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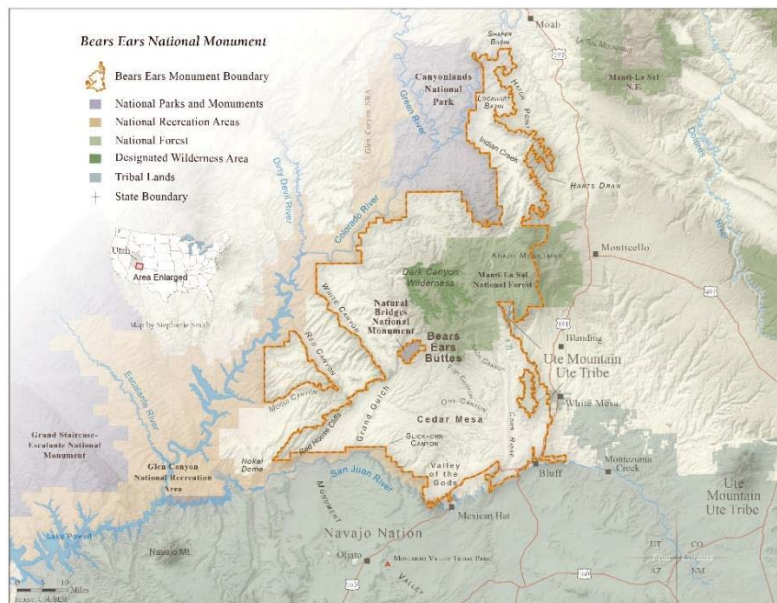
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“AT BEARS EARS WE CAN HEAR THE VOICES OF OUR ANCESTORS IN EVERY CANYON AND ON EVERY MESA TOP”: The Creation of the First Native National Monument

Charles Wilkinson*



The Bears Ears National Monument as proclaimed by President Barack Obama on December 28, 2016

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INTRODUCTION

On December 28, 2016, President Barack Obama proclaimed the Bears Ears National Monument.¹ It is glory country. This classic Southwestern landscape of canyons, mesas, mountains, and redrock formations is every bit the equal of national parks such as Canyonlands, Arches, Zion, and Capitol Reef. The distinctive Bears Ears Buttes rise to an elevation of 8,700 feet and are visible for forty to sixty miles in every direction. Leading Western writer Wallace Stegner wrote that the wonders of the Bears Ears country “fill up the eye and overflow the soul.”² At 1.35 million acres in southern Utah, it is the second largest national monument in the contiguous forty-eight states and the District of Columbia.³

Bears Ears holds profound significance for members of the five tribes—Hopi, Navajo, Ute Mountain Ute, Uintah and Ouray Ute, and Zuni—who formally petitioned President Obama and for many other Southwestern tribes as well. The antiquity is everywhere. With more than 100,000 archaeological sites, ranging from lithic scatter to granaries to elaborate villages, the Bears Ears landscape is America’s most significant unprotected cultural area.⁴ Native people come to Bears Ears for many reasons, including holding ceremonies, hunting, celebrating family occasions, and gathering medicines, roots, nuts, berries, and weaving materials. They also come to heal, to

1. Proclamation No. 9558, 82 Fed. Reg. 1139 (Dec. 28, 2016).

2. WALLACE STEGNER, *THE SOUND OF MOUNTAIN WATER* 18 (1969).

3. Nicole Greenfield, *This Ancient Place Just Secured Membership in America’s Culture Club*, NAT’L RESOURCE DEF. COUNCIL (Dec. 29, 2016), <https://www.nrdc.org/stories/ancient-place-just-secured-membership-americas-culture-club>.

4. WILLIAM STEGNER, *A SENSE OF PLACE* (Audio Press 1989), *quoted in* Charles Wilkinson, *Wallace Stegner and the Shaping of the Modern West*, in WALLACE STEGNER AND THE CONTINENTAL VISION: ESSAYS ON LITERATURE, HISTORY, AND LANDSCAPE 3, 12 (Curt Meine ed., 1997).

alleviate the continuing pain of the centuries-old land loss and assimilationist policies:

Like all Native Americans, I feel this historical trauma. We've lost our land and may never get it back.

