of an explicit power to alter or rescind could mean. One argument is that the power to alter or rescind, though not explicitly stated in the language of the Act, is implicit, and inherent in the power to designate. The other argument is that because the language of the Act excludes the power to alter or rescind, then Congress excluded it on purpose and never intended the president to have that power, reserving it instead for themselves as a balance against executive authority. This ambiguity has led to contention over whether President Trump had the authority to alter BENM so drastically, and scholars have taken sides on the constitutionality of the Trump proclamation. Some scholars even argue that the Antiquities Act “should be amended to provide for more discernable guidelines,” or in other words, amended to state explicitly whether or not the president has to power to alter his or her own or other president’s monument designations.<sup>63</sup>

*In Support of Presidential Power to Reduce or Revoke National Monuments*

The argument that supports presidential power to reduce or revoke a national monument is centered around the assertion “that under traditional principles of constitutional, legislative, and administrative law, the authority to execute a discretionary power includes the authority to reverse it.” John Yoo and Todd Gaziano explicate this

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<sup>63</sup> Andrew Diaz, “The Transformation of the Antiquities Act: A Call for Amending the President’s Power Regarding National Monument Designations,” *Golden Gate University Law Review* 49, no. 2 (April 2019): 138-139, <https://digitalcommons.law.ggu.edu/ggulrev/vol49/iss2/5>.

argument in their article titled, “Presidential Authority to Revoke or Reduce National Monument Designations.” They claim that in the history of American law, courts have never “held that a grant of authority does not include the power of the relevant office holder to revoke prior uses of that power,” and therefore the same must be true for the Antiquities Act. They assert that to prohibit a president from altering a designation made by a previous president would be unconstitutional, because “[n]o President (nor any Congress or Supreme Court) can permanently bind subsequent Presidents in their exercise of the executive power.” Yoo and Gaziano argue against some of the uses of the Act, on the basis that because it was a response to the looting of Native American sites, its original purpose was to protect manmade objects of historical significance. Therefore, the Antiquities Act should not be used to protect “vast scenic or geological parks.” Though the broad language of the Act does allow the president to protect “historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest,” it would undermine Congress’ power to create national parks if the president could create national monuments that closely resembled national parks.<sup>64</sup> Part of the foundation of Yoo and Gaziano’s argument is an assertion that the ruling made by Attorney General Homer Cummings in 1938, stating that the president lacked the power to abolish a national monument, “makes errors of constitutional and statutory interpretation.”<sup>65</sup> Yoo and Gaziano state that Cumming’s opinion is the “primary legal authority for the claim against a revocation power in the Antiquities Act,” and that

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<sup>64</sup> John Yoo and Todd Gaziano, “Presidential Authority to Revoke or Reduce National Monument Designations,” *Yale Journal on Regulation* 35, no. 2 (2018): 617-625. [quotations from 617, 620, 621, and 625 respectively]; Antiquities Act, 54 U.S.C. § 320301 (2014).

<sup>65</sup> Britton-Purdy, “Whose Lands? Which Public?” 951; Yoo and Gaziano, “Presidential Authority,” 633-634.

because his opinion has errors, the argument against revocation power is fundamentally flawed. They broaden their argument to include not just the history of the Antiquities Act, but the general history of executive orders, stating that it is normal for presidents to “issue executive orders reversing, modifying, or even extending the executive orders of past presidents.”<sup>66</sup>

Before President Barack Obama’s thirty-four proclamations relating to national monuments, President Carter had created the largest monuments, and President Clinton had created the most. But President Obama surpassed both Carter and Clinton in monument acreage and quantity.<sup>67</sup> For Yoo and Gaziano, this is a clear sign that the Antiquities Act was abused by the Obama administration, and that the modifications made to BENM during the Trump administration were legal. One of their strongest arguments is that presidents have frequently revised existing monuments, “shrinking a few by tens or hundreds of thousands of acres and other (much smaller) ones by large fractions of their total area.”<sup>68</sup> Presidents have also added on to monuments, such as in 2016 when President Obama expanded the size of the Papahānaumokuākea Marine National Monument in Hawaii, originally designated as a national monument by President George W. Bush in 2006, to 582,578 square miles. Papahānaumokuākea is now the largest protected area on earth.<sup>69</sup> Thus the argument goes that if the president can make large additions to a monument, then he or she should also be able to “determine

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<sup>66</sup> Yoo and Gaziano, “Presidential Authority,” 634-643. [quotations from 634 and 643 respectively].

