

University of Colorado Law School

## Colorado Law Scholarly Commons

---

Articles

Colorado Law Faculty Scholarship

---

2018

### Public Lands, Conservation, and the Possibility of Justice

Sarah Krakoff

*University of Colorado Law School*

Follow this and additional works at: <https://scholar.law.colorado.edu/articles>



Part of the [Indian and Aboriginal Law Commons](#), [Law and Race Commons](#), [Legal History Commons](#), and the [Natural Resources Law Commons](#)

---

#### Citation Information

Sarah Krakoff, *Public Lands, Conservation, and the Possibility of Justice*, 53 HARV. C.R.-C.L. L. REV. 213 (2018), available at <https://scholar.law.colorado.edu/articles/1174>.

#### Copyright Statement

Copyright protected. Use of materials from this collection beyond the exceptions provided for in the Fair Use and Educational Use clauses of the U.S. Copyright Law may violate federal law. Permission to publish or reproduce is required.

This Article is brought to you for free and open access by the Colorado Law Faculty Scholarship at Colorado Law Scholarly Commons. It has been accepted for inclusion in Articles by an authorized administrator of Colorado Law Scholarly Commons. For more information, please contact [jane.thompson@colorado.edu](mailto:jane.thompson@colorado.edu).

# Public Lands, Conservation, and the Possibility of Justice

---

*Sarah Krakoff\**

## I. INTRODUCTION

The Bears Ears region includes narrow canyons that wind their way to the Colorado River, wild sandstone uplifts and towers, and troves of ancient Puebloan ruins. President Obama proclaimed Bears Ears as a National Monument on December 28, 2016 pursuant to his authority under the Antiquities Act, which authorizes the President to create monuments on federal public lands to protect objects of historic or scientific interest.<sup>1</sup> The Monument's 1.35 million acres lie in the heart of Utah's dramatic red rock country, where the forces of water and wind turn cliff walls into natural works of art. Canyonlands and Arches National Parks lie to the north and the eerie blue waters of Lake Powell to the south. Today, the human population is sparse, and reflects the different waves of migration to this parched corner of the world—Utes, Paiutes, Navajos, Mormons, and white hippy/bohemians each lay claim to parts of the neighboring small towns.<sup>2</sup> But not too long ago, the region was solely populated by the indigenous ancestors of American Indian Tribes.<sup>3</sup>

---

\* Raphael J. Moses Professor of Law, University of Colorado Law School. I am grateful to Shelby Krantz, Makenzi Galvan, and Hillary Hammond for excellent research assistance, and to Kristen Carpenter, Angela Riley and all of the participants in the Boulder Climate Change Law & Policy Works-in-Progress Symposium, August, 2017, for their insightful comments and questions.

<sup>1</sup> Proclamation No. 9558, 82 Fed. Reg. 1139, 1143 (Dec. 28, 2016).

<sup>2</sup> Bears Ears National Monument is located in southeastern Utah, inside the boundaries of San Juan County. San Juan County's population is 46.9% white and 49.9% American Indian. See *Quick Facts: San Juan County*, U.S. CENSUS BUREAU (July 1, 2016), <https://www.census.gov/quickfacts/table/PST045216/49037> [<https://perma.cc/6TKF-DJE3>]. In 2010, 44% of San Juan County residents identified as Mormon (members of the Church of Latter Day Saints). See *County Membership Report: San Juan County, Utah*, THE ASSOCIATION OF RELIGIOUS DATA ARCHIVES, [http://www.thearda.com/rcms2010/r/c/49/rcms2010\\_49037\\_county\\_name\\_2010.asp](http://www.thearda.com/rcms2010/r/c/49/rcms2010_49037_county_name_2010.asp) [<https://perma.cc/MY5B-HRH3>]. The nearest towns are Moab (which is in Grand County), Monticello, Blanding, Bluff, White Mesa, and Mexican Hat. White Mesa is on the White Mesa Ute Reservation, which is affiliated with the Ute Mountain Ute Tribe. The towns of Blanding and Monticello are predominately Mormon, whereas Bluff (population 350 or so) has a mix of mostly non-Mormon whites, including artists, outdoor guides, and others who moved to the area after the decline in uranium mining, which almost depopulated Bluff. Southern San Juan County borders the Navajo Nation, and most of the American Indian population is Navajo, with the rest composed largely of Utes from White Mesa.

<sup>3</sup> In this Article, I use the terms "American Indian Tribe," and "Native Nation" interchangeably. Likewise for the terms "indigenous," "Native American," and "Indian." "Native Nation" is the preferred contemporary term for indigenous political sovereigns, but "American Indian Tribe" is firmly entrenched in legal documents and vocabulary, and at times has distinct legal meaning.

Like all national monuments, Bears Ears contains a surfeit of “historic and prehistoric structures, and other objects of historic or scientific interest.”<sup>4</sup> Unlike every other monument since the passage of the Antiquities Act, however, Bears Ears was proposed by a coalition of Tribes. The Bears Ears Inter-Tribal Coalition, which submitted the tribally-led proposal to protect Bears Ears, included representatives from the Hopi Tribe, Navajo Nation, Ute Mountain Ute, Uintah and Ouray Ute, and Zuni tribal governments.<sup>5</sup> Each of these Native Nations has historic ties to Bear Ears, and their members today engage in cultural, religious, and subsistence practices throughout the dramatic landscape.<sup>6</sup> The Bears Ears Proclamation recognizes these affiliations and gives the five Tribes a unique role in managing the Monument.<sup>7</sup> It establishes a “Bears Ears Commission” composed of representatives from each Tribe, which provides “guidance and recommendations on the development and implementation of management plans and on management of the monument.”<sup>8</sup> In addition, the Proclamation repeatedly recognizes the Tribes’ traditional knowledge of the area, and the importance of that knowledge for protecting the landscape and its inhabitants, human and otherwise.<sup>9</sup>

Historically, the Antiquities Act played a very different role in the lives of Native people. The Act, signed into law by President Theodore Roosevelt in 1906,<sup>10</sup> was motivated in large part by concerns that homesteaders, looters, and private collectors were plundering ancient Puebloan sites in the Southwest.<sup>11</sup> These antiquities—the heritage of Native peoples—were pro-

<sup>4</sup> Antiquities Act of 1906, Pub. L. No. 209, 34 Stat. 225, codified as amended at 54 U.S.C. § 320301(a) (2014).

<sup>5</sup> *See BEARS EARS INTER-TRIBAL COALITION, PROPOSAL TO PRESIDENT BARACK OBAMA FOR THE CREATION OF BEARS EARS NATIONAL MONUMENT* (2015).

<sup>6</sup> *See* Interview with James Enote, Executive Director, A:shiwi A:wana Museum and Heritage Center (June 23, 2017).

<sup>7</sup> Proclamation No. 9558, 82 Fed. Reg. at 1144 (The Bears Commission “shall consist of one elected officer each from the Hopi Nation, Navajo Nation, Ute Mountain Ute Tribe, Ute Indian Tribe of the Uintah and Ouray, and Zuni Tribe, designated by the officers’ of the respective Tribes.”).

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> RONALD F. LEE, *Chapter 1: Beginnings of Public Interest in American Indian Antiquities*, in *THE STORY OF THE ANTIQUITIES ACT* (Electronic Ed., Nat’l Park Serv. 2001) (1970) [hereinafter LEE, *Ch. 1*], [https://www.nps.gov/archeology/pubs/lee/Lee\\_CH1.htm](https://www.nps.gov/archeology/pubs/lee/Lee_CH1.htm) [https://perma.cc/DVW8-JTSJ].

<sup>11</sup> *See* RONALD F. LEE, *Chapter 4: Vandalism and Commercialism of Antiquities, 1890-1906*, in *THE STORY OF THE ANTIQUITIES ACT*, *supra* note 10 [hereinafter LEE, *Ch. 4*], [https://www.nps.gov/archeology/pubs/lee/Lee\\_CH4.htm](https://www.nps.gov/archeology/pubs/lee/Lee_CH4.htm) [https://perma.cc/YD4N-4SMG]; *see also* RONALD F. LEE, *Chapter 3: Growth of Interest in American Indian Antiquities, 1889-1906*, in *THE STORY OF THE ANTIQUITIES ACT*, *supra* note 10 [hereinafter LEE, *Ch. 3*], [https://www.nps.gov/archeology/pubs/lee/Lee\\_CH3.htm](https://www.nps.gov/archeology/pubs/lee/Lee_CH3.htm) [https://perma.cc/E2TA-VRTD] (“Public and scholarly interest in American Indian antiquities grew rapidly after 1889. . . . Published reports of new archeological discoveries further aroused public interest . . .”). These included books about Canyon de Chelly and numerous others, all describing ancient Puebloan ruins in and around the four corners and the Southwest. *See* LEE, *Ch. 3, supra*. While these sites and ruins provided the initial impetus for the Antiquities Act, it is important to note that the Act’s passage included support by conservation proponents who lobbied for broad language to allow for landscape-scale protection. *See* RONALD F. LEE, *Chapter 6: The Antiquities Act, 1900-06*, in

tected often at the expense of Native American access to the lands that contained them.<sup>12</sup> Other conservation laws of the time had similar effects; they eliminated indigenous presence in order to preserve landscapes for non-Indians.<sup>13</sup> Forest reserves, national parks, and national monuments were designated on tribal lands, and indigenous people were driven out by the project of conservation, just as they were by the forces of privatization and extraction.<sup>14</sup> The dawn of conservation also coincided with federal Indian policies of “Allotment and Assimilation,” which winnowed the tribal land base and aimed to destroy Tribes’ cultures and political structures.<sup>15</sup> Together, conservation law and American Indian law functioned to dispossess Tribes of their lands and cultures in order to settle and conserve the land for others. Conservation laws thus fit into the larger story of “Indian appropriation,” which legal scholars Angela Riley and Kristen Carpenter describe as “the process by which the U.S. legal system . . . historically facilitated and normalized the taking of all things Indian for others’ use, from lands and sacred objects, to bodies and identities.”<sup>16</sup>

This dark side of our conservation history is seldom discussed in conventional accounts of environmental law-making, which typically embrace a narrative of moral progress from policies that exploited natural resources to those that protected and preserved them.<sup>17</sup> Current debates about public land status also fail to account for indigenous voices, highlighting instead two opposed and seemingly mutually exclusive communities: (non-indigenous) locals who derive livelihood and economic benefit from the land, and outsid-

---

THE STORY OF THE ANTIQUITIES ACT, *supra* note 10 [hereinafter LEE, *Ch. 6*], [https://www.nps.gov/archeology/pubs/lee/Lee\\_CH6.htm](https://www.nps.gov/archeology/pubs/lee/Lee_CH6.htm) [<https://perma.cc/2MP8-E2KC>]. The Act’s final language reflects both concerns, allowing the President to protect “historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest.” 54 U.S.C. § 320301(a).

<sup>12</sup> See generally STEPHEN HIRST, *I AM THE GRAND CANYON: THE STORY OF THE HAVASUPAI PEOPLE* (2006); ROBERT H. KELLER & MICHAEL F. TUREK, *AMERICAN INDIANS & NATIONAL PARKS* 32–38 (1998) (describing how designation and enlargement of Mesa Verde National Park took lands from the Ute Mountain Ute Tribe); MARK DAVID SPENCE, *DISPOSSESSING THE WILDERNESS: INDIAN REMOVAL AND THE MAKING OF NATIONAL PARKS* (1999).

<sup>13</sup> See HIRST, *supra* note 12, at 73–76 (describing how creation of forest reserves deprived Havasupai of aboriginal lands); *id.* at 81–83 (recounting an encounter between President Theodore Roosevelt and Gswedva, a Havasupai tribal member, in which Roosevelt said that the Havasupai had to move because of plans for a park at Grand Canyon).

<sup>14</sup> See *infra* Sections I.A–B.

<sup>15</sup> See *infra* text accompanying notes 89–102.

<sup>16</sup> Angela R. Riley & Kristen A. Carpenter, *Owning Red: A Theory of Indian (Cultural) Appropriation*, 94 TEX. L. REV. 859, 866 (2016).

<sup>17</sup> See, e.g., RODERICK NASH, *WILDERNESS AND THE AMERICAN MIND* (1967) (formative text for the development of the American wilderness ideal); see also ALDO LEOPOLD, *A SAND COUNTY ALMANAC WITH ESSAYS ON CONSERVATION FROM ROUND RIVER* 237–39 (Random House 1966) (1953). Leopold prefaced his famous argument for a “Land Ethic” with a linear account of humanity’s moral progress. *Id.* For recent sources that explore the links between colonialism, white supremacy, and conservation policy, see MILES A. POWELL, *VANISHING AMERICA* (2016); KARL JACOBY, *CRIMES AGAINST NATURE: SQUATTERS, POACHERS, THIEVES, AND THE HIDDEN HISTORY OF AMERICAN CONSERVATION* 149–51 (2001); MARK DOWIE, *CONSERVATION REFUGEES* (2009); SPENCE, *supra* note 12.

ers who want to protect the land from resource extraction and environmental harm.<sup>18</sup> Both of these accounts omit the views and experiences of Native peoples, and also elide the complicated ways that public lands policies have variously privileged some groups, marginalized others, and rarely tracked clear lines of “local” versus “outsider” beneficiaries.<sup>19</sup>

Bears Ears and other recent monuments constitute a step toward repairing past injustices and reintegrating disenfranchised groups with the landscape.<sup>20</sup> Rather than create islands of nature separate from islands of people, as early conservation laws did, these monuments reflect human connections to the land and prioritize traditionally marginalized communities.<sup>21</sup> The protective aspects of monument designation are achieved through participatory stewardship rather than exclusion.<sup>22</sup> Bears Ears in particular shows that conservation and public land laws can become vehicles for equality and justice, even if they initially served the interests of the politically and economically powerful.

As of this writing, Bears Ears and other National Monuments are at risk.<sup>23</sup> President Trump issued a Proclamation on December 4, 2017 shrinking Bears Ears to 15 percent of its size and dividing it into two small management areas.<sup>24</sup> The account of the Bears Ears’ contested landscape is

<sup>18</sup> See DANIEL J. KEMMIS, *THIS SOVEREIGN LAND* 177–233 (2d ed. 2001).

<sup>19</sup> See JACOBY, *supra* note 17.

<sup>20</sup> See Matt Nykiel, *For the Benefit of All 5* (May 10, 2015) (unpublished paper) (on file with author) (describing President Obama’s pattern of designating national monuments that reflect the nation’s diversity). For example, the press release for the San Gabriel National Monument described the monument’s significance as follows: “For many residents of Los Angeles County—one of the most disadvantaged counties in the country when it comes to access to parks and open space for minorities and children—the San Gabriel Mountains provide the only available large-scale open space.” Press Release, Office of the Press Sec’y, President Obama Designates San Gabriel National Monument (Oct. 10, 2014), <https://obamawhitehouse.archives.gov/the-press-office/2014/10/10/president-obama-designates-san-gabriel-mountains-national-monument> [https://perma.cc/HLU8-MSB8]. Other monuments fitting this priority include: Birmingham Civil Rights National Monument, Caesar E. Chávez National Monument, Charles Young Buffalo Soldiers National Monument, Freedom Riders National Monument, Gold Butte National Monument, Harriet Tubman Underground Railroad National Historic Park, Honouliuli National Monument, Reconstruction Era National Monument, and Stonewall National Monument. Ani Kame’enui, *Monuments Protected Under the Antiquities Act*, NATIONAL PARKS CONSERVATION ASSOCIATION (Jan. 13, 2017), <https://www.npca.org/resources/2658-monuments-protected-under-the-antiquities-act#sm.000094fr6Orc4fr110byn1hvcz4ut> [https://perma.cc/TY9U-YQ72].

<sup>21</sup> See Nykiel, *supra* note 20, at 5.

<sup>22</sup> See Proclamation No. 9558, 82 Fed. Reg. at 1139 (establishing the Bears Ears Commission).

<sup>23</sup> See Presidential Proclamation Modifying Bears Ears National Monument (Dec. 4, 2017); Sec’y of the Interior Ryan Zinke, *Final Report Summarizing Findings of the Review of Designations Under the Antiquities Act* (Aug. 24, 2017) (recommending shrinking Bears Ears and other National Monuments). President Trump and Secretary Zinke’s actions followed President Trump’s Executive Order directing review of all National Monument designations or expansions since 1996 that covered more than 100,000 acres or otherwise lacked “adequate public outreach and coordination with stakeholders.” Exec. Order No. 13792, 82 Fed. Reg. 20429 (April 27, 2017).

<sup>24</sup> See Presidential Proclamation Modifying Bears Ears National Monument, *supra* note 23.

nonetheless worth telling. Its saga explores the intertwined histories of the development of racial attitudes and environmental thought, and fills in an important chapter in the larger story of Indian appropriation.<sup>25</sup> Whether Bears Ears National Monument—a step toward making reparations for the dark side of conservation history—endures or not, it is important to excavate the ways that environmental protection does not, by itself, result in justice and equity. The two goals can and should be compatible, but they are not inevitably so.<sup>26</sup> Indeed, for much of our nation’s history, conservation policies were at best neutral with regard to structural inequalities, and at worst thoroughly implicated in reproducing them.<sup>27</sup> The Tribes that proposed the Bears Ears National Monument made public land laws bend toward equality and justice, and that legacy endures even if the current Bears Ears’ boundaries do not.

To tell this story, Part One will delve into the history of the Antiquities Act and other conservation statutes, exploring their intersections with Indian appropriation and racialized inequality. The point is not to second-guess the retention of public lands by the federal government nor to disparage their management for aesthetic, ecological, and scientific purposes. Rather it is to highlight that in a political economy rooted in structures of inequality, conservation policies (like all other policies) inevitably further inequality unless they deliberately aim to do otherwise. In the United States, structures of inequality include the distinctive racialization of American Indians and other non-white groups.<sup>28</sup> Conservation laws were just as implicated in this as laws promoting privatization of public lands. Part Two will describe Bears Ears National Monument, its import to the five Tribes that proposed it, and the history of achieving its proclamation. This story reveals that public land conservation laws, notwithstanding their history, can be redeemed through indigenous agency and activism. Part Three will consider Bears Ears in the larger context of climate change and other global environmental threats. It will highlight how Bears Ears not only represents an act of local environmental justice, but also a movement toward integrating social justice with

---

<sup>25</sup> Cf. CARL A. ZIMRING, *CLEAN AND WHITE: A HISTORY OF ENVIRONMENTAL RACISM IN THE UNITED STATES* (2015) (examining how constructions of waste and dirt were deployed to consolidate racial hierarchy and white supremacist thinking); Riley & Carpenter, *supra* note 16, at 869 (summarizing theory of Indian appropriation).