Still, we appreciate what we do have. Going back to Bears Ears reminds us of where we came from. I find a valley with yellow flowers, and I go there quietly and take it all in. This is personal healing like nothing else can be. It is also healing for the land and its precious resources. This is why healing forms the inner core of our Bears Ears movement.⁵

This spirituality is evident in the connections to Bears Ears often expressed by traditional Indian people. Phillip Vicenti, Zuni, explained:

The importance of Bears Ears for our people is through our ancestral sites that were left behind eons ago by our ancestors. They documented the sites by using oral history, pictographs, and by leaving their belongings. When we visit Bears Ears, we connect with our migration history immediately without doubt.⁶

Alfred Lomahquahu, Hopi, reflected that Bears Ears

is a part of our footprints, a path that tells a story. History is crucial to man because it tells us who we are. 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.⁷

This article traces the origins and creation of the monument, especially how it was conceived, put forth, and shepherded by Indian people. The article further explores the promising provisions for collaborative management of the monument between a tribal commission and federal agencies, with the aim of blending Native traditional knowledge and culture with existing federal public land practices. Bears Ears is a place of enormous importance to the nation and to the tribes. This magnificent monument can become one of the most distinctive and celebrated units in America's world-renowned public land conservation system.

Soon after taking office, President Trump, responding to insistent pressure from the Utah Congressional Delegation, issued an executive order directing

5. Regina Lopez-Whiteskunk, *Bears Ears, a Land of Culture and Mystery*, HEWLETT FOUND. (Oct. 13, 2016), <https://www.hewlett.org/bears-ears/>.

6. BEARS EARS INTER-TRIBAL COAL., PROPOSAL TO PRESIDENT BARACK OBAMA FOR THE CREATION OF THE BEARS EARS NATIONAL MONUMENT 10 (2015) <http://www.bearscoalition.org/wp-content/uploads/2015/10/Bears-Ears-Inter-Tribal-Coalition-Proposal-10-15-15.pdf> [hereinafter BEARS EARS PROPOSAL].

7. *Id.*

Interior Department Secretary Ryan Zinke to study Bears Ears and several other national monuments and make recommendations on whether some or all of them should be reduced in size or extinguished altogether. Bears Ears was particularly targeted. Secretary Zinke then produced a short report in which he recommended that Bears Ears be substantially reduced in size. At the printing of this article, the President has taken no action attempting to weaken the monument and, if he does, it is impossible to predict exactly what it will be.⁸ One thing is for sure: the tribes, conservation organizations, and the outdoor recreation industry will challenge any presidential action in court. Existing law strongly suggests that any attempt by President Trump to extinguish or diminish the Bears Ears National Monument will be struck down.⁹ Of course, only time will tell. But, whatever the outcome, the creation of this monument is a story of law, land, culture, policy, and history that is well worth telling.

8. For a discussion of the actions of President Trump and Secretary Zinke, see Julie Turkewitz & Lisa Friedman, *Interior Secretary Proposes Shrinking Four National Monuments*, N.Y. TIMES (Aug. 24, 2017), https://www.nytimes.com/2017/08/24/us/bears-ears-utah-monument.html?mcubz=0&_r=0.

9. See Mark Squillace, Eric Biber, Nicholas Bryner & Sean Hecht, *President's Lack the Authority to Abolish or Diminish National Monuments*, 103 VA. L. REV. ONLINE 55, 71 (2017), <http://www.virginialawreview.org/sites/virginialawreview.org/files/Hecht%20PDF.pdf>. For a different view, see Richard H. Seamon, *Dismantling Monuments* 51 (Sept. 3, 2017) (unpublished manuscript), <https://ssrn.com/abstract=3031279>.

I. THE BEARS EARS REGION: A LANDSCAPE INTERWOVEN WITH HISTORY AND CULTURE



The Bears Ears Buttes as seen from Natural Bridges National Monument

Indian people have lived in the Bears Ears region since time immemorial.¹⁰ As many as thirty tribes have called the land their home at some point. Some came through, some came and left, many stayed.¹¹ Beginning in the 1860s, tribal people were forced out of Bears Ears. Military efforts included federal troops marching Navajo people out of the region as part of the Long Walk that began in 1864.¹² Non-Indian settlers, who began to arrive in 1880, co-existed well with tribal people at first but, in time, began aggressively driving Natives off the land. Government policy required tribal members to remain on their reservations.¹³ Tribes that had freely traveled across the Southwest—following sources of food to hunt, gathering medicinal herbs, and visiting sacred sites legendary to their world views—were now confined to reservations. But these arbitrary borders drawn could not stop Indian people from returning to the Bears Ears region. Those who had called this land home

10. BEARS EARS PROPOSAL, *supra* note 6, at 8–9, 41–42.

11. For sources on the histories of the Hopi, Ute, Navajo, and Zuni people, see *id.*

12. See, e.g., PETER IVERSON & MONTY ROESSEL, *DINÉ: A HISTORY OF THE NAVAJOS* 51–57 (2002); Robert A. Roessel, Jr., *Navajo History, 1850–1923*, in 10 *HANDBOOK OF NORTH AMERICAN INDIANS: THE SOUTHWEST* 506–23 (Alfonso Ortiz ed., 1983).