<sup>67</sup> Yoo and Gaziano, “Presidential Authority,” 653-654. [quotations from 653 and 654 respectively].

<sup>68</sup> Britton-Purdy, “Whose Lands? Which Public?” 925.

<sup>69</sup> “Timeline of Protections,” Papahānaumokuākea Marine National Monument, About, accessed April 13, 2021, <https://nmspapahanaumokuakea.blob.core.windows.net/papahanaumokuakea-prod/media/archive/pdf/timeline.pdf>.

that some large reductions are reasonable or necessary to satisfy the ‘smallest area’ requirement of the Act.” Though reductions have been made by presidents in the past, there has not been any court ruling on the subject of reducing the size of a monument. Yoo and Gaziano also argue that national monuments created in recent history were issued not primarily to protect historically significant objects or sites, but rather “to lock up natural resources from development and use – regardless of how limited or temporary the surface disturbances would be.” Reminiscent of the opposition from Utah, Yoo and Gaziano pose this argument in defense of the economic hardships of the communities around the monuments that depended on “timber, grazing, or mineral resources” for their livelihood. They also argue that, for reasons such as “maintenance backlog on Department of Interior land-management responsibilities,” the vast, million acre, monument designations can actually be counterproductive, harm the landscape, and “diffuse attention and resources from higher priorities.”<sup>70</sup>

Yoo and Gaziano make the distinction between the president’s authority through the Act to revoke a monument versus his or her authority to reduce the size of one, and that even if the courts one day ultimately ruled that the president lacked revocation power, that he or she would still “retain the authority, if not the duty, to reduce the size of existing monuments that were unreasonably large relative to the objects being preserved – or have become illegally large with changed circumstances.” They conclude their argument by pointing to the separation of powers, in that if a president chooses to use his or her executive authority through the Antiquities Act and “not protect their policies

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<sup>70</sup> Yoo and Gaziano, “Presidential Authority,” 659-661. [quotations from 659, 661, 661, and 661 respectively].

through Congress's bicameral process," then their policies are subsequently open to modification or revocation at the hands of future presidents "by constitutional design."<sup>71</sup>

*Against Presidential Power to Reduce or Revoke National Monuments*

In the article "Whose Lands? Which Public? The Shape of Public-Lands Law and Trump's National Monument Proclamations," Jedediah Britton-Purdy argues that the Antiquities Act does not grant the president power to alter national monuments, and that the Act "gives a power only to protect public lands, not to remove them from protection." Britton-Purdy's main claim is that arguments such as Yoo and Gaziano's do not take into account the trend of public-lands law, which "consistently denies the President the power unilaterally to remove lands from statutorily protected categories once they are placed within those categories." Britton-Purdy argues that in public-lands law there is "a strong premise of an *asymmetric* presidential power," meaning that more power is granted to the president to protect land, but that there is "a corresponding wariness" of presidential authority to make land available for "drilling, mining, and other privatizing regimes." He argues that although the Antiquities Act can be read outside of the context of public-lands law, it is nevertheless most accurately interpreted "in light of the broader body of law in which it fits." Within public-lands law, the trend of leaving the power to reopen lands with Congress is partially based on a fear of corruption, and of preventing the extraction of finite resources that would cause irrevocable damage on a unique landscape. In this context, the Antiquities Act can be interpreted "as a structural anti-corruption device,

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<sup>71</sup> Yoo and Gaziano, "Presidential Authority," 664-665. [quotations from 664 and 665 respectively].

designed to protect irreplaceable public resources.” If the Antiquities Act did not prevent the president from privatizing land, then Britton-Purdy argues that it would be an anomaly within public-lands law, which “otherwise integrates competing values through a statutory allocation of powers.” Congress’ silence on revocation power in the Antiquities Act is in accordance “with a well-justified and consistent pattern of not authorizing unilateral presidential declassifications of categorically protected lands.” Simply put, “the Antiquities Act does not do what it does not say,” and granting the president power to reduce or revoke a monument would be contrary to the purpose of the Antiquities Act, which is to preserve and protect.<sup>72</sup>