<sup>26</sup> See Kate Raworth, *A Safe and Just Space for Humanity: Can We Live Within the Doughnut?*, Oxfam Discussion Paper (Feb. 2012), <https://www.oxfam.org/sites/www.oxfam.org/files/dp-a-safe-and-just-space-for-humanity-130212-en.pdf> [<https://perma.cc/68UQ-6X72>]; Sarah Krakoff, *Sustainability and Justice*, in *RETHINKING SUSTAINABILITY TO MEET THE CLIMATE CHANGE CHALLENGE 1* (Jessica Owley & Keith Hirokawa, eds., 2015).

<sup>27</sup> See JACOBY, *supra* note 17; ZIMRING, *supra* note 25; see also MARK DOWIE, *CONSERVATION REFUGEES: THE HUNDRED YEAR CONFLICT BETWEEN GLOBAL CONSERVATION AND NATIVE PEOPLES 1–22* (2009) (recounting the ruthless eviction of the indigenous people of Yosemite to create the wilderness ideal).

<sup>28</sup> See Sarah Krakoff, *They Were Here First: American Indian Tribes, Race, and the Constitutional Minimum*, 69 *STAN. L. REV.* 491, 543 (2017) (describing how racial formation theory “opened terrain to interrogate how different groups were racialized for different purposes.”).

global environmental protection.<sup>29</sup> It is no accident that Tribes are playing prominent roles in these efforts. In a time of heightened assault on the Earth's resources, with particularly dire consequences for the poor, Tribes and other historically marginalized groups are fighting back with resolve.<sup>30</sup> Bears Ears National Monument—the process of achieving it and the philosophy it embodies—presents the possibility that we can imagine a different way to relate to the Earth and its creatures, and that from time to time we can make the leap from imagination to practice.

## II. LAND CONSERVATION AND AMERICAN IDENTITY

The Antiquities Act was passed in 1906 and signed into law by President Theodore Roosevelt.<sup>31</sup> Its original text comprised just four short paragraphs, the second of which included the proclamation power: The President may, in the President's discretion, declare by public proclamation historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest that are situated on land owned or controlled by the Federal Government to be national monuments. . . .<sup>32</sup> The Act was passed during the heart of the Progressive era, and is similar to other major policy trends of that period. First, it embodies the belief that the federal government should exercise its constitutional powers to conserve and protect resources for the benefit of all.<sup>33</sup> And second, the Act reflected the emergence of expertise as a guiding force in law-making, here in the fields of archeology and anthropology.<sup>34</sup> As such, the Antiquities Act was of a piece with other public lands statutes of its time, including the Forest Service Or-

<sup>29</sup> Encyclical Letter, Pope Francis, *Laudato Si'* of the Holy Father Francis: On Care for Our Common Home (May 24, 2015), [http://w2.vatican.va/content/francesco/en/encyclicals/documents/papa-francesco\\_20150524\\_enciclica-laudato-si.html](http://w2.vatican.va/content/francesco/en/encyclicals/documents/papa-francesco_20150524_enciclica-laudato-si.html) [<https://perma.cc/Q677-T7F9>].

<sup>30</sup> Rob Nixon makes a similar point in his book examining the intertwined effects of colonialism, neoliberalism, and environmental harm on poor communities throughout the world. ROB NIXON, *SLOW VIOLENCE AND THE ENVIRONMENTALISM OF THE POOR* 4 (2011) (“[I]f the neoliberal era has intensified assaults on resources, it has also intensified resistance, whether through isolated site-specific struggles or through activism . . .”).

<sup>31</sup> 54 U.S.C. § 320301. For a thorough history of the Antiquities Act, its legacy, and its legal interpretations, see Mark Squillace, *The Monumental Legacy of the Antiquities Act of 1906*, 37 GA. L. REV. 473 (2003).

<sup>32</sup> 54 U.S.C. § 320301(a).

<sup>33</sup> This understanding of the federal role was sparked by the Gilded Age, and its abuses by the private sector, as well as the dawning recognition that natural resources (timber, oil, and water) are finite and therefore require market controls). See POWELL, *supra* note 17, at 46–47; Francis P. McManamon, *The Foundation for American Public Archaeology, in THE ANTIQUITIES ACT: A CENTURY OF AMERICAN ARCHAEOLOGY, HISTORIC PRESERVATION, AND NATURE CONSERVATION* 153, 164–66 (Harmon, et al., eds. 2006); WALLACE STEGNER, *BEYOND THE HUNDRETH MERIDIAN: JOHN WESLEY POWELL AND THE SECOND OPENING OF THE WEST* 354–56 (1954).

<sup>34</sup> See LEE, *Ch. 1, supra* note 10 (describing the emergence of the fields of ethnology, archeology, and anthropology as key forces in shaping the Antiquities Act); RONALD F. LEE, *Chapter 5: The Temporary Protection of Ruins, in THE STORY OF THE ANTIQUITIES ACT, supra* note 10, [https://www.nps.gov/archeology/pubs/lee/Lee\\_CH5.htm](https://www.nps.gov/archeology/pubs/lee/Lee_CH5.htm) [<https://perma.cc/6F47-WYSK>] (“The early 1900’s was a great period for applying scientific management to the

ganic Act<sup>35</sup> and the National Park Service Organic Act.<sup>36</sup> Until this point, the federal government's policies concerning its vast federal land holdings were to dispose of them to states, railroads, miners, and settlers.<sup>37</sup> This prior period, known in public land law circles as the era of disposition, eventually led to severe degradation of range, timber, and mineral resources.<sup>38</sup> With a dawning sense that disposition era laws resulted in the permanent loss of public experiences and resources, federal policy inched toward conservation.

The Act also came at a time when American identity was up for grabs in a variety of ways. In 1893, Frederick Jackson Turner famously declared that the American "frontier" no longer existed because the country had been settled from coast to coast.<sup>39</sup> Pressure to relocate people from urban areas to the rural west persisted nonetheless, and the Jeffersonian dream of an agricultural democracy fueled westward migration and settlement.<sup>40</sup> At the same time, in some elite white circles, anxieties increased about the demographics of this spreading populace.<sup>41</sup> Immigrants from countries outside of Northern Europe, Hispanic settlers in the Southwest, and African-Americans fleeing the South all posed threats to that vision of the country's identity.<sup>42</sup> The story of the Antiquities Act and its era is also therefore a story of creating a version of the United States that many wanted to be true, and perceived to be at risk.<sup>43</sup> There were steep costs to that project. These included erasing the presence and identities of Native Americans and other non-white groups,<sup>44</sup>

---

public lands and forest reserves of the West."); see also SAMUEL P. HAYS, *CONSERVATION AND THE GOSPEL OF EFFICIENCY* (1999).

<sup>35</sup> 16 U.S.C. § 473 (1897) (amending Forest Reserve Act, 26 Stat. 1103 (1891), which first authorized presidential withdrawals of forest lands).

<sup>36</sup> 54 U.S.C. § 100101(a) (1916).

<sup>37</sup> See GEORGE COGGINS ET AL., *FEDERAL PUBLIC LANDS AND RESOURCES LAW* 45 (7th ed. 2014).

<sup>38</sup> See *id.* at 58; see also CHARLES F. WILKINSON, *CROSSING THE NEXT MERIDIAN: LAND, WATER, AND THE FUTURE OF THE WEST* 18 (1992) (describing the "Great Barbeque" and other abuses of the land toward the end of the nineteenth century).

<sup>39</sup> Frederick Jackson Turner, Address at World's Columbian Exposition in Chicago: Frontier Thesis (July 12, 1893). See also POWELL, *supra* note 17, at 47–48. Recently, historians have challenged Turner's thesis and historiography, calling into question both the myth of the frontier and its supposed demise. See, e.g., PATRICIA NELSON LIMERICK, *LEGACIES OF CONQUEST: THE UNBROKEN PAST OF THE AMERICAN WEST* 20–25 (1987).

<sup>40</sup> See ROY M. ROBBINS, *Horace Greeley: Land Reform and Unemployment, 1837–1862*, *AGRICULTURAL HIST.* VII 18 (1933). For more information on homesteading policies, see STEGNER, *supra* note 33, at 217–23.

<sup>41</sup> See POWELL, *supra* note 17, at 5–6.

<sup>42</sup> See *id.*

<sup>43</sup> See *id.* at 5.

<sup>44</sup> The Progressive Era was full of these seeming contradictions. On one hand, Progressive Era laws and policies promoted a vision of government to protect the people, including fair labor standards, regulation of monopolies, and natural resources conservation. On the other, that vision excluded certain classes and races of people, and policies such as segregation, racialized immigration restrictions, and, as detailed here, the attempted elimination of American Indians as distinct peoples, were also hallmarks of the Progressive Era. See GENDER, CLASS, RACE, AND REFORM IN THE PROGRESSIVE ERA (Noralee Frankel & Nancy S. Dye, eds.) (1991) (examining how gender, race, and class informed various experiences and reform efforts); Michael Klarman, *Race and the Court in the Progressive Era*, 51 *VANDERBILT L. REV.*

and displacing knowledge practices that were incompatible with the scientific aspirations of the emerging social sciences.<sup>45</sup>

A. *The Antiquities Act in Context: Eliminating Indigenous Presence while Saving the Indigenous Past*

Sponsors of the Antiquities Act were concerned about historic and pre-historic ruins and artifacts, particularly ancient Puebloan sites in the Southwest,<sup>46</sup> many of which are similar to the those located throughout the Bears Ears landscape.<sup>47</sup> Public land laws at the time encouraged entry for homesteading and mining, and some settlers exploited the opportunity to lay claim to troves of ruins, potsherds, arrow heads, and other indigenous artifacts.<sup>48</sup> Archeologists, anthropologists, and their fellow travelers became alarmed at what they perceived as the risk to the United States' unique heritage.<sup>49</sup> At the same time, Native Americans themselves were under siege. Archeology and anthropology emerged as disciplines in the United States at the very moment when the country's Indian policies, particularly those of allotment and assimilation, were most aggressively designed to get Tribes off of the land.<sup>50</sup>

The convergence of these trends was not mere coincidence. Federal Indian policies that aimed to eliminate Tribes spurred social scientists to catalogue indigenous languages and cultures on the eve of their supposed disappearance.<sup>51</sup> The context of "vanishing people" also gave American social scientists identities and purposes distinct from their European counterparts.<sup>52</sup> Indigenous ruins and relics provided American archeologists with areas of expertise other than classical and ancient Rome and Greece. For American anthropologists, Native peoples' presumed disappearance pro-

---

881, 888–93 (1998) (describing deterioration of race relations during the Progressive Era, including increases in segregation, lynchings, and anti-immigrant sentiment).

<sup>45</sup> See Riley & Carpenter, *supra* note 16, at 918–19 (describing the displacement of indigenous traditional knowledge as another aspect of Indian appropriation).

<sup>46</sup> See LEE, *Ch. 4, supra* note 11. The Act also protects other "objects of historic or scientific interest," and that language has been interpreted to allow for protection of entire landscapes, the most famous example of which is the mile-deep Grand Canyon. See *Cameron v. United States*, 252 U.S. 450, 455–56 (1920) (upholding President Theodore Roosevelt's 800,000-acre Grand Canyon National Monument Proclamation). The Act's legislative history supports such designations, given that the statute's final language reflected a compromise between archeologists, chiefly concerned with protecting specific sites and ruins, and the Department of the Interior, which advocated for broad authority to withdraw lands for scenic, scientific, and aesthetic purposes. See LEE, *Ch. 6, supra* note 11.

<sup>47</sup> See BEARS EARS INTER-TRIBAL COALITION, *supra* note 5.

<sup>48</sup> LEE, *Ch. 1, supra* note 10 (describing concerns about the pillaging of ruins at Pecos, New Mexico).

<sup>49</sup> See POWELL, *supra* note 17, at 46–47.

<sup>50</sup> See *infra* text at notes 89–91 (describing Allotment and Assimilation policies).

<sup>51</sup> See Robert H. McLaughlin, *The Antiquities Act of 1906: Politics and the Framing of an American Anthropology & Archeology*, 23 OKLA. CITY U. L. REV. 61, 74 (1998).

<sup>52</sup> See POWELL, *supra* note 17, at 47 ("The profession of American anthropology flourished in the late nineteenth century partly as an expression of this desire to preserve a record of supposedly vanishing people.").

vided an urgent mandate: 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.<sup>53</sup>

To a significant extent, the movement that coalesced behind the Antiquities Act embodied these forces and sentiments. This not to say that the proponents of American ethnography were monolithic. Major John Wesley Powell, for example, aspired to learn from the indigenous people he encountered. From his explorations in the Colorado River basin, Powell understood that many distinct Tribes populated the Colorado Plateau region, and that they had created civilizations throughout the landscape.<sup>54</sup> He became particularly close to the Ute people of northern Utah, and learned enough of their language to communicate with other Tribes of the region as well.<sup>55</sup> Others had less knowledge of or concern for indigenous peoples, but wanted to use the example of their past to solidify national narratives about “the achievements of Western science in prevailing over native spiritualism.”<sup>56</sup> And within the archeological and anthropological communities, there was intense debate about how to properly study archeological records.<sup>57</sup> What all of the groups shared, however, was a belief in the inevitability that indigenous peoples would vanish.<sup>58</sup> Preserving their artifacts and history, whether to accurately describe their cultures or to create a more robust account of the United States, gained traction as a result.

The dramatic villages, cliff dwellings, rock art, and artifacts of the Southwest provided the immediate impetus for protective federal legislation. Support for preservation came from local groups of concerned citizens as well as from the increasingly professionalized voices within archaeology and

---

<sup>53</sup> See POWELL, *supra* note 17, at 47–49; McLaughlin, *supra* note 51, at 63; see also LEE, *Ch. 6, supra* note 11 (describing justification for a predecessor bill as including emphasis on “the sharp contrast between the excellent protection afforded antiquities by most European governments and the almost total absence of such protection in the United States”).

<sup>54</sup> See DONALD WORSTER, *A RIVER RUNNING WEST: THE LIFE OF JOHN WESLEY POWELL* 275–76, 285–91 (2002); STEGNER, *supra* note 33 at 40–42, 128–29; see also McLaughlin, *supra* note 51, at 75.

<sup>55</sup> See WORSTER, *supra* note 54, at 150, 214 (noting that Powell’s knowledge of the Ute language made it possible for him to understand Paiute as well).

<sup>56</sup> See McLaughlin, *supra* note 51, at 91.

<sup>57</sup> See *id.* at 82–84 (describing debate between Franz Boas, who held non-hierarchical views about culture and advocated contextual methodologies for interpreting the archeological record, and Powell and his followers, who applied theories of cultural progress and evolution to their findings).

<sup>58</sup> See *id.* at 74–75; WORSTER, *supra* note 54, at 284–85 (summarizing Powell’s views of the fate of American Indians). According to Worster, Powell’s philosophy blended assimilationist views with genuine empathy for American Indians. Powell saw himself as “a realist and harmonizer trying to find a solution that hurt neither Indians nor whites.” WORSTER, *supra* note 54, at 284. These views led, nonetheless, to his conclusion that “the ancient inhabitants of the country must be lost; and we may comfort ourselves with the reflection that they are not destroyed, but are gradually absorbed, and become a part of more civilized communities.” *Id.* at 285 (quoting John Wesley Powell, *An Overland Trip to the Grand Canyon*, 10 SCRIBNER’S MONTHLY 659, 677 (1875)).

anthropology.<sup>59</sup> The language deployed by the local groups further highlights the “vanishing Indian” assumption. The following Petition to Congress from the New England Historic Genealogical Society, for example, at once describes existing Pueblo villages with “ten thousand inhabitants,” and yet bemoans the “extinction” of the inhabitants of these very peoples’ ancestral sites:

That there are in the Territories of New Mexico and Arizona twenty-six towns of the Pueblo Indians . . . in all containing about ten thousand inhabitants; . . . that many of their towns have been abandoned by the decay and extinction of their inhabitants; . . . that the question of the origin of those Pueblos and the age of their decayed cities . . . constitute one of the leading and most interesting problems of the antiquary and historian of the present age; that relic-hunters have carried away, and scattered wide through America and Europe the remains of these extinct towns, thus making their historic study . . . nearly impossible; that these extinct towns, the only monuments or interpreters of these mysterious races, are now daily plundered and destroyed . . .<sup>60</sup>

In their Petition, the authors express dismay at the plundering of these sites—a dismay that the Pueblo people themselves surely shared—but their concern is for the preservation of objects of study, not for the Pueblo who remained alive in their midst. Most strikingly, the authors convey their alarm at losing the “extinct towns,” because they constitute the “only monuments or interpreters of these mysterious races,” without once surmising that the living Pueblo people might be able to unlock the mysteries about their own “origin and history.”<sup>61</sup>

The New England Historic Genealogical Petition was typical of the general concerns of the time. The Southwest was being “discovered” by entrepreneurs, politicians, and archaeologists. Dramatic villages at Chaco Canyon, cliff dwellings at Mesa Verde, and similar sites throughout the four corners region and Colorado Plateau contained treasures that had market value.<sup>62</sup> Settlers and traders, such as the infamous Wetherill brothers, came upon these sites and made quick work of pillaging them.<sup>63</sup> As recounted by historian Ronald Lee, “. . . one December day in 1888, ranchers Richard

<sup>59</sup> See RONALD F. LEE, *Chapter 7: Creating Mesa Verde National Park and Chartering the Archeological Institute, 1906*, in *THE STORY OF THE ANTIQUITIES ACT*, *supra* note 10 [hereinafter Lee, *Ch. 7*], [https://www.nps.gov/archeology/pubs/lee/Lee\\_CH7.htm](https://www.nps.gov/archeology/pubs/lee/Lee_CH7.htm) [<https://perma.cc/JJ9L-GES2>]; KELLER & TUREK, *supra* note 12, at 33–34 (describing efforts by a group of Colorado women, who organized the Cliff Dwelling Association, to advocate for the protection of Mesa Verde in Southwest Colorado).

<sup>60</sup> LEE, *Ch. 1*, *supra* note 10 (quoting New England Historic Genealogical Society, Petition to Congress (May 10, 1882)).

<sup>61</sup> *Id.*

<sup>62</sup> See LEE, *Ch. 4*, *supra* note 11; McLaughlin, *supra* note 51, at 72.

<sup>63</sup> See LEE, *Ch. 4*, *supra* note 11.