13. For authority on the removal of Native people from the Bears Ears landscape, see BEARS EARS PROPOSAL, *supra* note 6, at 42–43.

came back to hunt, gather, hold ceremonies, and seek healing. Thus, they maintained a connection to the land that continues to this day.¹⁴

Late in the nineteenth century, non-Indians became fascinated by artifacts they found and began to explore the gravesites and abandoned homes of the ancients. They could not believe what they had found and many soon turned to looting. Most of the artifacts had been preserved by the dry southwestern air. At first, it was the moccasins, the clothes, the cooking equipment, and the pots that the looters took, but then they turned to desecrating gravesites and removing human remains.¹⁵ The destruction of these and other archaeological sites eventually drew the attention and ire of Washington politicians who passed the Antiquities Act in 1906. It is with the creation of that Act that the story of the Bears Ears National Monument begins.

II. THE ANTIQUITIES ACT

The Antiquities Act of 1906 is a succinct but powerful piece of legislation.¹⁶ Its passage marked a significant response to the looting that had destroyed and continued to jeopardize archaeological sites throughout the Southwestern United States.¹⁷ The law makes it illegal to take archaeological material out of protected sites.¹⁸ But more importantly for the purpose of the Bears Ears National Monument, the Antiquities Act gives the President of the United States, “in the President’s discretion,” authority to proclaim

14. *Id.* at 12–13.

15. *See, e.g.*, Ronald F. Lee, *Beginnings of Public Interest in American Indian Antiquities*, NAT’L PARK SERV., https://www.nps.gov/history/archeology/pubs/lee/Lee_CH1.htm (last visited Feb. 26, 2018).

In general the vandalism committed in this venerable relic of antiquity defies all description . . . All the beams of the old structure are quaintly . . . carved . . . much scroll work terminating them. Most of this was taken away, chipped into uncouth boxes, and sold, to be scattered everywhere. Not content with this, treasure hunters . . . have recklessly and ruthlessly disturbed the abodes of the dead.

Id. (alterations in original).

16. *See* Antiquities Act of 1906, Pub. L. No. 59-209, 34 Stat. 225 (original version codified at 16 U.S.C. §§ 431–433). The statute was then edited and re-codified (with the intent of “conforming” to the original intent of Congress) in 2014. Act of Dec. 19, 2014, Pub. L. No. 113-287, 128 Stat. 3094. The Act was also re-numbered, with the provisions for national monuments—the main focus of this article—now cited as 54 U.S.C. § 320301 (Supp. III 2015). The criminal provisions for injuring or destroying historic objects are now cited as 18 U.S.C. § 1866 (Supp. III 2015).

17. 18 U.S.C. § 1866.

18. *Id.*

monuments for the protection of “historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest that are situated upon the lands owned or controlled by the government of the United States.”¹⁹ This breathtakingly broad grant of power to the executive, however, would seem to be limited by a provision that monuments must be “confined to the smallest area compatible with proper care and management of the objects to be protected.”²⁰ Indeed, some in Congress wanted to restrict the size of monuments to 160 acres or other smaller acreages.²¹

But the first President to wield power under the Antiquities Act was not shy about it. President Theodore Roosevelt famously traveled to the South Rim, looked out over the Grand Canyon, and declared the canyon to be worthy of protection under the Antiquities Act. So he did just that, protecting 800,000 acres.²² Subsequent presidents followed in Roosevelt’s footsteps, courts announced extremely broad presidential discretion, and the Antiquities Act became one of the cornerstones of American conservation law.²³

III. THE ANTIQUITIES ACT, PRESIDENT OBAMA, AND THE SOUTHWESTERN TRIBES

The Act, however, had never been used at the behest, or for the benefit, of tribes. In the early part of the twenty-first century, Diné people, mostly in Utah, came together to address the continuing sense of loss and pain over having been removed from Bears Ears. In 2010, Utah Senator Rob Bennett was beginning work on a bill to resolve contentious public lands issues in Southern Utah. Also, Indian people knew about the Antiquities Act. They formed a nonprofit, Utah Diné Bikéyah (UDB), which instituted a substantial research campaign: developing cultural maps, conducting interviews with elders and other tribal members, bringing in academic experts, and gathering

19. 54 U.S.C. § 320301(a).