In reference to the Trump administration’s reasoning that the revisions are “merely implementing the Antiquities Act’s requirement that monuments occupy the smallest area compatible with protection of the designated objects,” Britton-Purdy argues that the Trump proclamation also contests the objects which the Obama proclamation deemed worthy of protection. Instead of drawing new boundaries to more accurately fit the “objects to be protected,” the Trump proclamation is a “substantive revisiting of which objects within the monuments are eligible for protection,” and “delimit[s] an area fitted to a new set of protected objects, smaller than and qualitatively different from Obama’s.”<sup>73</sup> In Secretary Zinke’s report, he argues that million-acre monuments subvert the Act because they make protection more difficult.<sup>74</sup> But Britton-Purdy points out that though the area of land must be the “smallest area compatible” under the Act, this

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<sup>72</sup> Britton-Purdy, “Whose Lands? Which Public?” 921-949. [quotations from 921, 925, 925, 949, 927, 948, 938, and 948 respectively].

<sup>73</sup> Britton-Purdy, “Whose Lands? Which Public?” 932.

<sup>74</sup> Zinke, Final Report, 9.



stipulation in no way means that the area must be small. Rather, “a monument’s permissible size is a function of the size of the object it protects,” and therefore it is possible for the protected object to “be a landscape level phenomenon.” Though Yoo and Gaziano argue that the large size of a monument can be counterproductive to its protective goal, the Inter-Tribal Coalition’s proposed “Collaborative Management” of BENM was intended to provide ample management of the monument by combining the resources and manpower of the federal agencies and the Tribal governments. The care taken by the Inter-Tribal Coalition and by the Obama administration was intentionally thoughtful of both the monument’s size and specific environmental characteristics. The Trump proclamation raises the question of presidential authority to reduce or revoke monuments because it directly challenges which objects are worthy of inclusion in the monument, and not just the appropriate size of the acreage.<sup>75</sup>

The Trump administration’s modification of BENM is motivated by a distinct preferential treatment of “a local and regional constituency that favors increased extractive access to the public lands,” a motivation that is evidenced heavily by his remarks in Salt Lake City on December 4, 2017.<sup>76</sup> He addressed the people of Utah, saying, “some people think that the natural resources of Utah should be controlled by a small handful of very distant bureaucrats located in Washington,” but that “your timeless bond with the outdoors” should not be controlled in this way. President Trump also stated that “this tragic federal overreach prevents many Native Americans from having their

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<sup>75</sup> Britton-Purdy, “Whose Lands? Which Public?” 931-932. [quotations from 931].

<sup>76</sup> Britton-Purdy, “Whose Lands? Which Public?” 933.

rightful voice.”<sup>77</sup> Though support for the monument was not universal among all Native Americans, and though the potential economic losses in Utah could have an adverse effect on the local tribes, the evidence points to majority support from Native American tribes in Utah and around the country. In addition to the efforts of the Bears Ears Inter-Tribal Coalition, the National Congress of American Indians, “the oldest and largest national organization of American Indian and Alaska Native tribal governments,” urged President Obama in 2015 to create BENM, and stated their support for the Inter-Tribal Coalition and Collaborative Management of the monument.<sup>78</sup>

Yoo and Gaziano utilize the revisions made to monuments in the Act’s early years to reinforce their argument. But Britton-Purdy argues that these revisions, like the Act itself, must be interpreted in their legal and historical context. The early revisions “took place against a background of expansive claims of presidential power to reclassify federal land,” a power which ceased to exist after the Federal Land Policy and Management Act (FLPMA) of 1976. Now, presidential power regarding national monuments is limited to what is authorized through the Antiquities Act, and the early revisions “would not be plausible today as exercises of the delegated power of the Antiquities Act.” Britton-Purdy concludes that “[p]rinciples that are well-grounded in the structure of public-lands law give good reason to judge that the [President Trump’s] proclamations are not authorized by the Antiquities Act.”<sup>79</sup>

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<sup>77</sup> Remarks on Signing Proclamations Affecting Prior Designations Under the American Antiquities Act of 1906 in Salt Lake City, Utah, 2017 Daily Comp. Pres. Doc. 879 (Dec. 4, 2017).

<sup>78</sup> *Supporting the Presidential Proclamation of the Bears Ears National Monument, Including Collaborative Management Between Tribal Nations and the Federal Agencies*, The National Congress of American Indians, Exec. Comm. Res. No. EC-15-002 (2015).