Wetherill and Charles Mason discovered Cliff Palace high on a canyon wall in the Mesa Verde area of southwestern Colorado. This silent, spectacular, many-roomed dwelling . . . had survived almost undisturbed for seven centuries.”<sup>64</sup> Later the same day, they saw “another large cliff dwelling they named Spruce Tree House. Neither the walls nor the contents of these ruins were to remain intact for long. Richard Wetherill and his brother, Alfred, were soon digging in the rooms.”<sup>65</sup> Shortly thereafter, they were joined by three additional brothers, and together they excavated “large quantities of decorated pottery, curious implements of stone, bone, and wood, ancient skulls, and other intriguing objects.”<sup>66</sup> The Wetherill brothers eventually sold part of their diggings to the Historical Society of Colorado “but kept a still larger collection.”<sup>67</sup> Privatization of public lands had a secondary and apparently unintended effect—that of putting the Nation’s heritage up for sale.<sup>68</sup>

Other collectors soon followed the Wetherills.<sup>69</sup> With increasing frequency, they filed fraudulent homestead claims on public domain lands where ruins were located.<sup>70</sup> In the Hovenweep area, the site of a spectacular ancient Puebloan village in southern Utah, a concerned researcher reported that “Cattlemen, ranchmen, rural picknickers, and professional collectors have turned the ground well over and have taken out much pottery, breaking more, and strewing the ground with many crumbling stones.”<sup>71</sup> According to Lee, the result of all of this activity “was a rush on prehistoric ruins of the Southwest that went on, largely unchecked, until about 1904.”<sup>72</sup> Prominent archeologists from various quarters converged to advocate for “wise legislation to prevent this vandalism . . . and good science to put all excavation of ruins in trained hands.”<sup>73</sup>

The American Indian Tribes of the Southwest had virtually no voice in that effort. The very people whose ancestors were excavated and whose material heritage was plundered, stolen, and sold were either not consulted or overruled.<sup>74</sup> The effort to preserve Mesa Verde is a prime example. Much of

---

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> *See id.*; McLaughlin, *supra* note 51, at 72.

<sup>69</sup> *See* LEE, *Ch. 4, supra* note 11.

<sup>70</sup> *Id.*

<sup>71</sup> *Id.* (quoting T. Mitchell Prudden, *The Prehistoric Ruins of the San Juan Watershed in Utah, Arizona, Colorado, and New Mexico*, AM. ANTHROPOLOGIST 224, 237 (1903)).

<sup>72</sup> *Id.*

<sup>73</sup> *Id.* (quoting J. Walter Fewkes, *Two Ruins Recently Discovered in the Red Rock Country, Arizona*, AMERICAN ANTHROPOLOGIST 263, 320 (1889)).

<sup>74</sup> *See* McLaughlin, *supra* note 51, at 69 (noting the “absence of Native American voice in the language of the Act and the Act’s emphasis on the scientific value of the archaeological record to the exclusion of alternative or competing systems of valuation, culturally specific systems with religious spiritual and historic dimensions of their own”). Ronald F. Lee’s thorough and detailed history of the Antiquities Act makes the same point through omission; there is no mention whatsoever of tribal participation or consideration of tribal values in the period leading to the Act’s passage. *See generally* RONALD F. LEE, *THE STORY OF THE ANTIQUITIES*

the land that now comprises Mesa Verde National Park was Ute tribal territory, and was obtained by the federal government despite persistent Ute objections.<sup>75</sup> Congress passed legislation creating Mesa Verde National Park in 1906, within weeks of the Antiquities Act and in response to the same concerns about indigenous sites.<sup>76</sup> The ruins that the Wetherill brothers encountered were vulnerable, and local and national groups converged to support protective legislation.<sup>77</sup> Yet a significant number of the most spectacular cliff dwellings were on Ute tribal land.<sup>78</sup> Initially, a group of Colorado women, who later organized as the Cliff Dwellers Association, attempted to negotiate a lease agreement with Ute tribal leaders Ignacio and Acowitz.<sup>79</sup> Ignacio and Acowitz rejected their offer, and the Secretary of the Interior vetoed subsequent attempts to negotiate a private lease.<sup>80</sup> Unable to obtain Ute agreement on their terms, the Cliff Dwellers Association joined forces with other Antiquities Act proponents to advocate for legislation designating the land as a national park.<sup>81</sup> The proposed Mesa Verde National Park included 42,000 acres of Indian land, but due to a faulty survey, failed to include most of the ruins.<sup>82</sup> An amendment to the bill therefore added all ruins located on unpatented lands within five miles of the park boundary, resulting in an additional 175,000 acres, much of it Ute lands.<sup>83</sup> Even that proved insufficient; a subsequent survey revealed that many cliff dwellings still remained on Ute lands outside of the Park.<sup>84</sup>

Despite intense pressure, Ute leaders remained steadfast in their refusal to trade the cliff dwelling sites for lands on Ute Mountain. When pressed by federal negotiators, Ute representatives Nathan Wing and Mariano challenged the legitimacy of the trade, asserting that the Ute Mountain lands were already within their reservation boundaries.<sup>85</sup> In the end, federal officials gave the Utes no choice. They threatened that if the Utes did not agree to the trade, the federal government would simply take the land for the park

---

ACT, *supra* note 10, <https://www.nps.gov/archeology/pubs/lee/index.htm> [<https://perma.cc/5TET-CHWH>]; *see also* Joe E. Watkins, *The Antiquities Act at One Hundred Years: A Native American Perspective*, in *THE ANTIQUITIES ACT: A CENTURY OF AMERICAN ARCHAEOLOGY, HISTORIC PRESERVATION, AND NATURE CONSERVATION* 187, 192 (Harmon, et al., eds., 2006) (“[B]y failing to take into consideration any interests American Indians might have had in protecting their own unwritten history and material culture from appropriation . . . the law bypassed Indians as well.”); *see also* KELLER & TUREK, *supra* note 12, at 34–38.

<sup>75</sup> *See* KELLER & TUREK, *supra* note 12, at 34–38 (describing process leading up to designation of Mesa Verde National Park, which included 42,000 acres of Ute tribal land without obtaining the Utes’ consent).

<sup>76</sup> *See id.* at 34.

<sup>77</sup> *See id.*; *see also* LEE, *Ch. 4, supra* note 11; LEE, *Ch. 7, supra* note 59.

<sup>78</sup> *See* KELLER & TUREK, *supra* note 12, at 34.

<sup>79</sup> *See id.* at 33; LEE, *Ch. 7, supra* note 59.

<sup>80</sup> KELLER & TUREK, *supra* note 12, at 33–34.

<sup>81</sup> *Id.*; LEE, *Ch. 7, supra* note 59.

<sup>82</sup> KELLER & TUREK, *supra*, note 12, at 33–34; LEE, *Ch. 7, supra* note 59.

<sup>83</sup> KELLER & TUREK, *supra* note 12, at 34; LEE, *Ch. 7, supra* note 59.

<sup>84</sup> KELLER & TUREK, *supra* note 12, at 34–35.

<sup>85</sup> *Id.* at 36–37.

regardless.<sup>86</sup> Once again, the federal government's survey was inaccurate, and the legislation that memorialized the supposed trade included an additional 1,320 acres of Ute land, resulting in a total transfer of 11,320 acres.<sup>87</sup> In the end, Wing and Mariano proved to be correct; the BIA conducted a subsequent survey showing that the Ute Mountain lands were already within the Utes' reservation. The Utes, in particular the Weeminuche Band, who today comprise the Ute Mountain Ute Tribe (one of the proponents of Bears Ears and member of the Bears Ears Inter-Tribal Coalition), had been forced to accept a trade for lands that were already theirs.<sup>88</sup>

The Utes' story is not atypical. During this same time period, Tribes everywhere were under assault to abdicate their lands, give up their cultures, and disappear as distinct peoples and governments. Historian Ronald Lee dates the timeframe during which the Antiquities Act was initiated and ultimately passed as 1879-1906.<sup>89</sup> Those years are encompassed within the broader timeframe comprising the federal Indian law period known as "Allotment and Assimilation," which dates from roughly 1871-1928.<sup>90</sup> The legislative centerpiece of the Allotment period was the General Allotment Act (or Dawes Act, after its sponsor Senator Henry Dawes of Massachusetts,) which authorized the president to allot Indian reservations to individual Indians or heads of household.<sup>91</sup> After allotments were issued, the remaining tribal lands could be declared "surplus" and opened to application of homestead, mining, or other disposition-era laws.<sup>92</sup> At the close of the allotment era, tribal landholdings had shrunk from a total of 138 million acres to 48 million, a loss of nearly two-thirds of the tribal land base.<sup>93</sup> Assimilation policies, aimed likewise at converting Indians into yeoman farmers or laborers, removed Indian children from their homes and educated them in board-

---

<sup>86</sup> See *id.* at 37.

<sup>87</sup> See *id.* at 38.

<sup>88</sup> See *id.* at 40.

<sup>89</sup> LEE, *Ch. 1, supra* note 10.

<sup>90</sup> See COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 1.04 (Nell Jessup Newton et. al eds., 2012) (dating Allotment and Assimilation period from 1871-1928); *id.* § 16.03(2)(a), at 1072 (describing Commissioner of Indian Affairs's "systematic effort" to persuade Tribes to accept allotment beginning in 1854); see also VINE DELORIA, JR. & CLIFFORD M. LYTLE, AMERICAN INDIANS, AMERICAN JUSTICE 8 (1983) (dating the Allotment and Assimilation period as starting in 1887, with the passage of the Dawes Act). Deloria and Lytle nonetheless acknowledge that allotment policies had long predated 1887, and gained momentum during the middle of the nineteenth century. DELORIA, JR. & LYTLE, *supra*, at 8 (describing allotment provisions in 1854 treaty with the Omaha and similar approaches in treaties with the plains Tribes in the late 1860s).

<sup>91</sup> 25 U.S.C. § 331 (repealed 2000).

<sup>92</sup> See Judith Royster, *The Legacy of Allotment*, 27 ARIZ. ST. L. J. 1, 29-43 (1995) (discussing § 5 of General Allotment Act, codified as amended at 25 U.S.C. § 348, which authorized opening reservation lands that had not been allotted).

<sup>93</sup> COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 90, § 1.04, at 73 (citing to Office of Indian Affairs, U.S. Department of the Interior, 10 Report on Land Planning 6 (GPO 1935)).

ing schools where their languages, cultures, and dress were forbidden.<sup>94</sup> Other policies took aim at reservation life, outlawing tribal dances and other cultural activities through federal law-and-order codes.<sup>95</sup>

President Theodore Roosevelt, champion of conservation and signatory of the Antiquities Act, was a full-throated proponent of allotment and assimilation policies. In a message to Congress in 1901, he described the Dawes Act as “a mighty pulverizing engine to break up the tribal mass.”<sup>96</sup> In the same message, President Roosevelt extolled the virtues of the nation’s forest reserves, and the new federal policy of retaining those lands and managing them for the purposes of preserving the watershed, wildlife, and flora, including but not limited to trees.<sup>97</sup> Conservation included retention of lands held for the benefit of the public (by the federal government,) and yet disposition of lands held collectively by Tribes.

Tribes in the Southwest, the heart of antiquities-preservation fervor, were under very specific forms of pressure to abandon their land bases and traditions to make way for non-Indian settlement. Allotment statutes did not affect Southwest Tribes as much as those in other regions, probably because non-Indians came later to this area and extreme aridity made farming a homestead-sized plot impractical.<sup>98</sup> But policies of shrinking the tribal land base and encouraging or coercing assimilation manifested themselves in other ways. For the Tribes of the Colorado River region, the federal government’s strategy was to confine them on reservations, which typically comprised fractions of their aboriginal territory.<sup>99</sup> Pursuant to an 1882 Executive Order, the Havasupai Tribe, whose traditional lands included side canyons of the Grand Canyon as well as forested plateau lands, were confined to 518 acres in a single narrow segment of Havasu Canyon.<sup>100</sup> The Hualapai, Zuni, and Hopi, whose aboriginal lands, trade routes, and ceremonial sites ex-

<sup>94</sup> See Allison M. Dussias, *Ghost Dance and the Holy Ghost: The Echoes of Nineteenth Century Christianization Policy in Twentieth Century Native-American Free Exercise Cases*, 49 STAN. L. REV. 773, 776–87 (1997).

<sup>95</sup> See OFFICE OF INDIAN AFFAIRS, *Rules for Courts of Indian Offenses*, in ANNUAL REPORT OF THE COMMISSIONER OF INDIAN AFFAIRS 29 (1892), <http://images.library.wisc.edu/History/EFacs/CommRep/AnnRep92/reference/history.annrep92.i0003.pdf> [https://perma.cc/3KJC-JEHD] (outlawing traditional dances and ceremonies, such as the Sun Dance, and making it a crime to prevent Indian children from being sent to boarding schools).

<sup>96</sup> President Theodore Roosevelt, President’s First Annual Message to Congress (Dec. 3, 1901), in 35 CONG. REC. 81, 90 (1902).

<sup>97</sup> See *id.* at 85–86.

<sup>98</sup> See COHEN’S HANDBOOK, *supra* note 90, § 16.03(2)(b), at 1073 (“[M]any reservations, particularly in the Southwest, escaped allotment.”). The Southern Ute Indian Tribe, however, was subject to allotment pursuant to the Hunter Act of 1895.

<sup>99</sup> See Sarah Krakoff, *Inextricably Political: Race, Membership, and Tribal Sovereignty*, 87 WASH. L. REV. 1041, 1092–93 (2012) (describing the federal government’s plan to concentrate all the tribes of the lower Colorado onto a single reservation near Parker, Arizona); see also WORSTER, *supra* note 54, at 275–77 (describing plan to divide the Native people of the Nevada/Utah territories “into four groups and concentrating them on four large reservations”).

<sup>100</sup> See JACOBY, *supra* note 17, at 158–59; President Chester A. Arthur, Executive Order of March 31, 1882, reprinted in BUREAU OF INDIAN AFFAIRS, EXECUTIVE ORDERS RELATING TO INDIAN RESERVES, FROM MAY 14, 1855, TO JULY 1, 1902 15 (1902), <http://lcweb2.loc.gov/>

tended throughout the plateau region including in Grand Canyon, experienced similar unilateral and arbitrary line-drawing concerning their reservation boundaries.<sup>101</sup> The Navajo, who today occupy a reservation that spans three states and comprises 17 million acres, were rounded up by the military and confined at Bosque Redondo in New Mexico until they negotiated their Treaty of 1868.<sup>102</sup> The Utes, composed of several bands throughout Utah and Colorado, were gradually coerced onto three small reservations, in derogation of an 1868 Treaty that recognized the western third of Colorado as Ute territory.<sup>103</sup>

During the very period when Southwestern indigenous relics and sites were of utmost concern to proponents of the Antiquities Act, indigenous people of the same region were inconvenient obstacles to white settlement and conservation objectives.<sup>104</sup> As archeologist Joe Watkins concludes, “[i]n some ways, the Antiquities Act of 1906 can be seen to be a continuation of government policies that were aimed at erasing the image of the contemporary American Indian from the landscape in favor of the ‘dead and disappearing culture’ destined to exist only in museums or be engulfed in mainstream America.”<sup>105</sup> The Antiquities Act’s role in “preserving” Indian lands and culture to the detriment of Indians themselves is consistent with the larger story of Indian appropriation throughout federal Indian law,<sup>106</sup> and also reflected in conservation law more generally as discussed below.

### B. *The Dark Side of Conservation Generally: Eugenics, White Supremacy, and Indian Elimination*

Within the early conservation movement, the Antiquities Act did not stand alone in marginalizing indigenous voices. The ironies are perhaps the sharpest in that context, given the Act’s specific concern with preserving aboriginal places and objects. But the connections between policies that excluded Tribes from their lands and resources and those that preserved and

---

service/gdc/scd0001/2012/20120509002ex/20120509002ex.pdf [https://perma.cc/CPH9-Q4F4]; HIRST, *supra* note 12, at 11, 64–65.

<sup>101</sup> See HIRST, *supra* note 12, at 54–58 (describing Hualapai removal and its consequences); Justin B. Richland, *Dignity as (Self-)Determination: Hopi Sovereignty in the Face of US Dispossession*, 41 LAW & SOC. INQUIRY 917, 918, 927–29 (2016) (telling Hopi story of land deprivation and its consequences). The Havasupai story is discussed in greater detail in Section I.B.2., *infra*.

<sup>102</sup> See Navajo Treaty of 1868, 15 Stat. 667; PETER IVERSON, *DINÉ: A HISTORY OF THE NAVAJOS* 62–65 (2002).

<sup>103</sup> See CHARLES WILKINSON, *FIRE ON THE PLATEAU* 127–55 (1999) (recounting history of making and breaking Ute treaties in Colorado). For more on Ute history, see generally JAN PETTIT, *UTES: THE MOUNTAIN PEOPLE* (1982); MARSHALL SPRAGUE, *MASSACRE: THE TRAGEDY AT WHITE RIVER* (1957).

<sup>104</sup> See Watkins, *supra* note 74, at 187–89; KELLER & TUREK, *supra* note 12, at 32–40 (describing displacement of the Weeminuche Band of Utes from Mesa Verde); *id.* at 157–58 (describing effects of protecting the Grand Canyon on the Havasupai).

<sup>105</sup> Watkins, *supra* note 74, at 19.

<sup>106</sup> See Riley & Carpenter, *supra* note 16, at 85–86.

conserved those same places for the “greater good” were widespread.<sup>107</sup> From the beginning of the conservation era in public lands policies, which many date to 1872 when Congress designated Yellowstone National Park, conservation went hand-in-hand with policies that eliminated American Indian presence on the land.<sup>108</sup> In the post-bellum period, white elites grew concerned about the erosion of their status, and identified themselves with vanishing wildlife and wilderness.<sup>109</sup> Racial and class hierarchies underlay many arguments for conservation laws and policies. Regardless of individual conservationists’ personal views on race, which varied, much of the language, tactics, and motivation for conservation laws and policies was imbued with white supremacist ideology. Those connections shaped who participated in the movement and who could not, and still affect how people of color view mainstream conservation groups.<sup>110</sup> Moreover, for Native people, the immediate effects were devastating, resulting in massive land loss and near annihilation of their ways of life.<sup>111</sup>

### 1. *Racialized Thought and Conservation*

Strains of elitism and privilege ran throughout early American conservationist thought. Some of the most important contributors to our understanding of ecology blended hierarchical views of humans into their conservationist ideals. George Perkins Marsh, for example, is widely and rightly recognized as an early champion of ecological thought. A polymath raised in New England who mastered several languages, Marsh authored “Man and Nature,” which was prescient in describing the importance of wetlands and the harms of wildlife extirpation, as well as in exhorting humans to steward, rather than merely exploit, nature’s resources.<sup>112</sup> Marsh’s

---

<sup>107</sup> Utilitarian approaches to resource management were introduced in the late nineteenth and early twentieth centuries, and championed in particular by Gifford Pinchot, founder of the Forest Service whose leadership was promoted by President Theodore Roosevelt. In a letter that became the Forest Service mission statement, Pinchot pronounced that the forests should be managed for the “greatest good for the greatest number over the long run.” See WILKINSON, *supra* note 38, at 128 (quoting Gifford Pinchot, The Pinchot Letter (Feb. 1, 1905), in U.S. DEPT OF AGRIC., FOREST SERV., THE PRINCIPAL LAWS RELATING TO THE ESTABLISHMENT AND ADMINISTRATION OF THE NATIONAL FORESTS AND OTHER FOREST SERVICE ACTIVITIES 67 (1964)).