20. *Id.* § 320301(b).

21. For a general overview of the legislative history of the Antiquities Act, see Francis P. McManamon, *The Antiquities Act and How Theodore Roosevelt Shaped It*, 31 *GEORGE WRIGHT F.* 324, 329–35 (2014).

22. *See, e.g., id.* at 338–39.

23. The Supreme Court upheld Theodore Roosevelt’s broad discretion in upholding the creation of the Grand Canyon National Monument in *Cameron v. United States*, 252 U.S. 450 (1920), and a District Court Judge similarly rejected challenges to President Franklin Roosevelt’s proclamation of the 220,000-acre Jackson Hole National Monument in Wyoming. *Wyoming v. Franke*, 58 F. Supp. 890, 895–96 (D. Wyo. 1945). Since then, every monument has been upheld. For a summary of antiquities law, see, for example, GEORGE COGGINS, CHARLES WILKINSON, JOHN LESHY & ROBERT FISCHMAN, *FEDERAL PUBLIC LAND AND RESOURCES LAW* 394–401 (7th ed. 2014).

other information to help them determine what the boundaries of a national monument or other protected area should be.²⁴ By 2013, they released their map of a Bears Ears cultural landscape, encompassing 1.9 million acres, and made many public presentations in Utah and Washington, D.C.

President Barack Obama put his own stamp on the Antiquities Act. In his second term, he expressed his desire to protect land that had special meaning to traditionally under-represented or dispossessed peoples. He designated the César Chavez National Monument to honor the Latino leader and farm workers, the Stonewall National Monument to commemorate the LGBT community's struggles, the Belmont-Paul Women's Equality National Monument to celebrate women's efforts to vote and attain equality, and the Birmingham Civil Rights National Monument to remember the history of the Civil Rights Movement.²⁵

With the word out that President Obama might be declaring Indian monuments, Native people saw their chance. However, UDB, while a Native American organization, is a nonprofit, not a tribe or tribal organization.²⁶ In order to get this proposal off on the right track, Indian people and UDB leaders agreed that the tribes should spearhead the effort. Further, there was a better chance to achieve the goal of collaborative management if the proposal was brought forth by tribal entities because of the special relationship between the federal government and Indian tribes.²⁷ To that end, a meeting was called on July 16, 2015 at the Ute Mountain Ute Reservation.²⁸

The full-day meeting of seventy-five to one hundred people proved to be a seminal moment, a spirited launching of a long and complicated public campaign that steadily accelerated and never seemed to let up. The introductions took a good two hours, since Indian people wanted to explain their own cultural and family ties to the Bears Ears landscape and their determination to see it protected. They knew that this might well be the only chance in their lifetimes to achieve full-scale protection. President Obama

24. *Origins of the Proposal*, UTAH DINÉ BIKÉYAH, <http://utahdinebikeyah.org/history/> (last visited Feb. 26, 2018).

25. See Proclamation No. 9567, 82 Fed. Reg. 6167 (Jan. 12, 2017); Proclamation No. 9465, 81 Fed. Reg. 42,215 (June 24, 2016); Proclamation No. 9423, 81 Fed. Reg. 22,503 (Apr. 12, 2016); Proclamation No. 8884, 77 Fed. Reg. 62,413 (Oct. 8, 2012).

26. *Our Mission & Vision*, UTAH DINÉ BIKÉYAH, <http://utahdinebikeyah.org/mission-and-vision/> (last visited Feb. 26, 2018).

27. See *Origins of the Proposal*, *supra* note 24.

28. See BEARS EARS PROPOSAL, *supra* note 6, at 17 (discussing the Intertribal Meeting to Discuss Proposal to President Obama for Creation of Bears Ears National Monument in Towaoc, Colorado held from July 15 to 17).

was widely regarded as one of the greatest presidents for Indian people ever.²⁹ They trusted him, were confident that he would give them full and fair consideration, and knew that his idea of dedicating monuments to dispossessed peoples was a matter that touched his heart. In addition to making necessary decisions that day, there were many times when people just poured out their reverence for this cultural landscape. Malcolm Lehi, Ute Mountain Ute, articulated a sentiment that many people affirmed over the course of the day: “At Bears Ears we can hear the voices of our ancestors in every canyon and on every mesa top.”³⁰