<sup>79</sup> Britton-Purdy, “Whose Lands? Which Public?” 928-963. [quotations from 956, 928, and 963 respectively].

## CHAPTER V: CONCLUSION

President Joe Biden was sworn into office on January 20<sup>th</sup>, 2021, a little over five years after the Bears Ears Inter-Tribal Coalition sent their proposal to President Obama. In those five years the Bears Ears National Monument went from a proposed 1.9 million acres, to an officially designated 1.35 million acres, and finally to a revised 201,876 acres with two new names, the Shash Jaa National Monument and Indian Creek National Monument. As it stands now, the national monument that was envisioned and created by the Navajo, Hopi, Zuni, Uintah and Ouray Ute, and Ute Mountain Tribes in collaboration with the Obama administration no longer exists. Only a fraction of the proposed monument lands are being protected under national monument status. But since the election of Joe Biden as President, considerable hope has been restored to the Tribes and other proponents of BENM. During his campaign, President Biden pledged that if he were elected, he would “take immediate steps” to repair BENM.<sup>80</sup> The Inter-Tribal Coalition has stated their support for President Biden, and that under his administration they look forward to collaborating on the restoration of BENM and the Bears Ears Commission.<sup>81</sup> So far, President Biden’s actions appear to be in line with his promises to address the changes made to BENM. On Monday, March 15<sup>th</sup>, 2021, the U.S. Senate confirmed Representative Deb Haaland as President Biden’s Secretary of the Interior.<sup>82</sup>

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<sup>80</sup> “Biden-Harris Plan For Tribal Nations,” Biden-Harris, accessed April 13, 2021, <https://joebiden.com/tribalnations/>.

<sup>81</sup> “Working together: Restoring protections for the sacred Bears Ears region alongside the new Biden-Harris administration,” *Bears Ears Inter-Tribal Coalition*, November 10, 2020, <https://bearscoalition.org/working-together-restoring-protections-for-the-sacred-bears-ears-region-alongside-the-new-biden-harris-administration>.

<sup>82</sup> Coral Davenport, “Deb Haaland Becomes First Native American Cabinet Secretary,” *New York Times*, March 15, 2021, <https://www.nytimes.com/2021/03/15/climate/deb-haaland-confirmation-secretary-of-interior.html?searchResultPosition=13>.

Secretary Haaland is a member of the Laguna Pueblo Tribe, and the first Native American cabinet secretary.<sup>83</sup> Though she now heads a department that has historically been responsible for many injustices against Native Americans, she, like the creation of BENM, represents a monumental step for the collaboration between the federal government and tribal governments.<sup>84</sup> Biden issued many executive orders on his first day in office, but in “Executive Order 139990—Protecting Public Health and the Environment and Restoring Science To Tackle the Climate Crisis,” he directs the Secretary of the Interior to “conduct a review of the monument boundaries and conditions that were established by Proclamation 9681.”<sup>85</sup> Secretary Haaland is set to visit Utah, carry out the review, and submit a report with her recommendations in April 2021.<sup>86</sup>

The argument supported by Britton-Purdy that the president lacks the power to reduce or revoke national monuments is ultimately stronger than the one supported by Yoo and Gaziano because it takes into greater account the historical and political context of the Antiquities Act and presidential power to regulate federal land. The original borders of Bears Ears National Monument should be restored because the authority to alter a national monument rests with Congress, and because BENM strengthened the relationship between federal and tribal governments in the United States. By developing a plan to utilize the strengths and resources of both groups, BENM created a more efficient and inclusive system of land conservation and management that prioritizes human

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<sup>83</sup> “Secretary Deb Haaland,” U.S. Department of the Interior, accessed April 13, 2021, <https://www.doi.gov/secretary-deb-haaland>.

<sup>84</sup> Davenport, “Deb Haaland Becomes First Native American Cabinet Secretary.”

<sup>85</sup> Exec. Order No. 13990, 86 Red. Reg. 7037 (Jan. 25, 2021).