<sup>108</sup> See generally SPENCE, *supra* note 12.

<sup>109</sup> See POWELL, *supra* note 17, at 5–6; see also ZIMRING, *supra* note 25, at 3 (“Increasing scientific definitions of waste as hazard and of racial categories in the immediate antebellum period established a foundation for later racist constructions that posited that white people were somehow cleaner than non-white people.”).

<sup>110</sup> See generally LAURET SAVOY, TRACE: MEMORY HISTORY, RACE AND THE AMERICAN LANDSCAPE (2015); CAROLYN FINNEY, BLACK FACES, WHITE SPACES: REIMAGING THE RELATIONSHIP OF AFRICAN AMERICANS TO THE GREAT OUTDOORS 25–26 (2014) (drawing connections between early segregation within the conservation movement and whiteness of environmental groups today).

<sup>111</sup> See *infra* Sections I.B.2–3.

<sup>112</sup> See STEWART UDALL, THE QUIET CRISIS 71 (1963) (describing Marsh); see also GEORGE PERKINS MARSH, MAN AND NATURE (1865).

work is included in all canons of American environmental writing, and his detailed descriptions of ecological relationships and the costs of heedless environmental destruction remain relevant today. But Marsh's thinking was also typical of his class and time, and he connected race with the ability to heal the land and make it productive.<sup>113</sup> According to historian Miles Powell, "Marsh shared popular American assumptions that the white race, which he restricted to people of northern European descent, could make the land more fruitful than its Indian occupants."<sup>114</sup> Marsh also linked "landscape health to racial vigor," and "loathed not just the growth of unwholesome cities, but also the influx of Irish Catholics who helped to swell their population."<sup>115</sup> As Powell acknowledges, Marsh "did not base his prescriptions solely on racial concerns. . . . We should certainly applaud Marsh's contributions to raising environmental awareness. But we should also recognize and confront the racist and exclusionary assumptions that permeated his thinking."<sup>116</sup>

Similar assumptions lay behind a great deal of conservationist thought in the late nineteenth and early twentieth centuries. Some of the most influential proponents of species conservation, wilderness protection, and landscape preservation were also eugenicists: followers of the now-defunct "science" of racial purity and improvement.<sup>117</sup> Madison Grant, Fairfield Osborn, and John C. Merriam, prominent conservationists who founded the Save-the-Redwoods League in 1918, were "at the core of the American eugenics movement."<sup>118</sup> Grant, Osborn, and Merriam, as well as President Theodore Roosevelt, subscribed to a belief system that elevated the role of white northern Europeans, demeaned lower-class whites and African-Americans, and bemoaned the inevitable destruction of Native Americans as they succumbed to civilization's seductions.<sup>119</sup> Concerns about preserving the great Redwood trees and other pristine landscapes intertwined with fears of the white race's deterioration. Nature preservation, and access to invigorating activities such as hunting, were promoted as cures for decline brought on by industrialization and immigration.<sup>120</sup> Their version of conservation, in other words, was of a piece with other laws and policies imposing racial and class hierarchies. They protected nature as a proxy for protecting whiteness.

The conservation and preservation policies that emerged from this milieu promoted nature and wilderness preserves devoid of human presence.

<sup>113</sup> POWELL, *supra* note 17, at 39.

<sup>114</sup> *Id.*

<sup>115</sup> *Id.* at 40.

<sup>116</sup> *Id.*

<sup>117</sup> See *id.* at 63–72, 117–18; ALEXANDRA MINNA STERN, *EUGENICS NATION: FAULTS AND FRONTIERS OF BETTER BREEDING IN AMERICA* 120–21 (2005).

<sup>118</sup> STERN, *supra* note 117, at 121.

<sup>119</sup> POWELL, *supra* note 17, at 63–72; 117–18.

<sup>120</sup> See STERN, *supra* note 117, at 32–33 ("[E]ugenicists . . . conceived of the West as a savage frontier where men afflicted by neurasthenia and the deleterious effects of urbanization and industrialization could be restored through mountaineering, bareback riding, and communing with the primeval forest.").

For nature to play its curative and elevating role, it had to be free from the sullyng effects of humanity.<sup>121</sup> In this way, the logic behind the Antiquities Act, policies of Indian removal, and land conservation for parks and wilderness were of a piece. To save a certain version of American heritage—archaeological, environmental, and genealogical—space had to be cleared and set aside.<sup>122</sup> Because these lands were persistently and pervasively occupied by Native Americans, virtually every act of conservation entailed acts of restricting or eliminating American Indian presence.<sup>123</sup>

## 2. *National Parks*

In the mid-nineteenth century, some proponents of the park ideal proposed to include American Indians as park residents. Early conservationists, such as George Catlin and Henry David Thoreau, envisioned parks that would preserve both wildlife and American Indians, the latter as human symbols of a vanishing landscape.<sup>124</sup> Catlin, who became renowned for his western landscape paintings, returned from a trip to the great plains and “lobbied the U.S. Government to establish ‘a magnificent park’ in that region, to be populated by buffalo, elk, and Indians and marketed as a world-class tourist attraction.”<sup>125</sup> According to historian David Brinkley, “Catlin envisioned a ‘nation’s park’ that would contain ‘man and beast, in all the wildness and freshness of nature’s beauty!’”<sup>126</sup> Thoreau, whose ecological writings at Walden Pond remain foundational to the conservation movement, likewise imagined nature preserves for “the bear and panther, and some even

---

<sup>121</sup> See POWELL, *supra* note 17, at 56–59, 67, 76; STERN, *supra* note 117, at 125; SPENCE, *supra* note 12, at 4 (describing late twentieth-century conservationists’ views that Indian use of the landscape was incompatible with views of wilderness “as an uninhabited Eden that should be set aside for the benefit and pleasure of vacationing Americans”).

<sup>122</sup> See *supra* notes 88–102 and accompanying text (describing overlap between history of the Antiquities Act and federal policies of Allotment and Assimilation); see also SPENCE, *supra* note 12, at 4.

<sup>123</sup> The creation of national forests, pursuant to the Act of March 3, 1891, which authorized presidential withdrawals of public domain lands for the creation of forest reserves, were no exception. This paper focuses on National Monuments and National Parks, but intertwined within those stories are often initial designations as forest reserves. See *infra* Section I.B.2.b (recounting the role of forest reserves and effects on the Havasupai). In addition, there are many national forest designations that, standing alone, infringed on tribal rights and territory. See, e.g., Richland, *supra* note 101, at 930 (describing how the creation of San Francisco Mountain Forest Reserve, today Coconino National Forest, deprived Hopi Tribe of sacred lands); Charles F. Wilkinson, *Indian Tribal Rights and the National Forests: The Case of the Aboriginal Lands of the Nez Perce Tribe*, 34 IDAHO L. REV. 435, 435–36, 450 (1998) (recounting history of Nez Perce relinquishment of aboriginal lands which then were reserved as national forests); *United States v. Gemmill*, 535 F.2d 1145, 1148 (9th Cir. 1976) (describing lands taken from the Pit River Indians that were designated as forest reserves).

<sup>124</sup> See POWELL, *supra* note 17, at 58.

<sup>125</sup> DOUGLAS BRINKLEY, *THE WILDERNESS WARRIOR: THEODORE ROOSEVELT AND THE CRUSADE FOR AMERICA* 4 (2009); see also POWELL, *supra* note 17, at 2.

<sup>126</sup> BRINKLEY, *supra* note 125, at 4.

of the hunter race . . . .”<sup>127</sup> Like others of their time, Catlin and Thoreau aligned Native people with wilderness and uncivilized nature, and saw parks as a way to preserve both.<sup>128</sup> Further, similar to the proponents of the Antiquities Act, Catlin and Thoreau believed that American Indians would disappear due to the inevitable march of western civilization, and that the only way to save them would be in parks where they could continue to live in all their “wildness.”<sup>129</sup>

Soon this racialized view of Native people as “the Noble Savage” gave way to another: “Savage,” plain and simple. As the conservation movement gained momentum in the early twentieth century, the ideal of nature devoid of humans became ascendant. To attain that ideal, conservation proponents moved sharply away from proposals to include American Indians in nature preserves.<sup>130</sup> Indeed, as if directly refuting Thoreau and Catlin’s romanticized descriptions of American Indians, John Muir, founder of the Sierra Club and renowned wilderness essayist, expressed the following views about the Yosemite people: “From no point of view that I have found are such debased fellow beings a whit more natural than the glaring tourists we saw that frightened the birds and the squirrels.”<sup>131</sup> To emphasize the point that the Yosemite people were a blight on the otherwise natural landscape, Muir further commented that they “seemed sadly unlike Nature’s neat well-dressed animals . . . the worst thing about them is their uncleanliness . . . nothing truly wild is unclean.”<sup>132</sup> Muir did not dwell on the problem of the Yosemite’s “unclean” presence for long, however. He did not have to because, like almost all others of his time, he assumed they would disappear:

It is when the deer are coming down that the Indians set out on their grand fall hunt. Too lazy to go in to the recesses of the mountains away from the trails, they wait for the deer to come out, and then waylay them. . . . But the Indians are passing away here as everywhere, and their red camps on the mountains are fewer every year.<sup>133</sup>

Muir’s view, not Thoreau’s, became the prevailing one. As articulated by historian Mark David Spence, “uninhabited wilderness had to be created before it could be preserved, and this type of landscape became reified in the first national parks.”<sup>134</sup> Several historians, including Spence, have docu-

<sup>127</sup> *Id.* (quoting Henry David Thoreau, *Chesuncook*, 2 *THE ATLANTIC MONTHLY* 305, 317 (1858)); HENRY DAVID THOREAU, *THE MAINE WOODS* 160 (1864); see also POWELL, *supra* note 17, at 33 (quoting Thoreau, *supra*).

<sup>128</sup> See POWELL, *supra* note 17, at 33, 44.

<sup>129</sup> See *id.*

<sup>130</sup> See generally, SPENCE, *supra* note 12.

<sup>131</sup> PHILIP BURNHAM, *INDIAN COUNTRY, GOD’S COUNTRY* 21 (2000).

<sup>132</sup> *Id.*

<sup>133</sup> JOHN MUIR, *The Animals of the Yosemite*, in *WILDERNESS ESSAYS* 156–57 (Frank Buske, ed., Peregrine Books, 1980) (1838–1914).

<sup>134</sup> SPENCE, *supra* note 12, at 4.

mented the expulsion of Indian tribes from park lands, as well as subsequent restrictions on tribal hunting and gathering activities.<sup>135</sup> While not comprehensive, the following discussion of two prominent national parks highlights the themes of erasing Indian presence and knowledge practices in order to further the dominant society's notions of progress and national identity.

*a. Yellowstone National Park and Blackfeet, Crow, Shoshone, and Bannock*

Yellowstone National Park, established in 1872, included lands previously occupied by Blackfeet, Crow, Shoshone, and Bannock Indians. These tribes had competing claims to lands throughout the Yellowstone plateau, and some of their rights had been acknowledged in the 1851 Treaty of Fort Laramie.<sup>136</sup> In addition, the Nez Perce, led by Chief Joseph, traveled through Yellowstone in efforts to resist forced relocation to a reservation in Idaho.<sup>137</sup> Yet the legislation establishing Yellowstone acknowledged none of these tribes when it declared the area "a public park or pleasure-ing ground for the benefit and enjoyment of the people."<sup>138</sup> Instead, Yellowstone's purpose was to preserve its natural and scientific curiosities, including its unique geothermal features, and to serve "as a unifying national emblem for a nation just emerging from a bloody and divisive Civil War."<sup>139</sup>

Non-Indian visitors to Yellowstone were well aware of Tribes' presence and effects on the land. Early park rangers "discovered abandoned Indian shelters . . . 'in nearly all of the sheltered glens and valleys of the Park.'"<sup>140</sup> Exploration and surveying parties encountered Indian themselves, including groups of Bannock, Shoshone, and Crow, and often followed their trails or employed tribal members as guides.<sup>141</sup> As with so much of early non-Indian exploration, whites depended on local indigenous knowledge of the landscape to get by.<sup>142</sup> Nonetheless, national park boosters "persisted in describing the Yellowstone region as existing in 'primeval solitude.'"<sup>143</sup> Park supporters maintained, in the face of clear evidence, that Indian tribes

<sup>135</sup> See generally KELLER & TUREK, *supra* note 12; SPENCE, *supra* note 12; see also JACOBY, *supra* note 17, at 81–92 (recounting history of Indian expulsions and restrictions at Yellowstone).

<sup>136</sup> POWELL, *supra* note 17, at 58; KELLER & TUREK, *supra* note 12, at 22 ("The unratified Fort Laramie Treaty of 1851 did recognize Blackfeet and Crow claims to the area, but the government extinguished those claims in subsequent treaties.").

<sup>137</sup> See JACOBY, *supra* note 17, at 81–82.

<sup>138</sup> Yellowstone National Park Establishment Act, 17 Stat. 32 (1872).

<sup>139</sup> JACOBY, *supra* note 17, at 82.

<sup>140</sup> *Id.* at 84; see also POWELL, *supra* note 17, at 58 (noting that park managers "saw clear signs of Indian habitation").

<sup>141</sup> See JACOBY, *supra* note 17, at 84.

<sup>142</sup> See *id.*; see also Irving Anderson, *The Sacagawea Mystique: Her Age, Name, Role and Final Destiny*, COLUMBIA MAGAZINE, Fall 1999, at 3, available at <http://www.washingtonhistory.org/files/library/sacagawea-mystique.pdf> [<https://perma.cc/G6KW-3DKC>].

<sup>143</sup> JACOBY, *supra* note 17, at 84.

“never entered the basin,” and attributed their reluctance to do so to superstitions about the thermal springs.<sup>144</sup>

To maintain the myth that Yellowstone was uninhabited, park managers and the federal government had to make it so.<sup>145</sup> First, consistent with federal Indian policy at the time, tribes were concentrated onto lands either far removed from, or a fractional size of, their aboriginal territories. Blackfeet and Crow, first promised access to Yellowstone in the 1851 Fort Laramie Treaty, were confined to smaller reservations in northern and southern Montana, respectively.<sup>146</sup> Shoshone and Bannock people ended up in Idaho, on the Fort Hall Reservation, and at the Wind River Reservation in Wyoming.<sup>147</sup> The Nez Perce eventually acceded to their reservation in north-central Idaho. Chief Joseph led a group who refused to be deprived of their original territory, and the Nez Perce War persisted until October of 1877.<sup>148</sup>

Second, after Yellowstone was established, park managers had to fend off Tribes’ recurring efforts to return to their hunting grounds. In the Park’s early years, Indian hunting was tolerated because park visitation was not very high. As the years wore on and visitors increased, park officials became irate.<sup>149</sup> They decried the Tribes’ hunting practices, describing them as “an unmitigated evil,” and called for increasing restrictions on their off-reservation activities.<sup>150</sup> Conservationists joined the outcry, describing the Tribes as “bands of roaming savages,”<sup>151</sup> and exhorting President Theodore Roosevelt to impose governmental controls on the Bannock, Shoshone, and Crow.<sup>152</sup> Eventually, according to Karl Jacoby, the problem of Indian lawlessness merged with that of local non-elite whites, whose hunting and squatting was

<sup>144</sup> *Id.* at 84–85; see also KELLER & TUREK, *supra* note 12, at 24–25 (describing pervasive unfounded myth that Indian people stayed away from various sites due to superstition: “No-where . . . did a myth of fearful Indians become as deeply entrenched as at Yellowstone.”).

<sup>145</sup> JACOBY, *supra* note 17, at 87.

<sup>146</sup> See Treaty with the Blackfeet, Oct. 17, 1855, 11 Stat. 657; Treaty with the Blackfeet Indians, Oct. 19, 1865, 14 Stat. 727; Treaty with the Blackfoot, Etc., Sept. 1, 1868 (unratified); Treaty with the Sioux Indians, Apr. 29, 1868, 15 Stat. 635.

<sup>147</sup> See Exec. Order of 1867, reprinted in 1 CHARLES KAPPLER, INDIAN AFFAIRS: LAWS AND TREATIES 837 (1902), <http://digital.library.okstate.edu/KAPPLER/Vol1/Images/v1p0837.jpg>, [<http://perma.cc/NS56-24XU>]; Fort Bridger Treaty with the Eastern Band Shoshoni and Bannock, Feb. 24, 1869, 15 Stat. 673. The Fort Bridger Treaty confirmed the 1867 Executive Order, thereby establishing both the Fort Hall and Wind River reservations. The Treaty also promised the Bannocks a separate reservation, but that promise was broken and the Bannocks remained at Fort Hall. See KAPPLER, *supra*, at 838, [http://digital.library.okstate.edu/KAPPLER/Vol1/HTML\\_files/IDA0835.html](http://digital.library.okstate.edu/KAPPLER/Vol1/HTML_files/IDA0835.html) [<https://perma.cc/AP7G-VQ9H>] (correspondence to Secretary of the Interior from Commissioner of Indian Affairs E.S. Parker concluding that the Bannocks are at Fort Hall and “desire to remain there,” and therefore no additional Bannock reservation is required).

<sup>148</sup> See ALVIN M. JOSEPHY, THE NEZ PERCE INDIANS AND THE OPENING OF THE NORTHWEST 445–633 (1965).

<sup>149</sup> JACOBY, *supra* note 17, at 88–89.

<sup>150</sup> *Id.* at 88; see also *id.* at 90–91 (describing increasing calls for restrictions on Indian hunting and use of the park).

<sup>151</sup> *Id.* at 91.

<sup>152</sup> *Id.*

equally vexing to park officials.<sup>153</sup> The solution to both was to militarize oversight of Yellowstone: “On August 17, 1886, Captain Moses Harris and fifty cavalymen from Fort Custer, Montana, marched into the park.”<sup>154</sup> Yellowstone became a “military reservation” occupied and defended by a permanent regiment of the U.S. cavalry, and remained so for thirty-two years, in large part to maintain its founding myth as an Indian-free zone.<sup>155</sup> The making of Yellowstone National Park was, among other things, the unmaking of Indian country. Thus at the dawn of the conservation era in federal public land law, preservation for the aesthetic and economic interests of some came at the expense of livelihood and access to Tribes and other non-elites.<sup>156</sup>

*b. Grand Canyon National Park and Havasupai*

Similar patterns of Indian displacement occurred in the making of another iconic national park. In 1919, Congress dedicated and set apart Grand Canyon National Park (GCNP) “as a public park for the benefit and enjoyment of the people.”<sup>157</sup> Today, three Indian Tribes—Havasupai, Hualapai, and Navajo—have reservations that border the Park. Five others—Hopi, Zuni, Kaibab Paiute, Shivwits Paiute, and San Juan Southern Paiute—have reservations nearby. For each of these Tribes, the Grand Canyon was part of their aboriginal territory.<sup>158</sup> Creating the GCNP therefore entailed marginalizing all of their claims, but in the interests of brevity, the Havasupai’s story will stand in for the larger one.