At that meeting, those in attendance voted to form an intertribal organization of five tribes with especially strong ties to the Bears Ears region: the Navajo, Hopi, Zuni, Northern Ute, and Ute Mountain Ute Tribes.³¹ The board was composed of one member from each of the five tribes and Alfred Lomahquahu (Hopi) and Eric Descheenie (Navajo) were named co-chairs.³² This newly established Bears Ears Inter-Tribal Coalition then set the lofty goal of writing a compelling, comprehensive, proposal to President Obama for the proclamation of a Bears Ears National Monument, to be presented to the President by October 15, 2015.³³

By late afternoon, realizing that October 15 would come quickly, the group turned its attention to planning for the preparation of the proposal to President Obama. Speakers emphasized the importance of having a first-rate document. One person said “let’s make it the best monument proclamation there has ever been.” Others urged that it not be legalistic and technical, that it have heart. Several people emphasized that the Indian voice and Native culture should be fully integrated into the document. There was agreement that there would need to be several drafts so that changes could be freely made and reviewed.³⁴

The participants set out a schedule of five meetings to develop the proposal. They would hold all-day meetings on every other Saturday in August and September 2015. That would leave time to do final editing and attend to other details in early October. The first meeting, in early August, would be dedicated to co-management. The group recognized that the term

29. See Editorial, *Candidate Obama Kept His Promise to Native Americans*, N.Y. TIMES (Sept. 30, 2016), <https://www.nytimes.com/2016/09/30/opinion/candidate-obama-kept-his-promise-to-native-americans.html>.

30. Malcolm Lehi, Ute Mountain Ute, Intertribal Meeting to Discuss Proposal to President Obama for Creation of Bears Ears National Monument in Towaoc, Colorado (July 16, 2015).

31. BEARS EARS PROPOSAL, *supra* note 6, at 9.

32. *Id.* at 9, 18.

33. *Id.* at 9.

34. *Id.*

“co-management” is ambiguous and can have many different meanings. Many people expressed that they had no clear idea of what it meant and wanted to be sure that this was something they wanted to pursue. The other four meetings would be held to go over successive drafts.³⁵

The meeting ended with a reaffirmation that the tribes would submit a truly excellent—and truly *tribal*—proposal by October 15, 2015, and not a day later. And that is just what they did.

IV. THE CONCEPTION OF A ONE-OF-A-KIND MONUMENT: THE PROPOSAL

At the first meeting on preparing the proposal, and on the general subject of co-management, the participants—about fifty tribal members—made the decision to pursue a true collaborative management relationship between the tribes and the federal agencies. In many contexts, federal agencies are required to *consult* with tribes.³⁶ But too often consultation becomes merely a “box to be checked” that allowed federal agencies to proceed on the projects which they prefer. The tribes wanted a deeper tribal-federal relationship with this monument. They wanted true joint responsibility for the management of the land. They did not want to be advisors, consultants, or have any other title that connoted that their contribution to the management of the monument would be their words alone. Rather, the tribes wanted to have a hand in actual land management decisions.³⁷ In their proposal, the tribes described this relationship as “collaborative management,” a term which they caught the spirit of the relationship better than “co-management.”³⁸

The next meeting, also a full day, was dedicated to reviewing and editing a first draft of the proposal. Coalition Co-Chair Eric Descheenie conducted the meeting. He made it a practice to put each page of the draft, one by one, on a large screen in front of everyone. When people were at first reluctant to make comments on page 1, he announced that he would not be moving on to the second page until he received comments on page 1. He proceeded to do the same thing for all forty pages of the proposal. The comments flew freely. As people offered word changes and shared their experiences, they provided great amounts of material for a second draft. The remaining meetings continued in the same manner and the document was steadily improved.

35. *See id.* at 9–10.

36. *See, e.g.*, INDIAN AFFAIRS EXEC. WORKING GRP. & CONSULTATION & COORDINATION ADVISORY GRP., LIST OF FEDERAL TRIBAL CONSULTATION STATUTES, ORDERS, REGULATIONS, RULES, POLICIES, MANUALS, PROTOCOLS AND GUIDANCE (2009), http://www.achp.gov/docs/fed%20consultation%20authorities%202-09%20ACHP%20version_6-09.pdf.

37. BEARS EARS PROPOSAL, *supra* note 6, at 21.

38. *Id.* at 21–22.

Critically, the process made the final proposal more and more Indian, more authentic. Further, the deep engagement in the drafting process equipped tribal leaders to be confident of their command of the subject matter, a point that was not lost on the many federal officials, state representatives, and members of the public that they would be meeting with in the months to come.