<sup>86</sup> “Interior Secretary Haaland To Visit Utah Before National Monuement Review,” *KNAU*, March 19, 2021, <https://www.knau.org/post/interior-secretary-haaland-visit-utah-national-monument-review>.

interaction with the environment instead of restricting it. Though there have been considerable difficulties along the way, land conservation and environmental justice in the U.S. are moving in a positive direction.<sup>87</sup> The story of Bears Ears will undoubtedly serve as a precedent and a guide for other conservation battles being fought by Native Americans and other Indigenous groups in the U.S. and around the globe. The “Proposal to President Barack Obama for the Creation of Bears Ears National Monument” created by the Bears Ears Inter-Tribal Coalition is a detailed and thorough template after which future proposals could be modeled, especially because of its success. The many aspects of BENM being discussed, such as history, culture, religion, politics, and the environment, will enable BENM to serve as a multi-layered case study for other complex situations. The arguments being brought to light will have an impact far beyond BENM, specifically those regarding presidential power and land conservation. And if the boundaries of BENM continue to be contested, it is possible that Congress will have to clarify the extent of presidential power in the Antiquities Act, a decision which could either jeopardize or strengthen the security of existing and future monuments.

The Bears Ears story contains larger lessons for the rest of the world and the United States. Each day it becomes more evident that climate change is affecting our lives in more ways than just raising the average temperature. Environmental catastrophes have increased in severity and frequency, and they have a particularly adverse effect on poor and marginalized communities. The most prominent cause of global climate change is human activity, and the habits and demands of our modern societies that have led to climate change “not only exhaust the resources which provide local communities with

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<sup>87</sup> Krakoff, “Public Lands, Conservation, and the Possibility of Justice,” 217-218.

their livelihood, but also undo the social structures which, for a long time, shaped cultural identity and their sense of the meaning of life and community.”<sup>88</sup> While the global population continues to rise, the places for us to live and the resources to sustain us remain finite. Therefore, the solution to climate change cannot be to entirely separate people from the environment. We will simply run out of places to go. “Nature cannot be regarded as something separate from ourselves or as a mere setting in which we live. We are part of nature, included in it and thus in constant interaction with it.”<sup>89</sup> In order to save our home from further harm, we must foster a healthier relationship with the environment. In the words of Robin Wall Kimmerer, “May we humans live in such a way that the land for whom we are grateful, will be grateful for our presence, in return.”<sup>90</sup>

Some of the best models of a healthy relationship between people and the earth have been set by Indigenous peoples. Indigenous communities “are not merely one minority among others, but should be the principal dialogue partners” in the conversation of environmental justice, “especially when large projects affecting their land are proposed.”<sup>91</sup> If we are going to learn how to deal with climate change in our communities, we must, in addition to adopting clean energy solutions, learn from the Indigenous people of the world. However, if we continue to marginalize Indigenous communities, then we are not only perpetuating human rights violations, but we also run the risk of losing some of the most valuable knowledge on responsible stewardship of the earth.

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<sup>88</sup> Grady Klein and Yoram Bauman, *The Cartoon Introduction to Climate Change* (Washington: Island Press, 2014), 71; Pope Francis, “Laudato Si’,” para. 145.

<sup>89</sup> Pope Francis, “Laudato Si’,” para. 139.

<sup>90</sup> Kimmerer, “Renewing Relationship Between Land and Culture.”

<sup>91</sup> Pope Francis, “Laudato Si’,” para. 146.

Social and environmental justice are dynamic problems, and therefore require dynamic solutions. In addressing these issues, the solutions to one problem have often perpetuated the other. Rapid modernization intended to provide basic rights to suffering communities is not always environmentally conscious, and single-minded goals of environmental conservation can cut off communities from areas of cultural or religious significance and from the resources they have always depended on. It is therefore necessary to include local people in the conversations about their homes and environments, “for quality of life must be understood within the world of symbols and customs proper to each human group.”<sup>92</sup> The creation of Bears Ears National Monument proves that it is possible to integrate “social justice with global environmental protection.”<sup>93</sup>

Further research should be conducted regarding the Bears Ears Inter-Tribal Coalition’s process of developing the monument proposal so that future land conservation efforts can benefit and learn from their strategies. Further research should also be conducted on the development of the Bears Ears story during the current, and possibly future, presidential administrations. Whether or not the boundaries of BENM undergo further modification or restoration, and whether or not the extent of presidential power in the Antiquities Act is clarified, any new developments will provide further insight into the topics discussed in this paper.

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<sup>92</sup> Pope Francis, “Laudato Si’,” para. 144.

<sup>93</sup> Krakoff, “Public Lands, Conservation, and the Possibility of Justice,” 217-218.

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