Today, GCNP spreads across 1.2 million acres in northern Arizona that include high desert plateaus, rugged forests, and, of course, a spectacular mile-deep eroded canyon. The GCNP reached its current size as a result of 1975 legislation, which added acreage to the Park, but also returned 185,000 acres to the Havasupai Tribe and ensured the Tribe access for traditional use to another 95,300 acres.<sup>159</sup> Before the GCNP’s creation in 1918, the Havasupai had long used lands within park boundaries for agriculture, hunting, and seasonal residence. Yet when the Park was first established, their rights were acknowledged only weakly in a provision authorizing the Secretary of the Interior “in his discretion” to permit Havasupai tribal members to use and occupy tracts within the park for agricultural purposes.<sup>160</sup> The story of the Havasupai’s decades-long exclusion from their traditional territory, ill-

<sup>153</sup> See *id.* at 95–98.

<sup>154</sup> *Id.* at 98.

<sup>155</sup> See *id.* at 98.

<sup>156</sup> See generally *id.*

<sup>157</sup> Grand Canyon National Park Establishment Act, Pub. L. No. 277, 40 Stat. 1175 (1919).

<sup>158</sup> See KELLER & TUREK, *supra* note 12, at 132–33.

<sup>159</sup> Grand Canyon National Park Enlargement Act, Pub. L. No. 93-620, 88 Stat. 2089, 2090–93 (1975).

<sup>160</sup> Grand Canyon National Park Establishment Act, Pub. L. No. 277, 40 Stat. 1175, 1177 (1919).

treatment by public land managers, and eventual reacquisition of at least a portion of their lands on the Canyon's forested plateau mirrors the evolution of conservation policy toward tribes generally.

For hundreds of years before the arrival of Europeans, the Havasupai farmed in the canyons by the blue waters of Havasu Creek in the spring and summer and moved to the plateau lands of the Grand Canyon's south rim for winter foraging and hunting.<sup>161</sup> When prospectors and ranchers, facilitated by the railroad, started to trickle into the forbidding high desert surrounding Havasu Canyon, the first threats to the Havasupai's sustainable, year-round use of their Grand Canyon home arrived. In symmetry with the railroads' opening the area for non-Indians, the federal government moved to confine the Indians to ever-smaller amounts of acreage.<sup>162</sup> In 1882, at the behest of Arizona territorial governor John Fremont, President Chester Arthur signed an executive order that designated a diminutive reservation for the Havasupai consisting of a slice of their summer home, and excluding entirely their winter range on the plateau.<sup>163</sup> "Thus, at the stroke of a pen, the entire Havasupai winter range and age-old plateau homeland became public property."<sup>164</sup>

Despite being confined, as a legal matter, to the small portion of their aboriginal lands that were designated as the Havasupai Reservation, most Havasupai continued to engage in the annual migration from their summer to winter homes.<sup>165</sup> But the federal land managers in charge of the Grand Canyon Forest Reserve, created in 1893 and surrounding the Reservation, proved to be tough and intolerant rivals.<sup>166</sup> In 1898, the Grand Canyon Forest Reserve Supervisor wrote to the Commissioner of Indian Affairs to declare:

The Indians boast and threaten to kill the deer and antelope so long as the "Government does not supply them with cow meat." The Grand Canon [sic] of the Colorado River is becoming so renowned for its wonderful and extensive natural gorge scenery and for its open clean pine woods, that it should be preserved for the everlasting pleasure and instruction of our intelligent citizens as well as those of foreign countries. Henceforth, I deem it just and necessary to keep the wild and unappreciable [sic] Indian from off the Reserve. . . .<sup>167</sup>

---

<sup>161</sup> HIRST, *supra* note 12, at 6, 7–8, 21.

<sup>162</sup> See *supra* text at notes 98–103 (discussing Southwest reservation policies).

<sup>163</sup> HIRST, *supra* note 12, at 59–64.

<sup>164</sup> *Id.* at 65.

<sup>165</sup> JACOBY, *supra* note 17, at 171–72; KELLER & TUREK, *supra* note 12, at 157 ("On paper, the government had confined the Havasupai to a single garden site. In reality, annual migrations between canyon and rim continued.")

<sup>166</sup> See HIRST, *supra* note 12, at 73–76; JACOBY, *supra* note 17, at 165–66.

<sup>167</sup> HIRST, *supra* note 12, at 75 (quoting Letter from W.P. Hermann, Grand Canyon Forest Reserve Supervisor, to Binger Hermann, General Land Commissioner, Department of the Interior (Nov. 8, 1898) (on file with the National Archive and Havasupai Tribal Collection)); JACOBY, *supra* note 17, at 175.

In keeping with his conclusion, the Forest Supervisor then implemented a ban on all Havasupai travel in the forest reserve, whether for hunting, gathering, or any other purpose.<sup>168</sup>

At the behest of conservationists, as well as his own concerns about wildlife and game, President Roosevelt designated the Grand Canyon a game preserve in 1906, and then a national monument in 1908.<sup>169</sup> The Grand Canyon National Monument was managed by the National Forest Service, which under Gifford Pinchot's urging had been created under the Department of Agriculture in 1905 and assumed authority over all of the forest reserves.<sup>170</sup> In 1916, Congress passed the National Park Service Organic Act, and the National Park Service was created. Just three years later, the Grand Canyon was designated a National Park on February 26, 1919.<sup>171</sup>

Each legal step forward in the history of Grand Canyon conservation was another blow to the Havasupai. At the time of President Roosevelt's designation of the Grand Canyon National Monument, there was talk of restoring land to the Havasupai.<sup>172</sup> Likewise, throughout the period from 1909 until after the legislation creating GCNP, the Havasupai and their occasional supporters in the Indian Service lobbied for recognition of their land.<sup>173</sup> Their pleas fell on deaf ears.<sup>174</sup>

All along, many Havasupai continued to undergo their annual migration, risking occasional violent conflicts with white settlers as well as the wrath of the Forest Service. Despite the steady diminishment of access to their lands and the negative effects of mining and grazing on environmental quality, most Havasupai persisted in living and farming as they had historically, until the Park designation. As characterized by historian Stephen Hirst, "the establishment of [the GCNP] marked the most damaging encroachment on their life yet dealt out by the federal government. At a stroke, all the tiny gains made from 1908 to 1916 were wiped away."<sup>175</sup> Park Service rangers broke the Havasupai's use of their winter range by searching out and destroying their camps and chasing them away from Pinyon gathering and other activities on the plateau.<sup>176</sup> Throughout the ensuing decades, as the

<sup>168</sup> See JACOBY, *supra* note 17, at 175–76.

<sup>169</sup> See MICHAEL F. ANDERSON, POLISHING THE JEWEL: AN ADMINISTRATIVE HISTORY OF GRAND CANYON NATIONAL PARK 8 (2000). Public lands withdrawn as game preserves had limited protections for hunting and wildlife; national monument status added a further layer of management for preservation purposes.

<sup>170</sup> *Id.* at 7.

<sup>171</sup> Grand Canyon National Park Establishment Act, Pub. L. No. 277, 40 Stat. 1175, 1177 (1919). With each new designation, the Grand Canyon area achieved heightened protections of its land and resources.

<sup>172</sup> See HIRST, *supra* note 12, at 97–105.

<sup>173</sup> *Id.*

<sup>174</sup> See *id.* at 101.

<sup>175</sup> *Id.* at 99; see also JACOBY, *supra* note 17, at 187 ("Of all the many changes that conservation brought in the opening because of the twentieth century, the most significant for the Havasupai was the creation of the Grand Canyon National Park in 1919.").

<sup>176</sup> See *id.*

Havasupai attempted to regain their homelands, the Park Service continued to be a staunch opponent.<sup>177</sup> In 1940, a NPS Director inquired whether the Havasupai could be removed to the Hualapai Reservation, thereby enabling the Havasupai Reservation to be added to the Grand Canyon National Park.<sup>178</sup> The recurring refrain was that the Havasupai would eventually disappear in any event, and 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.<sup>179</sup>

### 3. *Tribal Self-Determination and the Dark Side of Conservation's Persistent Legacy*

The ways of the Park Service in the early days of Yellowstone and GCNP no longer prevail.<sup>180</sup> Since the 1970s, the federal government has officially embraced policies of tribal self-determination.<sup>181</sup> As a result, many Tribes have reconstituted their governments, reasserted their treaty rights, and revitalized their battered cultures.<sup>182</sup> Federal agencies have responded, albeit unevenly, by reconsidering their relationship with Tribes. In the public lands context, several statutes and executive orders require or encourage federal agencies to cooperate and consult with Tribes on a range of matters.<sup>183</sup> And at Yellowstone and GCNP, the Park Service regularly consults with the many Tribes that once called those vast landscapes home.<sup>184</sup>

---

<sup>177</sup> See *id.*; see also Janet Balsom, *Inclusion in National Park Service Management at Grand Canyon: Tribal Involvement and Integration*, in *CROSSING BOUNDARIES IN PARK MANAGEMENT: PROCEEDINGS OF THE 11TH CONFERENCE ON RESEARCH AND RESOURCE MANAGEMENT IN PARKS AND ON PUBLIC LANDS* 249, 2450 (David Harmon, ed., George Wright Society 2001).

<sup>178</sup> HIRST, *supra* note 12, at 166.

<sup>179</sup> *Id.* at 173 (quoting a National Park Service report from 1942). The Park Service Report, co-authored by Frederick Law Olmsted, rejected the Havasupai's proposal because "[t]he view down into Havasupai Canyon . . . will remain uniquely interesting and beautiful for centuries to come—perhaps long after the last of the Havasupais shall have passed away." *Id.*

<sup>180</sup> See generally Balsom, *supra* note 177.

<sup>181</sup> See generally ANDERSON, BERGER & KRAKOFF, *AMERICAN INDIAN LAW, CASES AND COMMENTARY* 148–63 (3rd ed., 2015) (describing self-determination era laws and policies).

<sup>182</sup> See generally CHARLES F. WILKINSON, *BLOOD STRUGGLE: THE RISE OF MODERN INDIAN NATIONS* (2006).

<sup>183</sup> Each public land agency has authority under federal law to enter into cooperative agreements, collaborative partnerships, or other similar arrangements with tribes for a variety of purposes. The National Park Service (NPS) is authorized under 54 U.S.C. § 101702(d); the Bureau of Land Management (BLM) under 43 U.S.C. § 1737(b); the Fish and Wildlife Service (FWS) under 16 U.S.C. § 661; and the Bureau of Reclamation under 43 U.S.C. § 373d. In addition, the Tribal Self-Governance Act of 1994 authorizes Indian tribes to contract for the operation of Department of the Interior programs of specific significance to the tribe. Mary Ann King, *Co-Management or Contracting? Agreements Between Native American Tribes and the U.S. National Park Service Pursuant to the 1994 Tribal Self-Governance Act*, 31 HARV. ENV'T'L L. REV. 475, 475 (2007). More recently, the Department of the Interior issued DOI Secretarial Order No. 3342, which requires the Department's agencies to, where possible, include tribes in the management of federal lands and resources.

<sup>184</sup> The GCNP consults with 11 Tribes (Havasupai Tribe, Hopi Tribe, Hualapai Tribe, Kaibab Band of Paiute Indians, Las Vegas Band of Paiute Indians, Moapa Band of Paiute

Yet the legacies of displacement have not vanished. Tribes' forced separation from their lands created an artificially depopulated backdrop against which conservationists measured their own goals for public lands. This became evident toward the end of the Havasupai's long struggle to regain a portion of their plateau lands, when conservation groups took varying positions on returning land to the Tribe. The Arizona Chapter of the Sierra Club initially opposed the return of any GCNP acreage on the grounds that no lands should be taken out of public ownership. When educated by the Havasupai about the historic and continuing injustice to the Tribe, the local chapter changed its position to support the Havasupai's claims.<sup>185</sup>

Two powerful national groups would not be persuaded. The national directorate of the Sierra Club, notwithstanding the position of the Arizona chapter as well as the Club's National Committee on Native American Issues, opposed any return of public lands to the Havasupai.<sup>186</sup> Friends of the Earth took the same stance.<sup>187</sup> Their tactics included circulating unfounded rumors that the Havasupai intended to develop the land, and the result would be an Indian-owned "Disneyland on the plateau."<sup>188</sup> As Havasupai historian Stephen Hirst observed, these same groups had voiced no concerns in response to the Park Service's mass-tourism oriented development and leases at the South Rim of the Grand Canyon.<sup>189</sup> The Park Service's plans at one point included hiring an architectural firm that actually *had* helped to design Disneyland,<sup>190</sup> and (proving that sometimes satire is impossible) converting Indian Garden, home to Havasupai families until they were evicted by the Park Service, into a "mock Havasupai camp" as a tourist attraction.<sup>191</sup> According to Hirst, "Of all this, the Sierra Club and most other environmental groups said nothing."<sup>192</sup> The environmental groups' silence in the face of extravagant non-Indian development and their fear of tribal control echo the

---

Indians, Navajo Nation, Paiute Indian Tribe of Utah, San Juan Southern Paiute Tribe, Yavapai-Apache Nation, and Zuni Tribe), and also has individual agreements with the Hualapai Tribe about lower Colorado River management and the Havasupai regarding their traditional lands and long-term use of Supai Camp. See NAT'L PARKS SERV., U.S. DEPT OF INTERIOR, GRAND CANYON NATIONAL PARK FOUNDATION STATEMENT 5 (2010), <https://www.nps.gov/grca/learn/management/upload/grca-foundation20100414.pdf> [<https://perma.cc/Q5HK-FPSD>]. Yellowstone National Park recognizes that 26 Tribes have historic and continuing interests in the Park, and consults with them on a range of issues, including bison management and protection of cultural resources. See *Modern Management*, NAT'L PARK SERV.: YELLOWSTONE, <https://www.nps.gov/yell/learn/historyculture/modernmanagement.htm> [<https://perma.cc/M8TU-PEJC>].

<sup>185</sup> HIRST, *supra* note 12 at 222–23.

<sup>186</sup> *Id.* at 226–27.

<sup>187</sup> *Id.*

<sup>188</sup> *Id.* at 214.

<sup>189</sup> *Id.* at 214–15.

<sup>190</sup> *Id.* at 215.

<sup>191</sup> *Id.*

<sup>192</sup> *Id.*

racialized sentiment of early conservationists that only the white race could “make the land more fruitful . . . .”<sup>193</sup>

With regard to the Havasupai’s land claims, the Sierra Club and Friends of the Earth maintained their vocal opposition throughout. In a last-ditch lobbying effort, the two groups circulated specious information that the Havasupai had signed a contract with the “Marriott Hotel Corporation for a giant resort complex and that Joe Sparks [the Tribe’s lawyer] was representing Marriott.”<sup>194</sup> Nonetheless, they failed to block the Tribe’s efforts. After several rounds of cliffhanger moments in Congress the legislation was finalized, and President Ford signed it into law on January 3, 1973. The Havasupai Tribe’s trust lands grew from the meager several hundred acres they had been consigned to since 1882 to 185,000, with additional use rights to 95,300.<sup>195</sup>

The Havasupai story reveals that conservation groups are still overcoming their legacies of exclusion. Myths of empty places die hard, and it is uncomfortable to confront the costs of seemingly benevolent policies. As noted above, these legacies affect national conservation groups’ ability to appeal to people of color generally, not just American Indians.<sup>196</sup> But the movement that culminated in the Bears Ears National Monument reveals that it is possible to move beyond the dark side of conservation and pursue a just and equitable conservation agenda.

### III. BEARS EARS NATIONAL MONUMENT: A NEW WAY

Bears Ears National Monument is, by process and design, an antidote to the discriminatory history described above. On October 15, 2015, the Bears Ears Inter-Tribal Coalition presented its “Proposal to President Barack Obama for the Creation of Bears Ears National Monument.”<sup>197</sup> The proposal itself tells much of the story of how the five Tribes—Hopi, Navajo, Ouintah and Ouray Ute, Ute Mountain Ute, and Zuni—developed it. And it does so in a way that reveals much more than a chronology. In just over forty pages, the proposal is a call for justice as well as a blueprint for a different way to conceive of human/land relations. Those aspects of the proposal jump out in the second paragraph:

This proposal has been a long time in the making. For six years, grassroots people and Tribal leaders have worked intensively to get

---

<sup>193</sup> See *supra* text accompanying notes 113–14.

<sup>194</sup> HIRST, *supra* note 12 at 230.

<sup>195</sup> Grand Canyon National Park Enlargement Act, Pub. L. No. 93-620, § 10(a), § 10(e), 88 Stat. 2089, at 2092–93 (1975).

<sup>196</sup> See SAVOY, *supra* note 110, at 22–28, 99–105; FINNEY, *supra* note 110 (describing persistent disjunction between white environmentalism and the African-American experience of discrimination, segregation, and exclusion from mainstream environmental causes and experiences).

<sup>197</sup> BEARS EARS INTER-TRIBAL COALITION, *supra* note 5.

to this point. The true origins, however, go back much farther. The need for protecting the Bears Ears landscape has been broad and heartfelt for well over a century. The rampant looting and destruction of the villages, structures, rock markings, and gravesites within the Bears Ears landscape saddened and sickened our ancestors, and that sense of loss and outrage continues today. The depth of our spiritual connection to these places is not widely understood, but it is true that these desecrations to our homeland, structures, implements, and gravesites—insults to the dignity of our societies and Traditional Knowledge as well-wound us physically. By visiting Bears Ears, giving our prayers, and conducting our ceremonies, we heal our bodies and help heal the land itself.<sup>198</sup>

The extraordinary nature of the proposal reflects the equally unusual process of arriving at it. That immediate history is detailed below, beginning with the formation of Utah Diné Bikéyah (which means “people’s sacred lands,” in Navajo), the Navajo non-profit that instigated the Bears Ears vision.

#### A. *Utah Diné Bikéyah: From Dream to Inter-Tribal Reality*

The question of when the Tribes started advocating for Bears Ears has different answers. Mark Maryboy, a Navajo Nation citizen and long-time political leader in southern Utah, tells a story about a chapter meeting in 1968. Robert Kennedy came to the Navajo Nation during his presidential campaign and asked the Navajo people what they wanted. They urged Kennedy to protect the ancient Puebloan villages and archeological resources of Bears Ears.<sup>199</sup> For Maryboy and other Utah-Navajos, the effort is therefore at least forty years in the making. The Bears Ears Proclamation states that the campaign to protect the Bears Ears area began “at least 80 years” ago.<sup>200</sup> And many Native people of the region would likely say that their interest in defending Bears Ears dates to time immemorial.<sup>201</sup>

It was not until 2010, however, that Senator Robert Bennett of Utah issued an invitation to Native American people residing in San Juan County, Utah.<sup>202</sup> Fresh off of a legislative victory concerning federal public lands in Washington County, Senator Bennett hoped to achieve similar resolutions to long-simmering debates throughout the State, most of which stemmed from conflicts about wilderness designations for Utah’s 23 million acres of Bureau

---

<sup>198</sup> *Id.* at 1.