The proposal for the monument was announced by way of a public press conference by five tribal leaders at the National Press Club in Washington D.C.³⁹ Some of the leaders wore traditional attire, while some wore suits, but the authenticity and sincerity of their reasons for wanting this monument pervaded the entire press conference.⁴⁰ No matter what the tribal leaders wore, it was clear that these were people who understood the modern world but were deeply traditional people as well. At the end of the conference, the Washington press corps applauded.⁴¹

V. OPPOSITION FROM UTAH

While the Bears Ears National Monument proposal was being crafted, the United States Senators and Representatives in the Utah Delegation were hard at work on their own plan for how they thought the land should be handled. They claimed that their Public Lands Initiative (PLI) offered many of the same protections as a national monument would, all while taking advantage of the economic potential locked deep beneath the surface of the land.⁴² The PLI proposal, however, tilted sharply toward industrial development and away from land protection and creation of tribal-federal collaborative management. In time, disagreements over how the land should be managed between those who supported Bears Ears and those who supported PLI became contentious.

Nationally, and even in much of Utah, the proposed Bears Ears National Monument had a great deal of support.⁴³ The monument and its connection

39. Bears Ears Inter-Tribal Coal., Press Conference (Oct. 10, 2015), in *10-15-15 National Press Club Press Conference Webcast*, BEARS EARS COALITION (Oct. 10, 2015), http://bearscoalition.org/october_webcast/.

40. *Id.*

41. *Id.*

42. Press Release, Rob Bishop, Congressman, U.S. House of Representatives, Bishop & Chaffetz Introduce Utah Public Lands Initiative (July 15, 2016), <https://robishop.house.gov/media/press-releases/bishop-chaffetz-introduce-utah-public-lands-initiative>.

43. See, e.g., Dustin Carlson, *Bears Ears Monument Would be Good for Fishing and for Utah's Economy*, SALT LAKE LAKE TRIB. (Aug. 7, 2016),

to the tribes it struck a chord with a wide array of people. Conservation organizations agreed to let the tribes take the lead and offered much-appreciated support. Several conservation groups assigned staff members to the Coalition and they produced all manner of valuable work on law, policy, land management, public relations, fundraising, and strategies for approaching the Administration. Prominent outdoor retailers lent their name to the project and helped introduce the proposed monument to a wide audience.⁴⁴

In rural San Juan County of Southeast Utah, where the monument's lands would be situated, the non-Indian people, ever wary of the federal government, opposed the idea of the federal government taking over management of what they saw as their land.⁴⁵ But the Utah Delegation's opposition and anger ran the deepest of all. And, to make matters worse for the monument's proponents, some in the Delegation wielded real power. Congressman Jason Chaffetz was the head of the House Investigative Committee, and Congressman Rob Bishop was the Chair of the House Natural Resources Committee. Orrin Hatch was a respected, senior United States Senator, and Senator Mike Lee was influential as well. Their behavior, as well as that of other officials in the State of Utah, was relentless and loud. Nonetheless, the tribal leaders were willing to enter into negotiations with the Delegation, although they withdrew when it was apparent no reasonable compromise could be made.⁴⁶

Ultimately, the PLI failed in Congress in September 2016.⁴⁷ President Obama, who wanted to give Congress time to act, declared the Bears Ears National Monument on December 28, 2016 in the waning days of his presidency.

<http://archive.sltrib.com/article.php?id=4190954&itype=CMSID>; Stephen Trimble, *The President Did the Right Thing: Bears Ears National Monument*, L.A. TIMES (Dec. 28, 2016), <http://www.latimes.com/opinion/op-ed/la-oe-trimble-bears-ears-national-monument-20161228-story.html>.

44. See, e.g., Patagonia (@patagonia), INSTAGRAM (Dec. 28, 2016), <https://www.instagram.com/p/BOIBQ1eDMJh/?hl=en&taken-by=Patagonia>.

45. See, e.g., Jami Bayles, *Here's What the Locals Really Think About Bears Ears Monument*, SUTHERLAND INST., <https://sutherlandinstitute.org/heres-locals-really-think-bears-ears-monument/> (last visited Feb. 21, 2018).

46. Letter from Alfred Lomahquahu & Eric Descheenie, Co-Chairs, Bears Ears Inter-Tribal Coal., to Hon. Rob Bishop & Hon. Jason Chaffetz, Utah Congressmen, U.S. House of Representatives (Dec. 31, 2015), http://www.bearscoalition.org/wp-content/uploads/2015/12/BEIC_Bishop_Letter_123115.pdf.