<sup>199</sup> Interview with Natasha Hale, Native American Program Director, Grand Canyon Trust (Jun. 27, 2017). *See also* BEARS EARS INTER-TRIBAL COALITION, *supra* note 5, at 14.

<sup>200</sup> Proclamation No. 9558, 82 Fed. Reg. at 4.

<sup>201</sup> *See* BEARS EARS INTER-TRIBAL COALITION, *supra* note 5, at 8; *see also* Interview with Charles Wilkinson, Distinguished Professor, University of Colorado Law School (Jun. 30, 2017).

<sup>202</sup> *See* BEARS EARS INTER-TRIBAL COALITION, *supra* note 5, at 14, app. Exhibit One.

of Land Management (BLM) lands.<sup>203</sup> In 1976, the BLM was charged with conducting an inventory of its lands for the purpose of recommending wilderness designations.<sup>204</sup> In 1980, the BLM finalized its proposal for Utah, concluding that only 2.5 million acres had wilderness characteristics worthy of congressional protection.<sup>205</sup> Citizens' groups reacted vehemently to the proposal, arguing that the BLM overlooked millions of acres of wild canyon country. The Southern Utah Wilderness Alliance and Utah Wilderness Coalition, which emerged from this milieu, conducted a citizens' survey, which concluded that 5.7 million acres of BLM lands had wilderness characteristics.<sup>206</sup> After further rounds of political turn-over, litigation, and re-inventories, the citizens' proposal expanded to include an additional 3.4 million acres, for a total of 9.1 million acres.<sup>207</sup>

The debate about wilderness in Utah was an umbrella for multiple disputes over how to manage Utah's vast federal public lands. Opponents of wilderness protection bladed roads through BLM lands, claiming rights-of-way under a nineteenth century mining statute.<sup>208</sup> Conservationists countered these actions with litigation as well as federal legislative advocacy.<sup>209</sup> In addition to fights over roads, every BLM land-use planning process spawned conflict over issues such as oil and gas leasing, travel planning, and grazing. Attempts to address these issues through federal legislation proved unavailing. Conservation groups were able to block stingy wilderness bills. The Utah delegation in Congress, on the other hand, was able to prevent the conservation groups' expansive wilderness proposals from gaining traction. The Washington County approach, which brought stakeholders to the table to propose a mutually acceptable legislative package, seemed to create a

<sup>203</sup> See Robert Bennett, *Resolving Utah's Wilderness Conflict*, DESERET NEWS, June 24, 2013, <https://www.deseretnews.com/article/765632762/Resolving-Utahs-wilderness-conflict.html>; *Origins of the Proposal*, UTAH DINÉ BIKÉYAH, <http://utahdinebikeyah.org/history/> [<https://perma.cc/2XDC-AJA9>]. For more on the background of wilderness and public lands fights in Utah, see also Sarah Krakoff, *Settling the Wilderness*, 75 COLO. L. REV. 1159 (2004); Stephen H.M. Bloch & Heidi McIntosh, *A View from the Front Lines: The Fate of Utah's Redrock Wilderness under the George W. Bush Administration*, 33 GOLDEN GATE U. L. REV. 473 (2003).

<sup>204</sup> See 16 U.S.C.A. §§ 1131–1132 (1964) (authorizing wilderness inventories); see also 43 U.S.C.A. § 1782 (1976) (authorizing Bureau of Land Management wilderness surveys).

<sup>205</sup> See Krakoff, *supra* note 203, at 1159 (citing *Utah: Final Wilderness Inventory Decision*, 45 Fed. Reg. 75, 602 (Nov. 14, 1980)).

<sup>206</sup> See *About the Utah Wilderness Coalition*, THE UTAH WILDERNESS COALITION, <http://www.protectwildutah.org/about/history.html> [<https://perma.cc/X9UL-AEUT>]; see also *The Story of America's Red Rock Wilderness Act*, SOUTHERN UTAH WILDERNESS ALLIANCE, [http://action.suwa.org/site/PageServer?pagename=work\\_arwahistory](http://action.suwa.org/site/PageServer?pagename=work_arwahistory) [<https://perma.cc/Z3DT-AVW3>].

<sup>207</sup> See THE UTAH WILDERNESS COALITION, *supra* note 206; see also SOUTHERN UTAH WILDERNESS ALLIANCE, *supra* note 206.

<sup>208</sup> See Bloch & McIntosh, *supra* note 203 at 488–89; BEARS EARS INTER-TRIBAL COALITION, *supra* note 5, app. Exhibit One at 8 (“[San Juan County] Commissioner Lyman leads an armed militia on an all-terrain vehicle ride into sacred Recapture Canyon trespassing into an area closed to motorized vehicles.”).

<sup>209</sup> See Bloch & McIntosh, *supra* note 203 at 493–95; Krakoff, *supra* note 203, at 1175–85.

path forward.<sup>210</sup> Senator Bennett proposed a state-wide process of working with all of the counties, which he claimed would put to rest fractious public lands battles in his state.<sup>211</sup> The effort was labeled the Public Lands Initiative (PLI), and it was under those auspices that Senator Bennett came to southeast Utah, some forty-five years after Bobby Kennedy, and asked Native American residents of San Juan County what they wanted.

Senator Bennett's invitation, however, came with a two-week deadline. The Navajo community embraced the opportunity to participate in the land-use planning, but rejected the highly unrealistic two-week turn-around.<sup>212</sup> Instead, Maryboy and other Navajo leaders, in concert with Round River Conservation, began a project of gathering knowledge and information from tribal elders and community members about herbs, plant gatherings, traditional firewood collecting, and ancestral and sacred places throughout Cedar Mesa, Grand Gulch, and the Bears Ears regions.<sup>213</sup> Utah Diné Bikéyah (UDB), a Navajo non-profit, was founded to support and oversee the cultural mapping project, as well as to ensure a distinctive indigenous voice to participate in Senator Bennett's PLI process.<sup>214</sup> Cautious optimism about an inclusive process faded, however, when Senator Bennett was ousted from the Republican primary and ultimately replaced by Senator Mike Lee.<sup>215</sup> The PLI was then overseen by Utah's U.S. Representatives Robert Bishop and Jason Chaffetz, who conducted the process in ways that marginalized conservationist and tribal voices.<sup>216</sup> According to the Bears Ears Inter-Tribal Coalition, throughout the process of developing the PLI, "San Juan County and the Utah congressional delegation . . . demonstrated that they either do not understand how to reach Native American Tribes and individuals, or they are unwilling to do so."<sup>217</sup>

<sup>210</sup> Omnibus Public Land Management Act of 2009, Pub. L. No. 111-11, 123 Stat. 991 (2009); Matt Canham, *Washington County Lands Bill May be the Wilderness Model*, THE SALT LAKE TRIBUNE (Mar. 30, 2009), [http://archive.sltrib.com/story.php?ref=/ci\\_12032209](http://archive.sltrib.com/story.php?ref=/ci_12032209) [https://perma.cc/463S-GXGJ].

<sup>211</sup> BEARS EARS INTER-TRIBAL COALITION, *supra* note 5, app. Exhibit One at 1.

<sup>212</sup> Interview with Natasha Hale, *supra* note 199.

<sup>213</sup> *Id.* See also BEARS EARS INTER-TRIBAL COALITION, *supra* note 5, app. Exhibit One at 2.

<sup>214</sup> See Interview with Natasha Hale, *supra* note 199.

<sup>215</sup> BEARS EARS INTER-TRIBAL COALITION, *supra* note 5, app. Exhibit One at 1 ("In 2010, Senator Robert Bennett initiated a process to resolve issues of conservation and development of public lands in eastern Utah. We pledged to participate in that effort, but it died when Senator Bennett was not returned to office.").

<sup>216</sup> See Comments of the Hopi Tribe, Navajo Nation, Ute Mountain Ute Tribe, Ute Indian Tribe, and Zuni Pueblo to the National Monument Review, Department of the Interior (May 25, 2017) [hereinafter Comments of the Bears Ears Inter-Tribal Coalition], <http://bearscoalition.org/wp-content/uploads/2017/05/Bears-Ears-Comments-5.25.pdf> [https://perma.cc/74LF-ZC6H]; see also David DeMille, *Bishop, Chaffetz Unveil Public Lands 'Compromise' Ahead of Congressional Hearing*, USA TODAY (Jan. 20, 2016), <https://www.usatoday.com/story/news/2016/01/20/bishop-chaffetz-unveil-public-lands-compromise-ahead-congressional-hearing/79065640/> [https://perma.cc/W94T-339E].

<sup>217</sup> BEARS EARS INTER-TRIBAL COALITION, *supra* note 5, app. Exhibit One at 2.

Over the next several years, UDB conducted a thorough and inclusive mapping project, the goal of which was “to establish conclusively the proper boundaries, defined scientifically, culturally, and historically, necessary to protect the Bears Ears homeland.”<sup>218</sup> UDB’s methodology comprised an interdisciplinary effort that drew from multiple sources, including academic experts in ecology, biology, anthropology, and public policy; data on wildlife from Utah State officials; and the traditional knowledge of local Native people. With regard to the last category, “[s]eventy cultural interviews were conducted by a Navajo traditionalist fluent in English and the Diné [Navajo] languages and possessing ethnographic training.”<sup>219</sup> The collected information was then “captured and organized on a fine scale.”<sup>220</sup> When the mapping project was complete, UDB released its Bears Ears proposal in April 2013. The proposal called for 1.9 million acres of the existing public lands in Bears Ears to be protected.<sup>221</sup>

Initially, UDB assumed that its proposal would be incorporated into the PLI process, and that the Bears Ears landscape could be protected under a variety of designations.<sup>222</sup> Before long, however, it became clear that the PLI was a dead-end. Tribes and conservation groups were shut out of the decisionmaking.<sup>223</sup> UDB’s repeated requests for information about the PLI proposals and meetings with Representative Bishop’s office were ignored or rebuffed.<sup>224</sup> According to the tribal representatives of the Bears Ears Commission, “In spite of our extensive and unwavering efforts, in no instance did anyone from the Utah delegation or the PLI make a single substantive comment, positively or negatively, on our proposal.”<sup>225</sup> The process, according to PLI leaders, was being conducted at the county level. Yet when UDB sought to have its proposal included in San Juan County’s public comment process, they were again excluded. As reported by the Bears Ears Commission, “Our painful experience with attempting to make an inroad into the PLI process was epitomized by our dealings with the San Juan County Commission.”<sup>226</sup>

---

<sup>218</sup> Comments of the Bears Ears Inter-Tribal Coalition, *supra* note 216, at 5.

<sup>219</sup> *See id.* at 5; *see also* BEARS EARS INTER-TRIBAL COALITION, *supra* note 5, app. Exhibit One.

<sup>220</sup> Comments of the Bears Ears Inter-Tribal Coalition, *supra* note 216, at 5.

<sup>221</sup> *See id.*; BEARS EARS INTER-TRIBAL COALITION, *supra* note 5, app. Exhibit One.

<sup>222</sup> *See* Comments of the Bears Ears Inter-Tribal Coalition, *supra* note 216, at 5–6 (describing Utah Diné Bikéyah’s proposal, which suggested designation as either a wilderness area, national recreation area, or “other classification under federal law.”). Each category has distinct legislative goals and corresponding management criteria, with wilderness being the most protective and national recreation areas more flexible. *See* Wilderness Act, 16 U.S.C. §§ 1131–1136 (barring all extractive uses, road construction, and mechanical vehicles); COGGINS, ET AL., *supra* note 37, at 28 (describing congressionally recognized “national conservation areas” as less preservationist than wilderness areas, but more protective than general multiple use lands).

<sup>223</sup> *See* Comments of the Bears Ears Inter-Tribal Coalition, *supra* note 216, at 6–7.

<sup>224</sup> *Id.* at 7–8.

<sup>225</sup> *Id.* at 7.

<sup>226</sup> *Id.*

Those dealings were as follows. In 2014, the San Juan County Commission conducted a process for gathering public comments on the PLI. Several proposals were to be circulated to the public as part of the comment process, and UDB's map and proposal for Bears Ears was identified as "Alternative D." County Commission staff at first agreed to include Alternative D in the list made available to the public, but staff then broke that promise and "refused to include Alternative D on the list."<sup>227</sup> When UDB and other supporters of Alternative D learned this, they orchestrated a write-in campaign, circulating the proposal in time for the public comment process.<sup>228</sup> Alternative D received 300 positive comments, which was 64% of the total of 467 comments received by the San Jun County Commission.<sup>229</sup> Nonetheless, the San Juan County Commission selected Alternative B, a "heavy development, low-conservation" alternative that had been formulated by the mining industry, which received only two positive comments.<sup>230</sup>

From this point on, UDB and the Tribes decided to consider different strategies in earnest. If the PLI process was going to proceed without the Tribes' input, there was a risk that any resulting legislation would undermine protection for Bears Ears rather than enhance it. In the meantime, UDB's proposed map of 1.9 million acres had gained traction with some of the leading conservation groups, including the Conservation Lands Foundation, The Wilderness Society, and Southern Utah Wilderness Alliance. The Tribes realized that to make the strongest case for protection, however, they could not take a backseat to the conservation groups. As these two currents grew—disillusion with the PLI process and support from conservation groups—the Tribes decided to hold a meeting about Bears Ears and set their own agenda.<sup>231</sup> On July 26, 2015, representatives from Hopi, Navajo, Ute Mountain Ute, Ute Tribe of Uintah and Ouray, and Zuni met in Towaoc, Colorado, on the Ute Mountain Ute Reservation. Over one hundred people attended. After introductions and robust discussion, the Tribes made three key decisions. First, the Tribes would submit a formal proposal to President Obama. Second, that proposal would be submitted on October 15, 2015. And third, that they would form an Inter-Tribal Coalition to lead the effort.<sup>232</sup>

The next day, July 27, 2015, the newly formed Inter-Tribal Coalition hosted a federal delegation in the heart of the Bears Ears landscape, just

---

<sup>227</sup> See *id.* at 8; see also Interview with Natasha Hale, *supra* note 199; Interview with Charles Wilkinson, *supra* note 201.

<sup>228</sup> See Comments of the Bears Ears Inter-Tribal Coalition, *supra* note 216, at 8–9; Interview with Natasha Hale, *supra* note 199, Interview with Charles Wilkinson, *supra* note 201.

<sup>229</sup> Comments of the Bears Ears Inter-Tribal Coalition, *supra* note 216, at 9.

<sup>230</sup> *Id.*; Interview with Charles Wilkinson, *supra* note 201.

<sup>231</sup> Interview with James Enote, *supra* note 6; Interview with Charles Wilkinson, *supra* note 201; see also Interview with Regina Lopez-Whiteskunk, in *EDGE OF MORNING: NATIVE VOICES SPEAK FOR THE BEARS EARS 23* (Jacqueline Keeler ed., 2017) (describing the five Tribes coming together at a meeting on July 15, 2015).

<sup>232</sup> Interview with Charles Wilkinson, *supra* note 201.

north of the Bears Ears buttes in an Aspen Grove.<sup>233</sup> The Tribes had decided that Eric Descheenie, representative for the Navajo Nation, and Alfred Lomaquahu, Jr., representative from the Hopi Tribe, would co-chair the meeting. Department of the Interior officials who attended included Kevin Washburn, Assistant Secretary for Indian Affairs, Nicole Buffa, Deputy Chief of Staff, Jonathan Jarvis, Director of the National Park Service, and Neil Kornze, Director of the Bureau of Land Management.<sup>234</sup> Ten tribal members spoke about the meaning of Bears Ears to them and their people, and then the federal officials had their turn.<sup>235</sup> It was, according to Professor Charles Wilkinson, a nationally recognized expert in American Indian and public land law who served as special advisor to the Inter-Tribal Coalition, “a very successful day. The federal officials were up there on the land for three hours. There was horseback riding, and talking and laughing. It was a great start. Nobody knew how bad the politics were going to get.”<sup>236</sup>

Before the bad politics began, the Inter-Tribal coalition members rolled up their sleeves and set to work creating the Bears Ears proposal. From the July 27 meeting on, the Tribes, through their representatives on the Inter-Tribal Coalition, were firm about two aspects of the proposal. First, they wanted to lead the process for developing it. Second, they wanted the proposal to include a serious management role for the Tribes. Natasha Hale, a member of the Navajo Nation who attended all of the Inter-Tribal Coalition meetings on behalf of the Grand Canyon Trust’s Native America Program, explained that these elements were crucial for the Tribes because “our history with monuments has not been good.”<sup>237</sup> That history, in addition to the larger context discussed in Part I.A., above, includes specific instances of monument designations depriving the Navajo of sacred places such as Rainbow Bridge and Canyon de Chelly.<sup>238</sup> Hale elaborated that the Tribes were worried on two fronts: first, that the conservation groups would take over and sideline the Tribes; second, that federal officials would minimize the tribal role in managing Bears Ears if a monument was designated.<sup>239</sup> Therefore, “participation and a say” were “make or break” issues for the Tribes.<sup>240</sup> James Enote, a Zuni tribal member and participant in most of the meetings, stressed this as well, stating, “This had to be tribally led.”<sup>241</sup>

A series of meetings followed, the first four of which were hosted at the reservations of the Coalition members.<sup>242</sup> At an August 8 meeting at the Twin Arrows Casino just outside of the Navajo Nation, the main topic was how

<sup>233</sup> *Id.*

<sup>234</sup> *Id.*

<sup>235</sup> *Id.*

<sup>236</sup> *Id.*

<sup>237</sup> Interview with Natasha Hale, *supra* note 199.

<sup>238</sup> See KELLER & TUREK, *supra* note 12, at 195–99, 205–12.

<sup>239</sup> See Interview with Natasha Hale, *supra* note 199.

<sup>240</sup> *Id.*

<sup>241</sup> Interview with James Enote, *supra* note 6.

<sup>242</sup> Comments of the Bears Ears Inter-Tribal Coalition, *supra* note 216, at 11.

the Inter-Tribal Coalition should articulate the tribal management role in the Bears Ears proposal.<sup>243</sup> The participants discussed the range of options, from fairly weak forms of consultation to full co-management, with the Tribes playing an equal role to that of federal land managers. Constitutional law imposes some constraints on federal delegation of responsibilities, and those would be considered later at the drafting stage.<sup>244</sup> At the Twin Arrows meeting, the objective was to agree on what the Tribes sought as a matter of principle.