47. See Utah Public Lands Initiative Act, H.R. 5780, 114th Cong. (2016).

VI. THE PROCLAMATION: A LAW CONSTRUCTED OF GOOD LAND
MANAGEMENT AND POETRY

As for legal issues, the Proclamation made two large decisions. Responding to the Utah Delegation and mining interests, the Administration reduced the boundaries from the 1.9 million acres proposed by the Coalition to 1.35 million acres. The Proclamation, reflecting an understanding between the Administration and tribal representatives reached after more than a year of discussions, required that the monument decisions would be developed through collaborative management between the federal agencies and a Bears Ears Commission composed of five tribal representatives, one from each tribe.

Further, the tone and tenor of the Proclamation is central to its meaning. The writing is powerful and often lyrical. Far more than any earlier proclamation, this one, because of the tribes' deep involvement in its development, is truly an Indian national monument. Although not explicitly stated, the purpose, best understood, of the Bears Ears National Monument is to honor the land; the tribes, past and present; and the tribes' relationship to the land.

The Proclamation, which spans about ten pages single-spaced and is well worth reading from beginning to end, glows with respect for tribal culture, tribal experience, tribal expertise, and tribal knowledge without ever being romantic. The writing draws the reader in from the start: "Rising from the center of the southeastern Utah landscape and visible from every direction are twin buttes so distinctive that in each of the native languages of the region their name is the same: Hoon'Naqvut, Shash Jáa, Kwiyaqatu Nukavachi, Ansh An Lashokdiwe, or 'Bears Ears.'"⁴⁸ This first sentence of the Proclamation both describes a natural landmark that would traditionally be considered worthy of protection under the Antiquities Act and additionally introduces the idea of honoring and protecting the Native connection to the land.

48. Proclamation No. 9558, 82 Fed. Reg. 1139, 1139 (Dec. 28, 2016).

This theme of connecting the people to the land and the land to the people continues throughout the Proclamation. It describes the link in historical terms:

For hundreds of generations, native peoples lived in the surrounding deep sandstone canyons, desert mesas, and meadow mountaintops, which constitute one of the densest and most significant cultural landscapes in the United States. Abundant rock art, ancient cliff dwellings, ceremonial sites, and countless other artifacts provide an extraordinary archaeological and cultural record that is important to us all, but most notably the land is profoundly sacred to many Native American tribes, including the Ute Mountain Ute Tribe, Navajo Nation, Ute Indian Tribe of the Uintah Ouray, Hopi Nation, and Zuni Tribe.⁴⁹

The text rightly extolls the tribes' long relationship by describing the human history of this Bears Ears area as being "as vibrant and diverse as the ruggedly beautiful landscape" and recognizing that the early trails "carved into steep canyon walls . . . illustrate the early people's ingenuity and perseverance."⁵⁰ The ancient villages still in evidence "allow visitors to marvel at artistry and architecture that have withstood thousands of seasons in this harsh climate."⁵¹

The proclamation also brings the Native nexus to the land into present times:

The area's cultural importance to Native American tribes continues to this day. As they have for generations, these tribes and their members come here for ceremonies and to visit sacred sites. Throughout the region, many landscape features, such as Comb Ridge, the San Juan River, and Cedar Mesa, are closely tied to native stories of creation, danger, protection, and healing. The towering spires in the Valley of the Gods are sacred to the Navajo, representing ancient Navajo warriors frozen in stone.⁵²

The Proclamation, in a profound passage worthy of inclusion with John Muir and Aldo Leopold in the pantheon of public lands philosophy and real-world good practices, also specifically identifies the tribes' traditional

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.* at 1140.

knowledge as a resource to be protected and used in managing the Bears Ears National Monument:

The traditional ecological knowledge amassed by the Native Americans whose ancestors inhabited this region, passed down from generation to generation, offers critical insight into the historic and scientific significance of the area. Such knowledge is, itself, a resource to be protected and used in understanding and managing this landscape sustainably for generations to come.⁵³

In keeping with the respect for the tribes' connection to the place and their knowledge of the land, the Proclamation sets out the framework for collaborative management. The tribe's Proposal to President Obama of October 15th for the monument urged a regime of true joint management.⁵⁴ This would have meant that no decision regarding the land could be made without the approval of both the agencies and the Commission.⁵⁵ Many rounds of discussions ensued, and in the end, the tribes and agency officials reached an understanding that was reflected in the Proclamation. There would be no joint decision making as the tribes initially proposed it, but the tribes would have a truly robust role in management and decision-making that goes far beyond traditional consultation.

The Proclamation emphasizes the importance of comprehensive tribal input and traditional knowledge with forceful language. The presidentially-created Commission was established "to *ensure* that management decisions affecting the monument reflect tribal expertise and traditional historical knowledge."⁵⁶ The Proclamation also recognized "the importance of tribal participation" to care and manage the monument;⁵⁷ provided that the "Secretaries shall *meaningfully engage* the Commission" in planning and management;⁵⁸ and granted broad authority to the Commission to "effectively partner" with the agencies.⁵⁹ To assure careful consideration of tribal

53. *Id.*

54. BEARS EARS PROPOSAL, *supra* note 6, at 28–34.

55. The Proposal acknowledged that, while broad authority may be delegated to non-federal entities, "final reviewing authority" must rest with the federal agency. See, the leading case, *National Parks and Conservation Association v. Stanton*, 54 F. Supp. 2d 7, 18 (D.D.C. 1999) and additional authority at BEARS EARS PROPOSAL, *supra* note 6, at 26–27. Accordingly, the tribes' proposal provided that the relevant Secretary could break any ties. BEARS EARS PROPOSAL, *supra* note 6, at 22.

56. Proclamation No. 9558, 82 Fed. Reg. 1139, 1144 (Dec. 28, 2016) (emphasis added).

57. *Id.*

58. *Id.* (emphasis added).

59. *Id.*

suggestions, agencies must provide a “written explanation of their reasoning” if they decide to reject any Commission recommendations.

As a central part of their role in collaborative management, the Commissioners, with broad support among their tribes, are laying plans for a Bears Ears Traditional Knowledge Institute. Collaborative management recognizes that western science has many values but understands also that broader and better results can be achieved by meshing it with traditional knowledge built upon Native cultural values. Over the past few decades, interest in traditional knowledge has steadily built in American land agencies and internationally as well.⁶⁰ Traditional knowledge is derived from the sturdy foundation of data derived from keen observation carried out and passed down over hundreds, even thousands, of years. It also consists of traditional stories about events, people, and the land. It represents another way of knowing the landscape. Traditional knowledge is invaluable in places where it remains intact—places such as Bears Ears. This Institute can allow excellent scholars to measure, over time, whether and how much traditional knowledge has affected land management decisions at the Bears Ears National Monument. It will be a place for the public to interact and be exposed to a broader vision of land management. This world-class Institute would build upon the widespread interest in indigenous traditional knowledge and host important gatherings of western scientists and traditional knowledge experts from many nations.

VII. CONCLUSION

President Barack Obama displayed vision and courage in proclaiming a national monument of this size and directing it to be operated under a regime whose time had come—collaborative management. There is little doubt, based on a mature body of case law recognizing extraordinarily broad presidential authority to create national monuments, that he had the authority to take such actions.

60. See, e.g., TRADITIONAL ECOLOGICAL KNOWLEDGE: CONCEPTS AND CASES (Julian T. Inglis ed., 1993) (collecting case studies on the uses of traditional ecological knowledge globally); Symma Finn, Mose Herne & Dorothy Castille, *The Value of Traditional Ecological Knowledge for the Environmental Health Sciences and Biomedical Research*, ENVTL. HEALTH PERSP., Aug. 29, 2017, at 1, https://ehp.niehs.nih.gov/wp-content/uploads/2017/08/EHP858.alt_.pdf; Catherin Gagnon & Dominique Berteaux, *Integrating Traditional Ecological Knowledge and Ecological Science A Question of Scale*, 14 ECOLOGY & SOC'Y, no. 2, 2009, <https://www.ecologyandsociety.org/vol14/iss2/art19/>; Nicolas Houde, *The Six Faces of Traditional Knowledge: Challenges and Opportunities for Canadian Co-Management Arrangements*, 12 ECOLOGY & SOC'Y, no. 2, 2007, <http://www.ecologyandsociety.org/vol12/iss2/art34/>.

At this moment, there is a cloud over the Bears Ears National Monument. As for the President's likely action, a significant reduction of the monument, the text of the Antiquities Act and existing principles of federal public land law indicate that he lacks such authority. There is no law directly on point simply because no previous President has attempted to tear apart the national monument system, a foundation stone of American conservation law and policy. As I have indicated, my best assessment is that the courts will strike his executive order down.

Let us hope that is the result. Then we and many beyond us can begin a full-scale celebration of, and lasting commitment to, the rare and exhilarating promise of the Bears Ears National Monument.