The discussion initially centered on how tribal knowledge about flora and fauna, gleaned from centuries living on the landscape—typically described as “traditional ecological knowledge”—could augment scientific knowledge.<sup>245</sup> James Enote challenged this framing, arguing that it subjugates tribal knowledge to science, and that the two are essentially different things: “Traditional knowledge is one sphere of knowledge, and science is another. Both are spheres of knowledge, but each has different methodologies.”<sup>246</sup> Enote elaborated that if tribal knowledge is framed as a subset of scientific knowledge, it will always lose out: “I have tried to bring science and traditional knowledge together for forty years and . . . it doesn’t work. Science is going to prevail if you bring the two together. The paper is going to be written or spoken in English, expressed in metrics, it will be subjugated to ethno-science and the real depth of that [traditional] knowledge is lost because it is not expressed completely.”<sup>247</sup> Instead of co-management, which implies the smashing together of traditional and scientific knowledge that results in subjugation, Enote advocated for “collaborative management,” which recognizes the distinct methodologies and contributions of each form of knowledge and promotes “learning across knowledge systems.”<sup>248</sup> At the end of a long day of discussion, Regina Whiteskunk, Chair of Ute Mountain Ute Tribe, stood up and said, “We have been talking all day about what kind of management we want, and we have a spectrum and we understand that

---

<sup>243</sup> See Interview with James Enote, *supra* note 6; Interview with Charles Wilkinson, *supra* note 201.

<sup>244</sup> The Inter-Tribal Coalition’s Proposal ultimately proposed full collaborative management, but with final decision-making power resting with the Secretaries of Interior and Agriculture. See BEARS EARS INTER-TRIBAL COALITION, *supra* note 5, at 26–28 (describing parameters of the non-delegation doctrine).

<sup>245</sup> Traditional Ecological Knowledge (TEK), Traditional Indigenous Knowledge (TIK), Traditional Knowledge (TK), and Traditional Ecological Knowledge and Wisdom (TEKW) and various related terms have been used interchangeably to describe similar concepts, but scholars define each slightly differently. Roughly, these terms represent “a cumulative body of knowledge and beliefs, handed down through generations by cultural transmission, about the relationship of living beings (including humans) with one another and with their environment.” M. Gadgil, F. Berkes, & C. Folke, *Indigenous Knowledge for Biodiversity Conservation*, 22 *AMBIO* 151, 151 (1993).

<sup>246</sup> Interview with James Enote, *supra* note 6.

<sup>247</sup> *Id.*

<sup>248</sup> *Id.*

spectrum. . . . I want to say I am for very strong collaborative management. Everyone in favor, raise your hand.”<sup>249</sup> Every hand in the room went up.<sup>250</sup>

With consensus achieved about the proposed boundaries, collaborative management, and the role of traditional knowledge, the Inter-Tribal Coalition devoted the next meetings to reading through and agreeing on every sentence of a draft Bears Ears Monument Proposal.<sup>251</sup> Participants added examples of tribal knowledge, including information about specific places, medicines, herbs, and species, and similar details about the landscape.<sup>252</sup> There was also very deep discussion about the damage that was occurring due to vehicle use, unregulated grazing, and looting.<sup>253</sup> “At the beginning, outside people said ‘you’ll never get five Tribes to agree on anything,’” according to Professor Wilkinson.<sup>254</sup> Yet at the end of the fourth meeting, in stark contrast to the erasure of Native voices and views that preceded the formation of Mesa Verde, Yellowstone, and Grand Canyon National Parks, the Tribes had agreed on every word and line of the Bears Ears Proposal.<sup>255</sup>

The Inter-Tribal Coalition met its internal deadlines in time to submit the Bears Ears Proposal to President Obama on October 15, 2015, as planned.<sup>256</sup> Then, the political gauntlet began. Some conservation group allies and administration insiders cautioned against submitting the proposal. Congressman Bishop and the Utah delegation remained outwardly committed to the PLI process, even though they had repeatedly excluded the Tribes and conservation groups.<sup>257</sup> Some Bears Ears supporters were worried that there would be backlash if the Tribes submitted a proposal for a National Monument before the PLI legislative proposal had clearly died.<sup>258</sup> Ultimately, the Inter-Tribal Coalition decided to adhere to its own deadline in order to honor the tribal leaders’ preferences.<sup>259</sup>

There is no formal process for filing a monument proposal. The Antiquities Act delegates power to the President, and the President is not subject to the Administrative Procedure Act or the National Environmental Policy

<sup>249</sup> Interview with Charles Wilkinson, *supra* note 201.

<sup>250</sup> *Id.*

<sup>251</sup> *See id.*

<sup>252</sup> *Id.*

<sup>253</sup> *Id.*

<sup>254</sup> Interview with Charles Wilkinson, *supra* note 201.

<sup>255</sup> *Id.*; *see also* Comments of the Bears Ears Inter-Tribal Coalition, *supra* note 216, at 10–11.

<sup>256</sup> *See* Anne Minard, *Tribes Ask President Obama to Designate Bears Ears as National Monument*, INDIAN COUNTRY TODAY MEDIA NETWORK, Oct. 16, 2015, <https://indiancountrymedianetwork.com/history/sacred-places/tribes-ask-president-obama-to-designate-bears-ears-as-national-monument/> [<https://perma.cc/B4YZ-UC5Y>] (noting that the Inter-Tribal Coalition presented their proposal to President Obama on October 15, 2015).

<sup>257</sup> For a review of the PLI process, including repeated instances of ignoring or rejecting input from Tribes and conservation groups, *see* BEARS EARS INTER-TRIBAL COALITION, *supra* note 5, at 5–14, app. Exhibit One.

<sup>258</sup> *See* Interview with Charles Wilkinson, *supra* note 201.

<sup>259</sup> *Id.*

Act.<sup>260</sup> Each administration determines its own approach. As in politics more generally, back-channel connections and insider relationships are often determinative. Here, though, the Tribes were determined to submit the Bears Ears Proposal in an open and formal manner. On October 15, 2015, a delegation from the Inter-Tribal Coalition traveled to Washington, D.C. and handed hard copies to officials at the Department of the Interior and the White House.<sup>261</sup> Tribal leaders, some dressed in conventional business attire and some in traditional regalia, spoke at a press conference before the Washington Press Corps. Each tribal leader spoke for just a few minutes. Malcolm Lehi, representing Ute Mountain Ute, delivered his brief comments in the Ute language. As a testament to the tribal leaders' passion and sincerity, at the end of the press conference the Washington Press Corps, contrary to all norms and traditions, applauded.<sup>262</sup>

From that point on, there were numerous meetings with administration officials.<sup>263</sup> The administration's sticking points were the proposed boundaries comprising 1.9 million acres and the collaborative management language.<sup>264</sup> With regard to the boundaries, administration officials countered with 1.35 million acres, which excluded the following from the Inter-Tribal proposal: part of the Abajo Mountains west of Monticello and north of Blanding; an area near the northeast boundary; and areas on the west/southwest boundary with a permitted uranium mine and potential uranium development.<sup>265</sup> The administration's boundaries mirrored the PLI proposal's very closely; in the PLI version, most of those same 1.35 million acres would have been designated a National Conservation Area or otherwise subject to protective management.<sup>266</sup> Presumably, the administration hoped that by conceding most of the areas outside of the PLI's proposed National Conservation Areas, a Bears Ears National Monument would be less controversial. That proved to be wishful thinking, as discussed below.<sup>267</sup>

---

<sup>260</sup> See 54 U.S.C. § 320301; National Environmental Policy Act of 1969, 42 U.S.C.A. § 4321 (1970); Administrative Procedure Act, 5 U.S.C. § 551 (2012).

<sup>261</sup> Interview with Charles Wilkinson, *supra* note 201.

<sup>262</sup> *Id.*

<sup>263</sup> *Id.* ("So many meetings, so many phone calls.")

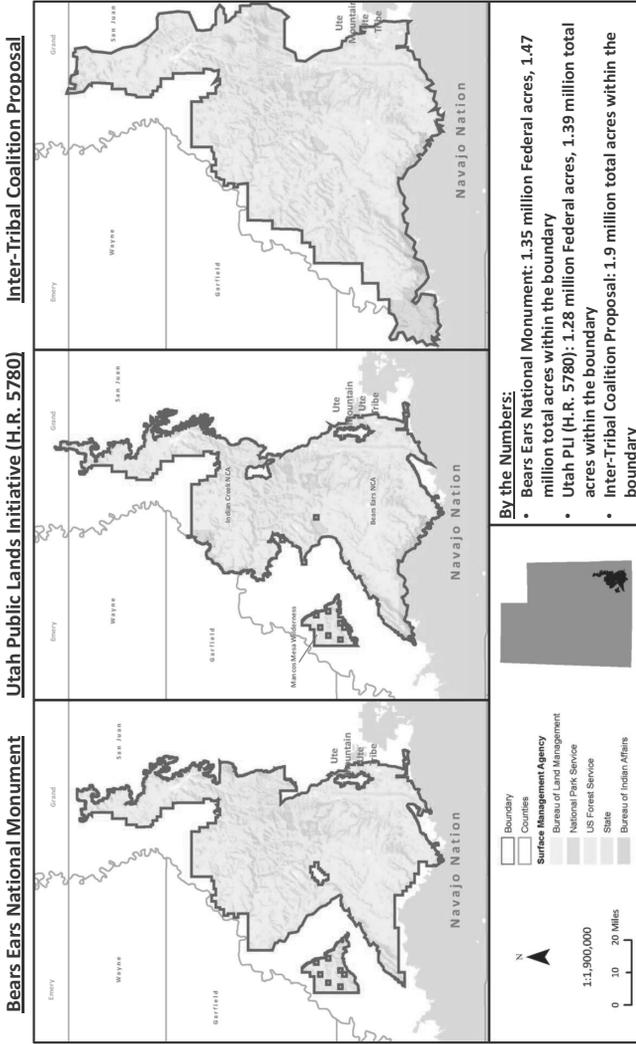
<sup>264</sup> See *id.*

<sup>265</sup> Compare BEARS EARS INTER-TRIBAL COALITION, *supra* note 5, at 6 (map with proposed 1.9 million acres) with Proclamation No. 9558, 82 Fed. Reg. at 1146.

<sup>266</sup> See *Utah PLI National Conservation Area Map*, BUREAU OF LAND MANAGEMENT (Jul. 13, 2016), [https://robishop.house.gov/uploadedfiles/upi\\_nationalconservationareas\\_071316.pdf](https://robishop.house.gov/uploadedfiles/upi_nationalconservationareas_071316.pdf) [<https://perma.cc/V2MQ-LHHJ>]; *Bears Ears National Monument Comparison Map*, BUREAU OF LAND MANAGEMENT (Dec. 28, 2016), <https://www.blm.gov/programs/national-conservation-lands/national-monuments/utah/bears-ears/map-comparison> [<https://perma.cc/Q5MJ-DD24>].

<sup>267</sup> See *supra* text accompanying notes 31–33.

**Bears Ears National Monument and other proposals for protecting the Bears Ears area**



- By the Numbers:**
- Bears Ears National Monument: 1.35 million Federal acres, 1.47 million total acres within the boundary
  - Utah PLI (H.R. 5780): 1.28 million Federal acres, 1.39 million total acres within the boundary
  - Inter-Tribal Coalition Proposal: 1.9 million total acres within the boundary

*Bears Ears National Monument Comparison Map*<sup>268</sup>

<sup>268</sup> *Bears Ears National Monument Comparison Map*, *supra* note 266.

In terms of collaborative management, the administration modified the Inter-Tribal Coalition's proposed language, but retained the establishment of a Bears Ears Commission composed of officers designated by the five coalition Tribes.<sup>269</sup> The Bears Ears Proclamation states:

In recognition of the importance of tribal participation to the care and management of the objects identified above, and to ensure that management decisions affecting the monument reflect tribal expertise and traditional and historical knowledge, a Bears Ears Commission (Commission) is hereby established to provide guidance and recommendations on the development and implementation of management plans and on management of the monument.<sup>270</sup>

Rather than require the Monument to be managed collaboratively by tribal representatives and federal agencies, as the Inter-Tribal Coalition proposed,<sup>271</sup> the Proclamation states that the "Secretaries shall meaningfully engage the Commission . . . . To that end . . . the Secretaries shall carefully and fully consider integrating the traditional and historical knowledge and special expertise of the Commission or comparable entity."<sup>272</sup> Further, if the Secretaries declined to incorporate the Commissions' written recommendations, they had to provide the Commission with "a written explanation of their reasoning."<sup>273</sup>

The road from October 15, 2015 to December 28, 2016, when President Obama signed the Proclamation with the above language, included several more dust-ups and detours. In addition to concerns about boundaries and management, administration officials were attentive to the PLI process. The administration and some conservation groups wanted to give the PLI every last chance to succeed or fail.<sup>274</sup> Congressmen Bishop and Chaffetz, after much delay, introduced a PLI bill in July, 2016. But it was clear from the outset that, without dramatic changes, it would not make it through the Senate.<sup>275</sup> The bill had too little wilderness, too much energy development, and insufficient tribal involvement or protection for Bears Ears.<sup>276</sup> With the PLI prospect finally dead for the 2016 legislative session, the question became whether President Obama would prioritize Bears Ears protection during his last months in office. It is unclear the extent to which President Trump's

<sup>269</sup> See Proclamation No. 9558, 82 Fed. Reg. 1139.

<sup>270</sup> *Id.* at 1144.

<sup>271</sup> See BEARS EARS INTER-TRIBAL COALITION, *supra* note 5, at 22.

<sup>272</sup> *Id.*

<sup>273</sup> *Id.*

<sup>274</sup> See Comments of the Bears Ears Inter-Tribal Coalition, *supra* note 216.

<sup>275</sup> See Thomas Burr, *Public Lands Initiative, Meant to Block Bears Ears Monument, Passes House Committee*, THE SALT LAKE TRIBUNE (Sep. 22, 2016), <http://www.sltrib.com/home/4386530-155/public-lands-initiative-meant-to-block> [<https://perma.cc/S9TM-BJ3D>].

<sup>276</sup> See Comments of the Bears Ears Inter-Tribal Coalition, *supra* note 216; Burr, *supra* note 275; *The Public Lands Initiative is a Disaster for Utah's Wild Places*, SOUTHERN UTAH WILDERNESS ALLIANCE, <https://suwa.org/bishops-grand-bargain-grand-bust-2/> [<https://perma.cc/A4AF-C4UG>].

victory in the presidential election on November 8, 2016 affected the timing or decision regarding the Bears Ears Proclamation. It seems likely that President Obama would have designated the Bears Ears National Monument whether or not he had a democratic successor. And, of course, he did issue the Bears Ears Proclamation in December 2016, as noted at the outset this Article. What the election did change were the Monument's prospects going forward.

### *B. Reparations at Risk*

During the summer of 2016, Governor Gary Herbert infelicitously described the Bears Ears proposal as a “political Tomahawk,” and opined “that a unilateral monument designation will divide the people. It will create anger and division. It will provoke protest and may inhibit our ability to resolve tough public land management decisions for decades to come.”<sup>277</sup> After the designation, members of Governor Herbert's political party made good on his predictions of acrimony. The Utah legislature described the designation as a “blatant federal land grab.”<sup>278</sup> Senator Orrin Hatch called it an “attack on an entire way of life.”<sup>279</sup>

President Trump responded swiftly to Utah politicians' outrage. On April 26, 2017, he signed an “Executive Order on the Review of Designations Under the Antiquities Act.”<sup>280</sup> The E.O. directed the Secretary of the Interior to review all monument “designations or expansions . . . under the Antiquities Act made since January 1, 1996, where the designation [or expansion] covers more than 100,000 acres . . . or where the Secretary determines that the designation or expansion was made without adequate public outreach and coordination with relevant stakeholders . . . .”<sup>281</sup> Taking particular aim at Bears Ears, the E.O. directed the Secretary to issue an interim report on the future of Bears Ears after 45 days, and a final report on all monuments after 120 days.<sup>282</sup> Among other criteria, the Secretary was to be guided by “concerns of State, tribal, and local governments affected by a designation, including the economic development and fiscal condition of affected States, tribes, and localities.”<sup>283</sup>

---

<sup>277</sup> Brian Maffly, *Utah Gov Calls Pro-Bears Ears Monument Proposal ‘a Political Tomahawk,’* SALT LAKE TRIBUNE (Jul. 27, 2016), <http://www.sltrib.com/news/4159848-155/utah-gov-calls-pro-bears-ears-monument> [https://perma.cc/4VFJ-DLL4].

<sup>278</sup> Press Release, Utah House of Representatives, Speaker Greg Hughes Statement about Bears Ears National Monument Designation (Dec. 28, 2016), <http://house.utah.gov/2016/12/28/media-statement-speaker-greg-hughes-statement-about-bears-ears-national-monument-designation/> [https://perma.cc/CS66-9LAG].

<sup>279</sup> Brian Maffly & Thomas Burr, *Obama Declares Bears Ears National Monument in Southern Utah,* SALT LAKE TRIBUTE (Dec. 28, 2016), <http://www.sltrib.com/home/4675012-155/mike-lee-staffer-says-bears-ears> [https://perma.cc/XRS5-NFY9].

<sup>280</sup> Exec. Order No. 13792, 82 Fed. Reg. 20429 (Apr. 26, 2017).

<sup>281</sup> *Id.*

<sup>282</sup> *Id.*

<sup>283</sup> *Id.*

On June 10, 2017, Secretary Ryan Zinke issued a five-page interim report on Bears Ears.<sup>284</sup> The Secretary described the Bears Ears Proclamation briefly, but mentioned none of the lengthy history of tribal governmental support for the Monument nor the UDB's extensive cultural mapping and multi-year attempts to participate in the PLI process.<sup>285</sup> In summarizing the Proclamation's management guidelines, the Secretary described the Bears Ears Commission accurately as "consisting of representatives of the Hopi Tribe, Navajo Nation, Ute Mountain Ute Tribe, Ute Tribe of the Uintah and Ouray Reservation, and Zuni Tribe."<sup>286</sup> He then gratuitously added, "The Commission does not include the Native American San Juan County Commissioner elected by the majority-Native American voting district in that County."<sup>287</sup> That commissioner, Navajo tribal member Louise Benally, opposed the Bears Ears National Monument, but was not an elected representative of the Navajo Nation. There is no reason she would be included on a Commission composed of tribal governmental representatives, rather than included in other stakeholder groups. Despite the overwhelming expressions of tribal support for Bears Ears National Monument—the Inter-Tribal Coalitions' proposal; a supportive resolution from the National Congress of American Indians, the country's oldest and largest national organization of tribal governments; and numerous other expressions of support from tribes and tribal members—Secretary Zinke highlighted the unrepresentative views of a single County Commissioner.<sup>288</sup> In addition, despite reports that comments submitted to the Secretary numbered over one million and overwhelmingly supported the Bears Ears National Monument, the Secretary stated that the Department received "approximately 76,500 comments," of varying views, and made special note of Utah federal and state officials' strong opposition.<sup>289</sup>

The Secretary further expressed concerns that Bears Ears National Monument was too large, and consisted of too many different public lands management designations.<sup>290</sup> He concluded by recommending that the President should revise the Bears Ears National Monument boundary, and that Congress should make "more appropriate conservation designations," and

---

<sup>284</sup> Memorandum from Ryan K. Zinke, Secretary of the Interior, to Donald J. Trump, President of the United States (Jun. 10, 2017), [https://www.eenews.net/assets/2017/06/12/document\\_pm\\_03.pdf](https://www.eenews.net/assets/2017/06/12/document_pm_03.pdf) [<https://perma.cc/XRS5-NFY9>].

<sup>285</sup> *See id.* at 4.

<sup>286</sup> *Id.*

<sup>287</sup> *Id.*

<sup>288</sup> *See id.* For more on the broad support within the Navajo Nation and by Tribes throughout the region, see Comments of the Bears Ears Inter-Tribal Coalition, *supra* note 216. Furthermore, it appears that San Juan County, had it not engaged in a pattern of voting rights discrimination against Native Americans, would have more than just one Native American County Commissioner. *See Navajo Nation, et al., v. San Juan County*, No. 2:12-CV-00039, 2017 WL 3016782, \*10–14 (D. Utah Jul. 14, 2017).

<sup>289</sup> *See* Memorandum from Ryan K. Zinke, *supra* note 284, at 4–5.

<sup>290</sup> *See id.* at 5.

“clarify the intent of [wilderness] management practices.”<sup>291</sup> Curiously, Secretary Zinke also recommended that “the President request congressional authority to enable tribal co-management of designated cultural areas within the revised BENM boundaries.”<sup>292</sup> As discussed above, however, the Bears Ears Proclamation established the Inter-Tribal Commission, which is charged with providing guidance and recommendations on all aspects of Monument planning.<sup>293</sup> If Secretary Zinke desired to strengthen tribal participation further, he could have recommended adopting the Bears Ears Inter-Tribal Coalition’s collaborative management proposal, with no further action by Congress.<sup>294</sup> Ethyl Branch, Attorney General for the Navajo Nation, and Natalie Landreth, a lawyer with the Native American Rights Fund representing the Hopi, Zuni, and Ute Mountain Ute tribes, expressed their clients’ dismay at Secretary Zinke’s report, and puzzlement at the call for congressional approval of co-management:<sup>295</sup> “Our initial reaction on behalf of the three tribes we represent is that this was really a cynical effort to distract Indian country from the devastating blow of reducing the size of the monument.”<sup>296</sup>

In terms of the Tribes’ level of trust, Senator Orrin Hatch made matters worse when he applauded Zinke’s actions and added that the Tribes had been “manipulated . . . The Indians, they don’t fully understand that a lot of the things that they currently take for granted on those lands, they won’t be able to do if it’s made clearly into a monument or a wilderness.”<sup>297</sup> Tribal representatives were understandably affronted by Senator Hatch’s remarks. Willy Grayeyes, chairman of the UDB board, responded in a written statement that it was “‘offensive’ to believe ‘that Native Americans do not have a will of their own, or if they do take a position that their position is influenced by a non-native person.’”<sup>298</sup> Indeed, it appears that the Tribes understood the Monument better than the Senator. The Bears Ears Proclamation recognizes that the “area’s cultural importance to Native American tribes continues to this day.”<sup>299</sup> It specifically describes “traditions of hunting, fishing, gather-

<sup>291</sup> *Id.*

<sup>292</sup> *Id.*

<sup>293</sup> See Proclamation No. 9558, 82 Fed. Reg. 1139, 1144 (Jan. 5, 2017).

<sup>294</sup> See BEARS EARS INTER-TRIBAL COALITION, *supra* note 5, at 23–26.

<sup>295</sup> See Rob Capriccioso, *Zinke Says Tribes are ‘Happy’ to Have Bears Ears Modifications; Tribes Disagree*, INDIAN COUNTRY TODAY (Jun. 13, 2017), <https://indiancountrymedianetwork.com/news/native-news/zinke-says-tribes-happy-bears-ears-modifications-tribes-disagree/> [<https://perma.cc/HEV3-3RTE>].

<sup>296</sup> *Id.* (quoting Natalie Landreth, Lawyer, Native American Rights Fund).

<sup>297</sup> Matthew Piper, *Zinke Says Monument Designations Have Been an ‘Effective Tool,’ Though ‘Very Few . . . Are to the Scale of the Recent Actions,’* THE SALT LAKE TRIBUNE (May 7, 2017), <http://www.sltrib.com/news/5262990-155/zinke-says-monument-designations-have-been> [<https://perma.cc/D4A5-QF3N>].

<sup>298</sup> Mariah Noble, *Tribal Leaders Demand Apology from Hatch After He Said They ‘Don’t Fully Understand’ Bears Ears Implications,* THE SALT LAKE TRIBUNE, (May 8, 2017), <http://www.sltrib.com/home/5267689-155/tribal-leaders-demand-apology-from-hatch> [<https://perma.cc/UZX5-RK8M>].

<sup>299</sup> Proclamation No. 9558, 82 Fed. Reg. at 1139, 1140 (Jan. 5, 2017).

ing, and woodcutting,” as well as “collection of medicinal and ceremonial plants, edible herbs, and materials for crafting items like baskets and footwear.”<sup>300</sup> The Proclamation further directs the Secretary of the Interior to “ensure protection of Indian sacred sites and traditional cultural properties . . . and provide access by members of Indian tribes for traditional cultural and customary uses . . . including collection of medicines, berries and other vegetation, forest products, and firewood for personal noncommercial use . . . .”<sup>301</sup> Yet all of those protections are now at risk, not because of the Monument, but due to Senator Hatch and his colleagues’ vehement opposition to it.

#### IV. BEARS EARS, SUSTAINABILITY, AND JUSTICE

For many Native people, conservation policies created a “narrative of loss.”<sup>302</sup> Forest reserves, national monuments, national parks, and wilderness areas imposed boundaries where none existed, resulting in “the deprivation of traditional resources; the breakdown of seasonal cycles . . . ; the undermining of belief systems”<sup>303</sup> as well as the loss of knowledge practices. Yet within these narratives of loss are also “tales of Indian reinvention and resistance.”<sup>304</sup> The Bears Ears story includes both of these elements—profound loss, followed by reinvention and resistance. Through their concerted effort to make the Antiquities Act an instrument for reparations and justice, the Tribes not only protected 1.35 million acres for all Americans. They also reclaimed their histories, safeguarded traditional practices, and spurred hope for younger generations.<sup>305</sup> And they created an inter-tribal political movement for others to follow, reviving optimism that public lands could become sites of cultural revival rather than solely of pain and trauma.<sup>306</sup>

The Tribes also created a vision of land management salient to global environmental threats, such as climate change.<sup>307</sup> The Proclamation em-

<sup>300</sup> *Id.*

<sup>301</sup> *Id.* at 1145.

<sup>302</sup> JACOBY, *supra* note 17, at 149.

<sup>303</sup> *Id.*

<sup>304</sup> *Id.* at 150.

<sup>305</sup> See Interview with Natasha Hale, *supra* note 199; Alastair Bitsoi, *Greenthread: Bears Ears to Brooklyn*, in *EDGE OF MORNING: NATIVE VOICES SPEAK FOR BEARS EARS*, *supra* note 231, at 45–46 (“Bears Ears reminds me of my purpose in life and affirms my identity as a Navajo being . . . .”); Interview with Regina Lopez-Whiteskunk, *supra* note 231, at 28 (Ute Mountain Ute Chair describing the value to her son of seeing and being involved in the Bears Ears effort).

<sup>306</sup> See Interview with James Enoté, *supra* note 6 (describing the Bears Ears effort as part of a larger movement, connected to Standing Rock and Oak Flats (the Apache efforts to stop a copper mine on their aboriginal lands)); Andrew Curley, *Some Thoughts on a Long-Term Strategy for Bears Ears*, in *EDGE OF MORNING: NATIVE VOICES SPEAK FOR BEARS EARS*, *supra* note 231, at 69, 73; Interview with Lopez-Whiteskunk, *supra* note 231, at 28–29 (describing the power of working with the other Tribes on the Bears Ears effort).

<sup>307</sup> For a summary of the physical science basis for climate change, see WORKING GROUP I, IPCC, *Summary for Policymakers*, in *CLIMATE CHANGE 2013: THE PHYSICAL SCIENCE BASIS*

braces tribal ecological knowledge in various places and, by creating the Bears Ears Commission, ensures its role in overseeing the Bears Ears landscape.<sup>308</sup> As many climate scientists are beginning to realize, traditional knowledge of landscapes, flora, and fauna will be critical in an era of increased global average surface temperatures, and the many effects that flow therefrom.<sup>309</sup> Traditional knowledge will complement, and sometimes be superior to, scientific information in the context of climate adaptation.<sup>310</sup> Science, with its methods of data collection, measurement, assessment, and falsification can tell us what has happened. It can also make predictions about the future. But traditional knowledge comprises an intimate and detailed cultural connection between humans and place, which accrues slowly and deeply over time.<sup>311</sup> This kind of knowledge will be crucial for maintaining the human-land connection as we move into an era of constant change.<sup>312</sup>

Land and resource management in a changed world will also entail taking care of places that are compromised or harmed. The knowledge and ceremonial practices of many Tribes, including those involved in the Bears Ears effort, are iterative and relational. They entail obligations that must be performed “in order to live in harmony with the plants, animals, water, and mountains.”<sup>313</sup> These obligations do not depend on an idealized state of nature; they persist even through disruption and dislocation.<sup>314</sup> Tribes are therefore well-suited to stewarding landscapes in distress.<sup>315</sup> The obligation, as

---

3 (T.F. Stocker et al. eds., 2013), [http://www.climatechange2013.org/images/report/WG1AR5\\_SPM\\_FINAL.pdf](http://www.climatechange2013.org/images/report/WG1AR5_SPM_FINAL.pdf) [<https://perma.cc/B3NH-DLBX>].

<sup>308</sup> See Proclamation No. 9558, 82 Fed Reg. 1139, *supra* note 1, at 1, 3, 4, 66, 1140, 1144.

<sup>309</sup> See, e.g., Fatima Denton, et al., 2014: *Climate-Resilient Pathways: Adaptation, Mitigation, and Sustainable Development*, in CLIMATE CHANGE 2014: IMPACTS, ADAPTATION AND VULNERABILITY, 1101, 1120–21 (Christopher B. Fields et al. eds., 2014), [https://www.ipcc.ch/pdf/assessment-report/ar5/wg2/WGIIAR5-Chap20\\_FINAL.pdf](https://www.ipcc.ch/pdf/assessment-report/ar5/wg2/WGIIAR5-Chap20_FINAL.pdf) [<https://perma.cc/H9MV-HZBA>].

<sup>310</sup> See Fikret Berkes et al., *Rediscovery of Traditional Ecological Knowledge as Adaptive Management*, 10 *ECOLOGICAL APPLICATIONS* 1251, 1259–60 (2000).

<sup>311</sup> See M. Madhav Gadgil, et al., *Indigenous Knowledge for Biodiversity Conservation*, 22 *AMBIO* 151, 151 (May 1993) (defining traditional knowledge as “a cumulative body of knowledge and beliefs, handed down through generations by cultural transmission, about the relationship of living beings (including humans) with one and another and with their environment”).

<sup>312</sup> See Ashley Thompson, *Dan Wildcat Discusses Indigenous Perspectives of Climate Change*, THE ICEBREAKER, May 2010, at 7, <https://www.cresis.ku.edu/sites/default/files/Icebreaker/PDF/icebreaker-spring2010.pdf> [<https://perma.cc/JNF5-TA64>] (discussing the role of what Wildcat calls “indigenuity”—knowledge that indigenous peoples glean from their dependence on the environment—in assessing and adapting to climate change).

<sup>313</sup> Riley & Carpenter, *supra* note 16, at 870.

<sup>314</sup> See *id.* at 871 (“[T]he relationship between tribes and their land is both pervasive and permanent, transcending even the experience of conquest.”).

<sup>315</sup> See Margaret M. Bruchac, *Indigenous Knowledge and Traditional Knowledge*, in *ENCYCLOPEDIA OF GLOBAL ARCHAEOLOGY* 3814, 3816 (Claire Smith ed., 2014) (describing the moral component of indigenous traditional ecological knowledge); *Interview with Jonah Yellowman*, in *EDGE OF MORNING: NATIVE VOICES SPEAK FOR BEARS EARS*, *supra* note 231, at 11, 19. Yellowman, a Navajo spiritual advisor, describes the Navajo approach this way: “We are here to take care of and look after it. If you take care of it and look after it, it’s going to take care of you. You’re going to get healed from it and you’re going to heal the land too.” *Id.*

Navajo spiritual advisor Jonah Yellowman put it, is “to take care of [the land,] to preserve it,” and to put that ethic into practice in every interaction with the Earth and its creatures.<sup>316</sup> To be clear, indigenous traditional knowledge is rooted in the particular histories and practices of different peoples, and should not be viewed as a monolithic and romanticized “at-one-with-nature” ideology. The point is not that Native people are naturally at one with the Earth, nor that their cultures are static. Rather, Tribes have beliefs and knowledge systems that include practices of taking care of place.<sup>317</sup> These are specific to particular peoples, and they emerge from historical relationships and practices.<sup>318</sup> As Jim Enote observed, traditional knowledge therefore cannot be extracted and spliced into scientific approaches.<sup>319</sup> It should instead play a co-equal and collaborative role in cross-cultural efforts to take care of the places that sustain us. This is a tall order. The Bears Ears Proclamation does not go quite that far, but by creating the Bears Commission and referencing the Tribes’ knowledge systems repeatedly, it takes a very significant step in that direction.

Bears Ears also has lessons for organizing a more diverse and equitable environmental movement. Given President Obama’s priorities for Monument designation, conservation groups were incentivized to allow Tribes to lead the Bears Ears effort.<sup>320</sup> This process was not always seamless. It raised longstanding tensions between the mainstream conservation movement and its effects on indigenous people.<sup>321</sup> While some of the conservation groups immediately embraced the Tribes’ leadership role, others were skeptical.<sup>322</sup> Similar to the conservation groups who opposed the Havasupai Tribe’s effort to regain their plateau lands, some conservationists involved in Bears Ears had difficulty trusting anyone other than their own staff and members.<sup>323</sup> The process of working through this was itself part of the solution. Skeptical participants heard from tribal leaders, learned the history, and accepted that abandoning control is sometimes the most important aspect of achieving cross-cultural justice. All of the groups eventually endorsed the Tribes’ pro-

---

<sup>316</sup> *Interview with Jonah Yellowman, supra* note 315, at 18.

<sup>317</sup> See VINE DELORIA, JR., *FOR THIS LAND: WRITINGS ON RELIGION IN AMERICA* 211 (James Treat, ed. 1999). Indigenous spiritual worldviews, as a general matter, include norms and practices of taking care of the non-human objects and creatures in their midsts; the object of these practices is to live in harmony with plants, animals, and land formations. See *id.*

<sup>318</sup> See MARIE BATTISTE & JAMES (SA’KE’I) YOUNGBLOOD HENDERSON, *PROTECTING INDIGENOUS KNOWLEDGE AND HERITAGE* 30 (2000).

<sup>319</sup> See *Interview with James Enote, supra* note 6.

<sup>320</sup> See *supra* text accompanying notes 264–72 (discussing President Obama’s National Monument priorities).

<sup>321</sup> See *supra* Section I.B.3 (discussing that history in the context of the Havasupai’s efforts to restore some of their plateau lands from Grand Canyon National Park).

<sup>322</sup> See *Interview with Charles Wilkinson, supra* note 201.

<sup>323</sup> See *id.*

posal and their role as leaders. Those lessons in working across cultures, if they persist, will benefit the conservation movement as a whole.<sup>324</sup>

Finally, the Bears Ears story tells us something about the enduring promise of public lands, notwithstanding the dark side of conservation. For decades, public land laws, whether through policies of disposition or conservation, had similar effects on American Indian Tribes. Disposition policies, which distributed public domain lands to homesteaders, miners, railroads, and states, eroded the tribal land base and had devastating effects on tribal culture and self-governance.<sup>325</sup> Conservation policies, as discussed at length above, also displaced Tribes and severed their connections to cultural practices, with enduring negative impacts.<sup>326</sup> But disposition policies privatized indigenous lands, and removed them permanently (barring tribal reacquisition) from tribal access. Public lands—whether as National Parks, Wilderness, National Monuments, or otherwise—remained open for contests over their use. Public lands, by remaining *public*, left open the space for Tribes to renegotiate their rights to their aboriginal lands, and thereby to nudge conservation policies toward justice. As long as the federal government retains one-third of the Nation's lands, there will be terrain (literally) for similar efforts. Indian appropriation can be reversed, so long as Tribes have avenues open for re-appropriation.<sup>327</sup>

## V. CONCLUSION

Southeastern Utah once was all Indian country. Ancient Puebloan peoples, and then Paiute, Hopi, Zuni, Pueblo, Ute, and Navajo people, were the sole human occupants. Privatization, in all of its forms, played a significant role in ejecting Tribes from vast swathes of this terrain. But conservation laws, in their early days, did no better. The Antiquities Act and other conservation laws reinforced racialized views of American Indians, and dispossessed them of their property, in all its forms. Native people were erased from the landscape and estranged from their culture in the name of preserving their own heritage, as well as to protect lands and resources. Today, several decades into the era of Tribal Self-Determination, Tribes and their allies have put conservation laws to a different use. The Bears Ears National Monument, designated under the Antiquities Act of 1906, reconnects Tribes to their histories and preserves their knowledge practices. At the same time, the new Monument is open to the public—to everyone, and allows for a wide variety of uses. Climbers, ranchers, hunters, star-gazers, amblers, and

---

<sup>324</sup> See Krakoff, *supra* note 26 (describing perils of failing to pursue environmental protection with social justice simultaneously).

<sup>325</sup> See *supra* text accompanying notes 37–38 (describing disposition policies), *supra*; notes 99–103 (describing Allotment and Assimilation policies); see also Royster, *supra* note 92, at 29–43.

<sup>326</sup> See *supra* Part I.

<sup>327</sup> Riley & Carpenter, *supra* note 16, at 930–31.

seekers can go to Bears Ears, breathe the clear desert air, and stare up at the sparkling blanket of stars in the night sky. It is too soon to conclude that the Bears Ears National Monument is a turning point in our conceptions of conservation, sustainability, and justice. But the effort to make it so has enduring lessons for how to heal human and environmental wounds, and how to conceive of those as interconnected. We have the Bears Ears Inter-Tribal Coalition and all of its supporters to thank for that, regardless of what the future holds.